Study K-201 March 29, 2004

Memorandum 2004-18

Conforming the Evidence Code to the Federal Rules of Evidence: Additional Hearsay Issues

The Commission has been working towards a tentative recommendation that would revise hearsay provisions in the Evidence Code to incorporate desirable aspects of the Federal Rules of Evidence and the Uniform Rules of Evidence. This memorandum discusses the following hearsay exceptions:

(1) Statement regarding declarant's will
(2) Judgment of conviction
(3) Judgment against a person entitled to indemnity or protected by a warranty
(4) Judgment against a third person whose liability, obligation, or duty is in issue in a civil action

A letter from the State Bar Trusts and Estate Section is attached as Exhibit pp. 1-2.

In studying the hearsay provisions, the Commission has been proceeding through an analysis prepared by its consultant, Professor Miguel Méndez of Stanford Law School. Méndez, *Comparison of Evidence Code with Federal Rules: Part I. Hearsay and Its Exceptions* (May 2002) (hereafter, "Méndez Hearsay Analysis"). That analysis was attached to Memorandum 2002-41 and is available on the Commission's website at <www.clrc.ca.gov>. The analysis has also been published. See Méndez, *California Evidence Code — Federal Rules of Evidence, I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 351 (2003).

STATEMENT REGARDING DECLARANT'S WILL

Evidence Code Section 1260 creates an exception to the hearsay rule for a statement regarding execution, revocation, or identification of the declarant's will. At the September meeting, the Commission decided that Section 1260 should be amended to include a statement regarding the terms of the declarant's will, as well as the other types of statements. Minutes (Sept. 2003), p. 20.

The State Bar Trusts and Estates Section supported that proposed change, but requested time to consider whether Section 1260 should be further revised to apply not only to wills but also to other types of testamentary instruments. The group has since studied the point and concluded that "Section 1260 as amended should apply to a broader range of testamentary instruments than just 'wills'." Exhibit p. 1. In particular, the group recommends that the provision apply to any "instrument" as defined in Section 45 of the Probate Code, which provides:

> 45. "Instrument" means a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property.

Id. The group points out that such a revision would put all donative instruments "on the same footing" as wills. *Id.*

The purpose of the revision would be to help in carrying out the donor's intentions. **The staff would implement the approach as follows:**

> 1260. (a) Evidence of a statement made by a declarant who is unavailable as a witness that ~~he~~ the declarant has or has not made or revoked a will or other instrument defined in Section 45 of the Probate Code, ~~or has or has not revoked his will,~~ or that identifies ~~his will~~ or relates to the terms of the declarant's will or other instrument defined in Section 45 of the Probate Code, is not made inadmissible by the hearsay rule.
>
> (b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.
>
> **Comment.** Section 1260 is amended to apply to any testamentary instrument, not just a will.
>
> Section 1260 is also amended to apply to a statement relating to the terms of a testamentary instrument, as well as a statement relating to execution, revocation, or identification of such a document. This conforms to the federal approach. See Fed. R. Evid. 803(3).
>
> Section 1260 is further amended to use gender-neutral language.

JUDGMENT OF CONVICTION

Suppose Bill was convicted of a crime, such as robbery or child molestation. In a later lawsuit (e.g., a child custody dispute), his former girlfriend Mary offers evidence of the judgment of conviction. The circumstances under which she offers the evidence are such that neither the doctrine of res judicata nor the doctrine of collateral estoppel applies (i.e., the judgment of conviction is not

considered conclusive on the point in question, only persuasive to whatever extent the factfinder deems appropriate). Is the evidence admissible?

The evidence is technically hearsay: an out-of-court statement offered for the truth of the matter asserted. It is thus inadmissible under the hearsay rule, unless an exception to the rule applies. Evid. Code § 1200; Fed. R. Evid. 802; Evid. Code § 1300 Comment; Méndez Hearsay Analysis at 25.

If Mary's purpose in offering the evidence is just to prove the fact of conviction, it may be possible to use the business or official records exceptions to the hearsay rule as a basis for admitting the evidence. See Evid. Code §§ 1270-1271, 1280; Fed. R. Evid. 803(6), (8); Méndez Hearsay Analysis at 25. But suppose Mary offers the evidence to prove the misconduct underlying the conviction, not simply to prove the fact of conviction. Is the evidence admissible for that purpose?

The Evidence Code and the Federal Rules of Evidence take different approaches to this issue, but both create a hearsay exception for a judgment of conviction, with certain limitations. The basis for such an exception is the presumed reliability of a judgment of conviction. As the Commission explained in its Comment to the California provision (Evid. Code § 1300), "the evidence involved is peculiarly reliable." The seriousness of a criminal charge "assures that the facts will be thoroughly litigated, and the fact that the judgment must be based upon a determination that there was no reasonable doubt concerning the defendant's guilt assures that the question of guilt will be thoroughly considered." *Id.*

California Approach

California actually has two provisions that warrant discussion: (1) Evidence Code Section 1300, which was drafted by the Commission as part of the Evidence Code enacted in 1965, and (2) Evidence Code Section 452.5, which was enacted in 1996 without Commission involvement.

Evidence Code Section 1300: Hearsay Exception for Evidence of a Judgment of Conviction Offered to Prove a Fact Essential to the Judgment

Evidence Code Section 1300 provides:

> 1300. Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact

> essential to the judgment whether or not the judgment was based on a plea of nolo contendere.

This provision creates a hearsay exception for evidence of a judgment of conviction, but only if the conviction is for a crime punishable as a felony, the evidence is offered in a civil action, and the evidence is offered to prove a fact essential to the judgment.

As originally drafted by the Law Revision Commission and enacted in 1965, the provision did not apply to a conviction based on a plea of nolo contendere. 1965 Cal. Stat. ch. 299, § 2. To facilitate suits by crime victims, the Legislature amended the provision in 1982 to apply to such a conviction. 1982 Cal. Stat. ch. 390, § 2; Méndez Hearsay Analysis at 25.

