Study K-600 October 23, 2007

# Second Supplement to Memorandum 2007-41

## Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing (Draft of Tentative Recommendation)

Attached for the Commission and interested persons to review is a draft of a tentative recommendation on forfeiture by wrongdoing as an exception to the hearsay rule. As discussed in Memorandum 2007-41, this draft solicits comment on three different approaches that appear reasonable based on the information currently at hand.

Also attached are the following comments that recently arrived:



We are grateful to these law professors for taking the time to share their views. Their comments are discussed below.

### COMMENTS OF PROF. PAUL BERGMAN

Prof. Paul Bergman teaches evidence at UCLA School of Law. He compliments Memorandum 2007-41 as "well-reasoned and well-written." Exhibit p. 1. He comments on three specific points: (1) the viability of Evidence Code Section 1350, (2) the effect of satisfying the requirements of Federal Rule of Evidence 804(b)(6), and (3) the dying declaration exception to the hearsay rule. Exhibit pp. 1, 2.

**Viability of Evidence Code Section 1350**

Prof. Bergman writes that "hearsay meeting the foundational requirements of Sec. 1350 will almost certainly be testimonial and therefore inadmissible under

the Confrontation Clause." Exhibit p. 2. He therefore considers Section 1350 "a nullity." Exhibit p. 1.

The staff agrees that evidence satisfying the requirements of Section 1350 will almost certainly be testimonial. Under paragraph (a)(3), such evidence must have 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. Evidence meeting this requirement would seem to be the kind of evidence that is considered testimonial under the criteria given in *Crawford* and *Davis*.

But the staff does not agree that this renders Section 1350 a nullity. Both *Crawford* and *Davis* recognize forfeiture by wrongdoing as a valid exception to the requirements of the Confrontation Clause. See CLRC Memorandum 2007-41, pp. 23-24. If a testimonial statement meets the constitutionally required criteria for forfeiture by wrongdoing, there is no constitutional barrier to admission.

The hearsay rule is still a barrier, however. Under *Crawford*, any reliability-based exception to that rule is inapplicable to a testimonial statement. Thus, with regard to a testimonial statement, Section 1350 is the only available exception, because it is forfeiture-based, not reliability-based. If evidence meets the requirements of Section 1350 as well as the constitutional requirements for forfeiture, it would be admissible. Consequently, the staff believes that Section 1350 remains a viable exception to the hearsay rule, not a nullity.

**Effect of Satisfying the Requirements of Federal Rule of Evidence 804(b)(6)**

Prof. Bergman says that "Prof. Mendez suggests that under Rule 804(b)(6), the federal forfeiture statute, a party offering hearsay under that provision still has to meet the foundational requirements of an independent hearsay exception." Exhibit p. 2. Prof. Bergman believes Prof. Méndez may be mistaken about this. *Id.*

The staff is unsure why Prof. Bergman thinks Prof. Méndez believes evidence offered under Rule 804(b)(6) must satisfy not only the requirements of that rule but also the requirements of another hearsay exception. We do not discern anything to that effect in Prof. Méndez's analysis. See First Supplement to CLRC Memorandum 2007-41, Exhibit pp. 1-21. Perhaps Prof. Méndez or Prof. Bergman will be able to shed some light on this at the Commission meeting.

**Dying Declaration Exception to the Hearsay Rule**

Prof. Bergman also questions Prof. Méndez's conclusion that California's hearsay exception for a dying declaration (Evid. Code § 1242) can apply even if the declarant does not die. Exhibit p. 2. In Prof. Bergman's view, that exception "seems to clearly require that the declarant die for a dying declaration to be admissible." *Id.*

The scope of the dying declaration exception is not presently an issue before the Commission, although the Commission has looked into the issue to some extent in the past. See CLRC Memorandum 2004-45, pp. 40-45; Minutes (March 2005), p. 11. We will keep Prof. Bergman's comments on hand for consideration if the Commission reactivates its work on the dying declaration exception to the hearsay rule.

## COMMENTS OF PROF. DANIEL CAPRA

Prof. Capra, the Reporter for the Federal Rules of Evidence, comments on (1) inclusion of a reliability requirement in a statutory forfeiture rule, and (2) proof of intent to silence testimony.

**Reliability Requirement in Statutory Forfeiture Rule**

Prof. Capra thinks that "including a reliability requirement in a statutory forfeiture rule is self-defeating." Exhibit p. 3. He explains that if the hearsay statement is reliable, "then it is almost certain to be admissible anyway under one of the hearsay exceptions — meaning that the rule has virtually no practical effect." *Id.* He further explains that "if it is understood that even unreliable evidence is admitted when a defendant disposes of a witness, then two salutory consequences are possible: 1) the rule provides more deterrent effect; and 2) drafters would need to focus more closely on the consequences of the rule, perhaps meaning that other protections like an intent requirement or a higher standard of proof become more palatable." *Id.*

Presumably, Prof. Capra's comments are intended, at least in part, to refer to Evidence Code Section 1350(a)(4). That paragraph of California's statutory forfeiture provision could be characterized as a reliability requirement: It requires proof that the proffered hearsay statement was made under circumstances indicating its trustworthiness.

With respect to a nontestimonial statement or a statement offered by the prosecution or by a party in a civil case, Prof. Capra is correct that if the

statement is reliable, it probably (but not certainly) would satisfy one or more of the many other hearsay exceptions. With respect to a testimonial statement offered against a criminal defendant, however, the many reliability-based exceptions are unconstitutional under *Crawford*. Only a forfeiture-based exception such as Section 1350 is constitutionally permissible. In that situation, it would be of significance whether the statute incorporates a reliability requirement.

On the one hand, if the trustworthiness requirement of Section 1350(a)(4) were deleted, some people might criticize that step for sanctioning the introduction of untrustworthy hearsay evidence. On the other hand, Prof. Capra points out that the deterrent effect of the statute may be enhanced if it is clear that courts will consider both trustworthy and untrustworthy evidence of witness tampering. As he also notes, removal of the trustworthiness requirement might help focus attention on the possible need for other, more concrete requirements.

Perhaps a further consideration is that retaining the trustworthiness requirement might lead a court to view Section 1350 as a reliability-based exception and thus vulnerable under *Crawford*, rather than as a forfeiture-based exception. The staff considers this unlikely. Although the constitutional requirements for forfeiture are not fully settled, it seems clear that Section 1350 satisfies those requirements. See CLRC Memorandum 2007-41, p. 43. The trustworthiness requirement supplements what appear to be the constitutional requirements for forfeiture; it does not attempt to replace any of those requirements. Consequently, inclusion of the trustworthiness requirement should not be cause for constitutional concern.

