

California Evidence Code— Federal Rules of Evidence

I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules

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I. Definition

THE CALIFORNIA EVIDENCE Code (“Code”) and the Federal Rules (“Rules”) of Evidence prohibit the use of hearsay, unless otherwise provided.¹ Although the Code and the Rules do not use identical terms, both define hearsay as an out of court statement offered at a hearing to prove as true the propositions asserted by the declarant in the statement.² Both recognize that a statement can include nonverbal conduct if the actor intends the conduct to substitute for an oral

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1. See FED. R. EVID. 802 (“Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress”); CAL. EVID. CODE § 1200(b) (West 1995) (“Except as provided by law, hearsay evidence is inadmissible”).

2. See FED. R. EVID. 801(a)–(c); CAL. EVID. CODE §§ 125, 135, 145, 225, 1200 (West 1995).

or written expression or assertion.³ The classic example is the crime scene witness who points to the accused when asked by a police officer to identify the perpetrator.

Because only assertive nonverbal conduct is defined as hearsay, the Code and the Rules reject the implied assertion doctrine. Suppose an issue is whether a ship lost at sea was seaworthy. Is evidence that the captain inspected his ship and then placed his family on it hearsay if offered to prove that the ship was seaworthy? Under the Code and the Rules the answer is no, unless the captain intended his acts of inspecting the ship and placing his family on it to substitute for the statement, "The ship is seaworthy."

For the same reason, the Code and the Rules also reject the implied assertion doctrine when a verbal out of court statement is offered, not for the truth of the matter stated, but as circumstantial evidence of the declarant's belief underlying the statement. In *Wright v. Doe D. Tatham*,⁴ an heir at law sought to set aside the testator's will on the ground that the testator was mentally incompetent at the time he made the will. At the trial, the beneficiary attempted to prove the testator's competency by offering several letters written to the testator. In one of the letters, the writer described a voyage to Virginia and the conditions he encountered there.⁵

Although the English position in *Wright* is to the contrary, under the Code and the Rules receiving the letters into evidence would not violate the hearsay rule. The letters were not offered to prove the truth of the matters stated (for example, the conditions the writer encountered in Virginia), but as circumstantial evidence of the writers' belief in the testator's competency. The writers would not have bothered to communicate with the testator unless they believed that he was sufficiently possessed of his faculties to understand the letters' subject matter.

Under the Rules, if the opponent objects to the introduction of the letter on hearsay grounds, the opponent has the burden of persuading the judge that the writer intended the letter to substitute for the statement, "The testator is competent." According to the Advisory Committee, Federal Rule 801 "[is] so worded as to place the burden upon the party claiming that the intention existed" and favors admissi-

3. FED. R. EVID. 801(a); CAL. EVID. CODE § 225.

4. 7 Eng. Rep. 559 (H.L. 1838).

5. See *id.* at 317-18.

bility in ambiguous and doubtful cases.⁶ Under the Code, the party claiming that hearsay falls within an exception has the burden of persuading the judge that it falls within the exception.⁷ Presumably, the same party would have the burden of persuading the judge that evidence objected to on hearsay grounds is not hearsay. Imposing the burden on the proponent would be consistent with the Code's position that hearsay should be withheld from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion.⁸

If this is the correct interpretation of the Code, different outcomes can be expected in federal and California courts where the hearsay declarant is not readily available to testify about his intentions. An example is provided in *United States v. Zenni*.⁹ Suppose that an airport security guard, after running a metal detector over a passenger, says, "Go on through." Over a hearsay objection, may the declaration be received in a California or federal court to prove that the passenger was not armed at the time? The guard's statement, obviously, is not offered for the truth of the matter stated, as it is bereft of direct assertions. Moreover, his belief that the passenger is not armed cannot be barred under the implied assertion doctrine, since the Code and the Rules reject the doctrine. But a California or federal judge can nonetheless sustain the hearsay objection if the judge concludes that the guard intended his statement as a substitute for the assertion, "You are not armed."

