Study K-200 October 29, 2002

Memorandum 2002-56

Comparison of Evidence Code with Federal Rules: Hearsay Issues

At the September meeting, the Commission began its study comparing the Evidence Code with the Federal Rules of Evidence. The Commission decided some basic issues relating to the study as a whole, and then considered a few issues relating to the hearsay rule. This memorandum addresses the next set of hearsay issues discussed in Prof. Miguel Méndez's background study: issues relating to the definition of "unavailability." Because the federal rule on dying declarations requires a showing of unavailability and the California rule does not, this memorandum also covers issues relating to dying declarations.

As discussed in September, our focus is on distinctions between corresponding provisions of the Evidence Code, the Federal Rules of Evidence, and the Uniform Rules of Evidence. We have not reviewed the case law and the literature for other issues relating to these provisions. The Commission is working towards a tentative recommendation covering some or all of the hearsay provisions.

(The hearsay portion of Prof. Méndez's background study — Méndez, *Comparison of Evidence Code with Federal Rules: Part I. Hearsay and Its Exceptions* (May 2002) (hereafter, "Méndez Hearsay Analysis") — was attached to Memorandum 2002-41 and is available on the Commission's website at www.clrc.ca.gov. An extra copy of the pertinent pages is enclosed with Commissioners' copies of this memorandum.)

DEFINITION OF UNAVAILABILITY

Some types of hearsay evidence are admissible only if the declarant is unavailable to testify. In California, Evidence Code Section 240 (hereafter, "Section 240") defines what it means to be "unavailable as a witness":

> 240. (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

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

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

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

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

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

Federal Rule of Evidence 804(a) (hereafter, "Rule 804(a)") sets forth a similar but not identical definition:

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

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

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

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

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

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

declarant's attendance or testimony) by process or other reasonable means.

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

….

Differences between these provisions are discussed below.

Unavailability of a Witness 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. Rule 804(a)(2). The California statute does not expressly address this situation, but case law does.

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

The Supreme Court upheld that ruling. 15 Cal. 3d at 547-53. Because Section 240 does not expressly cover a refusal to testify, however, the Court's determination that the witness was unavailable was based on Section 240(a)(3), which applies where a witness is "unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity." Specifically, the Court ruled that a trial court is permitted to "consider whether a mental state induced by fear of personal or family harm is a 'mental infirmity' that renders the person harboring the fear unavailable as a witness." *Id*. 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. Prof. Méndez recommends that Section 240 be amended along those lines. Méndez Hearsay Analysis at 5. **The staff agrees with that recommendation and suggests the following language:**

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.

(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.

Subdivision (b) is amended to encompass the revision of subdivision (a).

Unavailability of a Witness Who Cannot Testify Due to Memory Loss

Under Rule 804(a)(3), 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." The Advisory Committee's note explains:

> The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability … finds support in the cases, though not without dissent. [Citation omitted.] If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances [of unavailability]. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

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

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

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

Again, it would be more straightforward if Section 240 expressly spoke to the situation. Prof. Méndez recommends that the provision be amended to include the witness who suffers substantial memory loss among those who are unavailable to testify. Méndez Hearsay Analysis at 5. **The staff would implement that approach 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 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 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 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.

Subdivision (b) is amended to encompass the revision of subdivision (a).

Unavailability of a Witness Who Is Disqualified

Unlike the federal provision, Section 240 states that a witness is unavailable if the witness is disqualified from testifying to the matter. This rule makes sense. It would apply, for instance, if a witness is disqualified for being incapable of testifying in a manner that can be understood or incapable of understanding the

duty to tell the truth. Evid. Code § 701(a). **California should retain this provision.**

Impact of Expert Testimony Regarding Physical or Mental Trauma

Another distinction between Section 240 and the corresponding federal rule is that Section 240 includes language regarding the impact of expert testimony concerning physical or mental trauma resulting from an alleged crime:

> (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) [inability to attend or testify because of then existing physical or mental illness or infirmity]. 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.

The first paragraph of subdivision (c) was added to Section 240 in 1984, in response to a case in which the trial court ruled that a minor victim was unavailable based solely on her mother's testimony that her daughter was suffering from emotional difficulties. *People v. Stritzinger*, 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983); see 1 B. Witkin, California Evidence *Hearsay* § 22, at 702-03 (4th ed. 2000); 1 B. Jefferson, California Evidence Benchbook *Hearsay Exceptions: General Principles* § 2.39, at 62 (3d ed. 2002). The Supreme Court disagreed, holding that such testimony was insufficient to establish that the minor was unavailable and admission of the testimony violated the defendant's right of confrontation. 34 Cal. 3d at 516-17. The Court explained that a "mental infirmity" preventing a witness from testifying must be established either by expert testimony or by the witness' own refusal to testify. *Id*. The Legislature added the second paragraph of subdivision (c) in 1988, to further clarify the impact of expert testimony concerning physical or mental trauma resulting from an alleged crime.