**If the Commission proposes an amendment of Section 1350 as discussed in Memorandum 2007-41, it will need to decide whether to (1) retain the trustworthiness requirement or (2) delete that requirement, as Prof. Capra appears to suggest.**

**Proof of Intent to Silence Testimony**

Prof. Capra recently spoke to about 50 district judges, including "some of the most conservative judges in the country," at the Fifth Circuit judicial conference. Exhibit p. 3. He informed them that some courts, including the California Supreme Court, have found forfeiture without requiring proof of intent to silence testimony. He reports that they "were shocked by the possibility that an alleged

victim's statements in a homicide case would be automatically admitted upon a finding by a preponderance that the defendant committed the crime charged." Exhibit p. 3. He says they were concerned "that in many cases the practical effect is that the defendant gets convicted by a preponderance of the evidence." *Id.*

**The Commission should take these comments into account in determining whether a forfeiture statute should require a showing of intent to silence testimony.**

### COMMENTS OF PROF. RICHARD FRIEDMAN

Prof. Richard Friedman teaches at University of Michigan Law School. He is very interested in the topic of forfeiture, and he has "written extensively on it, in print and on the Confrontation Blog, www.confrontationright.blogspot.com," which he maintains. Exhibit p. 4. He also successfully represented the defendant before the United States Supreme Court in *Hammon v. Indiana*, __ U.S. __, 126 S.Ct. 2266 (2006), the companion case to *Davis*. He makes a number of comments.

#### Likelihood That the United States Supreme Court Will Soon Decide Whether Intent to Silence Testimony is Constitutionally Required

As discussed in Memorandum 2007-41, two cases before the United States Supreme Court present the issue of whether forfeiture of the federal Confrontation right requires proof that the defendant intended to silence testimony by the declarant whose statement is offered in evidence: *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), and *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).

Due to a jurisdictional problem, Prof. Friedman thinks it unlikely that the United States Supreme Court will grant certiorari in *Romero*. Exhibit p. 4. With regard to *Giles*, he says, "It is always hard to predict what will happen on a *certiorari* petition, but I believe there is at least a plausible chance that this one will be granted ...." *Id*. He explains that "[t]he intent issue is an important one, the conflict among jurisdictions is clear, and so far as I am aware there are no procedural obstacles to the Court taking the case." *Id*. Because there is "a substantial chance that the Supreme Court will soon decide this matter," Prof. Friedman "do[es] not believe it makes much sense for the California Legislature

to revise the law on this matter now." *Id.* **The staff shares this view.** See Memorandum 2007-41, pp. 31-34.

If the Court denies certiorari in *Giles*, however, Prof. Friedman thinks "there would then be a stronger argument for codifying California's approach to the forfeiture issue." *Id.* He "would read denial as a signal that the Court is not in a rush to resolve this matter ...." *Id.*

**Proof of Intent to Silence Testimony**

Prof. Friedman goes on to say that he thinks the California Supreme Court "got it right" when it decided in *Giles* that forfeiture does not require proof of intent to silence testimony. Exhibit p. 4. He believes that "the administration of justice would be improved if the state adopted generally the principle that a holding of forfeiture is appropriate if the defendant's wrongful conduct — intimidation as well as homicide or kidnapping — rendered the witness unavailable to testify at trial, *whether or not this prospect motivated the conduct*." *Id*. (emphasis added).

Prof. Friedman's comments on the intent issue, coupled with Prof. Capra's comments on the same issue, underscore that the issue is divisive and unsettled, both as a matter of policy and as a matter of law. **The Commission should take that into account in deciding how to proceed on the issue.**

**Participation in the Commission's Meetings on Forfeiture by Wrongdoing**

By phone and in his written comments, Prof. Friedman has also expressed interest in participating in the Commission's discussions relating to forfeiture by wrongdoing. Because he lives in Michigan, however, it would be easier for him to do so "by phone or video hookup than in person." Exhibit p. 4.

The Commission has received a few similar requests in the past, but it has never used videoconferencing and it has only used teleconferencing on rare occasions when absolutely necessary, such as when it would otherwise be impossible to establish a quorum. Rule 2.1.4 of the Commission's handbook states:

> 2.1.4. Teleconference Meetings
>
> As a general rule, the Commission believes that in-person attendance is important and discourages the use of teleconference meetings. Teleconference is disruptive and changes the character of the discussion and deliberations. However, in extraordinary situations, such as where a quorum cannot be attained and Commission action is needed to approve a tentative

> recommendation, action on a Commission bill, or other time-sensitive matter, the Commission may hold a teleconference meeting, as determined by the Chairperson.

(Footnotes omitted.)

**The Commission should discuss whether to permit teleconferencing by out-of-state experts who wish to participate in meetings relating to this study.** Several evidence law professors from other states have already expressed interest in the study. So far, Prof. Friedman is the only one who has asked to participate in the meetings by teleconference, but others might make similar requests. **The Commission should consider whether the benefits of having such participation would outweigh the possible detrimental effect on the tone of the meeting.**

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

**Bergman, Paul**

**From:** Bergman, Paul
**Sent:** Tuesday, October 16, 2007 4:02 PM
**To:** 'bgaal@circ.ca.gov'
**Subject:** CA Law Revision Study of Misc. Hearsay Exceptions



Dear Ms. Gaal,

I am a Professor of Law at UCLA and teach an Evidence course. I thank you for sending me Memorandum 2007-41, concerned chiefly with unavailability and forfeiture by wrongdoing. Congratulations on the fine quality of the Memorandum; it is well-reasoned and well written.

I want to offer a brief response to your discussion of Section 1350. While you offer other options, you conclude on p. 45 that a reasonable approach is to leave Sec. 1350 as is, and await further judicial guidance. My concern with this conclusion is that virtually any hearsay statement that may be admissible under present Sec. 1350 would be inadmissible under the Confrontation Clause, as interpreted by Crawford and Davis. As a result, Sec. 1350 seems to me to be a nullity. While the Commission may ultimately decide for the moment to leave Sec. 1350 alone, I believe that a conclusion on whether to amend it now or later should be reached with the knowledge that no hearsay is admissible under the current version of Sec. 1350.

My conclusion is based on Subsection (3) of Sec. 1350. Subsection (3) states that in order for a hearsay statement to be admissible, it must have been memorialized in a tape recording or writing prepared by a law enforcement official. But if my understanding of Crawford and Davis is correct, hearsay memorialized in such a recording or writing is exactly the kind of hearsay that would be considered "testimonial" and therefore barred (unless the defendant had a pre-trial chance to cross examine the declarant, an unlikely scenario). Thus, by fulfilling this foundational requirement of Sec. 1350, a prosecutor virtually guarantees that hearsay will be inadmissible under Crawford and Davis.

I hope that you will proceed with these comments in mind.

Thank you,

Paul Bergman

Paul Bergman

Bergman@law.ucla.edu

Sent by regular mail - email was bounced back.

# ADDITIONAL COMMENTS OF PROF. PAUL BERGMAN

From: Bergman, Paul <bergman@law.ucla.edu>
Subject: CA Law Revision Study of Misc. Hearsay Exceptions
Date: October 19, 2007
To: bgaal@clrc.ca.gov

Dear Ms. Gaal,

I am a Professor of Law at UCLA and teach an Evidence course. In response to your comments in Memorandum 2007-41, I mailed to you a short explanation of my opinion that hearsay meeting the foundational requirements of Sec. 1350 will almost certainly be testimonial and therefore inadmissible under the Confrontation Clause. Thus, as it presently reads, Sec. 1350 is a nullity.