Whether the judge sustains the hearsay objection depends on who has the burden of proving that the guard intended his statement as a substitute for the assertion. Under the Code, the proponent appears to have the burden of persuading the judge that the statement is not hearsay because the guard did *not* intend his statement to substitute for the assertion. Because the Rules favor admissibility, the objecting party would have the burden of persuading the judge that the statement is hearsay because the guard *intended* his statement as a substitute for the assertion. Who bears the burden is crucial, since the guard's intentions are not likely to be known by anyone other than the guard, and, presumably, the proponent is offering the guard's statement because the guard is unavailable to testify.

6. FED. R. EVID. 801 advisory committee's note. The wording of the rule does not support this assertion by the advisory committee.

7. See CAL. EVID. CODE § 405 cmt. (West 1995).

8. See *id.*

9. 492 F. Supp. 464, 468 n.18 (E.D. Ky. 1980).

Cases such as *Zenni* probably are rare, and conforming the Code to the Rules would require simply a change to the comment to section 405 clarifying that the opponent has the burden of proving the declarant's intentions. A more serious difference stems from the Rules' position that some statements that are clearly hearsay are "not hearsay" under Federal Rule of Evidence 801(d).

Subdivision (d) classifies prior statements of witnesses as not constituting hearsay even if these witnesses' out of court statements are offered to prove the truth of the matters asserted. The statements embraced by subdivision (d) include consistent and inconsistent statements, statements of identification, party admissions (including adoptive and authorized admissions), and coconspirator's declarations.¹⁰

The justification for exempting these statements from the operation of the federal hearsay rule can be traced principally to Professor Edmund Morgan. He advocated a rule, first found in the Model Code of Evidence¹¹ and later in the 1953 version of the Uniform Rules of Evidence,¹² that would make admissible any hearsay declaration if the judge found that the declarant was present at the hearing and subject to cross-examination.

To a significant degree, Professor Morgan's rule coincides with the ideal conditions for receiving testimony. Witnesses should testify under oath in the fact-finder's presence subject to cross-examination.¹³ Receiving hearsay violates these conditions whenever the hearsay declarant is not produced for cross-examination. The hearsay rule thus can be seen as designed to give opponents an opportunity to cross-examine percipient witnesses under oath in the presence of the fact finders.

The framers of the California Evidence Code rejected Professor Morgan's position. They feared that such a rule "would permit a party to put in his case through statements carefully prepared in his attorney's office, thus enabling him to present a smoothly coherent story which could often not be duplicated on direct examination of the declarant."¹⁴ The Rules take a contrary position with respect to prior

10. See FED. R. EVID. 801(d)(1)-(2).

11. See MODEL CODE OF EVID. R. 503 (1942).

12. See UNIF. R. EVID. 63(1) (1953). The Uniform Rule added a further condition: the prior statement could be admitted only if it would have been admissible if made by the declarant while testifying as a witness.

13. See FED. R. EVID. 701, advisory committee's note, article VIII.

14. 6 CALIFORNIA LAW REVISION COMMISSION, REPORTS, RECOMMENDATIONS, AND STUDIES APPENDIX 313 (1964) [hereinafter COMMISSION REPORTS]. They were also concerned

statements of witnesses, presumably since by definition the declarants must appear in court as witnesses where they can be subjected to cross-examination under oath.¹⁵

From an outcome perspective, it is immaterial whether prior statements of witnesses are classified as a hearsay rule exception (as under the Code) or exemption (as under the Rules). In either case, the net result is that the out of court statement can be received for the truth of the matter stated if certain other conditions are satisfied. From a practical perspective, however, consequences do attach to the federal treatment of prior statements. Evidence professors spend countless hours explaining to their students how under the Rules these statements, falling squarely within the federal definition of hearsay, nonetheless can be received for the truth of the matters asserted because in the words of Rule 801(d) they are "not hearsay." Adopting the federal approach to prior statements of witnesses would require instructing California judges and lawyers on this elusive distinction. Moreover, the federal approach invites additional confusion with a related concept. Out of court statements that are not offered for the truth of the matters stated are not hearsay. If prior statements of witnesses are "not hearsay," some might be misled into believing that they cannot be offered for the truth.

