Study K-201 January 6, 2005

Memorandum 2005-6

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

This memorandum continues the process of analyzing whether provisions in the California Evidence Code pertaining to hearsay should be revised to incorporate aspects of the corresponding Federal Rules of Evidence. The starting point for discussion is an analysis prepared by the Commission's consultant, Prof. Miguel Méndez of Stanford Law School. This memorandum focuses on the following exceptions to the hearsay rule:

(1) **Declaration against interest** (Evid. Code § 1230; Fed. R. Evid. 804(b)(3))
(2) **Statement by a minor victim under age 12 describing child abuse or neglect, offered in a criminal case** (Evid. Code § 1360)
(3) **Statement describing infliction or threat of physical injury to declarant** (Evid. Code § 1370)
(4) **Statement by an elder or dependent adult, offered in a criminal prosecution for abuse** (Evid. Code § 1380)

The Commission is working towards a tentative recommendation on hearsay issues.

The analysis prepared by Prof. Méndez (hereafter, "Méndez Hearsay Analysis") 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).

DECLARATION AGAINST INTEREST

Suppose George tells a group of his friends that on Saturday night he played poker and sniffed cocaine at his apartment with his cousin Mario, who belongs to the Mafia. Mario is later accused of having murdered his boss that same Saturday night. Before the trial, George dies in a car accident. May Mario offer George's out-of-court statement to

establish an alibi? May the prosecution offer George's out-of-court statement to establish that Mario was in the vicinity of his boss's house on the night of the murder?

Both the Evidence Code and the Federal Rules of Evidence include an exception to the hearsay rule for a declaration against interest — i.e., a statement that was contrary to the declarant's best interests when made. The California provision is Evidence Code Section 1230, which provides:

> 1230. Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

This exception applies only if the declarant is unavailable to testify.

The corresponding federal provision is Federal Rule of Evidence 804(b)(3), which states:

> 804....
> (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> ....
> (3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Like the corresponding California provision, this exception applies only if the declarant is unavailable to testify.

These exceptions are based on the "assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." Fed. R. Evid. 804(b)(3) advisory committee's note. Prof. Méndez points out that "this commonplace assumption has not been tested

empirically." M. Méndez, Evidence: The California Code and the Federal Rules — A Problem Approach § 9.01, at 274 (3d ed. 2004) (hereafter, "Méndez Casebook"). It is, however, "consistent with the psychological literature on the phenomenon of lying," which indicates that people often lie to protect their own interests. Imwinkelried, *Declarations Against Social Interest: The (Still) Embarrassingly Neglected Hearsay Exception*, 69 So. Cal. L. Rev. 1427, 1434-35 (1996).

The California and federal exceptions for a declaration against interest do not require a showing that the declarant was aware of the damaging effect of the statement in question. "Since by definition the declarant must be shown to be unavailable to testify, such a requirement most likely would eviscerate the exception." Méndez Casebook at 274. Instead, it is enough if the proponent of the evidence shows that the statement was so contrary to the declarant's best interests that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. *Id*. It is unclear to what extent a court can consider the subjective motivation of the declarant or the testifying witness in deciding whether to admit an out-of-court statement pursuant to one of these exceptions. *Id*.

The California exception differs from the federal provision in a number of respects, including:

(1) Application to a declaration that is damaging to the declarant's social interest.
(2) Treatment of a declaration exposing the declarant to criminal liability, offered to exculpate a criminal defendant.
(3) Inclusion of a requirement that the declarant have sufficient knowledge of the subject.
(4) No necessity of an attempt to depose the declarant.

Uniform Rule of Evidence 804(b)(3) presents another variation. Unlike the California and federal exceptions, it specifically addresses a declaration that is damaging both to the declarant and to another person — to wit, the defendant in a criminal case in which the declaration is offered.

Those five points are discussed in order below.

Declaration Against Social Interest

The California and federal exceptions for a declaration against interest apply to a statement that is contrary to the declarant's pecuniary or proprietary interest,

a statement that tends to subject the declarant to civil or criminal liability, and a statement that tends to render invalid a claim by the declarant against another. Only the California exception applies to a statement that creates a risk of making the declarant "an object of hatred, ridicule, or social disgrace in the community."

An example of this type of statement is a revelation that the declarant committed adultery. *See People v. Wheeler*, 105 Cal. App. 4th 1423, 1426-30, 129 Cal. Rptr. 2d 916 (2003). Other examples include a man's admission that he is the father of an illegitimate child, an unmarried woman's disclosure that she is pregnant, and a man's confession that he is impotent. *Id*. at 1427, *quoting* Chadbourn, *A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence*, 4 Cal. L. Revision Comm'n Reports 401, 501 (1962). "As a rule of thumb, if a statement imputing certain conduct to a person would be defamatory, the person's 'open, ... deliberate' acknowledgment of the conduct can be considered disserving." Imwinkelried, *supra*, at 1434-35. It has even been argued that the prosecution in the O.J. Simpson case could have invoked this theory to gain admission of statements that Nicole Brown Simpson made to her mother regarding threats and violence by the accused. *Id*. at 1429-30.

Although the federal exception for a declaration against interest does not encompass a declaration against social interest, a number of states have deviated from the federal approach and included such a declaration. See authorities cited in Imwinkelried, *supra*, at 1430 & nn. 11 & 12. In addition, Uniform Rule of Evidence 804(3) specifically refers to a statement tending to "make the declarant an object of hatred, ridicule, or disgrace." Similar language was included in the version of the federal rule recommended by the United States Supreme Court, but was deleted in the House Judiciary Committee due to concerns about the reliability of a declaration against social interest. H.R. Rep. No. 93-650 (1973).

Preeminent evidence scholars such as Prof. Edmund Morgan, Dean McCormick, and Justice Bernard Jefferson did not share those concerns, "advocat[ing] the recognition and use of the exception." Imwinkelried, *supra*, at 1443. Similarly, in his 1976 analysis for the Commission, Prof. Jack Friedenthal of Stanford Law School recommended that California retain its approach to a declaration against social interest:

> There is no reason for alteration of § 1230. Under the section the court must decide if the nature of the foreseeable detriment of making the statement is such that a reasonable man would not have made it unless it were true. If the embarrassment is sufficient to

> [satis]fy such a standard, the statement should be admitted. The courts are capable of making such decisions.

J. Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code* 50-51 (1976) (on file with the Commission) (hereafter, "Friedenthal Analysis"). More recently, Prof. Edward Imwinkelried of the University of California at Davis wrote that "[t]here is an especially strong inference that declarations disserving social interest are sincere and, under hearsay policy, that inference should lead to expanded use of the exception." Imwinkelried, *supra*, at 1451.