Since sending that message, I have received in the mail a First Supplement, consisting chiefly of comments by Profs. Mendez and Fisher. I have time only for a brief response to Prof. Mendez's analysis.

First, Prof. Mendez discusses Sec. 1350 in detail on pp. 12-13, in particular its foundational requirement that a statement have been memorialized by a law enforcement official. Yet, he nowhere mentions that this foundational requirement almost certainly renders a statement inadmissible under the Confrontation Clause. Thus, I believe that his using Sec. 1350 as a basis of evaluating the propriety of proposed section 1390 is suspect.

Second, as I read his analysis, Prof. Mendez suggests that under Rule 804 (b)(6), the federal forfeiture statute, a party offering hearsay under that provision still has to meet the foundational requirements of an independent hearsay exception. I believe that this position may also be mistaken. As I read Rule 804(b)(6), a party who meets its foundational requirements both (a) establishes a declarant's unavailability and (b) meets the foundational requirements of a hearsay exception. In other words, the conduct that constitutes forfeiture also establishes the trustworthiness of a declarant's hearsay statements. (Note that the federal forfeiture provision is in the second portion of Rule 804, among a small group of exceptions to the hearsay rule, each based on an assumed basis of trustworthiness).

Finally, Prof. Mendez states on p. 2, footnote 8, that for a dying declaration to be admissible in California, "the declarant does not have to die." This statement also seems to me to be erroneous. CEC Sec. 1242 creates a hearsay exception for statements that, among other requirements, "respect the cause and circumstances of (the declarant's) death." Unlike its federal counterpart, Sec. 1242 seems to clearly require that the declarant die for a dying declaration to be admissible.

Thank you for considering these comments.

Sincerely,

Paul Bergman

## COMMENTS OF PROF. DANIEL CAPRA

From: Daniel Capra
Subject: CLRC study of forfeiture by wrongdoing
Date: October 17, 2007
To: Barbara Gaal <bgaal@clrc.ca.gov>

This is really a fine piece of work.

I would be most grateful if you could keep me posted on developments.

I have two further observations:

1. I made a presentation on Crawford yesterday at the Fifth Circuit judicial conference. I spoke to about 50 district judges. I raised the forfeiture question and noted that some courts, including California Supreme, find forfeiture without a requirement of intent to dispose of a witness. I must say they were shocked by the possibility that an alleged victim's statements in a homicide case would be automatically admitted upon a finding by a preponderance that the defendant committed the crime charged. They were concerned, of course, that in many cases the practical effect is that the defendant gets convicted by a preponderance of the evidence. And these were some of the most conservative judges in the country. [I realize that the problem is ameliorated if the standard is clear and convincing, but as you note it is unlikely after Lego v. Twomey, Matlock, and other cases that the constitutional standard would be anything more than a preponderance.]

2. I think including a reliability requirement in a statutory forfeiture rule is self-defeating. If the hearsay statement is reliable, then it is almost certain to be admissible anyway under one of the hearsay exceptions --- meaning that the rule has virtually no practical effect. Moreover, if it is understood that even unreliable evidence is admitted when a defendant disposes of a witness, then two salutary consequences are possible: 1) the rule provides more deterrent effect; and 2) drafters would need to focus more closely on the consequences of the rule, perhaps meaning that other protections like an intent requirement or a higher standard of proof become more palatable.

Thanks again.

Daniel Capra
Reed Professor of Law
Fordham Law School

## COMMENTS OF PROF. RICHARD FRIEDMAN

From: Richard D. Friedman <rdfrdman@umich.edu>
Subject: Forfeiture
Date: October 16, 2007
To: bgaal@clrc.ca.gov

Thanks for talking with me by phone today, and I appreciate the opportunity to comment on your memo of October 10. The forfeiture issue is one that has been of particular interest of mine, and I have written extensively on it, in print and on the Confrontation Blog, www.confrontationright.blogspot.com, which I maintain. Forfeiture is a complicated matter.

I suspect the petition in *Romero* will be denied; there is a jurisdictional problem that may be a show-stopper, and if not is sufficiently serious that the Court would likely look for a better vehicle to address the merits. The petition in *Giles* will presumably be decided sometime around late January or early February; the Court has just asked the state to respond, the response due November 5, and the state is likely going to ask for an extra 30 days. The petitioner will presumably then file a reply. It is always hard to predict what will happen on a *certiorari* petition, but I believe there is at least a plausible chance that this one will be granted: The intent issue is an important one, the conflict among jurisdictions is clear, and so far as I am aware there are no procedural obstacles to the Court taking the case. With a substantial chance that the Supreme Court will soon decide this matter, I do not believe it makes much sense for the California Legislature to revise the law on this matter now.

If the Court denies the *Giles* petition, however, there would then be a stronger argument for codifying California's approach to the forfeiture issue. I would read denial as a signal that the Court is not in a rush to resolve this matter; indeed, since *Crawford*, the Court has taken only one pair of cases, argued in tandem, presenting follow-up issues. My own view is that on the main issue the California Supreme Court got it right in *Giles*, and the administration of justice would be improved if the state adopted generally the principle that a holding of forfeiture is appropriate if the defendant's wrongful conduct -- intimidation as well as homicide or kidnapping -- rendered the witness unavailable to testify at trial, whether or not this prospect motivated the conduct. (I might note that, although my view on this issue is pro-prosecution, on other issues related to the confrontation right -- including whether to invoke forfeiture doctrine the prosecution must mitigate the problem created by the defendant's wrongful conduct -- my views tend more to be pro-defendant, and I successfully argued for the defendant before the United States Supreme Court in *Hammon v. Indiana*.)

If the Commission is inclined to explore the merits of forfeiture issues, I am happy to offer my views; because I live in Michigan, it would be easier for me to do so by phone or video hookup than in person.

#K-600

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

# STAFF DRAFT

TENTATIVE RECOMMENDATION

## Miscellaneous Hearsay Exceptions: Forfeiture By Wrongdoing

[Date To Be Determined]

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN _____.

The Commission will often substantially revise a proposal in response to comment it receives. Thus this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335
<commission@clrc.ca.gov>

# SUMMARY OF TENTATIVE RECOMMENDATION

Fundamental to our justice system is the principle that each side in a civil or criminal case is given the opportunity to question adverse witnesses under oath in the presence of the trier of fact. The federal and state constitutions guarantee this right of confrontation to a defendant in a criminal case; the federal and state prohibitions against use of hearsay evidence serve a similar function but apply to all parties in either a civil or a criminal case. The process of questioning witnesses in this manner promotes determination of the truth, so that justice can be served.

Sometimes, however, a person attempts to thwart justice by killing a witness, threatening a witness so that the witness refuses to testify, or engaging in other conduct that prevents a witness from testifying. If such conduct is sufficiently egregious and appropriately proved, it may result in forfeiture of the constitutional right of confrontation, such that there is no constitutional barrier to admission of an out-of-court statement by the unavailable witness.