California avoids these pitfalls by remaining faithful to the common law tradition. If an out of court statement is offered for the truth of the matter stated, then it is hearsay and is not admissible unless it falls within an exception. It is immaterial that the testimonial source for the out of court statement might be the hearsay declarant for purposes of determining whether the statement is hearsay. In this respect, the Code, like the common law, is declaration centered.¹⁶ The focus is on whether the out of court declaration is being offered for the truth. The Rules, on the other hand, are declarant centered in the case of prior statements of witnesses. The question is whether the out of court declarant is on the stand subject to cross-examination under oath in

that such a rule would undermine the rule prohibiting the use of leading questions on direct examination and the requirement that in most instances testimony be given under oath.

15. See FED. R. EVID. 801(d)(1), which exempts from the hearsay definition certain out of court statements made by declarants who testify at the hearing and are subject to cross-examination concerning their statements. The presumption is unwarranted. A party does not have to testify in order for his or her admissions to be admissible. Moreover, the Federal Rule allows declarations by agents and conspirators to be offered against a party even if the declarants do not testify. See FED. R. EVID. 801(d)(2).

16. See Roger Park, *Two Definitions of Hearsay*, in EVIDENCE 90 (John Kaplan et al. eds., 7th ed. 1991).

the presence of the fact-finder. Regardless of the underlying merits of the federal position, it is clear that from a practical perspective the Code's approach is preferable.

II. Unavailability of the Hearsay Declarant

Some exceptions to the hearsay rule require the proponent to demonstrate the unavailability of the hearsay declarant as a witness. These include the exceptions for former testimony and statements against interest. Under the Federal Rules, the proponent of a dying declaration must also show the unavailability of the declarant.¹⁷ The Code, on the other hand, does not impose this condition.¹⁸

Evidence Code section 240 sets out the grounds for determining the unavailability of witnesses. It defines as unavailable declarants who are (1) exempted or precluded from testifying on the grounds of privilege; (2) disqualified from testifying; (3) dead or unable to testify on account of mental or physical illness; (4) absent from the hearing and beyond the court's process to compel attendance; or (5) absent from the hearing despite the proponent's reasonable efforts to compel attendance through the court's process.¹⁹ Under the Code, the proponent has the burden of persuading the judge of the declarant's unavailability by a preponderance of the evidence.²⁰ A declarant, however, is not unavailable if his unavailability was procured by the proponent for the purpose of preventing the declarant from testifying.²¹ In this case, however, it is the opponent who has the burden. She must persuade the judge by a preponderance of the evidence that this is the reason for the declarant's unavailability.²²

The Federal Rules of Evidence differ from the Code in three important respects. Only two are examined here.²³ First, the Rules recognize that a contumacious witness—a witness who refuses to testify despite a court order to do so—is as unavailable as a declarant who does not attend the hearing.²⁴ Second, the Rules acknowledge that a

17. See FED. R. EVID. 804(b)(2).

18. See CAL. EVID. CODE § 1242 (West 1995).

19. See CAL. EVID. CODE § 240(a) (West 1995).

20. See CAL. EVID. CODE § 405 cmt. (West 1995).

21. See CAL. EVID. CODE § 240(b).

22. See CAL. EVID. CODE § 405 cmt.

23. See FED. R. EVID. 804(a)(5). The Federal Rules take a more stringent approach to the admissibility of some hearsay statements when the declarant is unavailable to testify. In addition to the usual grounds of unavailability, in some cases the proponent must show that an attempt was made to depose the declarant.

24. See FED. R. EVID. 804(a)(2).

witness who cannot testify because of a failure of recollection is likewise unavailable.²⁵

California cases now recognize as unavailable witnesses who refuse to testify despite court orders to do so. A witness who refuses to testify because of fear for his safety or that of his family is unavailable under section 240 by reason of "mental illness or infirmity" due to a "defect of personality or weakness of the will."²⁶ Mere inconvenience, however, including the anguish and physical discomfort that can be produced by testifying, is insufficient to render the witness unavailable.²⁷ If, on the other hand, expert testimony establishes that the physical or mental trauma suffered by a crime witness has caused such harm that the witness cannot testify or can do so only by enduring additional substantial trauma, the witness can be declared unavailable.²⁸