Evidence Code Section 452.5: Certified Computer-generated Official Court Record Relating to a Criminal Conviction

In 1996, the Legislature enacted the Criminal Convictions Record Act. The purpose of the Act was to "simplify recordkeeping and admission in evidence of records of criminal convictions by establishing a central computer data base of that data, and by authorizing admission in evidence of this computer data." 1996 Cal. Stat. ch. 642, § 1. It was "anticipated that this [would] result in considerable savings of time and money by state and county courts and agencies while improving or maintaining the accuracy of the records." *Id.*

One of the provisions of the Criminal Convictions Record Act is Evidence Code Section 452.5, which states:

> 452.5. (a) The official acts and records specified in subdivisions (c) and (d) of Section 452 include any computer-generated official court records, as specified by the Judicial Council which relate to criminal convictions, when the record is certified by a clerk of the superior court pursuant to Section 69844.5 of the Government Code at the time of computer entry.
>
> (b) An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.

Subdivision (a) of Section 452.5 makes clear that a court can take judicial notice (under Evidence Code Section 452) of a properly certified computer-generated court record relating to a criminal conviction.

Subdivision (b) pertains to an "official record of conviction certified in accordance with subdivision (a) of Section 1530," which provides in part that a copy of a writing in the custody of a public entity is prima facie evidence of the existence and content of the writing if the copy is certified as correct by a public employee having legal custody of the writing. Subdivision (b) states that such a record is admissible pursuant to Section 1280 (the official records exception to the hearsay rule) "to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record."

In *People v. Duran*, 97 Cal. App. 4th 1448, 1460, 119 Cal. Rptr. 2d 272 (2002), the court of appeal construed that language to create "a hearsay exception allowing admission of qualifying court records to prove not only the fact of conviction, *but also that the offense reflected in the record occurred*." (Emphasis added.) The court of appeal could "conceive of no other meaning for Evidence Code section 452.5's declaration that a certified official record of conviction is admissible to prove, not only a prior conviction, but also 'the commission' of a criminal offense, and an 'act' or 'event' recorded by the record." *Id*. at 1461.

In reaching that conclusion, the court of appeal made no attempt to reconcile its construction of Section 452.5 with the limitations of Section 1300 (i.e., evidence of a judgment of conviction is exempt from the hearsay rule only if the conviction is for a crime punishable as a felony, the evidence is offered in a civil action, and the evidence is offered to prove a fact essential to the judgment). The court's construction of Section 452.5 is also dictum, because the certified minute order at issue "would have been admissible even apart from Evidence Code section 452.5." *Id*. at 1461 n.5.

Prof. Méndez believes that the construction of Section 452.5 in *Duran* "is wrong." Email from M. Méndez to B. Gaal (March 15, 2004). He explains:

> The purpose of the new section is to facilitate proof of conviction records as official records under the hearsay exception for official records, not to create a hearsay exception greater than that created under the official records exception to the hearsay rule. But now we have an appellate opinion holding that a conviction record offered under 452.5 can be offered to prove, not just the fact of conviction, but also the misconduct giving rise to the conviction. Section 452.5 does not distinguish between misdemeanor and felony convictions and is not limited to civil cases. For these reasons, I find the court of appeals decision incomprehensible.

Id.

The staff agrees with Prof. Méndez that *Duran*'s construction of Section 452.5 is questionable. The bill analyses for the Criminal Convictions Record Act make no mention of any intent to override the longstanding limitations of Section 1300 on use of a judgment of conviction for purposes of proving the underlying misconduct. We are seeking further information on the legislative history from State Archives, but do not expect to find any evidence of intent to override Section 1300. Had there been such intent, there should have been some attempt to coordinate Section 452.5 with Section 1300, such as repealing Section 1300. The *Duran* construction of Section 452.5 renders Section 1300 unnecessary, yet a court is to construe a statute to avoid surplusage, *City and County of San Francisco v. Farrell*, 32 Cal. 3d 47, 54, 648 P.2d 935, 184 Cal. Rptr. 713 (1982); *MW Erectors, Inc. v. Niederhauser*, __ Cal. App. 4th __, 9 Cal. Rptr. 3d 351, 357 (2004); and take into account the entire statutory scheme, *People v. Pieters*, 52 Cal. 3d 894, 899, 802 P.2d 420, 276 Cal. Rptr. 918 (1991); *Chaffee v. San Francisco Library Comm'n*, __ Cal. App. 4th __, 9 Cal. Rptr. 3d 336, 341 (2004).

The focus of the Criminal Convictions Record Act was on establishing "a uniform, local, computerized prior tracking system operated by court clerks that could [be] accessed by prosecutors to obtain conviction documents necessary for use in court." Assembly Floor Analysis (Aug. 9, 1996), at 2. Such a system was much needed:

> Presently, prosecutors receive preliminary criminal history information through the Department of Justice Criminal Identification and Information system. While this system is automated, it typically only provides timely accurate posting of criminal history data.
>
> While this information is much needed, prosecutors must supplement this initial data with actual and court records prior to the completion of most cases. Typically, the court records must be order in writing through mail. the receiving court will process and certify copies of the records, and then forward them to the prosecuting agency via United State[s] mail.
>
> This procedure often takes weeks or months and is very expensive. As a result, cases are routinely delayed while awaiting the requested information. Should the case require expedited court processing (i.e., for "Three Strikes" purposes or when a defendant is in custody), this delay can jeopardize the successful prosecution of the defendant. Prosecutors often must resort to having an investigator travel to the court of record. If a person has a

> significant record, the investigator may be required to travel to multiple jurisdictions to recover the appropriate records.

Id. at 2-3.