Because subdivision (c) was added to provide guidance on issues that arose in litigation, the staff **recommends that it be retained.** Deleting subdivision (c) to

conform to the federal provision could well generate new confusion regarding issues that have already been settled in California.

Necessity of an Attempt to Depose the Witness

A further difference between the federal and California definitions of unavailability is that in three situations the federal provision requires not only that the proponent of a hearsay statement be unable to procure the declarant's attendance at trial, but also that the proponent attempt to depose the declarant. Fed. R. Evid. 804(a)(5). The contexts in which that extra requirement applies are (1) dying declarations, (2) statements against interest, and (3) statements of personal or family history. *Id.* Rather than discussing the need for the requirement here, we plan to consider it when we discuss each of those topics. Dying declarations are discussed below; statements against interest and statements of personal or family history will be covered in future memoranda.

DYING DECLARATIONS

Under certain circumstances, an out of court statement made by a dying person is admissible at trial. Evidence Code Section 1242 (hereafter "Section 1242") states the California rule:

> 1242. Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death.

The comparable federal provision is Rule 804(b)(2) of the Federal Rules of Evidence (hereafter, "Rule 804(b)(2)"), which provides:

> (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ….
>
> (2) **Statement under belief of impending death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

The theory underlying these provisions is that a person is unlikely to lie if the person believes death is near, because of religious beliefs, because of a lack of

worldly motives, or because of the powerful psychological forces bearing on a person in the process of dying. *People v. Smith*, 214 Cal. App. 3d 904, 910, 263 Cal. Rptr. 155 (1989); *see also* Weissenberger, *Federal Rules of Evidence 804: Admissible Hearsay From an Unavailable Declarant*, 55 U. Cin. L. Rev. 1079, 1106-07 (1987). The dying declaration exception to the hearsay rule also "rests in part upon the necessity principle." Weissenberger, *supra*, at 1108. "In the usual case the words of the declarant are offered to prove that the accused was the declarant's murderer and in this situation, necessity assumes special importance in justifying the exception." *Id*.

Types of Proceedings in Which the Dying Declaration Exception Applies

An important distinction between the California and federal provisions on dying declarations relates to the types of cases to which they apply. In drafting Section 1242 in the early 1960's, this Commission deliberately broadened the existing exception to apply to all types of cases, not just criminal homicide actions. As the Comment explains,

> **Comment.** Section 1242 is a broadened form of the well-established exception to the hearsay rule for dying declarations relating to the cause and circumstances of the declarant's death. The existing law — Code of Civil Procedure Section 1870(4) as interpreted by the courts — makes such declarations admissible only in criminal homicide actions. People v. Hall, 94 Cal. 595, 30 Pac. 7 (1892); Thrasher v. Board of Medical Examiners, 44 Cal. App. 26, 185 Pac. 1006 (1919). For the purpose of the admissibility of dying declarations, *there is no rational basis for differentiating between civil and criminal actions or among various types of criminal actions.* Hence, Section 1242 makes the exception applicable in all actions.

(Emphasis added.)

As proposed by the United States Supreme Court, the federal exception for dying declarations would also have applied to all civil and criminal cases. Congress revised it, however, to apply only to civil cases and homicide prosecutions, not to other criminal cases. The House report explains:

> The Committee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the provision to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present. This is existing law. At the same time, the Committee approved the expansion to civil actions and proceedings where the stakes do not

> involve possible imprisonment, although noting that this could lead to forum shopping in some instances.

H.R. Rep. No. 93-650 (1973).

As Prof. Méndez points out, this reasoning is curious. If dying declarations are not very reliable, "one would expect the declarations to be excluded precisely in those cases — homicides — where the stakes are highest and call for using only the most reliable evidence against the accused." Méndez Hearsay Analysis at 32. Prof. Méndez recommends that California retain its rule.

Prof. Jack Friedenthal reached the same conclusion when he compared the Evidence Code with the Federal Rules of Evidence shortly after the latter were adopted. He explained that once a hearing exception for dying declarations is made, "there is little reason to restrict its scope solely to homicide cases." Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code* (Jan. 1976), at 56. The Uniform Rules of Evidence are consistent with that reasoning: Unlike its federal counterpart, the dying declaration exception under those rules applies to all civil and criminal cases. Unif. R. Evid. 804(a)(1)(B).

In light of these authorities, **California should stick with its current approach of applying the dying declaration exception to all types of cases.** That is not only sound policy but also conforms to the Commission's practice of adhering to its previous recommendations unless a clear need for change appears. Commission Handbook § 3.5, p. 10 (Jan. 2002).

Necessity of Death

Under federal law, the dying declaration exception applies to any statement "made by a declarant *while believing that the declarant's death was imminent*, concerning the cause or circumstances of *what the declarant believed to be impending death*." Fed. R. Evid. 804(b)(2) (emphasis added). The focus is on whether the declarant *believed* death was about to occur, not on whether death *actually did* occur. The declarant must be unavailable for the statement to be admissible, but "[u]navailability is not limited to death." Fed. R. Evid. 804(b)(2) advisory committee's note. Thus, federal law makes clear that the dying declaration exception applies even if the declarant unexpectedly survives.