In light of the substantial support for the California approach, as well as its logical and commonsense appeal, **Section 1230 should continue to encompass a declaration against social interest.** It would be a mistake to delete this type of declaration from the California provision simply for purposes of conforming the provision to the corresponding federal rule.

Prof. Imwinkelried points out, however, that Section 1230 refers to a statement that creates a risk of making the declarant "an object of hatred, ridicule, or social disgrace *in the community*." Imwinkelried, *supra*, at 1440-42 (emphasis added). He explains statements against social interest fall in two categories:

> (1) In some instances, a statement is against the declarant's interest because the declarant anticipates that the addressee will share the statement with the community as a whole, which will adversely affect the declarant. *Id*. at 1440. For example, a teenager who admits to a reporter that she flunked all her fall term classes might fear being ridiculed by her classmates after her statement is published in a local newspaper.
> (2) In other instances, a statement is against the declarant's interest because the declarant anticipates adverse consequences simply from making the statement to the addressee. *Id*. at 1440-42. For example, a teenager who tells her mother that she flunked all her fall term classes might be primarily concerned about the negative reaction she will get from her mother.

Prof. Imwinkelried argues that both types of declarations against social interest should be included in Section 1230:

> It would ... be advisable to amend the statut[e] to make it clear that a statement can qualify as a declaration against social interest either when the declarant fears subsequent public repetition of the revelation or when the declarant fears that the revelation itself will

> cause an unwelcome change in the addressee's perception of the declarant. It would make sense to amend the statut[e] along these lines because, in both situations, there is a solid inference of the declarant's sincerity.

Id. at 1459-60 (footnotes omitted).

The staff finds this argument persuasive. If the Commission agrees, **Prof. Imwinkelried's suggestion could be implemented by amending Section 1230 along the following lines:**

> **Evid. Code § 1230 (amended). Declaration against interest**
>
> SEC. ____. Section 1230 of the Evidence Code is amended to read:
>
> 1230. Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace ~~in the community~~, that a reasonable man in his position would not have made the statement unless he believed it to be true.
>
> **Comment.** Section 1230 is amended to make clear that it encompasses a declaration against social interest regardless of whether a reasonable person in the declarant's position would fear subsequent public repetition of the revelation, or simply an unwelcome reaction from the person to whom the statement is addressed.

Because this reform would not narrow the admissibility of relevant evidence in a criminal case, it would not trigger any concerns relating to the Truth-in-Evidence provision of the California Constitution (Cal. Const. art. I, § 28(d)). If the Commission decides to propose this amendment, we would also incorporate nonsubstantive revisions to make the statute gender neutral.

Declaration Exposing the Declarant to Criminal Liability, Offered to Exculpate a Criminal Defendant

Under Rule 804(b)(3), "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the

statement." The corresponding California provision does not contain similar language.

According to Prof. Méndez, the federal restriction "reflects a fear that such statements may be falsely contrived to aid the accused." Méndez Casebook at 278. Historically, courts viewed such statements so skeptically that the declaration against interest exception to the hearsay rule was limited to a statement that was contrary to the declarant's pecuniary or proprietary interest. It did not include a statement that was contrary to the declarant's penal interest, such as a confession of murder.

For example, in *Donnelly v. United States*, 228 U.S. 243 (1913), the defendant was convicted of murdering an Indian named Chickasaw. At trial, the defendant had offered evidence that another man, Joe Dick, had confessed to the murder but was unavailable to testify at trial because he was dead. The defendant also offered corroborating evidence, including evidence of tracks leading from the scene of the crime to the place where Dick was staying. The trial court excluded the evidence and the United States Supreme Court upheld this ruling, explaining that "hearsay evidence is an unsafe reliance in a court of justice." *Id*. at 273.

Justice Holmes, joined by two other justices, dissented. He explained that the "confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make anyone outside of a court of justice believe that Donnelly did not commit the crime." *Id*. at 277 (Holmes, J., dissenting). He also pointed out that "the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder." *Id*. at 278 (Holmes, J., dissenting).

In drafting Rule 804(b)(3), the Evidence Advisory Committee balanced the logic of Justice Holmes' position against the traditional distrust of a declaration against penal interest, offered to exculpate the accused. The corroboration requirement was included as a compromise:

> The common law required that the interest declared against be pecuniary or proprietary....
>
> The exception discards the common law limitation.... [E]xposure to criminal liability satisfies the against-interest requirement. The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in Donnelly v. United States, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913), but one senses in the decisions a distrust of

> evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. [Citations omitted.] *The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations....* The requirement of corroboration should be *construed in such a manner as to effectuate its purpose of circumventing fabrication.*

Fed. R. Evid. 804(b)(3) advisory committee's note (emphasis added).

In his 1976 analysis for the Commission, Prof. Friedenthal argued that Section 1230 should not be amended to incorporate the federal corroboration requirement. He viewed the requirement as primarily directed at an easily fabricated false assertion by a jailhouse snitch or other questionable character that "I heard someone else confess." He maintained that the requirement is unnecessary in California because the court already has authority to exclude an untrustworthy statement:

> Federal Rule 804(b)(3) includes a caveat, not present in § 1230, as follows: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." This clause appears designed primarily to combat an easy-to-make, false assertion that, "I heard someone else confess," as a means of casting doubt on the guilt of an accused. Interestingly enough, this problem does not as much involve a hearsay danger as it does the reliability of the witness who is on the stand and subject to cross-examination as to whether the statement was in fact made and as to the precise circumstances. The federal proviso seems overly cautious and California should not adopt it; the court has ample power to exclude any such statement if the circumstances indicate that it is untrustworthy. See generally, McCormick, Evidence p. 674 (2d ed. 1972).

Friedenthal Analysis at 51.

Case law interpreting Section 1230 confirms that a declaration against penal interest is admissible over a hearsay objection only if it is "clothed with indicia of reliability." *See, e.g.*, *People v. Lucas*, 12 Cal. 4th 415, 462, 907 P.2d 373, 48 Cal. Rptr. 2d 525 (1995), *modified*, 12 Cal. 4th 825A (1996); *People v. Coble*, 65 Cal. App. 3d 187, 192, 135 Cal. Rptr. 199 (1976); *People v. Shipe*, 49 Cal. App. 3d 343, 354, 122

Cal. Rptr. 701 (1975). As the California Supreme Court has explained, the proponent of a declaration against penal interest must show that it "was sufficiently reliable to warrant admission despite its hearsay character." *People v. Cudjo*, 6 Cal. 4th 585, 863 P.2d 635, 25 Cal. Rptr. 2d 390, 403 (1993). "To determine whether the declaration passes the required threshold of trustworthiness, a trial court 'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.'" *Id*., *quoting People v. Frierson*, 53 Cal. 3d 730, 745, 808 P.2d 1197, 280 Cal. Rptr. 440 (1991). The court may only assess the reliability of the hearsay declarant; it may not evaluate the credibility of the witness who testifies to the out-of-court statement. *Vorse v. Sarasy*, 53 Cal. App. 4th 998, 1013, 62 Cal. Rptr. 2d 164 (1997). We are not aware of any authority suggesting that this requirement of reliability is limited to exculpatory, as opposed to inculpatory, use of a declaration against penal interest.