As explained in the legislative history, the bill "would also create an evidence code section to allow for the admissibility of computer generated prior conviction records when properly certified by the court clerk." *Id*. at 2; see also Sen. Crim. Proc. Analysis (June 4, 1996), at 6-7. The focus of Section 452.5 was thus on ensuring the admissibility of conviction records generated by the new computer system.

The details regarding use of such records were not spelled out. Rather, Section 452.5(b) states simply that a certified "official record of conviction" (perhaps as opposed to a record that may merely "relate to a criminal conviction under subdivision (a)) "is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record." That statement makes clear that such a record is admissible for the specified purposes, to the extent permitted by the official records exception to the hearsay rule. But it does not preclude the possibility that for some of the specified purposes additional criteria must be met, such as the requirements of Section 1300.

A record of a judgment of conviction is hearsay when offered to prove the fact of conviction: It is an out-of-court statement used to prove the truth of the matter asserted in the record (i.e., that a particular person was convicted of a particular crime). The official records exception to the hearsay rule (Section 1280) is sufficient to admit the record for that purpose, if the record was made by and within the scope of duty of a public employee, the writing was made at or near the time of conviction, and the sources of information and method and time of preparation were such as to indicate its trustworthiness. Section 452.5 serves to make clear that a certified "official record of conviction" meets those requirements.

But a record of a judgment of conviction implicates the hearsay rule further when offered to prove that the defendant actually committed the alleged crime. In essence, it is a record of a statement by the court that determined the criminal case, being offered as proof of the minimum evidence the prosecution had to offer to make out a prima facie case. M. Méndez, Evidence: The California Code and the Federal Rules *Exceptions to the Hearsay Rule: Learned Treatises, Commercial*

Lists, and Judgments § 12.03, at 290 (1999); *see also* Section 1300 Comment. Another hearsay exception, not just Section 1280, must apply to overcome the hearsay problem. *People v. Wheeler*, 4 Cal. 4th 284, 300, 841 P.2d 938, 14 Cal. Rptr. 2d 418 (1992) ('[W]hile the documentary evidence of a conviction may be admissible to prove that the conviction occurred, the business or official records exceptions do not make the abstract of judgment admissible to show that the witness committed the underlying criminal conduct.").

Section 1300 is such an exception, but it incorporates important limitations. For example, because Section 1300 applies only to a civil case, evidence of a judgment of conviction of a third person could not be used against a defendant in a criminal case. "A contrary position would seem clearly to violate the right of confrontation." Fed. R. 803(22) advisory committee's note. Further, Section 1300 applies only to a conviction of a crime "punishable as a felony." As explained with regard to the comparable federal provision, "[p]ractical considerations require exclusion of convictions of minor offenses . . . because motivation to defend at this level is often minimal or nonexistent." Fed. R. 803(22) advisory committee's note. A judgment of conviction is highly persuasive, so it should only be used where a defendant was strongly motivated to defend against the charge.

The *Duran* construction of Section 452.5 would override those limitations. It seems improbable to the staff, however, that the Legislature would have intended to make such a fundamental change without discussion.

A more reasonable interpretation is that Section 452.5 makes a certified "official record of conviction" admissible as an official record under Section 1280 and the record may be used for the specified purposes, *provided other applicable requirements are met*. In particular, if the record is to be used to prove "the commission, attempted commission, or solicitation of a criminal offense" in a situation that is not governed by res judicata or collateral estoppel, the requirements of Section 1300 must be met.

Section 452.5(b) should be amended to make this more clear:

> 452.5. (a) The official acts and records specified in subdivisions (c) and (d) of Section 452 include any computer-generated official court records, as specified by the Judicial Council which relate to criminal convictions, when the record is certified by a clerk of the superior court pursuant to Section 69844.5 of the Government Code at the time of computer entry.

(b) An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 and, subject to Section 1300, it may be used to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.

Comment. Subdivision (b) of Section 452.5 is amended to clarify its interrelationship with Section 1300 (hearsay exception for evidence of judgment of conviction offered to prove fact essential to that judgment).

Section 1280 creates a hearsay exception for a record that was made by and within the scope of duty of a public employee, at or near the time of the events recorded, under circumstances that indicate its trustworthiness. Section 452.5(b) serves to make clear that an "official record of conviction" certified under Section 1530(a) is admissible under Section 1280 to prove the fact of conviction, or another event recorded by a public employee pursuant to an official duty at or near the time of the event.

If, however, the record is offered to prove the underlying misconduct (i.e., "the commission, attempted commission, or solicitation of a criminal offense"), it is in substance a record of a statement by the court in the prior case, being offered as proof of the minimum evidence the prosecution had to offer to make out a prima facie case. M. Méndez, Evidence: The California Code and the Federal Rules *Exceptions to the Hearsay Rule: Learned Treatises, Commercial Lists, and Judgments* § 12.03, at 290 (1999); *see also* Section 1300 Comment. To be used for this purpose, it is not sufficient that the record is admissible under Section 1280, as provided in Section 452.5. See People v. Wheeler, 4 Cal. 4th 284, 300, 841 P.2d 938, 14 Cal. Rptr. 2d 418 (1992). The record must also satisfy the requirements of Section 1300. The amendment of Section 452.5 serves to make that point clear, and to disapprove contrary dictum in *People v. Duran*, 97 Cal. App. 4th 1448, 1460, 119 Cal. Rptr. 2d 272 (2002) (Section 452.5 "allow[s] admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred.").

Federal Approach

The federal provision comparable to Evidence Code Section 1300 is Federal Rule of Evidence 803(22), which states:

> 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ….

> (22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Like Section 1300, Rule 803(22) only permits a party to use a judgment of conviction to prove a fact essential to the judgment.

The rule differs from Section 1300 in the following respects:

(1) It refers to "a crime punishable by death or imprisonment in excess of one year," instead of "a crime punishable as a felony."
(2) In certain circumstances it applies in a criminal case, not just in a civil case.
(3) It does not apply to a conviction based on a plea of nolo contendere.
(4) It expressly addresses the impact of a pending appeal.