California cases also recognize that a witness's memory loss can constitute a mental or physical illness that renders the witness unavailable. In *People v. Alcalá*²⁹ the prosecution was allowed to offer a witness's former testimony after eliciting evidence from the witness that she could not recall any matters connected with the case as a result of a stress related disability. In upholding the trial judge's ruling, the California Supreme Court noted that total memory loss can constitute a "mental infirmity" within the meaning of section 240.³⁰ Expert testimony is unnecessary to establish that the loss constitutes a mental infirmity. The witness's own testimony, if believed by the trial judge, can support a finding of unavailability on this basis.³¹

The California cases demonstrate the wisdom of the Rules in including the contumacious witness and the witness who suffers substantial memory loss among those who are unavailable to testify. The Code should be amended to include these grounds, and consideration should be given to including some of the language of the cases in a comment to serve as guidance for their application.

25. See FED. R. EVID. 804(a)(3).

26. See *People v. Rojas*, 542 P.2d 229, 235-36 (Cal. 1975) (Webster's definition of "infirmity," when considered with the wide discretion given judges to determine necessity in a particular case, "permits the trial court to consider whether a mental state induced by fear of personal or family harm is a 'mental infirmity' that renders the person harboring the fear unavailable as a witness.").

27. See *People v. Williams*, 155 Cal. Rptr. 414, 421 (Ct. App. 1979).

28. See *id.*

29. 842 P.2d 1192 (Cal. 1992).

30. See *Alcalá*, 842 P.2d at 1212-13.

31. See *id.* at 1214 .

III. Exceptions

The Code contains more exceptions to the hearsay rule than do the Rules. In addition, in some instances the exceptions that overlap contain significant differences.

A. Prior Inconsistent Statements

Under the Code, statements that are inconsistent with the declarant's testimony may be offered to impeach the declarant, as well as for the truth of the matter stated.³² Extrinsic evidence of the statement, however, may not be received unless the declarant is given an opportunity to explain or deny the statement before the close of the evidence.³³ The Rules take a similar approach, but such statements may be used substantively only if "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."³⁴ The Federal Rule, as originally prescribed by the United States Supreme Court, was identical to the Code. Congress, however, placed the limitation on the substantive use of the statements because of concerns about their reliability.³⁵ California appellate opinions do not confirm Congress's concerns. Measured by this standard, there appears to be no justification for imposing a similar restriction on the hearsay use of prior inconsistent statements in California.

In June 1982, the California electorate approved Proposition 8, an initiative entitled "The Victims Bill of Rights." One of its provisions, "The Right to Truth-in-Evidence," transformed the rules of evidence applicable to criminal proceedings by amending the state constitution to give the parties a right *not* to have relevant evidence excluded.³⁶ This provision, in pertinent part, reads as follows:

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . . Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103.³⁷

A literal application of this provision would repeal all the Code sections that ban or limit evidence bearing on the credibility of witnesses, including the restriction on the extrinsic proof of prior incon-

32. See CAL. EVID. CODE §§ 1235, 770 (West 1995).

33. See *id.*

34. FED. R. EVID. 801(d)(1)(A).

35. See FED. R. EVID. 801(d)(A)(1) conference report.

36. See CAL. CONST. art. I, § 28(d).

37. *Id.*

sistent statements.³⁸ Since such evidence is relevant, its admissibility would be governed instead by section 352, a section expressly exempted from the operation of the Right to Truth-in-Evidence provision. Under section 352, a judge can exclude relevant evidence if its probative value is substantially outweighed by enumerated trial concerns.³⁹ These include the risk that the evidence may consume too much time, unfairly prejudice the opposing party, confuse the issues, or mislead the jury.⁴⁰ A literal interpretation of the proposition would thus replace the certainty provided by specific rules governing credibility with the discretion accorded trial judges by section 352. Whether or not the initiative has repealed the restrictions on the use of extrinsic evidence of prior inconsistent statements has not been decided.⁴¹ But conforming the Code to the Rule's provision on prior inconsistent statements by the super majority contemplated by the initiative would repeal the effect of the initiative on the use of such statements.