In contrast, the federal corroboration requirement is expressly limited to a declaration against penal interest that is "offered to exculpate the accused." This one-sidedness has been criticized on constitutional grounds, and some circuits have read into the Rule 804(b)(3) a corroboration requirement for an inculpatory declaration against interest. See cases cited in *United States v. Candoli*, 870 F.2d 496, 509 (9th Cir. 1989); E. Imwinkelried & T. Hallahan, Imwinkelried & Hallahan's California Evidence Code Annotated 229 (1995).

In 2003, a proposal to amend Rule 804(b)(3) to address this point was approved by the Federal Rules Advisory Committee and the Standing Committee on Rules of Practice and Procedure for transmission to the Judicial Conference with the recommendation that it be approved and sent on to the United States Supreme Court. The proposal would have retained the existing corroboration requirement for an exculpatory declaration against interest, while adding a requirement that an inculpatory declaration against interest be supported by particularized guarantees of trustworthiness:

> 804....
>
> (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ....
>
> (3) **Statement against interest.** A statement ~~which~~ <u>that</u> was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the

> declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. But in a criminal case a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ under this subdivision in the following circumstances only: (A) if offered to exculpate an accused, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness, or ~~of the statement~~ (B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

The reference to "particularized guarantees of trustworthiness" was drawn from the then-prevailing Confrontation Clause standard enunciated in such cases as *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). See Advisory Committee's Note to Proposed Amendment to Rule 804(b)(3). The proposed amendment will need to be rethought in light of the new Confrontation Clause standard enunciated in *Crawford v. Washington*, ___ U.S. ___ , 124 S.Ct. 1354 (2004).

In light of the current uncertainty regarding Confrontation Clause jurisprudence, the Commission should not propose to amend Section 1230 at this time to add the federal corroboration requirement for an exculpatory declaration against penal interest. Attempting to add such a requirement for an exculpatory declaration against penal interest would necessarily raise issues about the proper treatment of an inculpatory declaration against penal interest. It would be premature to codify any requirement for an inculpatory declaration against penal interest, because *Crawford* left many questions unanswered, including the definition of a testimonial statement and the proper Confrontation Clause standard for a nontestimonial statement. A further complication is that a declaration against penal interest could be offered in a civil case, not just in a criminal one. It may be illogical to require corroboration in one context but not in the other. **It seems best to avoid these issues by sticking with the current California approach,** in which Section 1230 does not expressly require corroboration of a declaration against penal interest, but case law firmly establishes that such a declaration is admissible only if it is "clothed with indicia of reliability."

Declaration By a Declarant Having Sufficient Knowledge of the Subject

A further distinction between the California and federal approaches to a declaration against interest is that the California provision expressly requires that the declarant "hav[e] sufficient knowledge of the subject." This requirement

"continues the similar common law requirement stated in Code of Civil Procedure Section 1853 that the declarant must have had some peculiar means — such as personal observation — for obtaining accurate knowledge of the matter stated." Section 1230 Comment. The federal provision does not include similar language.

We suspect, however, that in practice courts applying the federal provision admit a declaration against interest only when the declarant has "sufficient knowledge of the subject." We have not attempted to research this point because such research is likely to be difficult and because the California requirement seems to be good policy. **We recommend retaining the requirement that the declarant "hav[e] sufficient knowledge of the subject."**

Necessity of an Attempt to Depose the Declarant

Both Section 1230 and Rule 804(b)(3) require that the declarant be unavailable to testify. Under federal law, a declarant is not unavailable for purposes of Rule 804(b)(3) unless the proponent of the evidence has unsuccessfully attempted to depose the declarant. See Fed. R. Evid. 804(a)(5); H.R. Rep. No. 93-650 (1973). California law does not include such a requirement. See Evid. Code § 240.

As previously discussed in connection with the hearsay exception for a dying declaration, **it does not seem advisable to revise California law to require an attempted deposition.** See Memorandum 2004-45, pp. 43-44 (available at www.clrc.ca.gov).

Declaration Disserving Both the Declarant and Another Person

Prof. Méndez writes that "[o]ne aspect of declarations against interest has been especially troubling to judges and scholars." Méndez Hearsay Analysis at 33. Specifically, if a declaration "is disserving of the declarant's interests and also of the interests of a party mentioned in the declaration, may the declaration be received against that party?" *Id*. Neither Section 1230 nor Rule 804(b)(3) specifically address that point.

Consider, for example, the following statement by a man arrested for a stabbing that occurred the preceding Saturday night:

> I have a silver 8" switchblade knife in a toolchest in my garage, on top of a wooden chest that I inherited from my grandfather. My cousin Frank gave the knife to me on Saturday night, when he and two other friends dropped by my house unexpectedly. The knife was bloody, so I washed it before I put it away. Frank and his

> friends didn't tell me how it got bloody. They were drunk and loud, so I was eager to get them to leave and didn't ask any questions.

How much, if any, of this statement is against the declarant's interest?

Some parts of the statement clearly could be harmful to the declarant. He admits to cleaning and putting away a bloody switchblade knife on the night that the stabbing occurred. Taken by itself, that evidence tends to suggest that the declarant was somehow involved in the stabbing. In context, however, much if not all of the declarant's statement appears calculated to direct suspicion to Frank and his friends, instead of the declarant. The statement also includes some information that is neutral in character, implicating no one — such as the comment that the declarant inherited the wooden chest from his grandfather.

In *People v. Leach*, 15 Cal. 3d 419, 438 n. 14, 541 P.2d 296, 124 Cal. Rptr. 752 (1975), the California Supreme Court considered a similar situation, in which two individuals made statements that implicated each other in a murder and "were indisputably adverse to their respective personal penal interests." The Court discussed the two leading approaches advocated by commentators:

- "'[E]vidence of so much of a hearsay declaration is admissible as consists of a declaration against interest *and such additional parts thereof,* including matter incorporated by reference, as the judge finds to be *so closely connected with the declaration against interest as to be equally trustworthy*.'" *Id*. at 439, *quoting* Model Code of Evid., Rule 509(2) (emphasis added). This approach was advocated by Dean Wigmore and Prof. Morgan. *Id*.
- "[E]vidence of any portions of declarations against interest — especially declarations against penal interest — not actually disserving to the declarant should be inadmissible." *Id*. This approach was advocated by Justice Jefferson. *Id*.