Those differences are discussed below.

Type of Crime

The California provision applies to a conviction for a "crime punishable as a felony." The focus is on the potential punishment at the time of conviction or entry of a plea of guilty or nolo contendere, not on the actual sentence. "The fact that a misdemeanor sentence is imposed does not affect the admissibility of the judgment of a conviction under this section." Evid. Code § 1300 Comment; *see also Rusheen v. Drews*, 99 Cal. App. 4th 279, 120 Cal. Rptr. 2d 769, 775 (2002) (plea of nolo contendere to felony constitutes plea to crime punishable as felony even though court later reduced offense to misdemeanor); *but see County of Los Angeles v. Civil Service Comm'n of Los Angeles County*, 39 Cal. App. 4th 620, 46 Cal. Rptr. 2d 256 (1995) (plea of nolo contendere to misdemeanor does not constitute plea to crime punishable as felony even though offense was originally charged as felony).

Penal Code Section 17 defines a "felony" as a "crime which is punishable with death or by imprisonment in the state prison." The maximum period for confinement in a jail is one year, as is the maximum period on conviction of a misdemeanor. Penal Code § 19.2. Consequently, a crime punishable by

imprisonment in excess of one year necessarily is a crime punishable by imprisonment in the state prison and thus a felony in California. It does not appear to be true, however, that under California law every crime punishable by imprisonment in the state prison (i.e., a felony under Section 17) necessarily is a crime punishable by imprisonment in excess of one year. For example, if a person attempts to commit a felony punishable by imprisonment in the state prison for less than two years, the attempt is punishable by imprisonment in the state prison (and thus a felony), but the length of the potential sentence is half that of the actual crime. See, e.g., Penal Code §§ 489 (Grand theft of firearm is punishable by "imprisonment in the state prison for 16 months, 2, or 3 years"); 664 ("If the crime attempted is punishable by imprisonment in the state prison, the person guilty of the attempt shall be punished by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of the offense attempted").

In contrast to the California provision, the federal hearsay exception for a judgment of conviction does not refer to a "felony." Rather, it applies to a "crime punishable by death or imprisonment in excess of one year."

Prof. Friedenthal considers the federal approach preferable on this point. In his 1976 background study for the Commission, he pointed out that a "crime committed in another jurisdiction may be deemed a 'felony' even though it is not regarded as serious and the authorized punishment is far less than what would qualify as a felony in California." Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code* (Jan. 1976), at 65 (hereafter, "Friedenthal Analysis").

The staff agrees that the federal approach is more precise and that a hearsay exception for a judgment of conviction should only be recognized if the defendant had strong incentives to vigorously litigate the criminal charge. If the charge was minor, the defendant may not have put much effort into contesting it, and the conviction may not be reliable evidence of whether the defendant actually engaged in the alleged criminal conduct.

But the concerns that Prof. Friedenthal raised in 1976 do not appear to have materialized. Although the definition of a felony is different under California law than other federal law, the concept remains limited to a crime of a serious nature, one that would prompt a vigorous defense from a person accused of it. According to Prof. Gerald Uelmen (Santa Clara School of Law), the same is true in other states.

While the goal of uniformity with the Federal Rules of Evidence is desirable, the staff is reluctant to recommend a change with respect to this aspect of Section 1300. The benefits of switching to the federal approach may be marginal, and the change might entail unexpected complications due to California's complex penal statutes and sentencing scheme. For example, it would be necessary to amend not only Section 1300, but also Penal Code Section 1016, which provides that in cases "other than those punishable as felonies" a plea of nolo contendere may not be used against the defendant as an admission in a civil suit based on the alleged criminal act. We would **stick with the existing language of Section 1300 on this point.**

Application to a Criminal Case

Evidence Code Section 1300 allows a judgment of conviction to be admitted only in a civil case. The corresponding federal rule applies not only in a civil case, but also in a criminal case under some circumstances.

Specifically, due to Confrontation Clause concerns, Rule 803(22) does not permit a judgment of conviction *of another person* to be offered as substantive evidence against the accused in a criminal case. For example, "the prosecution may not use a thief's conviction to prove that the accused possessed stolen postage stamps." Méndez Hearsay Analysis at 25. The rule does not, however, preclude the prosecution from introducing a judgment of conviction *of the defendant.* Nor does the rule prevent the defendant from introducing a judgment of conviction to disprove the charges against the defendant.

Prof. Friedenthal maintains that the federal rule is preferable in this respect to the narrower California provision:

> First it may be important for a criminal defendant to be able to utilize the exception, for example, to show that another person has been convicted of the crime for which he is being tried. Second, there is no reason that the prosecutor should not be permitted to use defendant's own prior conviction. Defendant had representation and the strongest of motives to obtain an acquittal. And the standard of conviction, beyond a reasonable doubt, adds reliability to the judgment. (It must be remembered that such a rule does not permit introduction of every prior conviction of every defendant. Only in a relatively rare situation when a fact that must have been decided in a prior case is relevant to the present action, can such a conviction be admitted, and only then when the value of the evidence outweighs its obvious prejudicial nature.)

Friedenthal Analysis at 65.

The staff finds these comments persuasive and is inclined to expand the scope of the California exception as Prof. Friedenthal recommends. That could be accomplished by **amending the provision along the following lines:**

> 1300. (a) Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment whether or not the judgment was based on a plea of nolo contendere.
>
> (b) Evidence of a final judgment adjudging a person other than the defendant guilty of a crime is not made inadmissible by the hearsay rule when offered in a criminal case to prove any fact essential to the judgment whether or not the judgment was based on a plea of nolo contendere.
>
> **Comment.** Section 1300 is amended to apply in a criminal as well as a civil case, with limitations to protect the defendant's constitutional right of confrontation (U.S. Const. art. VI; Cal. Const. art. I, § 15). This conforms to the federal approach. See Fed. R. Evid. 803(22) & advisory committee's note.