B. Prior Consistent Statements

Both the Code and the Rules authorize the use of statements that are consistent with a witness's testimony to be offered for the truth of the matter stated as well as to support the witness's credibility.⁴² The principal difference is not the hearsay aspects of such statements, but the circumstances which authorize their use. The Code allows a party to support the credibility of a witness with statements that are consistent with the witness's testimony if one of two conditions is satisfied.⁴³ First, if the witness was impeached with a prior inconsistent statement, the witness can be rehabilitated with a consistent statement, if the statement was made before the alleged inconsistent statement.⁴⁴ Second, where the witness has been expressly or impliedly charged with fabricating his testimony or allowing bias or other improper motive to shape his testimony, the witness can be rehabilitated with a prior con-

38. *But cf.* CAL. EVID. CODE § 782 (West 1995). Section 782 would not be affected because it is expressly exempted from the operation of Proposition 8. Section 782 governs the use of a complaining witness' sexual conduct to attack her credibility in sex offense prosecutions.

39. *See* CAL. EVID. CODE § 352 (West 1995).

40. *See id.*

41. *See* *People v. Garcia*, 273 Cal. Rptr. 666, 669-70 (Ct. App. 1990). A post-Proposition 8 decision discussing the need to give the witness an opportunity to explain or deny the statement fails to mention the impact of Proposition 8 on this requirement.

42. *See* FED. R. EVID. 801(d)(1)(B); CAL. EVID. CODE §§ 1236, 791 (West 1995).

43. *See* CAL. EVID. CODE § 791.

44. *See* § 791(a).

sistent statement if the statement was made before the motive to fabricate or other improper motive is alleged to have arisen.⁴⁵

The Rules take a more restrictive approach. A prior consistent statement may be received only to rebut an express or implied charge of recent fabrication or improper influence.⁴⁶ The Rules do not contain a provision equivalent to section 791(a), which permits the use of a prior consistent statement to rehabilitate a witness if the witness has been impeached by a prior inconsistent statement and the consistent statement was made before the inconsistent one.⁴⁷ Conforming the Code to the Rules would require repealing this section.

Where the witness has been expressly or impliedly charged with fabricating his testimony or allowing bias or other improper motive to shape his testimony, the Code requires the rehabilitating party to show that the witness made the consistent statement before the motive to fabricate or other improper motive is alleged to have arisen.⁴⁸ The Rules omit this requirement, but the United States Supreme Court has read it into the Federal Rule as a matter of statutory interpretation.⁴⁹ The Code's requirement should be retained in the event the Code provision is conformed to the Federal Rule.

In California criminal cases, a literal application of Proposition 8 would repeal the restrictions on the use of consistent statements to rehabilitate witnesses and, instead, would commit their admissibility to the judge's discretion under section 352. Consistent statements are probative of a witness's credibility even if the witness's credibility has not first been attacked. Conforming the Code provision to the Federal Rule would eliminate the effect of Proposition 8 if the re-enactment satisfies the initiative's super majority requirements.

C. Statements of Identification

Both the Code and the Rules allow the hearsay use of a statement previously made by a witness identifying another as a person who participated in a crime or other occurrence.⁵⁰ The Federal Rule imposes no limitations on the use of the statement provided the declarant

45. See § 791(b).

46. See FED. R. EVID. 801(d)(1)(B). *But see* CAL. EVID. CODE § 791 cmt. An argument can be made that the Rules should permit such rehabilitation: offering a prior inconsistent statement necessarily implies that the witness has fabricated his testimony since the time he made the inconsistent statement.

47. See CAL. EVID. CODE § 791 cmt.

48. See § 791(b).

49. See *Tomé v. United States*, 513 U.S. 150, 159-60 (1995).

50. See FED. R. EVID. 801(d)(1)(C); CAL. EVID. CODE § 1238 (West 1995).

made the statement after perceiving the person and is subject to cross-examination concerning the statement.⁵¹ The Code, on the other hand, imposes a number of limitations. To be admissible under this hearsay exception, the proponent must show that the statement was made at a time when the crime or other occurrence was fresh in the declarant's memory. In addition, the proponent may not offer the statement unless the declarant first testifies that the statement of identification was a true reflection of his or her recollection.⁵² Under the Code, subjecting the declarant to cross-examination is not a sufficient guarantee of trustworthiness. Further, the declarant must vouch for the accuracy of the statement. Conforming the Code to the Federal Rule would result in the loss of these additional guarantees of reliability.