The Court opted for the latter approach, stating that ""[i]n the absence of any legislative declaration to the contrary, we construe the exception to the hearsay rule relating to evidence of declarations against interest set forth in section 1230 of the Evidence Code to be *inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant*." *Id*. at 441 (emphasis added). As Justice Jefferson explained,

> [T]he presence of the declaration against interest does not add to the trustworthiness of neutral and self-serving statements. They

> would seem equally trustworthy or unreliable whether accompanied by a declaration against interest or not.

Id. at 440 n.15, *quoting* Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 63 (1944). The Court reaffirmed this position in the recent case of *People v. Duarte*, 24 Cal. 4th 603, 12 P.3d 1110, 101 Cal. Rptr. 2d 701 (2000), in which the Court determined that a declaration regarding a drive-by shooting had not been adequately redacted to excise self-serving and neutral material, and alternatively that the declaration was too unreliable to be admissible in any event.

The United States Supreme Court reached the same conclusion regarding Rule 804(b)(3) in *Williamson v. United States*, 512 U.S. 594 (1994). In an opinion authored by Justice O'Connor, a six-member majority explained that "Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Id*. at 599. According to the majority, the "fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Id*. In fact, "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Id*. at 599-600. Thus, in the majority's view, "the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Id*. at 600-01.

Despite this clear holding, however, the majority could not agree on how to apply it to the facts of *Williamson*, which involved testimony by law enforcement agents as to an arrestee's statements regarding cocaine transactions. Four members of the majority concluded that the arrestee's statements were not against the arrestee's interest and thus were not admissible under Rule 804(b)(3). *Id*. at 607-11 (Ginsburg, J., concurring in part and concurring in the judgment). Justice O'Connor, joined by Justice Scalia, decided that parts of the arrestee's statements were clearly admissible under Rule 804(b)(3), while other parts should be examined by the Court of Appeals to determine their proper treatment. *Id*. at 604-05 (O'Connor, J.). Justice Scalia also wrote separately that "a declarant's statement is not magically transformed from a statement against penal interest into one that is inadmissible merely because the declarant names another person or implicates a possible codefendant." *Id*. at 605-07 (Scalia, J.,

concurring). The three justices who did not join the majority opinion concurred in the judgment, contending that if a declarant makes a statement containing a fact against the declarant's penal interest, "the court should admit all statements related to the precise statement against penal interest, subject to two limits." *Id*. at 620 (Kennedy, J., concurring in the judgment). Specifically, these justices thought that "the court should exclude a collateral statement that is so self-serving as to render it unreliable," *id*., and "where the statement was made under circumstances where it is likely that the declarant had a significant motivation to obtain favorable treatment, as when the government made an explicit offer of leniency in exchange for the defendant's admission of guilt, the entire statement should be inadmissible," *id*.

Prof. Méndez agrees with the approach taken by the California Supreme Court in *Leach* and *Duarte* and by the United States Supreme Court in *Williamson*. He points out that limiting the exception for a declaration against interest "to those statements disserving of the declarant's interests minimizes the risk of offending the accused's confrontation rights." Méndez Hearsay Analysis at 33. He recommends that "[a]ny change to the California Code should make this limitation explicit in the rule itself or in the accompanying comment." *Id*.

Because Rule 804(b)(3) does not address this matter, however, such a revision would not help bring the Evidence Code into conformity with the Federal Rules of Evidence. The only provision we know of that could serve as a model is Uniform Rule of Evidence 804(b)(3), which includes a sentence stating: "A statement or confession offered against the accused in a criminal case, made by a codefendant or other individual implicating both the codefendant or other individual and the accused, is not within this exception." But that sentence differs in content from the holdings of *Leach*, *Duarte*, and *Williamson*, which simply say that if a statement includes both (1) disserving and (2) self-serving or neutral material, then only the portion that is disserving is admissible as a declaration against interest. In fact, the possibility of revising the quoted sentence in light of *Williamson* was raised in a February 1999 redraft of the Uniform Rules of Evidence. We do not know why that possibility was rejected, but the final redraft, approved by the National Conference of Commissioners on Uniform State Laws in July 1999, leaves the quoted sentence intact. We could investigate this further if the Commission is interested.

Rather than using the language in Uniform Rule of Evidence 804(b)(3), the staff tried to draft an amendment of Section 1230 that would codify the rule

enunciated in *Leach* and *Duarte*: That proved difficult, however, because the current statutory language already limits the exception to a statement that disserves the declarant's interest. Our attempts to codify the rule enunciated in *Leach* and *Duarte* seemed to merely repeat what was already in the rule.

The staff has concluded that it would be preferable to address the point in a Comment. That could be done by **expanding the Comment to the proposed amendment on page 6, as shown in boldface below:**

> **Evid. Code § 1230 (amended). Declaration against interest**
>
> SEC. ____. Section 1230 of the Evidence Code is amended to read:
>
> 1230. Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace ~~in the community~~, that a reasonable man in his position would not have made the statement unless he believed it to be true.
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> **Comment.** Section 1230 is amended to make clear that it encompasses a declaration against social interest regardless of whether a reasonable person in the declarant's position would fear subsequent public repetition of the revelation, or simply an unwelcome reaction from the person to whom the statement is addressed.
>
> **For guidance on applying this provision to a statement that combines self-serving or neutral material with material that disserves the declarant's interest, see *People v. Leach*, 15 Cal. 3d 419, 441, 541 P.2d 296, 124 Cal. Rptr. 752 (1975) (Section 1230 is "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant."). See also People v. Duarte, 24 Cal. 4th 603, 612, 12 P.3d 1110, 101 Cal. Rptr. 2d 701 (2000) (same). For the leading federal decision on the same point, see *Williamson v. United States*, 512 U.S. 594, 600-01 (1994) ("[T]he most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.").**

STATEMENT BY A MINOR VICTIM UNDER AGE 12 DESCRIBING CHILD ABUSE OR NEGLECT, OFFERED IN A CRIMINAL CASE (EVID. CODE § 1360)

In 1995, California enacted Evidence Code Section 1360, which creates a hearsay rule exception for a statement by a minor victim under age 12 describing child abuse or neglect. The statute applies only in a criminal case. It provides:

> 1360. (a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:
>
> (1) The statement is not otherwise admissible by statute or court rule.
>
> (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.
>
> (3) The child either:
>
> (A) Testifies at the proceedings.
>
> (B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.
>
> (b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.
>
> (c) For purposes of this section, "child abuse" means an act proscribed by Section 273a, 273d, or 288.5 of the Penal Code, or any of the acts described in Section 11165.1 of the Penal Code, and "child neglect" means any of the acts described in Section 11165.2 of the Penal Code.