Similarly, federal law contains an exception to the hearsay rule, which applies when a party has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of a witness. If an out-of-court statement satisfies both the requirements of that exception and the constitutional requirements for forfeiture, the statement may be admitted in evidence. California has a similar hearsay rule exception, but it is narrower and more detailed than the federal one.

The Law Revision Commission is studying whether to revise California's approach to this matter. Its report is due by March 1, 2008. Possible steps include:

- Repeal California's existing provision on forfeiture by wrongdoing and replace it with a provision that tracks the constitutional minimum.
- Replace the existing provision with one similar to the federal rule.
- Broaden the existing provision to a limited extent, with the possibility of further revisions later.
- Leave the law alone until there is further judicial guidance.

The first approach is inadvisable because the United States Supreme Court has not yet given guidance on key aspects of the constitutional minimum. The Commission has tentatively concluded that the other options are reasonable possibilities. It solicits comment on which of these approaches is preferable.

A related issue is defining when a witness is "unavailable" for purposes of the hearsay rule. The Commission tentatively recommends that California's provision on unavailability be amended to expressly recognize that a witness who refuses to testify or has a total lack of memory on a subject is unavailable. The Commission also solicits comment on this reform.

This recommendation was prepared pursuant to Resolution Chapter 100 of the Statutes of 2007.

# MISCELLANEOUS HEARSAY EXCEPTIONS: FORFEITURE BY WRONGDOING

The Law Revision Commission has been directed to study forfeiture by wrongdoing as an exception to the hearsay rule.[1] 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[2] and state[3] constitutions.

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.[4] The Commission's report on these matters is due by March 1, 2008.[5]

To provide context for consideration of these issues, it is necessary to present some background information on the hearsay rule and the Confrontation Clause.

Next, the Commission examines what constitutes unavailability for purposes of the hearsay rule. The Commission tentatively recommends that California's provision on unavailability be amended to codify case law recognizing that a witness who refuses to testify is unavailable. The Commission also recommends codifying case law holding 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.

Finally, the Commission discusses forfeiture by wrongdoing as an exception to the hearsay rule. The Commission has tentatively concluded that three approaches deserve serious consideration at this time:

---

1. See Letter from Ellen Corbett, Chair of Senate Committee on Judiciary, to Brian Hebert, Executive Secretary of California Law Revision Commission (Aug. 20, 2007) (Commission Staff Memorandum 2007-28, Exhibit p. 1).

Any California Law Revision Commission document referred to in this recommendation 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.

2. U.S. Const. amend. VI.

3. Cal. Const. art. I, § 15; see also Penal Code § 686.

4. See Letter from Ellen Corbett, Chair of Senate Committee on Judiciary, to Brian Hebert, Executive Secretary of California Law Revision Commission (Aug. 20, 2007) (Commission Staff Memorandum 2007-28, Exhibit p. 1).

5. *Id.*

- Repeal California's existing provision on forfeiture by wrongdoing and replace it with a provision similar to the corresponding federal rule.
- Broaden the existing provision to a limited extent, with the possibility of further revisions later.
- Leave the law alone until there is further judicial guidance.

The Commission solicits comment on which of these approaches is preferable. The Commission also solicits comment on the proposed reforms relating to unavailability, and on any other aspect of this tentative recommendation.

## THE HEARSAY RULE AND ITS PURPOSE

The Evidence Code 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."[6] Under this definition, evidence of a statement is not hearsay if it is offered for a purpose other than proving the truth of the statement.[7]

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.

Except as provided by law, hearsay evidence is inadmissible.[8] This is known as the hearsay rule.[9]

A principal reason for the hearsay rule is to exclude a statement when the truthfulness of the declarant cannot be tested through cross-examination.[10] The process of cross-examination allows an opposing party to expose both inadvertent and conscious inaccuracies in perception and recollection.[11] Cross-examination has been described as the greatest legal engine ever invented for the discovery of truth.[12]

---

6. Evid. Code § 1200(a).
7. Evid. Code § 1200 Comment.
8. Evid. Code § 1200(b).
9. Evid. Code § 1200(c).
10. Evid. Code § 1200 Comment.
11. M. Méndez, Evidence: The California Code and the Federal Rules 166 (3d ed. 2004) (hereafter, "Méndez Treatise").
12. California v. Green, 399 U.S. 149, 158 (1970), *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).

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 cause a witness to feel a special obligation to speak the truth.[13] It may also help make the witness aware of the possibility of criminal punishment for perjury.[14]

A third reason for the hearsay rule is that if a witness testifies before the trier of fact, that enables the trier of fact to take the demeanor of the witness into account in assessing credibility."[15] A person who sees, hears, and observes a witness may be convinced of, or unpersuaded of, the witness' honesty, integrity, and reliability. Evaluating the credibility of a witness depends largely 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."[16]

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,[17] which is binding on the states.[18] In addition, the California Constitution contains its own Confrontation Clause.[19]

The state constitutional right of confrontation is not coextensive with the corresponding federal right.[20] California is not bound to adopt the same

---

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).

13. McCormick, *supra* note 12, at 457.

14. *Id*.

15. Méndez Treatise, *supra* note 11, 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).

16. Meiner v. Ford Motor Co., 17 Cal. App. 3d 127, 140-41, 94 Cal. Rptr. 702 (1971).

17. U.S. Const. amend. VI.

18. Pointer v. Texas, 380 U.S. 400 (1965).

19. Cal. Const. art. I, § 15.

20. 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).

interpretation of its Confrontation Clause that the federal courts adopt with regard to the federal Confrontation Clause.[21]

The federal Confrontation Clause gives the defendant in a criminal case the right "to be confronted with the witnesses against him."[22] Similarly, the state's Confrontation Clause gives the defendant in a criminal case the right "to be confronted with the witnesses against the defendant."[23] Under either provision, the Confrontation Clause can only be invoked by a defendant in a criminal case.

The essential purpose of the federal Confrontation Clause is to give the defendant the opportunity to cross-examine adverse witnesses, which is essential to ensuring a fair trial.[24] 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.[25]

Thus, the hearsay rule and the Confrontation Clause protect similar values. They both ensure that prosecution witnesses testify under oath, subject to cross-examination, and in the presence of the trier of fact.[26] The United States Supreme Court has made clear, however, that the Confrontation Clause is not a mere codification of the hearsay rule.[27] Admission of evidence in violation of the hearsay rule is not necessarily a violation of the right of confrontation.[28] Similarly, the Court has more than once found a Confrontation Clause violation even though the statement in question was admitted under a hearsay exception.[29]

---

21. "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.

22. U.S. Const. amend. VI.

23. Cal. Const. art. I, § 15.

24. Alvarado v. Superior Court, 23 Cal. 4th 1121, 1137, 5 P.3d 203, 99 Cal. Rptr. 2d 149 (2000).

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

26. Méndez, Crawford v. Washington*: A Critique*, 57 Stan. L. Rev. 569, 574; see also California v. Green, 399 U.S. 149, 157 (1970).