D. Admissions by a Party

The Code and the Rules allow a party to offer the opposing party's out of court statements for the truth of the matter asserted.⁵³ These statements fall into four principal categories: (1) a party's own statements; (2) statements made by others but adopted by a party; (3) statements a party has authorized others to make on his or her behalf; and (4) statements made by a party's co-conspirator.

1. A Party's Own Statements

The definition of a party's own statements is virtually the same under the Code and the Rules.⁵⁴

2. Adoptive Admissions

The definition of adoptive admissions is virtually the same under the Code and the Rules.⁵⁵

3. Authorized Admissions

Although the definition of authorized admissions is similar under the Code and the Rules, the Code defines these statements as those made by a person authorized by the party to make the statement "for him" concerning the subject matter of the statement.⁵⁶ The Federal

51. See FED. R. EVID. 801(d)(1)(C).

52. See CAL. EVID. CODE § 1238.

53. See FED. R. EVID. 801(d)(2); CAL. EVID. CODE § 1220 (West 1995).

54. Compare FED. R. EVID. 801(d)(2)(A) with CAL. EVID. CODE § 1220.

55. Compare FED. R. EVID. 801(d)(2)(B) with CAL. EVID. CODE § 1221 (West 1995).

56. See CAL. EVID. CODE § 1222 (West 1995).

Rule also embraces statements made *to* the party.⁵⁷ Under the Code, statements made by an agent to the party are beyond the definition even if the agent is authorized to make the statement. The limitation in the Code is inadvertent and should be eliminated by adopting the federal definition or deleting "for him."

Whether or not a party has authorized someone to make a statement on his behalf presents a preliminary issue that should not be resolved by the law of evidence, but by the law of agency. California cases, however, have drained the exception of much of its utility by insisting on proof that the party expressly authorized the declarant to make the statement.⁵⁸ Concerned that federal courts might impose such a narrow construction on authorized admissions, the framers of the Federal Rules added a new hearsay exception for statements made "by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."⁵⁹ The California Law Revision Commission included a similar provision when it recommended the adoption of the Evidence Code.⁶⁰ The Legislature, however, deleted the provision. In light of the judicial limitations placed on the use of authorized admissions, the Legislature should enact the provision originally recommended by the Law Revision Commission.

Unlike the Rules, the Code contains a hearsay exception for a number of out of court statements akin to admissions. These statements do not qualify as admissions because the declarant is not a party to the action in which the declarations are offered and the statements do not qualify as statements adopted or authorized by the party against whom they are offered. But the statements would qualify as party admissions had the declarant had been a party.

Section 1224 provides as follows:

When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.⁶¹

57. See FED. R. EVID. 801(d)(2)(C).

58. See cases collected in MIGUEL A. MÉNDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES § 703 (2d ed.1999).

59. FED. R. EVID. 801(d)(2)(D).

60. See COMMISSION REPORTS, *supra* note 14 APPENDIX 485-89 (1964).

61. CAL. EVID. CODE § 1224 (West 1995).

*Labis v. Stopper*⁶² illustrates how section 1224 can be used. Labis sued a painting contractor for injuries she received when one of the contractor's painters moved a drop cloth while the plaintiff was walking on it. To prove that the painter moved the drop cloth without first looking, she offered a statement in which the painter told an investigating police officer that he was not aware that anyone was on the drop cloth when he moved it.⁶³ The contractor's liability depended in part on the painter's breach of the duty of care he owed the plaintiff; consequently, since the painter's statement would have been admissible against him as an admission, it was admissible against the contractor under section 1224 for the truth of the matter stated.⁶⁴