Plea of Nolo Contendere

The federal hearsay exception for a judgment of conviction does not apply to a conviction based on a plea of nolo contendere. As Prof. Méndez explains, the "purpose of such a plea is to encourage criminal defendants to forego the right of trial without fear that the plea might be offered against them as a party admission in a subsequent civil action for damages." Méndez Hearsay Analysis at 25.

As originally enacted, Evidence Code Section 1300 followed the same approach. In 1982, however, the Legislature amended the provision to apply even when a judgment of conviction is based on a plea of nolo contendere. 1982 Cal. Stat. ch. 390, § 2. The Legislature found that "when possible the criminal justice system should be designed so as to assist the efforts of victims of crime to obtain compensation for their injuries from the criminals who inflicted those injuries." 1982 Cal. Stat. ch. 390, § 1. The Legislature further found that "the practice of permitting defendants in criminal cases to enter pleas of nolo contendere and thus avoid the use of the criminal conviction in a civil suit where the victim of the crime seeks to recover damages for injuries sustained by the criminal act runs counter to the interest of victims of crime." *Id.*

Extending Section 1300 to a plea of nolo contendere reduced the incentives for a criminal defendant to forego the right to trial by entering such a plea, but it did not completely eliminate such incentives. As the court of appeal explained in a recent case:

> While the nolo plea can be introduced into evidence in the civil proceeding it is not conclusive against the defendant. When a no contest plea is admissible in a civil action, the opponent is free to contest the truth of the matters admitted by the plea and explain why the plea was entered, including all circumstances surrounding the charge and the plea. In contrast, if the defendant pleads not guilty to the wobbler and is convicted the conviction may be conclusive against the defendant to the extent the elements of the crime also establish civil liability.

Rusheen, 99 Cal. App. 4th at 287-88 (footnotes omitted).

It is debatable whether Section 1300 as amended or the corresponding federal rule more properly balances the competing policy considerations. Because the Legislature specifically addressed that matter as recently as 1982 and we are not aware of any substantial dissatisfaction with that approach, it seems advisable to **stick with the current treatment of a plea of nolo contendere,** instead of revisiting the point.

Impact of a Pending Appeal

In federal court under Rule 803(22), "[t]he pendency of an appeal may be shown but does not affect admissibility" of a judgment of conviction. In contrast, Section 1300 creates a hearsay exception only for evidence of "a *final* judgment adjudging a person guilty of a crime punishable as a felony." (Emphasis added.) A judgment on appeal is not a *final* judgment within the meaning of the statute. *In re L.S.*, 189 Cal. App. 3d 407, 413-15, 234 Cal. Rptr. 508 (1987).

Thus, in *In re L.S.* the juvenile court ordered a child removed from his parents' home and made a ward of the state. The juvenile court relied solely on a judgment convicting the father of molesting other children. The court of appeal reversed, because the judgment of conviction was on appeal and thus was not admissible under Section 1300 to prove that the father molested anyone. *Id*. The court of appeal explained that "the barren fact the father suffered a conviction which was on appeal, without more, does not support a finding of depravity and unfitness of the home." *Id*. at 414.

The court of appeal further pointed out that the juvenile court had considered independent evidence of the alleged conduct on which the conviction was based,

but had found that evidence unpersuasive. *Id.* at 411-12, 414-15. The court of appeal did not say that its interpretation of Section 1300 was limited to that situation.

As a matter of policy, it is not clear-cut whether the federal approach is preferable to the California approach on this point. On the one hand, injustice may result from allowing a court to admit and rely on a conviction that is pending on appeal. In *In re L.S.*, for example, the two children who testified accused numerous adults of molestation, gave inconsistent testimony, and made patently unbelievable assertions. *See id.* at 410-11. The juvenile court did not rely on any of their testimony in depriving the parents of parental control, but grounded its decision solely on the father's conviction that was pending on appeal. Given the far-fetched testimony presented to and disbelieved by the juvenile court, one has to wonder whether that conviction was proper and withstood appeal.

Importantly, the issue here is not whether evidence of prior misconduct should be admissible against a party. Such evidence is admissible in some circumstances. The question here is whether to provide a shortcut in presenting such evidence, by allowing the proponent to prove the misconduct through evidence of the conviction instead of evidence of the misconduct itself. When a conviction is pending on appeal, it is perhaps appropriate to insist that the proponent present the actual evidence of misconduct, rather than taking the shortcut.

On the other hand, if the hearsay exception applies even when a conviction is pending on appeal, that might further justice by facilitating proof of the facts underlying the conviction. For example, such a rule might help ensure that a child is promptly removed from a home in which there is a danger of child abuse.

Almost all convictions are upheld on appeal, so evidence of a judgment of conviction is likely to be just as reliable if an appeal is pending than if the case has been fully resolved. A recent report on court statistics shows, for example, that in appeals terminated by a written opinion only 5% of criminal convictions are reversed. Judicial Council, 2003 Court Statistics Report: Statewide Caseload Trends 1992-1993 Through 2001-2002, at 28 (Table 6). About 94% of the convictions are affirmed (77% in full and 17% with modifications); the remaining 1% of criminal convictions terminated by a written opinion are dismissed. *Id*.

An appeal can also take a long time to resolve. If evidence of a judgment of conviction is not admissible until all appeals are exhausted, it may not be possible to use such evidence to prove the underlying misconduct until long after the evidence is needed in a related case. In the interim, parties must present the underlying evidence instead of relying on the evidence of conviction. That tends to be costly, time-consuming, and burdensome on the court and the parties.

Further, evidence admitted under Section 1300 is only persuasive, not conclusive. The section does "not purport to deal with the doctrines of res judicata and estoppel by judgment." Section 1300 Comment. Consequently, if there is contradictory evidence (as in *In re L.S.*), the court admitting evidence of the judgment of conviction is free to reach a different determination of the underlying issues. That minimizes any risk of error that could arise from admitting evidence of a judgment that is pending on appeal. The benefits of admitting such evidence may thus outweigh the detriments.