The statute is intended to "protect child victims." Senate Committee on Criminal Procedure Analysis of AB 355 (June 13, 1995), p. 9. It was enacted as part of a national effort to facilitate proof of child abuse. "Beginning in 1982 in Washington, and following the recommendation of a report by the American Bar Association, a majority of states adopted statutes and rules of evidence allowing the introduction of hearsay statements by child abuse victims." *People v. Eccleston*, 89 Cal. App. 4th 436, 443, 107 Cal. Rptr. 2d 440 (2001).

The Federal Rules of Evidence do not contain a comparable provision. They do, however, include a catchall exception to the hearsay rule — Federal Rule of Evidence 807 (former Fed. R. Evid. 803(24), 804(b)(5)) — that is "used with some frequency in child abuse litigation." *Doe v. United States*, 976 F.2d 1071, 1074 (7th Cir. 1992).

When the bill that included Section 1360 was pending in the Legislature, some parties raised concerns about whether the provision would violate a defendant's constitutional right of confrontation (U.S. Const. amend. VI; Cal. Const. art. I, § 15). As one of the bill analyses pointed out,

> This bill ... will allow in out of court statements, for the basis that it states true facts, when the child is not even present. Thus, a defendant has no opportunity to cross-examine regarding the statement, whether they remember making it, whether they still believe it to be true, whether it was what the[y] meant.

Senate Committee on Criminal Procedure Analysis of AB 355 (June 13, 1995), p. 9.

In *Eccleston*, however, the court of appeal rejected a Confrontation Clause challenge to Section 1360, concluding that the statute incorporated "particularized guarantees of trustworthiness" as required under the then-prevailing Confrontation Clause test. 89 Cal. App. 4th at 439, 442-49. An appellate court has also upheld the statute against a due process attack. *People v. Brodit*, 61 Cal. App. 4th 1312, 1325-27, 72 Cal. Rptr. 2d 154 (1998).

It is clear, however, that a litigant invoking the exception must strictly satisfy the statutory safeguards. For example, a trial court erred in admitting a child's out-of-court statements under Section 1360 when there was insufficient proof that the child was unavailable to testify and inadequate notice of the prosecution's intent to use the statements. *People v. Roberto V.*, 93 Cal. App. 4th 1350, 113 Cal. Rptr. 2d 804 (2001).

In his hearsay analysis for the Commission, Prof. Méndez recommended retaining the statute. Méndez Hearsay Analysis at 33. After he made that recommendation, however, the United States Supreme Court issued its decision in *Crawford v. Washington*, ___ U.S. ___ , 124 S.Ct. 1354 (2004), which rewrote Confrontation Clause jurisprudence. That raises the issue of whether Section 1360 is constitutional under the *Crawford* test — i.e., A testimonial statement is admissible "only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine." *Id*. at 1369.

One court has already decided that admission of certain out-of-court statements under Section 1360 violated the *Crawford* test because the statements were testimonial, the declarant was unavailable to testify at trial, and the defendant had no previous opportunity to cross-examine the declarant. *People v. Sisavath*, 118 Cal. App. 4th 1396, 13 Cal. Rptr. 3d 753 (2004). But the court made clear that its ruling was limited to the particular facts before it and was not intended to apply to all statements admitted under Section 1360 or even to all statements made in an interview conducted by a Multidisciplinary Interview Center. *Id*. at 1403.

Although the precise definition of a testimonial statement remains unclear, it is beyond dispute that Section 1360 allows admission of evidence that is not subject to the restrictions of *Crawford*. In fact, the statute applies not only to inculpatory evidence but also to exculpatory evidence. *Brodit*, 61 Cal. App. 4th at 1326. Further, the statute is not limited to an out-of-court statement by an unavailable declarant. It also applies to an out-of-court statement by a declarant who testifies at trial. Evid. Code § 1360(a)(3)(A). *Crawford* clearly would not apply in that situation.

Thus, while *Crawford* may restrict the use of Section 1360 in some circumstances, it is clear that the statute remains practically significant. Courts across the country are still struggling to determine what *Crawford* means, so it is too soon to attempt to refine the statute to reflect the limitations of that decision. Similarly, it would be inappropriate for the Commission to revisit the policy determination that the Legislature made in enacting Section 1360 only a decade ago. The staff therefore recommends that **Section 1360 be left as is for the time being.** We would continue to monitor *Crawford*-related developments and would alert the Commission if it appears necessary to reexamine the provision.

STATEMENT DESCRIBING INFLICTION OR THREAT OF PHYSICAL INJURY TO DECLARANT (EVID. CODE § 1370)

A year after enacting Section 1360, the Legislature enacted another new exception to the hearsay rule: Evidence Code Section 1370, which "will always be known as the O.J. Simpson exception to the hearsay rule." E. Scallen & G. Weissenberger, California Evidence: Courtroom Manual 1217 (1st ed. 2000). In the murder trial of O.J. Simpson, the court excluded as inadmissible hearsay certain out-of-court statements by the victim, Nicole Brown Simpson, regarding

threatened abuse by the defendant. Section 1370 was intended to help curb domestic violence by making such evidence admissible subject to a number of requirements. As one of the bill analyses explains:

> According to the author, the fact that very credible evidence of a victim's fear of murder cannot be admitted into evidence is a nail in the coffin for the credibility of the courts. Nicole Brown Simpson made statements in her diaries and to friends in order to tell the world who her possible future murderer might be. She probably did not know that an archaic legal rule would keep a jury from hearing this relevant evidence. Victims should be able to make statements with knowledge that if sufficiently corroborated, they will not be kept from juries trying to discover the truth. Most importantly, the public deserves courts that operate in a manner commensurate with common sense.

Assembly Floor Analysis of AB 2068 (Aug. 16, 1996), p. 2.

Requirements of Section 1370

Section 1370 creates a hearsay exception for an out-of-court statement describing the infliction of, or a threat of, physical injury to the declarant. It currently provides:

> 1370. (a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:
>
> (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> (2) The declarant is unavailable as a witness pursuant to Section 240.
>
> (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.
>
> (4) The statement was made under circumstances that would indicate its trustworthiness.
>
> (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.
>
> (b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:
>
> (1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

(c) A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

The exception applies only if (1) the declarant is unavailable, (2) the statement was made at or near the time of the infliction or threat of physical injury, (3) the statement was made under circumstances that indicate its trustworthiness, and (4) the statement was made in writing, electronically recorded, or made to a physician, nurse, paramedic, or law enforcement official. The exception applies in a civil case, as well as in a criminal case. *See, e.g.*, *Guardianship of Simpson*, 67 Cal. App. 4th 914, 937-38, 79 Cal. Rptr. 2d 389 (1998).

Federal Law

The Federal Rules of Evidence do not contain a comparable provision. Rather, a party seeking to introduce a hearsay statement describing a past incident of threatened or actual physical abuse probably would have to rely on the catchall exception to the hearsay rule (Fed. R. Evid. 807).