In some instances, section 1224 can confer a benefit on the plaintiff without according the defendant a similar advantage. Suppose that in *Labis* the plaintiff had died and the action had been brought by her survivor as a wrongful death action. Suppose also that prior to her death the plaintiff had said that she had walked around a sawhorse designed to keep pedestrians off the drop cloth. The statement would not be admissible against the survivor as an admission by the party opponent, since the decedent is not a party in the wrongful death action. Nor would the statement be admissible under section 1224, since the section contemplates the use of the statement against defendants, not plaintiffs. To help rectify this imbalance, the Code includes a hearsay exception for some statements made by the deceased in wrongful death actions. Under section 1227, statements made by the deceased are as admissible against the survivor as they would have been against the deceased in an action brought by the deceased.⁶⁵ Similarly, in actions brought by parents to recover for injuries to their children, the children's statements are as admissible against the parents as they would have been against the children in an action brought by the children.⁶⁶ Again, in actions involving property disputes, declarations by a predecessor in interest are as admissible

62. 89 Cal. Rptr. 926 (Ct. App. 1970). Although CAL. EVID. CODE § 1224 would appear to apply to any case involving the liability of an employer under the doctrine of respondeat superior, COMMISSION REPORTS, *supra* note 14, APPENDIX 495 (1964), the California Supreme Court, citing lack of precedent, refused to give that construction to § 1224. *Markley v. Beagle*, 429 P.2d 129 (Cal. 1967). The *Labis* court in turn declined to follow *Markley*, holding that "it would be an unfair extension of the true rule of *Markley* to broaden its language beyond its holding . . ." *Labis*, 89 Cal. Rptr. at 927.

63. *See id.* at 926.

64. *See id.*

65. *See* CAL. EVID. CODE § 1227 (West 1995).

66. *See* CAL. EVID. CODE § 1226 (West 1995).

against successors as they would have been in action against the predecessor.⁶⁷

These sections permit the use of the statements even though the parties against whom they are offered in no way authorized the declarants to make the statements. The Federal Rule exempting from the hearsay rule statements by a party's agent or servant at most might embrace the painter's statement if under the law of agency he qualifies as an agent or servant.⁶⁸ The Code provisions provide useful exceptions and should be retained if the Code is conformed to the Federal Rules.⁶⁹

4. Coconspirators' Declarations

Both the Code and the Rules allow damaging statements made by a party's coconspirators to be offered against the party for the truth of the matter asserted even in the absence of evidence that the party authorized the coconspirators to make the statement on his or her behalf.⁷⁰ Coconspirators are presumed to have authorized each other to speak for one another if certain conditions are met. These relate principally to the circumstances attending the making of the statements.

In California, the proponent must show that the coconspirator made the declaration while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the conspiracy.⁷¹ The proponent must also show that the coconspirator made the declaration prior to or during the time that the opponent was participating in the conspiracy.⁷² Similarly, the Federal Rules require the proponent to show that the declaration was made by the coconspirator during the course and in furtherance of the conspiracy.⁷³ And though the Rules

67. See CAL. EVID. CODE § 1225 (West 1995).

68. See FED. R. EVID. 801(d)(2)(D).

69. See CAL. EVID. CODE § 1228 (West 1995) for a list of the conditions that must be satisfied for the children's hearsay statements to be received. In some instances, hearsay statements by children who have been abused sexually may be offered for the truth of the matter stated in order to comply with the foundational requirements for the introduction of the confessions of the persons accused of abusing the children.

70. See FED. R. EVID. 801(d)(2)(E); CAL. EVID. CODE § 1223 (West 1995).

71. See CAL. EVID. CODE § 1223 cmt. Statements not in furtherance of the conspiracy are outside the exception because they are not the acts "of the conspiracy for which the party, as a coconspirator, is legally responsible." Underlying this concept is the notion that conspirators act as agents for each other only with respect to acts and statements that promote the agreed upon criminal enterprise. See FED. R. EVID. 801(d)(2)(E) advisory committee's note.

72. See CAL. EVID. CODE § 1223.

73. See FED. R. EVID. 801(d)(2)(D).

seemingly require the proponent to show that the declaration was made while the declarant was a coconspirator of the party opponent, case law holds that, as in California, declarations made prior to the time the party joined the conspiracy are admissible against the party.