The Commission needs to assess the alternatives and determine which approach is the best policy. The staff tentatively recommends **amending Section 1300 to conform to the federal approach:**

> 1300. (a) Evidence of a ~~final~~ judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment whether or not the judgment was based on a plea of nolo contendere.
>
> (b) The pendency of an appeal may be shown but does not affect the admissibility of a judgment under this section.
>
> **Comment.** Section 1300 is amended to make evidence of a judgment of conviction admissible even if an appeal from the conviction is pending. This overturns *In re L.S.*, 189 Cal. App. 3d 407, 413-15, 234 Cal. Rptr. 508 (1987), and conforms to the federal approach. See Fed. R. Evid. 803(22).

JUDGMENT IN A CIVIL CASE

The Evidence Code includes two provisions that create a hearsay exception for a specified type of judgment in a civil case. Section 1301 applies to a judgment against a person entitled to indemnity; Section 1302 applies to a judgment against a third person whose liability, obligation, or duty is in issue in a civil action. There is no federal counterpart to either of these provisions. We briefly describe each provision below, but analyze the provisions together because most of the factors to consider apply to both provisions.

Judgment Against a Person Entitled to Indemnity or Protected By a Warranty

Section 1301 provides:

> 1301. Evidence of a final judgment is not made inadmissible by the hearsay rule when offered by the judgment debtor to prove any fact which was essential to the judgment in an action in which he seeks to:
>
> (a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment;
>
> (b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or
>
> (c) Recover damages for breach of warranty substantially the same as the warranty determined by the judgment to have been breached.

The substance of this provision (or at least most of it) predates the enactment of the Evidence Code. See Section 1301 Comment.

The provision applies only in limited circumstances. As Justice Jefferson explains:

> When a defendant is being sued and is protected by a right of indemnity or is the obligee under a warranty contract, the defendant normally gives notice to the indemnitor or warrantor to appear and defend the action. Giving such notice crates a binding effect of the judgment on the indemnitor or warrantor. See CC § 2778; CCP § 1912.
>
> A defendant who fails to give such notice and has judgment rendered against him or her may still sue for indemnity, but in that event the judgment is not conclusive against the indemnitor. In such an action, Evid C § 1301 permits the judgment debtor to use the judgment as an exception to the hearsay rule in order to prove the liability to be indemnified. Because the indemnitor or warrantor is not conclusively bound by the judgment, he or she may contest the issued determined by the judgment admitted in evidence.
>
> In view of the customary procedure used by a defendant to make a judgment against that defendant conclusive on his or her indemnitor or warrantor, the opportunity to use this exception seldom arises.

Jefferson's California Evidence Benchbook *Judgments* § 9.10, at 171 (3d ed., March 2003 update). In fact, a Westlaw search for published California cases interpreting Section 1301 revealed a few cases referring to the provision, but not a single one in which the exception was used as a basis for admitting evidence.

The idea underlying Section 1301 "is that, even though as evidence the judgment is hearsay and even though the indemnitor has not had the notice and opportunity to defend requisite to give the judgment binding force, nevertheless, the judgment should be admissible against the indemnitor as an item of nonconclusive evidence." Chadbourn, *A Study Relating to the Hearsay Evidence Article of the Uniform rules of Evidence*, 4 Cal. L. Revision Comm'n Reports 401, 542 (1962). In support of this concept, "it may be argued that, even though the indemnitor has not had notice and opportunity to defend the action against the indemnitee, the interests of the indemnitor have probably been safeguarded by adequate representation by the indemnitee and the judgment is probably 'right.'" *Id*. Even in the "exceptional cas[e] where this is not so, the indemnitor may yet protect himself by relitigating the issue and proving the judgment is 'wrong.'" *Id*.

Judgment Against a Third Person Whose Liability, Obligation, or Duty Is In Issue in a Civil Action

Section 1302 provides:

> 1302. When the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment against that person is not made inadmissible by the hearsay rule when offered to prove such liability, obligation, or duty.

Again, the substance of this provision predates the enactment of the Evidence Code. See Section 1302 Comment.

Also like Section 1301, this provision appears to be used rarely if ever. See Jefferson, *supra*, *Judgments* § 9.11, at 172. A Westlaw search disclosed no case in which Section 1302 was used as a basis for admitting evidence.

Prof. Friedenthal's Analysis

Prof. Friedenthal questions the reliability of the evidence made admissible under Sections 1301 and 1302:

> The policy behind these sections [is] strongly related to principles of collateral estoppel. Unfortunately, there are substantial hearsay dangers that raise serious questions about the wisdom of §§ 1301 and 1302. For example, suppose a plaintiff sues and obtains a large judgment against a servant, who is insolvent. Plaintiff in a subsequent suit against the servant's employer may introduce the judgment obtained against the servant to prove the latter's liability. Yet the servant may have had little motive and no money with which to put up a defense. Indeed, even a judgment by default would be admissible under the section.

Friedenthal Analysis at 66. He contrasts the provisions with Section 1300, pointing out that Section 1300 only applies to a judgment of conviction of a crime punishable as a felony, and such a conviction necessarily is obtained by proof beyond a reasonable doubt, which provides assurances of reliability that do not exist with regard to a judgment in a civil case. As he puts it,

> Under § 1300 regarding criminal convictions, only felony convictions are admissible. By way of contrast §§ 1301 and 1302 provide no similar guarantee as to the importance of the first action. Moreover, the reasonable doubt standard is inapplicable in civil cases, so the decision in the first suit may have been a close one. In states such as California, as many as three of the twelve jurors could even have voted for the losing party.

Id. Prof. Friedenthal suggests that if Sections 1301 and 1302 are retained, they should at least be amended to permit the opponent of the proffered judgment to introduce evidence that the decision was not unanimous.