27. The Court's decisions "have never established such a congruence ...." *Green*, 399 U.S. at 155.

28. *Id*. at 156.

29. *Id*. at 155-56.

Under the Supremacy Clause of the United States Constitution,[30] 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.[31]

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 *CRAWFORD* AND *DAVIS* DECISIONS

The United States Supreme Court has recently issued two major decisions interpreting the federal Confrontation Clause: *Crawford v. Washington*,[32] and *Davis v. Washington*.[33] For many years before *Crawford*, the Court used the two-part test of *Ohio v. Roberts*[34] 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."[35]

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."[36] The Court explained that in light of this purpose, the *Roberts* test is both overbroad and overly narrow,[37] and so unpredictable that it does not provide meaningful protection even with respect to core confrontation violations.[38] According to the Court, the most serious vice of the *Roberts* test is not its unpredictability but rather "its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[39] *Id.*

---

30. U.S. Const. art. VI, § 2.

31. *"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).

32. 541 U.S. 36 (2004).

33. __ U.S. __, 126 S.Ct. 2266 (2006).

34. 448 U.S. 56 (1980).

35. *Id.* at 66.

36. 541 U.S. at 50.

37. *Id.* at 59.

38. *Id.* at 63.

39. *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 is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant.[40] If those conditions are not met, admission of the statement would violate the Confrontation Clause.

The Court did not define the term "testimonial statement."[41] 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.[42]

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.[43]

The Court also made clear that a nontestimonial statement is subject to traditional limitations upon hearsay evidence, but it is not subject to the federal Confrontation Clause.[44]

## THE DEFINITION OF UNAVAILABILITY

The hearsay rule has many exceptions.[45] In general, two justifications for these exceptions have been advanced.[46] First, there is the necessity rationale: An

40. *Id*. at 53-54.

41. *Id*. at 51-52, 68.

42. *Id*. at 68.

43. 126 S.Ct. at 2273-74.

44. *Id*. at 2273.

45. See Evid. Code §§ 1220-1380.

46. Méndez Treatise, *supra* note 11, at 191.

exception may be justified by identifying a special need for the evidence.[47] Second, there is the reliability rationale: An exception may be based on a belief that the circumstances under which a statement was made suggest that the statement is reliable to prove the truth of the matter stated.[48] These circumstances are considered an adequate substitute for the benefits of cross-examining the declarant under oath in the presence of the trier of fact.[49]

Consistent with the necessity rationale, some exceptions to California's hearsay rule apply only if the declarant is unavailable.[50] Similarly, some exceptions to the federal rule that prohibits hearsay evidence[51] apply only if the declarant is unavailable.[52]

To facilitate application of these exceptions, both the Evidence Code[53] and the Federal Rules of Evidence[54] define what it means for a declarant to be

---

47. *Id.*

48. *Id.*

49. *Id.*

50. See, e.g., Evid. Code §§ 1230 (declaration against interest), 1290-1292 (former testimony).

51. Fed. R. Evid. 802.

52. See Fed. R. Evid. 804(b).

53. Evidence Code Section 240 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.
>
> (4) Absent from the hearing and the court is unable to compel his or her attendance by its process.
>
> (5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.
>
> (b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.
>
> (c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.
>
> The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

54. Federal Rule of Evidence 804(a) provides:

> 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

"unavailable." The federal and the California definitions of "unavailability" are similar, but differ in certain respects. In particular, they differ in their approach to (1) a witness who refuses to testify and (2) a person who cannot testify due to memory loss.[55]

**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.[56] The California statute does not expressly address this situation,[57] 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 a leading California case, a witness refused to testify for fear of his safety and the safety of his family.[58] 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 California Supreme Court upheld that ruling.[59] Because the California statute on unavailability does not expressly cover a refusal to testify, however, the Court's determination that the witness was unavailable was based on the provision that applies when a witness is "unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity."[60] 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."[61]

---

(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.

55. There are also several other distinctions between the California statute and the corresponding federal rule on unavailability of a declarant. For information on these points, see Commission Staff Memorandum 2005-6, p. 11; Commission Staff Memorandum 2004-45, pp. 43-44; Commission Staff Memorandum 2003-7, pp. 9-11.

56. Fed. R. Evid. 804(a)(2).

57. See Evid. Code § 240.

58. People v. Rojas, 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975).

59. *Id.* at 547-53.

60. Evid. Code § 240(a)(3).

61. *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.[62] The Law Revision Commission recommends that California's provision on unavailability be amended in that manner.[63]

**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."[64] Unlike the federal provision, the corresponding California provision does not expressly refer to a witness who cannot testify due to a failure of recollection.[65] Again, however, case law addresses the point.

In *People v. Alcala*,[66] 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.[67] On that basis, the trial court determined that she was unavailable to testify and admitted testimony that she had given at an earlier trial.[68]

The Supreme Court upheld that ruling, even though California's statute on unavailability 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.[69] The Court further ruled that expert medical evidence was not necessary to establish the existence of such a mental infirmity.[70]

---

62. 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").

63. See proposed amendment to Evid. Code § 240 *infra*. The language used in the proposed new paragraph on refusal to testify (proposed paragraph (a)(6)) tracks the language used in Federal Rule of Evidence 804(a)(2). 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. 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.

64. 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.

65. See Evid. Code § 240.

66. 4 Cal. 4th 742, 778, 842 P.2d 1192, 15 Cal. Rptr. 2d 432 (1992).

67. *Id.*

68. *Id.*

69. *Id.* at 778.

70. *Id.* at 780.

Again, it would be more straightforward if California's statute on unavailability expressly covered the situation.[71] The Law Revision Commission recommends that the statute be amended to expressly state that a witness who suffers substantial memory loss is unavailable to testify.[72]

**Need for the Reforms**

These reforms relating to unavailability appeared advisable before *Crawford* was decided.[73] But *Crawford* has reinforced the need for the reforms.

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 a case may be characterized as a testimonial. If so, the evidence is inadmissible under *Crawford* unless the declarant testifies at trial, or the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant.

For example, a prosecution for domestic violence, child abuse, or criminal conspiracy frequently relies on a hearsay statement of an unavailable witness.[74] These cases are particularly affected by *Crawford* because the victim is often reluctant to testify, prone to recant a prior statement, or considered too young to testify.[75]

---

71. Méndez Hearsay Analysis, *supra* note 62, at 355.

72. See proposed amendment to Evid. Code § 240 *infra*. The language used in the proposed new paragraph on lack of memory (proposed 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 case law discussing whether a witness was unavailable due to a lack of memory. If the proposed amendment is enacted, the 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.

73. See Minutes of March 2003 Commission Meeting, pp. 10-11.

74. Flanagan, *Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing*, 14 Wm. & Mary Bill Rts. J. 1193, 1194 (2006).

75. *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.").

