

First Supplement to Memorandum 2004-18

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

This supplement (1) describes the results of the staff's request for legislative history on Evidence Code Section 452.5, (2) reports and corrects an error in Memorandum 2004-18 relating to a proposed amendment of Evidence Code Section 1300, (3) discusses implications of *Crawford v. Washington*, __ U.S. __, 124 S.Ct. 1354 (2004), on use of a prior conviction, and (4) raises an issue regarding the proposed amendment of Evidence Code Section 1260. Unless otherwise indicated, all further statutory references are to the Evidence Code.

LEGISLATIVE HISTORY OF SECTION 452.5

As discussed in Memorandum 2004-18, the staff requested information from State Archives on the legislative history of the Criminal Convictions Record Act. We received over a hundred pages of materials. In reviewing these materials, we did not find any evidence that the Legislature intended Section 452.5(b) to override the longstanding limitations of Section 1300 on use of a judgment of conviction for purposes of proving the underlying misconduct. We stand by our previous analysis of Section 452.5(b).

PROPOSED EXTENSION OF SECTION 1300 TO A CRIMINAL CASE

As discussed in Memorandum 2004-18, Section 1300 allows a judgment of conviction to be admitted as proof of the underlying misconduct only in a civil case. The corresponding federal rule allows a judgment of conviction to be admitted as proof of the underlying misconduct if the evidence is (1) offered in a civil case, (2) offered by the defendant in a criminal case, or (3) offered by the government in a criminal case and it is a conviction of the defendant. Due to Confrontation Clause concerns, the federal rule does not permit a judgment of conviction of *another person* to be offered against the accused in a criminal case.

In Memorandum 2004-18, the staff recommends amending Section 1300 to track the federal approach in this regard. A proposed amendment is set out on page 13.

Unfortunately, the staff made some last minute changes in that amendment when preparing Memorandum 2004-13, and made mistakes in the process. **We would replace that erroneous amendment with the following:**

1300. Evidence (a) In a civil action, 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) In a criminal action, 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 either of the following circumstances to prove any fact essential to the judgment whether or not the judgment was based on a plea of nolo contendere:

(1) The defendant offers the evidence.

(2) The government offers evidence of a final judgment adjudging the defendant guilty of a crime punishable as a felony.

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.

We regret the error and apologize for any confusion it may have caused.

IMPLICATIONS OF *CRAWFORD* ON USE OF A PRIOR CONVICTION

The staff has been considering whether and how *Crawford* affects the admissibility of evidence of a judgment of conviction, and what impact, if any, this has on Sections 452.5 and 1300 and on our proposed amendments of those provisions. We have not yet reached any clear conclusions on this point, largely because *Crawford* provides little guidance on this matter. We will discuss this point further at the upcoming meeting, with anticipated assistance from Prof. Méndez.

EVIDENCE CODE SECTION 1260

At the suggestion of the State Bar Trusts and Estates Section, Memorandum 2004-18 proposes to amend Section 1260 to apply to “a will or other instrument defined in Section 45 of the Probate Code.” The proposed Comment states in part:

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....

Memorandum 2004-18, p. 2 (emphasis added). The references to a “testamentary instrument” stem from a letter submitted by the Trusts and Estates Section, which states that Section 1260 “should apply to a broader range of testamentary instruments than just ‘wills.’” Memorandum 2004-18, Exhibit p. 1.

On reflection, however, it appears more appropriate to refer to a “donative instrument” than to a “testamentary instrument” in the proposed Comment, because that is the terminology used in Probate Code Section 45. We brought this point to the attention of the Trusts and Estates Section, asking which term should be used in the Comment and whether the group really intended to extend Section 1260 to any donative instrument, or just to any “testamentary instrument.” We have not yet received a response. Absent further clarification from the Trusts and Estates Section, we would **replace the references to “testamentary instrument” in the proposed Comment with references to “donative instrument.”**

Respectfully submitted,

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