Recommendation

To some extent, the staff shares Prof. Friedenthal's concern regarding the reliability of the evidence covered by Sections 1301 and 1302. The requirements for obtaining a civil judgment are not as demanding as those for obtaining a criminal judgment, so a civil judgment is less reliable as an indicator of the facts underlying the judgment. The threshold of reliability for admitting evidence of a judgment should be high, because a judgment carries the aura of the court and jurors may give it great weight. The judgments within the scope of Sections 1301 and 1302 might not be sufficiently reliable to warrant a hearsay exception.

Sections 1301 and 1302 also appear to serve little purpose, as they are not used much if at all. They may thus be unnecessary.

In addition, repealing the provisions would help eliminate inconsistencies between the Evidence Code and the Federal Rules of Evidence because the Federal Rules do not include equivalents of Sections 1301 and 1302. The Federal Rules do, however, include a catchall hearsay exception, which in specified circumstances can serve as a basis for admitting hearsay evidence that does not fall within a specific exception to the hearsay rule. Rule 807 provides:

> 807. A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than

> any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Commentary has pointed out that if evidence of a judgment covered by Section 1301 or Section 1302 were to be admitted in federal court, the judge would have to invoke this catchall hearsay exception. E. Imwinkelried & T. Hallahan, Imwinkelried & Hallahan's Cal. Evid. Code Annotated 246-47 (1995).

We do not know whether the catchall hearsay exception has actually been used to admit evidence that would fall within the scope of Section 1301 or Section 1302. We suspect that this practically never happens. Not only are the circumstances for admitting a judgment pursuant to Section 1301 or Section 1302 rare, but also Rule 807(B) requires a showing that "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts," which would be hard to satisfy with respect to a judgment. We could look into this further if the Commission thinks it would be worth the effort.

An advantage of the California approach is that it provides guidance and promotes consistent treatment in the limited circumstances when Section 1301 or Section 1302 applies. The result in comparable circumstances under federal law is less certain. Given the countervailing considerations, however, the greater certainty afforded by Sections 1301 and 1302 does not seem a sufficient reason to retain those provisions.

The staff thus tentatively recommends that **Sections 1301 and 1302 be repealed:**

> ~~1301. Evidence of a final judgment is not made inadmissible by the hearsay rule when offered by the judgment debtor to prove any fact which was essential to the judgment in an action in which he seeks to:~~
>
> ~~(a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment;~~
>
> ~~(b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or~~

~~(c) Recover damages for breach of warranty substantially the same as the warranty determined by the judgment to have been breached.~~

Comment. Section 1301 is repealed to promote conformity with the Federal Rules of Evidence, which do not include a comparable exception to the hearsay rule. The provision also appears to be little used and its theoretical basis is debatable.

The repeal of this section does not affect the use of a judgment for purposes of establishing res judicata or collateral estoppel in an indemnity or warranty situation. When the requirements for application of one of those doctrines are met, the judgment is conclusive on the matter. See, e.g., Civil Code Section 2778 (if indemnitor neglects to defend action after request by indemnitee, recovery against indemnitee is conclusive against indemnitor); Code Civ. Proc. § 1912 (principal bound if surety bound and principal had notice of action and opportunity to join in defense). Former Section 1301 did not apply in those circumstances; it only applied when the prerequisites for res judicata or collateral estoppel were lacking and evidence of a judgment was introduced for its persuasive value. See former Section 1301 Comment (1965).

The repeal of this section does not preclude admission of evidence of a judgment under Section 1280, which creates an exception to the hearsay rule for a record made by a public employee. If a court admits evidence of a judgment pursuant to Section 1280, the evidence may be used to show that the judgment was entered, not to prove the underlying events. For a provision authorizing a court to take judicial notice of a judgment, see Section 452.

~~1302. When the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment against that person is not made inadmissible by the hearsay rule when offered to prove such liability, obligation, or duty.~~

Comment. Section 1302 is repealed to promote conformity with the Federal Rules of Evidence, which do not include a comparable exception to the hearsay rule. The provision also appears to be little used and its theoretical basis is debatable.

The repeal of this section does not affect the use of a judgment for purposes of establishing res judicata or collateral estoppel. When the requirements for application of one of those doctrines are met, the judgment is conclusive on the matter. Former Section 1302 did not apply in those circumstances; it only applied when the prerequisites for res judicata or collateral estoppel were lacking and evidence of a judgment was introduced for its persuasive value.

The repeal of this section does not preclude admission of evidence of a judgment under Section 1280, which creates an

exception to the hearsay rule for a record made by a public employee. If a court admits evidence of a judgment pursuant to Section 1280, the evidence may be used to show that the judgment was entered, not to prove the underlying events. For a provision authorizing a court to take judicial notice of a judgment, see Section ~~4~~52.

If the Commission follows this approach, **a conforming revision should be made in Civil Code Section 2778:**

2778. In the interpretation of a contract of indemnity, the following rules ~~are to be applied~~ apply, unless a contrary intention appears:

~~1.~~ (a) Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming ~~liable;~~ liable.

~~2.~~ (b) Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment ~~thereof;~~ thereof.

~~3.~~ (c) An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against ~~such~~ claims, demands, or liability incurred in good faith, and in the exercise of a reasonable ~~discretion;~~ discretion.

~~4.~~ (d) The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the ~~latter~~ person indemnified in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct ~~such~~ those defenses, if ~~he~~ the person indemnified chooses to do ~~so;~~ so.

~~5.~~ (e) If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the ~~latter~~ the person indemnified suffered by ~~him~~ that person in good faith, is conclusive in ~~his~~ favor of the person indemnified against the ~~former;~~ person indemnifying.

~~6.~~ (f) If the person indemnifying, whether ~~he~~ that person is a principal or a surety in the agreement, has not received reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the ~~latter is only presumptive~~ the person indemnified is not evidence against the ~~former;~~ person indemnifying.