Confrontation Clause Challenges: Pre-Crawford

When the bill that became Section 1370 was pending in the Legislature, opponents contended that it would violate the Confrontation Clause. Similar concerns were raised in 2000, when Section 1370 was amended to include a statement made to a physician, nurse, or paramedic.

The constitutionality of the provision was also questioned in commentary. For example, a publication in *Harvard Law Review* explained that under the then-prevailing Confrontation Clause test, "new hearsay exceptions should be limited to situations where the witness is unavailable and the circumstances afford some degree of trustworthiness." Recent Legislation, *California Adopts Hearsay Exception Making Written Statements By Unavailable Witnesses That Describe Past Physical Abuse Admissible in Civil and Criminal Cases*, 110 Harv. L. Rev. 805, 808 (1997). The publication then pointed out that the "bulk of the safeguards created by the new statute are irrelevant to the question of an out-of-court statement's

trustworthiness." *Id*. at 809. For instance, "the fact that a statement was made verbally to a police officer fails to provide any indication of the statement's accuracy or trustworthiness, unless one both accepts the romantic notion that police officers never distort the truth and believes that police officers' memories never fail." *Id*. Thus, the publication concluded that "although the California exception seeks to provide the trier of fact with additional, relevant information about a defendant's abusive past, the exception allows potentially unreliable allegations of past physical abuse to be admitted into evidence against a defendant, thereby undermining important procedural safeguards that the hearsay rule provides — safeguards that help to ensure that all defendants, regardless of the charge against them, receive a fair trial." *Id* at 807. In short, the publication contended that "California's quick fix to a serious problem is no solution at all." *Id*. at 810.

Similarly, shortly after the enactment of Section 1370, another author wrote that the provision "is likely to pose serious constitutional issues under the Sixth Amendment's guarantee of the right of confrontation." Adams, Comment, *The Confrontation Clause and Evidentiary Admissions*, 28 Pac. L. J. 809, 814 (1997). According to the author, the statute "does not seem to possess an overwhelming reason to dispense with the right of the accused to confront the witness at trial ...." *Id*. The author claims that the statute "would have been on more solid constitutional ground if reliability requirements were incorporated into its provisions."

In *People v. Hernandez*, 71 Cal. App. 4th 417, 83 Cal. Rptr. 2d 747 (1999), however, the court of appeal upheld the statute against both due process and Confrontation Clause challenges. With regard to the right of confrontation, the court explained:

> Evidence Code section 1370 contains particularized guarantees of trustworthiness and adequate indicia of reliability by requiring the statement to be made (1) at or near the time of the incident (similar to a spontaneous declaration) by a person who experienced the incident, firsthand, (2) under circumstances indicating its trustworthiness, including whether it had been made in contemplation of litigation, whether the declarant had a bias or motive to fabricate and whether it is corroborated by other evidence not admissible under Evidence Code section 1370 and (3) to have been recorded in writing or electronically, or to have been made to a police officer (who normally makes a written report of such statements).

Id. at 424 (footnotes omitted). The court also pointed out that "a police officer is generally a neutral and detached party and ... making a false report to an officer is a violation of the law." *Id.* at 424 n.6.

In *People v. Kons*, 108 Cal. App. 4th 514, 522, 133 Cal. Rptr. 2d 520 (2003), the court of appeal "agree[d] with *Hernandez's* conclusion section 1370 includes factors that may be properly considered under the confrontation clause's requirement of trustworthiness before a hearsay statement may be admitted against a criminal defendant." The court of appeal enumerated such factors. *Id*. at 522-23. The court concluded, however, that one of the statements admitted at trial "fail[ed] to contain sufficient indicia of trustworthiness to be admitted in the face of defendant's confrontation clause objection." *Id.* at 524. In reaching that conclusion, the court pointed out that the prosecution had not presented evidence establishing that the declarant was unbiased and lacked a motive to lie. *Id*. The court also explained in detail that "there would be great utility in testing [declarant's] testimony by cross-examination." *Id.* at 525. It further explained that there was "little comfort" in the fact that the statement was made to a police officer and recorded:

> While it is true filing a false police report may subject one to criminal sanction ..., that alone does not establish the statement is trustworthy. Many people lie to the police. There is no showing in this record that due to his background or culture, [declarant] was unlikely to be one of those people. Further, nothing in the record establishes [declarant] knew his statement was being recorded.

Id. (citation omitted).

Confrontation Clause Challenges: Post-Crawford

The United States Supreme Court handed down its decision in *Crawford* in March 2004. Since then, the California courts of appeal have already issued six published decisions addressing the impact of *Crawford* on admission of evidence pursuant to Section 1370. Three of those opinions have been superseded because the California Supreme Court granted review:

- *People v. Adams* (No. S127373). Briefing and further action in this case have been deferred pending decision in *People v. Cage* (No. S127344), which concerns "whether all statements made by an ostensible crime victim to a police officer in response to general investigative questioning are 'testimonial hearsay' within the meaning of [*Crawford*] and inadmissible in the absence of an

opportunity to cross-examine the declarant, or only statements made in response to a formal interview at a police station."

- *People v. Ochoa* (No. S128417). Briefing and further action in this case have also been deferred pending decision in *People v. Cage* (No. S127344).
- *People v. Giles* (No. S129852). "The issues to be briefed and argued are limited to the following: Did defendant forfeit his Confrontation Clause claim regarding admission of the victim's prior statements concerning an incident of domestic violence (see Evid. Code § 1370) under the doctrine of 'forfeiture by wrongdoing' because defendant killed the victim, thus rendering her unavailable to testify at trial? Does the doctrine apply where the alleged 'wrongdoing' is the same as the offense for which defendant was on trial?"

A petition for review is pending in a fourth case, in which the court of appeal determined that certain evidence was testimonial and its admission pursuant to Section 1370 violated the Confrontation Clause. *People v. Kilday*, 123 Cal. App. 4th 406, 20 Cal. Rptr. 3d 161 (2004), *petition for review pending* (No. S129567). It seems likely that the Court will grant review and put the case on hold pending the decision in *Cage*, as it has in the other cases involving whether a statement to a police officer is a testimonial (*Adams* and *Ochoa*).

In another recent case, the court ruled that admission of a victim's declaration pursuant to Section 1370 was erroneous because the prosecution had not shown that it was trustworthy, as the statute requires. *People v. Pantoja*, 122 Cal. App. 4th 1, 18 Cal. Rptr. 3d 492 (2004). The court also discussed but did not resolve whether admission of the declaration violated the Confrontation Clause as construed in *Crawford*. *Id*. at 9 & 10 nn. 2, 3.