The California provision is more ambiguous on this point. It provides that evidence of a statement "made by a *dying* person respecting the cause and circumstances of his *death* is not made inadmissible by the hearsay rule if the

statement was made upon his personal knowledge and under a sense of immediately impending death." (Emphasis added.) Prof. Friedenthal interprets the provision to apply "only if death occurs." Friedenthal, *supra*, at 56; *see also* B. Jefferson, *supra*, *Hearsay Exceptions: General Principles* § 2.34, at 60. That is consistent with case law predating the Evidence Code. *See, e.g.*, *People v. Cord*, 157 Cal. 562, 569-70, 108 P. 511 (1910); *People v. Ybarra*, 68 Cal. App. 259, 264, 228 P. 868 (1924). It also serves to explain why the provision does not require that the declarant be unavailable, as the federal provision does. A dead declarant is necessarily unavailable.

But the main rationale for the dying declaration exception — that a person is unlikely to lie if the person believes death is near — is unrelated to whether the person ultimately survives. Friedenthal, *supra*, at 56. Consequently, **the California provision should be amended to make clear that it applies regardless of the declarant's fate:**

> 1242. Evidence of a statement made by a ~~dying~~ person respecting the cause and circumstances of ~~his death~~ the person's impending death is not made inadmissible by the hearsay rule if the statement was made upon ~~his~~ personal knowledge and under a sense of immediately impending death, regardless of whether death actually occurred.
>
> **Comment.** Section 1242 is amended to make clear that the focus is on whether the declarant sincerely believed death was near, not on whether the declarant actually died. *Cf*. Fed. R. Evid. 804(b)(2) advisory committee's note ("Unavailability is not limited to death.").

Necessity of Unavailability

If Section 1242 is amended to make clear that it applies regardless of whether death actually ensues, a subsidiary issue is whether to limit the provision to situations in which the declarant is unavailable. Most of the time, this will not be an issue because the declarant will be dead. In rare circumstances, however, the declarant will unexpectedly survive, raising the question of whether the declarant must be unavailable for the out of court statement to be admissible.

The federal rule requires a showing of unavailability for admission of a dying declaration. Fed. R. Evid. 804(b)(2). Prof. Friedenthal argues that this is unnecessary. Friedenthal, *supra*, at 56. "If the declarant is available, then he can be called and subjected to full examination on the matter and it is of far less consequence whether or not the statement is admitted." *Id*. "The court may

always keep out such a statement on the ground that its value is outweighed by possible prejudicial aspects." *Id*.

The staff does not have a strong opinion on whether it is better policy to require a showing of unavailability or to omit such a requirement. As with the burden of proof issue that the Commission discussed in September (Memorandum 2002-41, pp. 8-10), key considerations are how much faith to put in the jury versus the effectiveness of cross-examination. Is it necessary to screen out a dying declaration if the declarant is available to testify, to protect the jury from potentially unreliable evidence when an alternate source is available? Or is the jury capable of properly evaluating the weight to be given to a dying declaration under such circumstances? **The Commission needs to decide its policy preference on this matter.**

Necessity of an Attempt to Depose the Witness

If the Commission opts to require a showing of unavailability for admission of a dying declaration, then it will also have to resolve another issue: Whether, in establishing unavailability, it is sufficient to show that the proponent was unable to procure the declarant's attendance at trial, or whether it is also necessary to show that the proponent unsuccessfully attempted to depose the declarant.

As originally proposed by the United States Supreme Court, the federal provision did not require an attempted deposition to establish unavailability in the context of a dying declaration, statement against interest, or statement of personal or family history. Fed. R. Evid. 804(b)(2) advisory committee's note. The House added the requirement (see H.R. Rep. No. 93-650 (1973)), but the Senate deleted it, stating:

> Under the House amendment, before a witness is declared unavailable, a party must try to depose a witness (declarant) with respect to dying declarations, declarations against interest, and declarations of pedigree. None of these situations would seem to warrant this needless, impractical and highly restrictive complication. …
>
> ….
>
> Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the amendment. No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule (a)(3) and Criminal Rule 15(e), a deposition, though taken, may not be admissible, and under

> Criminal Rule 15(a) substantial obstacles exist in the way of even taking a deposition.

S. Rep. No. 93-1277 (1974). Without explaining its reasoning, the Conference Committee reinserted the attempted deposition requirement. H.R. Conf. Rep. No. 93-1597 (1974).

Again, **the Commission needs to decide how cautious to be in admitting hearsay evidence, weighing the factors previously discussed.** Is it necessary to insist that a deposition have been attempted, as under the federal provision, or would that be a "needless, impractical and highly restrictive complication," as the Senate unsuccessfully contended?

Once the Commission resolves whether to require a showing of unavailability before admitting a dying declaration, and, if so, whether to require an attempted deposition, it will be a simple matter to revise the amendment shown above to conform to those decisions (if necessary). **If the Commission has no clear policy preference on these points, it should adopt the federal approach in the interest of uniformity.**

Respectfully submitted,

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