~~7.~~ (g) A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is inapplicable if ~~he~~ the person indemnified had a good defense upon the merits, which by want of ordinary care ~~he~~ the person indemnified failed to establish in the action.

Comment. New subdivision (f) (former subdivision (6)) of Section 2778 is amended to reflect the repeal of Evidence Code Section 1301. For further explanation, see former Section 1301 Comment (200x).

Section 1260 is further amended to use gender-neutral language, improve clarity, and conform to modern drafting conventions. These are nonsubstantive revisions.

Alternative Approach

If the Commission decides to retain Sections 1301 and 1302 instead of proposing their repeal, it should look into Prof. Friedenthal's idea regarding lack of unanimity. Specifically, it may be advisable to amend the provisions to expressly permit the opponent of the proffered judgment to introduce evidence that the decision was not unanimous.

Prof. Friedenthal also suggests clarifying whether Section 1302 applies in the employer-employee context. Friedenthal Analysis at 66. A California Supreme Court decision casts doubt on that matter. *Markley v. Beagle*, 66 Cal. 2d 951, 429 P.2d 129, 59 Cal. Rptr. 809 (1967); see Friedenthal Analysis at 66. We will provide further information about this issue if the Commission is inclined to explore it.

Further, the Commission should consider amending the provisions to make clear whether they apply to a judgment that is on appeal. See the above discussion regarding "Impact of a Pending Appeal" with respect to Section 1300.

IMPACT OF THE TRUTH-IN-EVIDENCE PROVISION

The Truth-in-Evidence provision of the California Constitution (Cal. Const. art. I, § 28(d)) imposes restrictions on certain evidentiary reforms that would narrow the admissibility of relevant evidence in a criminal case. It is important to consider whether the Truth-in-Evidence provision would have an impact on any of the reforms recommended in this memorandum.

The staff does not think so. The recommended reforms are:

(1) Amend Evidence Code Section 1260 to apply to a statement relating to the terms of a testamentary instrument, as well as a statement relating to execution, revocation, or identification of such a document.

(2) Amend Evidence Code Section 452.5 to clarify its interrelationship with Evidence Code Section 1300.

(3) Amend Section 1300 to apply in a criminal as well as a civil case, with limitations to protect the defendant's constitutional right of confrontation.

(4) Amend Section 1300 to make evidence of a judgment of conviction admissible even if an appeal from the conviction is pending.

(5) Repeal Evidence Code Section 1301 (judgment against person entitled to indemnity or protected by warranty).

(6) Repeal Evidence Code Section 1302 (judgment against third person whose liability, obligation, or duty is in issue in civil action).

Reforms (1), (3), and (4) would expand the admissibility of evidence, so they would not raise concerns about limiting the admissibility of relevant evidence. Reforms (5) and (6) would not affect the admissibility of evidence in a criminal case, because the provisions to be repealed only apply in the civil context.

Reform (2) — amending Evidence Code Section 452.5 to clarify its interrelationship with Section 1300 — might be viewed as narrowing the scope of admissible evidence, if one agrees with *Duran*'s interpretation of Section 452.5. We believe, however, that our proposed clarification of Section 452.5 is more consistent with the statutory intent than the interpretation in *Duran*, and would amount to a nonsubstantive change.

Moreover, the Truth-in-Evidence provision did not affect "any existing statutory rule of evidence relating to . . . hearsay." Cal. Const. art. I, § 28(d). When the Truth-in-Evidence provision (Proposition 8) was enacted in 1982, the hearsay rule (Evid. Code § 1200) and Section 1300 were in effect. "Nothing in Proposition 8 change[d] the long-established understanding that a misdemeanor conviction comes within the statutory rule of inadmissible hearsay (Evid. Code § 1200) when offered for the truth of the charge." *Wheeler*, 4 Cal. 4th at 298-99.

Section 452.5 was not enacted until 1996. It thus postdates the Truth-in-Evidence provision. Consequently, even if Section 452.5 is interpreted to override the limitations of Section 1300, and our proposed amendment recognizing those limitations is viewed as narrowing the scope of admissible evidence under Section 452.5, the amendment would not trigger the Truth-in-Evidence provision.

Respectfully submitted,

Barbara Gaal
Staff Counsel

TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

180 HOWARD STREET
SAN FRANCISCO, CA 94105-1639
415-538-2206
FAX 415-538-2368
WWW.CALBAR.ORG

February 26, 2004

BY TELEFACSIMILE – (650) 494-1827
AND U.S. MAIL

Barbara Gaal
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Evidence Code Section 1260

Dear Ms. Gaal:

On behalf of the Trusts and Estates Section of the State Bar of California, I am following up on our letter to you of September 11, 2003, in which our Section gave its input concerning a proposed amendment to Evidence Code Section 1260 (Statement Concerning Declarant's Will).

In our letter of September 11, 2003, we supported the changes encompassed in the proposed amendment, and questioned whether Section 1260 as amended should be limited to "wills" or should apply to other testamentary instruments as well. We asked for the opportunity to consider this question further and to submit additional comments to the Commission.

Our section has had the opportunity to consider the matter further. We believe that Section 1260 as amended should apply to a broader range of testamentary instruments than just "wills". We recommend that Section 1260 apply to any ""instrument' as defined in Section 45 of the Probate Code." That will put all donative instruments on the same footing as "wills."

If you have any questions about our Section's recommendation, please feel free to contact me, either by phone at (415) 421-0288, or by e-mail at cpwolff@elc-law.com. Thank you for your consideration of these comments.

Very truly yours,

Charles P. Wolff

cc: Randall B. Godshall
Barry C. Fitzpatrick
Christopher M. Moore
Shirley L. Kovar
Catherine A. Lawson
Silvio Reggiardo III
Kenneth S. Wolf
clrc evidence 1260.20040219