It has also been noted, however, that many techniques are available to address the reasons for a domestic violence victim's refusal to testify. Some data suggests that by using a combination of these techniques, between 65% and 95% of domestic violence victims will fully cooperate with the prosecution. Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution,* 63 Fordham L. Rev. 853, 873 (1994).

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 during a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable the police to meet an ongoing emergency.[76] 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.[77]

Concerns about the impact of *Crawford* could be further alleviated by amending California's statute on unavailability to expressly state 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 the statute, without having to search and explain case law on these matters. Amending the statute in that manner would thus help courts and other persons determine whether the requirement of unavailability for certain hearsay exceptions is met.

## 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.

The California provision, Evidence Code Section 1350, is detailed and incorporates many safeguards to ensure that it is only invoked where there is strong evidence that a criminal defendant engaged in egregious conduct to prevent a witness from testifying.[78] The provision was enacted in 1985 to address what is

76. 126 S.Ct. at 2273.

77. *Id*. at 2276-77.

78. Evidence Code 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.

known as the "murdered witness problem" — the unfortunate reality that "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."[79]

The corresponding federal provision, Federal Rule of Evidence 804(b)(6), was enacted only ten years ago. It is broader in scope than the California provision, but it is far less detailed. It creates a hearsay rule exception for a statement that is "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."[80]

---

(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.

79. 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). The Law Revision Commission was not involved in drafting Evidence Code Section 1350.

80. According to the advisory committee's note, 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 Uniform Rules of Evidence contain a provision that is almost identical to the federal rule. See Unif. R. Evid. 804(b)(5).

The provision is intended as a "prophylactic rule" to deal with abhorrent behavior that strikes at the heart of the justice system.[81]

**Differences Between the California Approach and the Federal Approach**

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

- **Type of Case in Which the Exception Applies.** The California provision applies only in "a criminal proceeding charging a serious felony."[82] The federal rule applies in any type of case, civil or criminal.[83]
- **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 ...."[84] 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."[85]
- **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."[86] Under the federal rule, "[t]he wrongdoing need not consist of a criminal act."[87]
- **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 ...."[88] 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."[89]
- **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."[90] The federal rule does not expressly state the applicable standard of proof, but the

81. Fed. R. Evid. 804(b)(6) advisory committee's note, *quoting* United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).

82. Evid. Code § 1350(a).

83. See Fed. R. Evid. 804(b)(6).

84. Evid. Code § 1350(a)(1).

85. Fed. R. Evid. 804(b)(6) advisory committee's note.

86. Evid. Code § 1350(a)(1).

87. Fed. R. Evid. 804(b)(6) advisory committee's note.

88. Evid. Code § 1350(a)(1) (emphasis added).

89. Fed. R. Evid. 804(b)(6) (emphasis added).

90. Evid. Code § 1350(a)(1) (emphasis added).

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."[91]

- **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."[92] The federal rule does not include such a limitation.[93]
- **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."[94] The federal rule does not impose any limitations on the form of the hearsay statement.[95]
- **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."[96] The federal rule does not include such a limitation.[97]
- **Relevance of the Hearsay Statement.** The California provision expressly states that the hearsay statement must be "relevant to the issues to be tried."[98] The federal rule includes no such language.[99] In both contexts, such language is unnecessary due to the general prohibition on introducing irrelevant evidence.[100]
- **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

91. Fed. R. Evid. 804(b)(6) advisory committee's note (emphasis added).

92. Evid. Code § 1350(a)(2).

93. See Fed. R. Evid. 804(b)(6).

94. Evid. Code § 1350(a)(3).

95. See Fed. R. Evid. 804(b)(6).

96. Evid. Code § 1350(a)(4).

97. See Fed. R. Evid. 804(b)(6).

98. Evid. Code § 1350(a)(5).

99. See Fed. R. Evid. 804(b)(6).

100. See Evid. Code § 350 ("No evidence is admissible except relevant evidence."); Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible.").

with which the party is charged."[101] "The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."[102] The federal rule includes no such requirement.[103]

- **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.[104] The federal rule does not require a party to give advance notice of intent to invoke the rule.[105]
- **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."[106] The provision also gives guidance on what procedure to use if the defendant elects to testify in connection with that determination.[107] The federal rule does not provide guidance on these points.[108]
- **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."[109] The federal rule includes no such language.[110] In both contexts, such language is unnecessary due to the general provision governing multiple hearsay.[111]
- **Use of Proffered Statement in Determining Whether Exception Applies.** The California provision and the federal rule also differ in the extent to which they permit the court to consider the proffered statement in determining whether the exception applies.[112]

In summary, California's hearsay exception for forfeiture by wrongdoing is more narrow and incorporates more restrictions than the corresponding federal rule. The many restrictions in the California provision "evince an abundance of

---

101. Evid. Code § 1350(a)(6).

102. *Id.*

103. See Fed. R. Evid. 804(b)(6).

104. Evid. Code § 1350(b). There is a good cause exception to the notice requirement, but if good cause is shown "the defendant shall be entitled to a reasonable continuance of the hearing or trial." *Id.*

105. See Fed. R. Evid. 804(b)(6).

106. Evid. Code § 1350(c).

107. *Id.*

108. See Fed. R. Evid. 804(b)(6).

109. Evid. Code § 1350(e).

110. See Fed. R. Evid. 804(b)(6).

111. See Evid. Code § 1201; Fed. R. Evid. 805.

112. See discussion of "Use of the Hearsay Statement in Determining Whether There Was Wrongdoing Warranting Forfeiture" *infra*.

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."[113]

**Forfeiture by Wrongdoing Exception to the Confrontation Clause**

In determining whether to revise California law on forfeiture by wrongdoing as an exception to the hearsay rule, it is necessary to consider the constitutional constraints imposed by the Confrontation Clause.

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*,[114]

> 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 has 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."[115] In several later cases, the Court mentioned the forfeiture exception, but did not provide much more guidance on its contours.[116]

---

113. Méndez Hearsay Analysis, *supra* note 62, at 390.

114. 98 U.S. 145, 158 (1878).

115. *Id.* at 159.

116. 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."[117]

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."[118] 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." 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. State courts tend to follow the same practice. Moreover, if a hearing on forfeiture is required, [a Massachusetts case] observed that "hearsay evidence, including the unavailable witness's out-of-court statements, may be considered." 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.[119]

117. 541 U.S. at 62 (emphasis added).

118. 126 S.Ct. at 2279-80.

119. *Id*. at 2280 (citations omitted, 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*,[120] the defendant admitted killing his ex-girlfriend, but he claimed to have acted in self-defense.[121] 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."[122] In those statements, the victim described an incident that allegedly occurred a few weeks before the killing. She said that the defendant "had held a knife to her and threatened to kill her."[123]

The Court concluded that the defendant "forfeited his confrontation clause challenge to the victim's prior out-of-court statements to the police."[124] 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."[125] 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.[126]

Thus, the Court concluded it is enough to show that the witness is genuinely unavailable to testify and the defendant's intentional criminal act caused that unavailability.[127]

---

120. 40 Cal. 4th 833, 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).