In still another case, the court explained that it had to construe Section 1370 "in a manner that is consistent with applicable constitutional provisions, seeking to harmonize the Constitution and the statute." *People v. Price*, 120 Cal. App. 4th 224, 239, 15 Cal. Rptr. 3d 229 (2004). The court therefore interpreted the trustworthiness requirement of subdivision (a)(4) "to require a prior opportunity to cross-examine the declarant." *Id*. Because the defendant had a prior opportunity to cross-examine the declarant regarding the statement in question, the court further concluded that there was no constitutional violation in admitting the statement. *Id*.

The California Supreme Court denied review, so *Price*'s interpretation of Section 1370 is the most authoritative post-*Crawford* analysis of the statute. By

construing the statute to encompass only a statement that the opponent had a prior opportunity to cross-examine, the court sharply limited the statute's applicability. Under such a construction, for example, the statute would not provide a basis for admitting the very statements by Nicole Brown Simpson that prompted its enactment.

Recommendation

The flurry of recent cases involving *Crawford* challenges to evidence admitted under Section 1370 attests not only to impact of *Crawford*, but also to the widespread use of Section 1370. The statute obviously has been invoked in numerous criminal prosecutions. To what extent that will remain true after *Crawford* remains to be seen.

Like Section 1360, Section 1370 applies to situations unaffected by *Crawford*, as well as to contexts governed by *Crawford*. For instance, Section 1370 applies to statements that almost certainly would not be considered testimonial, such as a diary entry. *Pantoja*, 122 Cal. App. 4th at 10 n.3. The statute also applies to evidence offered *by* a criminal defendant, not just evidence offered *against* a criminal defendant. *Hernandez*, 71 Cal. App. 4th at 422. Unlike Section 1360, Section 1370 even applies in a civil case. *See, e.g.*, *Guardianship of Simpson*, 67 Cal. App. 4th at 937-38.

Again, it is too early to decide whether, much less how, to revise the statute to reflect the Confrontation Clause limitations announced in *Crawford*. The Commission should await further guidance from the courts. Section 1370 was enacted in response to a perceived problem with how evidence of abuse was handled in the O.J. Simpson case. It is not the Commission's function to second-guess the recent underlying legislative policy determination, and it is not the time to make adjustments to conform to as-yet-unclear constitutional constraints. **For now, the Commission should leave Section 1370 as is.** As with Section 1360, we would continue to monitor *Crawford*-related developments and would alert the Commission if it appears necessary to reexamine the provision.

STATEMENT BY AN ELDER OR DEPENDENT ADULT, OFFERED IN A CRIMINAL PROSECUTION FOR ABUSE (EVID. CODE § 1380)

> *An elderly woman ... was bilked out of $377,980 of her life savings by an investment con man who used some of the money to buy himself a houseboat, ski boat, and a motorcycle. Criminal charges were brought, but*

> *the woman died before the trial began. The judge ruled that her grand jury testimony, her diary, and her interview statements were inadmissible hearsay. Without any of this evidence, the prosecution was forced to dismiss the charges, and the perpetrator walked away unpunished.*

Hatch, *Great Expectations — Flawed Implementation: The Dilemma Surrounding Vulnerable Adult Protection*, 29 Wm. Mitchell L. Rev. 9, 42 (2002) (footnotes omitted).

Evidence Code Section 1380 was enacted in 1999 to address situations such as this one. As one of the bill analyses explains, justice "may be easily thwarted because the suspect picked his or her victim because of their particular vulnerability," such as old age. Assembly Committee on Judiciary Analysis of AB 526 (May 11, 1999), p. 5. After exploiting the especially vulnerable victim, the suspect often flees the jurisdiction. "By the time that person is apprehended by arrest warrant — sometimes 1 or 2 years later — the infirmity of the victim or even death may have occurred," making prosecution difficult if not impossible. *Id*. Sometimes it is possible to preserve the witness' testimony pursuant to a statute such as Penal Code Sections 1335-1345 (examination of witnesses conditionally). But "this is not always practical with witnesses of fragile physical or mental health." Schulman, Comment, *The Florida Supreme Court vs. The United States Supreme Court: The Florida Decision in* Conner v. State *and the Federal Interpretation of Confrontation and Federal Rule of Evidence 807*, 55 U. Miami L. Rev. 583, 612 (2001). To facilitate proof of crimes against elder and dependent adults, Section 1380 creates a hearsay exception for certain statements by such victims.

Requirements of Section 1380

Section 1380 is a narrow exception. It applies only in a criminal case charging a violation or attempted violation of Penal Code Section 368, which prohibits physical abuse and other abuse (e.g., theft or fraud) of an elder or dependent adult. For purposes of that statute and Section 1380, an "elder" adult is person over age 64 and a "dependent" adult is a person between the ages of 18 and 64 who has physical or mental limitations that restrict the person's ability to carry out normal activities or protect the person's rights. Pen. Code § 368(g), (h).

Under Section 1380, a hearsay statement by a victim of elder or dependent adult abuse who is unavailable to testify is exempt from the hearsay rule, but only if numerous requirements are satisfied:

1380. (a) In a criminal proceeding charging a violation, or attempted violation, of Section 368 of the Penal Code, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, as defined in subdivisions (a) and (b) of Section 240, and all of the following are true:

(1) The party offering the statement has made a showing of particularized guarantees of trustworthiness regarding the statement, the statement was made under circumstances which indicate its trustworthiness, and the statement was not the result of promise, inducement, threat, or coercion. In making its determination, the court may consider only the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.

(2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.

(3) The entire statement has been memorialized in a videotape recording made by a law enforcement official, prior to the death or disabling of the declarant.

(4) The statement was made by the victim of the alleged violation.

(5) The statement is supported by corroborative evidence.

(6) The victim of the alleged violation is an individual who meets both of the following requirements:

(A) Was 65 years of age or older or was a dependent adult when the alleged violation or attempted violation occurred.

(B) At the time of any criminal proceeding, including, but not limited to, a preliminary hearing or trial, regarding the alleged violation or attempted violation, is either deceased or suffers from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunction, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.

(b) If the prosecution intends to offer a statement pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement, unless the prosecution shows good cause for the failure to provide that notice. In the event that good cause is shown, the defendant shall be entitled to a reasonable continuance of the hearing or trial.

(c) If the statement is offered during trial, the court's determination as to the availability of the victim as a witness shall be made out of the presence of the jury. If the defendant elects to testify at the hearing on a motion brought pursuant to this section, the court shall exclude from the examination every person except

> the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant and his or her counsel, an investigator for the defendant, and the officer having custody of the defendant. Notwithstanding any other provision of law, the defendant's testimony at the hearing shall not be admissible in any other proceeding except the hearing brought on the motion pursuant to this section. If a transcript is made of the defendant's testimony, it shall be sealed and transmitted to the clerk of the court in which the action is pending.

