

CALIFORNIA LAW REVISION COMMISSION

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Miscellaneous Hearsay Exceptions: Forfeiture By Wrongdoing

Request for Public Comment

Fundamental to our justice system is the principle that each party is permitted 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 criminal defendant; 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.

Sometimes a person tries to evade justice by killing a witness or engaging in other conduct that prevents a witness from testifying. If such conduct is sufficiently egregious and appropriately proven, it may result in forfeiture of the constitutional right of confrontation, such that there is no constitutional barrier to admitting 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 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. Possible approaches 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 this conclusion and 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 the provision on unavailability be amended to expressly recognize that a witness who refuses to testify or totally lacks memory on a subject is unavailable. The Commission also solicits comment on this reform.

The tentative recommendation is available from the California Law Revision Commission, 4000 Middlefield Road, Room D-1, Palo Alto, CA 94303-4739. The tentative recommendation is also available at <www.clrc.ca.gov/K600.html>.

The Commission often revises its recommendations as a result of public comment. To be most helpful, comments should be received by **December 3, 2007**. The Commission will still accept comments after that date and consider them to the extent possible.