121. *Id.* at 837.

122. *Id.*

123. *Id.*

124. *Id.* at 855.

125. *Id.* at 841 (emphasis added).

126. *Id.* at 849 (footnote omitted, emphasis added).

127. *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."[128] 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."[129] 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*."[130]

The Court rejected that argument, explaining that the presumption of innocence and right to jury trial will not be violated because the jury will not know of the judge's preliminary finding and will use different information and a different standard of proof in deciding the defendant's guilt.[131] Consistent with that conclusion, the Court made clear that the jury should not be informed of the judge's preliminary finding that the defendant committed an intentional criminal act.[132]

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*."[133] 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.[134]

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

128. *Id*. at 851 (emphasis added).

129. *Id*. at 851 (emphasis added).

130. *Id*. (emphasis added).

131. *Id*. at 851, *quoting United States v. Mayhew*, 380 F. Supp. 2d 961, 968 (S.D. Ohio 2005).

132. *Giles*, 40 Cal. 4th at 854.

133. *Id*. at 852 (emphasis added).

134. *Id*. at 853.

must be independent corroborative evidence that supports the forfeiture finding."[135]

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.)[136]

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."[137] She criticized the Court, however, for addressing and resolving two subsidiary questions that were unnecessary to disposition of the case before it.[138]

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."[139]
- The Court "decides whether and to what extent the victim's challenged statements may be used in making this threshold showing of wrongdoing,

135. *Id*. at 854.

136. *Id*.

137. *Id*. at 855 (Werdegar, J., concurring).

138. *Id*.

139. *Id*.

> despite the fact, again, the evidence independent of [the victim's] statements makes it unnecessary to speak to this point."[140]

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."[141]

**Possible Statutory Approaches**

Due to *Crawford* and the restrictions it has placed on introduction of a testimonial statement, there has been debate over whether to change California's approach to forfeiture by wrongdoing.[142] Because California's hearsay rule exception for forfeiture by wrongdoing appears to be narrower than the constitutional exception for forfeiture by wrongdoing, a testimonial statement that would be admissible under the constitutional exception might still be excluded under the hearsay rule in California.

In response to that debate, the Legislature could take a number of different approaches to forfeiture by wrongdoing as an exception to the hearsay rule:

(1) Replace Evidence Code 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.

(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 Legislature 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.

---

140. *Id.*

141. *Id.* at 856, 857.

142. See, e.g., AB 268 (Calderon) (2007-2008).

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."[143]

**Option #1. Replace Evidence Code 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.

143. U.S. Const. art. VI, § 2.

- 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.[144]

As explained below, the Law Revision Commission does not consider such an approach advisable at this time.

***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, *State v. Romero*,[145] is also pending before that court. 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.

---

144. A provision attempting to codify *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").

145. 141 N.M. 403, 156 P.3d 694, *petition for cert. filed*, __ U.S.L.W. __ (U.S. July 6, 2007) (No. 07-37).

***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."[146] 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."[147] According to the New Mexico Supreme Court, that is the majority rule.[148]

Similarly, a commentator has reported 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."[149] 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."[150]

Some commentators believe the original approach, requiring proof of intent to prevent testimony, is better policy than the alternative approach.[151] Still other commentators disagree.[152]

Until the United States Supreme Court rules on the issue, it is impossible to be certain whether the constitutional forfeiture doctrine requires proof that the defendant intended to prevent the declarant from testifying. Regardless of how the Court rules, a further question is whether it would be good policy to statutorily require such proof.

***Uncertainty Regarding Other Issues***

The petitions for certiorari in *Giles* and *Romero* focus on the issue of intent to prevent testimony. But uncertainty exists regarding other issues as well.

---

146. 40 Cal. 4th at 846.

147. 156 P.3d at 703.

148. *Id*. at 702.

149. Flanagan, *supra* note 74, at 1214.

150. *Id*. at 1196.

151. See *id*. at 1248-49; see also 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.").

152. 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* note 75, at 253 ("The standard of forfeiture by wrongdoing should not require a showing of the defendant's intent to prevent a witness from testifying.").

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."[153] 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.[154] As Justice Werdegar pointed out in her *Giles* concurrence, however, that majority federal view "might well be right, but it might also be wrong," especially because 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."[155]

There is also "disagreement in the courts as to the issue of 'bootstrapping,' or whether the statement itself can establish the wrongdoing."[156] As Justice Werdegar stated, it is unclear "whether and to what extent the victim's challenged statements may be used" in making the threshold showing of wrongdoing that results in forfeiture.[157]

***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 Evidence Code 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

153. Percival, *supra* note 75, at 231.

154. *Davis,* 126 S. Ct. at 2280; *Giles*, 40 Cal. 4th at 852.

155. *Giles*, 40 Cal. 4th at 856 (Werdegar, J., concurring).

156. King-Ries, *supra* note 75, at 2.

157. *Giles*, 40 Cal. 4th at 855 (Werdegar, J., concurring).

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[158] 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 Evidence Code Section 1350 With a Provision Similar to Federal Rule of Evidence 804(b)(6)**

A second possibility would be to repeal Evidence Code Section 1350 and replace it with a provision similar to Federal Rule of Evidence 804(b)(6).[159] Because the federal rule provides a much broader forfeiture exception to the hearsay rule than the California provision, 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 the federal rule applies to all parties, this approach would also be more even-handed than the California provision, 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 the California provision.

It is important to consider, however, whether a provision modeled on the federal rule would comply with the constraints of the Confrontation Clause. That point is discussed below.

***Intent to Prevent Testimony***

The federal rule applies only if a party "engaged or acquiesced in wrongdoing that *was intended to,* and did, *procure the unavailability of the declarant as a witness*."[160] Because the federal rule requires proof of intent to prevent testimony, neither it nor a provision modeled on it could 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 provide assurance that a provision modeled on the federal rule is constitutionally viable in this respect.

158. Cal. Const. art. art. I, § 15.

159. See proposed Evid. Code § 1350 (Option #2) *infra*.

160. Fed. R. Evid. 804(b)(6) (emphasis added).

***Standard of Proof***

With regard to the standard of proof, the matter is not quite so clear-cut. The federal rule does not specify the standard of proof.[161] But the advisory committee's note states that the preponderance of the evidence standard was adopted in light of the behavior the new rule seeks to discourage.[162] It is thus probable that any provision modeled on the federal rule would be interpreted to incorporate a preponderance of the evidence standard, unless the provision expressly provides otherwise.

To help ensure that a provision modeled on the federal rule is constitutional, it could be modified to expressly incorporate the clear and convincing evidence standard. 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 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 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.[163] 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. The federal rule on forfeiture by wrongdoing does not address either point,[164] but another federal rule 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."[165] That approach received approval in *Bourjaily v. United States*,[166] 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.[167] 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.

---

161. See Fed. R. Evid. 804(b)(6).

162. Fed. R. Evid. 804(b)(6) advisory committee's note.

163. See, e.g., Lego v. Twomey, 404 U.S. 477, 489 (1972) (court may use preponderance of evidence standard in determining voluntariness of confession).

