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First Supplement to Memorandum 2010-13

2010 Legislative Program: New Developments

This supplement provides an update on the status of Senate Bills 1080 and 1115 (Committee on Public Safety), which would implement the Commission's recommendation on *Nonsubstantive Reorganization of Deadly Weapon Statutes*. The supplement also discusses the status of Assembly Bill 1723 (Lieu and Emmerson), which addresses hearsay issues that the Commission considered a few years ago.

SB 1080 & SB 1115. Deadly Weapons

SB 1080 and SB 1115 were heard in the Senate Committee on Public Safety on April 6, 2010. The Legal Community Against Violence and the California Brady Campaign Chapters submitted support letters before the hearing, which were noted in the bill analysis. At the hearing, representatives of the National Rifle Association and the California Rifle and Pistol Association testified in support of the bills. The committee approved the bills by a unanimous vote. The bills are now pending on the Senate floor.

Before the hearing, the Commission staff did an exhaustive comparison of the bills as introduced (which totaled 571 pages) with the language proposed by the Commission. As discussed in Memorandum 2010-13, the bill that contains the heart of the proposal (SB 1080) was amended to address certain technical problems we discovered in this process. Although amending such a big bill is costly, some of the mistakes were significant enough to require immediate attention (particularly the discrepancies in the list of weapons in proposed Penal Code Section 32105).

The companion bill consisting of conforming revisions (SB 1115) also contains a few glitches. However, these are minor in nature and do not warrant the expense of amending such a big bill. It would be better to deal with them next year, in a clean-up bill. For example, the Commission proposed to amend Penal

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

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

Code Section 2933.5(a)(2)(N) to fix cross-references to three deadly weapon statutes that would be relocated. As introduced, SB 1115 would only fix two of those cross-references; the other was apparently overlooked. Rather than amending SB 1115 to conform that cross-reference, it would be preferable to do so in a clean-up bill next year. SB 1115 is 233 pages long, while Penal Code Section 2933.5 is less than two pages. If an amendment of that section was included in a clean-up bill, the clean-up would still be accomplished before the nonsubstantive reorganization becomes operative on January 1, 2012. And a clean-up bill appears inevitable, because SB 1115 contains a subordination clause and there is a strong likelihood that one or more of its 106 amendments will be chaptered out by a conflicting bill.

In several places in its report, the Commission recommended a stylistic revision that was not incorporated into SB 1115. Some of these are no problem, because the stylistic revision was not essential and the Commission's Comment still correctly describes the statutory revisions that would be made by the legislation.

In three instances, however, the Commission needs to revise its Comment, because the Comment refers to a stylistic revision that is not in the bill. Specifically, the Commission proposed to delete "such" in Business and Professions Code Section 7574.14(j), replace "such a refuge" with "a clam refuge" in Fish and Game Code Section 10500(g), and replace "such firearm" with "the firearm" in Penal Code Section 833.5(e). Because SB 1115 does not include those stylistic revisions, the Commission should revise the corresponding Comments accordingly:

> **Comment.** ~~Subdivision (j) of Section 7574.14 is amended to make a technical revision.~~
> Subdivision (k) of Section 7574.14 is amended to reflect nonsubstantive reorganization of the statutes governing control of deadly weapons.
>
> **Comment.** Subdivision (b) of Section 10500 is amended to reflect nonsubstantive reorganization of the statutes governing control of deadly weapons.
> ~~Subdivision (g) is amended to make a technical revision.~~
>
> **Comment.** Subdivision (e) of Section 833.5 is amended to reflect nonsubstantive reorganization of the statutes governing control of deadly weapons. ~~That subdivision is also amended to make a technical revision.~~

Otherwise, the Comments will refer to stylistic revisions that were not made, and people reading the Comments will hunt in vain to figure out what those revisions were.

It will not be necessary to do anything in SB 1115 or a clean-up bill to deal with these points. The stylistic revisions that Legislative Counsel omitted are not necessary to the Commission's recommendation and are not worth pursuing in this context.

AB 1723. Hearsay

At the request of the Legislature a few years ago, the Commission prepared a report on *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing*, 37 Cal. L. Revision Comm'n Reports 443 (2007). In that report, the Commission recommended that the Legislature await guidance from the United States Supreme Court before taking any action on forfeiture by wrongdoing as an exception to the hearsay rule. The Commission also recommended that California's provision on unavailability (Evid. Code § 240) be amended to expressly recognize that a witness is unavailable if the witness refuses to testify on a subject, despite a court order to do so:

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

(d) 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.

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, 547-52, 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.

Subdivision (b) is amended to reflect the revisions of subdivision (a).

Subdivision (c) is amended to reflect the revisions of subdivision (a) and delete the second sentence, which is continued without substantive change in new subdivision (d).

The Commission did not take steps to obtain enactment of this amendment.

As we reported at the April meeting, AB 1723 is not part of the Commission's current legislative program, but it is of interest because it addresses both of the topics that were covered in the Commission's report on *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing*. As amended on April 8, 2010, the bill would add a new forfeiture-by-wrongdoing exception (Evid. Code § 1390) to California's hearsay rule. That exception would have a sunset date of January 1, 2016.

The bill would also amend Evidence Code Section 240(a), as follows:

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~~ 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) Persistent in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so.

The bill would not make any changes to the remainder of Section 240, except replacing "which" with "that" in the first sentence of subdivision (c).

Earlier this week, the Assembly Judiciary Committee passed AB 1723 by a unanimous vote. The bill analysis is thorough and detailed, and includes the following discussion of the amendment of Section 240:

> Recommendations of the California Law Revision Commission: On the question of whether or not to expand the definition of "unavailable as a witness" to include persistent refusal to testify even when ordered to do so, the CLRC responded in the affirmative. The CLRC noted that a witness who refuses to testify even when ordered to do so is, for all practical purposes, just as "unavailable" as a witness under any of the other existing categories. For example, under existing law, a witness is considered "unavailable" if the court was unable to compel his or her attendance, or if the witness exercised a right not to testify due to a recognized privilege (e.g. a spousal privilege.) The CLRC added that, as a matter of case law, California courts have already held that a person who refused to testify out of fear for the safety of his family was "unavailable" as a witness, but the court could only so only by forcing the facts into one of the other definitional categories. (See e.g. People v. Rojas, 15 Cal. 3d 540, holding that a witness who refused orders to testify due to fears of violence suffered from a temporary mental "infirmity" and was therefore unavailable under Evidence Code Section 240(a)(3)-(4).) Professor Miguel Mendez, a princip[al] consultant to the CLRC, has argued that it would be more straightforward to simply recognize that a witness who persistently refuses to testify is "unavailable" for all practical purposes, rather than forcing the courts to force the facts into another definitional category. *The CLRC agreed, which is why it recommended the definitional change that this bill now adopts.* (See

> Miguel Mendez, California Evidence Code - Part I, Hearsay and Its Exceptions," 37 USFL Rev 251 (2005); and CLRC Miscellaneous Hearsay Exceptions: Tentative Recommendation (October 2007; Id. Final Recommendation, 2008).

(Emphasis added.) The bill analysis thus correctly indicates that AB 1723 incorporates the key change that the Commission recommended to Section 240.

At this point, no one from the Legislature has requested that the Commission or its staff become involved in AB 1723. Unless we receive such a request, we will simply continue to monitor the progress of the bill through the Legislature. See Gov't Code § 8288 (restricting political activities of Commissioners and staff).

Respectfully submitted,

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