In particular, the statement must be supported by corroborative evidence and memorialized in a videotape recording made by a law enforcement official. The proponent must not be responsible for the declarant's unavailability and must show that the statement bears particularized guarantees of trustworthiness and was not the result of promise, inducement, threat, or coercion. When the statement is offered, the declarant must not only be unavailable but must either be dead or suffering from the infirmities of aging or other physical, mental, or emotional dysfunction to an extent impairing the person's ability to provide for the person's own care or protection.

Federal Law

The Federal Rules of Evidence do not contain a provision similar to Section 1380. A party seeking to a introduce a hearsay statement regarding abuse of an elder or dependent adult would have to rely on the catchall exception to the hearsay rule (Fed. R. Evid. 807).

Other Jurisdictions

A few other states have hearsay exceptions similar to Section 1380. See 11 Del. Code tit. 11, § 3516 (Westlaw 2004); Fla. Stat. ch. 90.803(24) (Westlaw 2004); 725 Ill. Comp. Stat. 5/115-10.3 (Westlaw 2004); Or. Rev. Stat. § 40.460(18a) (Westlaw 2004). Even before the United States Supreme Court issued its decision in *Crawford*, the Florida Supreme Court ruled that the Florida provision violates the Confrontation Clause. *See Conner v. State*, 748 So.2d 950 (Fla. S. Ct. 1999). In reaching that conclusion, the Florida Supreme Court emphasized the importance of the right of confrontation:

> [T]he right of confrontation serves a threefold purpose because it: "(1) insures that the witness will give his statements under oath — thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;

> (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth,' (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility."

Id. at 955, *quoting California v. Green*, 399 U.S. 149, 158 (1970) (footnote omitted). The Court pointed out that "[i]f the need to prosecute crimes constituted a sufficient interest to justify the admission of the hearsay statements of witnesses and victims, the state and federal constitutional rights of confrontation would be substantially eviscerated." *Conner*, 748 So.2d at 960. The Court also stressed that Florida's hearsay exception for elderly adults (1) applies to a broad class of adult declarants, encompassing any adult over the age of 60, and (2) is "broadly applicable to a wide variety of crimes and is not restricted to the elder abuse context." *Conner*, 748 So.2d at 958. Section 1380 is much narrower than the Florida statute both with respect to whose statements are covered and with respect to the types of crime to which it applies.

Confrontation Clause Challenges to Section 1380

In a pre-*Crawford* decision, a California court of appeal upheld Section 1380 against a Confrontation Clause challenge. *See People v. Tatum*, 108 Cal. App. 4th 288, 133 Cal. Rptr. 2d 267 (2003). Another court of appeal reached the same result soon afterwards, but its decision was depublished after *Crawford* was decided. *See People v. Watson*, 7 Cal. Rptr. 3d 295 (2003), *review denied & depublished* March 24, 2004.

People v. Pirwani, 119 Cal. App. 4th 770, 14 Cal. Rptr. 3d 673 (2004), appears to be the only published post-*Crawford* decision on the constitutionality of Section 1380. In *Pirwani*, the California Attorney General conceded that Section 1380 is unconstitutional on its face under the Confrontation Clause as construed in *Crawford*. *Id*. at 786. The court of appeal agreed with that conclusion, explaining that it could not "conceive of a situation in which a statement given to law enforcement officers under Evidence Code section 1380 would be other than 'testimonial' within the meaning of *Crawford*." *Id*.

The staff finds *Pirwani* baffling. A statute is only unconstitutional *on its face* if there is no conceivable set of circumstances in which it can be constitutionally applied. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *People v. Rodriguez*, 66 Cal. App. 4th 157, 166-67, 77 Cal. Rptr. 2d 676 (1998). Nothing in the language of Section 1380 indicates that it only applies to evidence offered by the prosecution.

It is entirely possible that a defendant might seek to introduce evidence pursuant to the provision, such as to establish that the alleged abuse was committed by another person. In that circumstance, the Confrontation Clause would not apply and there would be no constitutional violation.

In fact, the statute repeatedly refers to "the party offering the statement," a broad term that could encompass both the prosecution and the defense. See Evid. Code § 1380(a)(1)-(2). But the requirement of providing advance written notice, Section 1380(b), applies "[i]f the *prosecution* intends to offer a statement pursuant to this section." (Emphasis added.) The reference to "the prosecution" in Section 1380(b) indicates that the Legislature knew how to refer specifically to the prosecution yet chose not to do so elsewhere in the statute. Section 1380's sister provisions — Sections 1360 and 1370 — have both been construed to apply to exculpatory as well as inculpatory evidence. *See Hernandez*, 71 Cal. App. 4th at 422; *Brodit*, 61 Cal. App. 4th at 1326. If these provisions were limited to inculpatory evidence, they might violate due process. *See generally Wardius v. Oregon*, 412 U.S. 470 (1973) (discovery statute that required defense to notify prosecution of alibi witness without imposing similar requirement on prosecution was one-sided and thus fundamentally unfair). If the *Pirwani* court had considered the possibility of applying Section 1380 to exculpatory evidence, perhaps it would not have concluded that the statute is unconstitutional on its face.

Rather, the correct result might be that the statute is unconstitutional as applied to a statement offered by the prosecution. The practical effect of such a ruling would be to prevent future application of Section 1380 in that context, but not to render it completely inoperative. *Rodriguez*, 66 Cal. App. 4th at 166-67. From a legislative standpoint, that would raise the policy question of whether to retain Section 1380 if it can only be used to benefit a defendant in a prosecution under Penal Code Section 368. A related issue is whether repealing Section 1380 would violate the constitutional right to Truth-in-Evidence (Cal. Const. art. I, § 28(d)) because it would narrow the admissibility of relevant evidence in a criminal case.

Recommendation of Prof. Méndez

Writing before issuance of the *Crawford* decision, Prof. Méndez recommended that California retain Section 1380. He explained that the "numerous limitations are designed to ensure reliability" and the "need to facilitate prosecutions against

victims who suffer from serious age or developmental disabilities justifies the exception." Méndez Hearsay Analysis at 35.

Staff Recommendation

As with Sections 1360 and 1370, it is too soon to know the full impact of *Crawford* on Section 1380. Importantly, however, the exception is limited to a videotaped statement made to a law enforcement official, which is likely to be considered testimonial. Thus, it seems probable that *Crawford* will render the statute unconstitutional as applied to a statement offered by the prosecution, at least where there are no grounds for arguing that the defendant forfeited the constitutional right of confrontation. That would severely undercut the intended effect of the provision. We therefore recommend **leaving Section 1380 as is for now, but keeping a close watch on case law assessing its constitutionality in light of *Crawford*.** We will bring this provision back to the Commission for further consideration once the constitutional issues are addressed by the courts. As a technical matter, the reference to "videotape" is obsolete and should be changed to "video recording" if Section 1380 is retained.

Respectfully submitted,

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