164. See Fed. R. Evid. 804(b)(6).

165. Federal Rule of Evidence 104(a).

166. 483 U.S. 171 (1987).

167. Fed. R. Evid. 801(d)(2)(E).

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.[168]

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.[169] 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 new provision expressly authorized 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***

If California's statute on forfeiture by wrongdoing was modeled on the federal rule, there would be consistency at the federal and state level. Cases interpreting the federal rule could be used in interpreting the California provision.

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 the federal rule 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

168. 40 Cal. 4th at 854.

169. Fed. R. Evid. 104(a) advisory committee's note (California does not allow judge to consider inadmissible evidence in determining admissibility); Méndez Treatise, *supra* note 11, at 598-99 (same); J. Friedenthal, Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code 6-7 (1976) (on file with the Commission) (same).

a reform would be difficult to achieve in California due to the Truth-in-Evidence provision of the Victims' Bill of Rights.[170]

Nonetheless, replacing Evidence Code Section 1350 with a provision similar to Federal Rule of Evidence 804(b)(6) appears to be a reasonable option. The Law Revision Commission solicits comment on whether it is the best option.

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

A third possibility would be to broaden Evidence Code 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 the statute 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

170. 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").

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 the statute, 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 the statute 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. That language is unnecessary due to the general prohibition on introducing irrelevant evidence. The language should be deleted.[171]
- **Evidence Connecting the Defendant to Commission of the Serious Felony Charged.** Under Section 1350, 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."[172] Evidence that merely shows the commission or circumstances of the offense is not sufficient corroboration.[173]

  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

171. See discussion of "Differences Between the California Approach and the Federal Approach" *supra*.

172. Evid. Code § 1350(a)(6).

173. *Id*.

sense and should be retained, but the language will require modification if the statute 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." That language is unnecessary due to the general provision governing multiple hearsay. The language should be deleted.[174]

The various revisions discussed above could be combined in a single amendment.[175]

***Constitutionality***

Such an amendment should withstand constitutional scrutiny. As under existing law, 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*."[176] Because the provision would require proof of intent to prevent testimony, it could not be held unconstitutional for failure to incorporate such a requirement.

The statute would also continue to require proof of the requisite misconduct by clear and convincing evidence.[177] Because it would use that standard rather than the lower preponderance of the evidence standard, the provision would not be unconstitutional even if the United States Supreme Court ultimately rejects the preponderance of the evidence standard.[178]

Finally, the statute would continue to 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 would be 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 does not seem to be any danger that the provision would be invalidated even if the United States Supreme Court concludes

---

174. See discussion of "Differences Between the California Approach and the Federal Approach" *supra*.

175. See proposed amendment to Evid. Code § 1350 (Option #3) *infra*.

176. *Id*. (emphasis added).

177. *Id*.

178. If the United States Supreme Court ultimately approves the preponderance of the evidence standard, California could consider the possibility of switching to that standard.

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 Evidence Code Section 1350 as discussed 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. For instance, some commentators have praised Section 1350 as "far more sensible than the vague and wide-ranging federal provision."[179]

The Law Revision Commission does not yet have sufficient information to assess whether amending Section 1350 along the lines discussed would represent an acceptable compromise between the competing views. More importantly, the Commission lacks sufficient information to determine whether such an amendment would represent an appropriate balance of the competing policy interests, which would serve California well in the long-term.

Based on the information currently on hand, however, amending Section 1350 to broaden its application appears to be another reasonable option. The Commission solicits comment on the pros and cons of this option as compared to the other options.

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

A fourth option would be to leave Evidence Code 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.

179. E. Scallen & G. Weissenberger, California Evidence: Courtroom Manual 1209 (1st ed. 2000).

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.

For these reasons, the possibility of taking no action on forfeiture by wrongdoing and awaiting further judicial guidance appears to be a reasonable option, warranting further exploration. The Commission solicits comment on whether to follow this approach.

**Selection of the Best Option**

Input from experts, stakeholders, and other interested persons is critical to the Law Revision Commission's study process. That may be especially true in this study, which the Commission is conducting under a tight time constraint. The Commission encourages individuals and organizations to share and explain their views on forfeiture by wrongdoing as an exception to the hearsay rule. That will be of invaluable assistance to the Commission 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.

Until the United States Supreme Court provides guidance on key issues relating to forfeiture by wrongdoing, any statute enacted 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 it would be good policy to revise the statute to conform to the constitutional minimum.

# PROPOSED LEGISLATION

**Evid. Code § 240 (amended). Unavailable witness**

SEC. ____. Section 240 of the Evidence Code is amended to read:

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).

---

☞ **Note.** Possible approaches to forfeiture by wrongdoing include:

> **Option #1.** Repeal California's existing provision on forfeiture by wrongdoing and replace it with a provision that tracks the constitutional minimum.
>
> **Option #2.** Replace the existing provision with one similar to the federal rule.
>
> **Option #3.** Broaden the existing provision to a limited extent, with the possibility of further revisions later.
>
> **Option #4.** Leave the law alone until there is further judicial guidance.

The first approach is inadvisable because the United States Supreme Court has not yet given guidance on key aspects of the constitutional minimum. The Law Revision Commission has tentatively concluded that the other options are reasonable possibilities. It solicits comment on which of these approaches is preferable.

Options #2 and #3 are shown below; no legislation on forfeiture by wrongdoing would be necessary under Option #4. The Commission solicits comment on each of these alternatives. The Commission also welcomes any other suggestions or comments relating to forfeiture by wrongdoing.

## OPTION #2.

## Repeal Evidence Code Section 1350 and Replace It with a Provision Similar to Federal Rule of Evidence 804(b)(6)

**Evid. Code § 1350 (repealed). Forfeiture by wrongdoing**

SEC. ____. Section 1350 of the Evidence Code is repealed.

~~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.~~

**Comment.** This section is superseded by new Section 1350, which is drawn from Federal Rule of Evidence 804(b)(6) and Uniform Rule of Evidence 804(b)(5).

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

SEC. ____. Section 1350 is added to the Evidence Code, to read:

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").

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

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

SEC. ____. Section 1350 of the Evidence Code is amended to read:

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").

## OPTION #4.
## Leave Evidence Code Section 1350 Alone Until There Is Further Judicial Guidance

☞ **Note.** No legislation on forfeiture by wrongdoing would be necessary under this alternative.

---

**Uncodified (added). Operative date**

SEC. ____. (a) This act shall become operative on January 1, 2009.

(b) This act applies in an action or proceeding commenced before, on, or after January 1, 2009.

(c) Nothing in this act invalidates an evidentiary determination made before January 1, 2009, that evidence is inadmissible pursuant to Section 1200 of the Evidence Code. However, if an action or proceeding is pending on January 1, 2009, the proponent of evidence excluded pursuant to Section 1200 of the Evidence Code may, on or after January 1, 2009, and before entry of judgment in the action or proceeding, make a new request for admission of the evidence on the basis of this act.

---