The major differences between the California and federal approaches to coconspirators' declarations concern the standard that must be met in proving the preliminary or foundational facts and the kind of evidence that can be offered to satisfy the standard. In California, a sufficiency standard applies.⁷⁴ Viewing the evidence in the light most favorable to the proponent, the judge must be convinced that a reasonable fact finder could find the foundational facts.⁷⁵ In making this showing, however, the proponent is limited to offering admissible evidence.⁷⁶ This limitation precludes bootstrapping. Over a hearsay objection, the proponent may not offer the coconspirator's hearsay declaration as evidence of the foundational requirements.⁷⁷

The Federal Rules are seemingly more protective of the accused than is the Code. The United States Supreme Court has construed the Rules to require the proponent to prove the foundational facts by a preponderance of the evidence.⁷⁸ This added protection, however, is undercut by the Rules' position permitting the proponent to offer the coconspirator's hearsay declaration as evidence of the existence of the

74. See CAL. EVID. CODE § 1223(c).

75. See CAL. EVID. CODE § 403 cmt. (West 1995). Some reviewing courts do not understand the role of trial judges in determining the existence of preliminary facts under a prima facie standard. Confusing the sufficiency standard with proof by a preponderance of the evidence, some hold that for a co-conspirator's declaration to be admissible the proponent has to "proffer sufficient evidence to allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence." *People v. Herrera*, 98 Cal. Rptr. 2d 911, 922 (Ct. App. 2000), and cases cited therein. For purposes of admissibility, the question for the trial judge is merely whether a reasonable juror could find that a conspiracy existed if the proponent's evidence is believed. Whether jurors should be instructed to disregard the evidence *after* it has been admitted unless they find the conspiracy by some higher standard is a separate question. In California, for example, jurors are routinely told to disregard evidence of uncharged misdeeds unless they first find by a preponderance of the evidence that the misdeed was committed. See MIGUEL MÉNDEZ, EVIDENCE: THE CODE AND THE FEDERAL RULES—A PROBLEM APPROACH § 3.17 (2d ed.1999). The 2001 revision to CALJIC 6.24 warns jurors not to consider a coconspirator's declaration unless they first find the foundational facts, including the conspiracy, by a preponderance of the evidence.

76. The Law Revision Commission recommended a rule on preliminary fact determinations that would have permitted the judge to consider inadmissible evidence in some instances. See COMMISSION REPORTS, *supra* note 14, at 19–21 (1964). The proposed rule, however, was rejected by the Legislature, which instead retained the practice of requiring the use of admissible evidence. See CAL. EVID. CODE §§ 400–406 (West 1995).

77. See *People v. Longines*, 40 Cal. Rptr. 2d 356, 359 (Ct. App. 1995).

78. See *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

conspiracy and of the accused's participation.⁷⁹ In enacting the rule governing the proof of preliminary facts Congress adopted the approach recommended by the California Law Revision Commission but rejected by the Legislature: the judge, in making preliminary fact determinations, is not bound by the rules of evidence except those regarding privileges.⁸⁰ Consequently, a federal judge can consider the coconspirator's declaration in determining whether the prosecution has proved the conspiracy and the accused's participation by a preponderance of the evidence, even though the use of the declaration for these purposes violates the hearsay rule.⁸¹

A federal judge, however, may not rely on the coconspirator's statement alone to find the preliminary facts. A 1997 amendment to Federal Rule 801 provides that the "contents of the statement are not alone sufficient to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered . . ." ⁸²The judge, in addition, must consider "the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question."⁸³

If the Code is conformed to the Federal Rule, California should retain the provision making a coconspirator's declaration admissible even if it was made prior to the time the party against whom it was offered joined the conspiracy. Whether the Code should be amended to allow judges to consider inadmissible evidence (other than privileged information) in making foundational determinations presents difficult questions regarding the proper allocation of power between judge and jury, and are left for later consideration. The related question of whether the foundational facts should be proved only by a sufficiency standard or by a preponderance of the evidence.

E. Contemporaneous Statements

Section 1241 creates a hearsay exception for statements which are "offered to explain, qualify, or make understandable conduct of the declarant" and which were "made while the declarant was engaged in

79. See FED. R. EVID. 104(a); see also FED. R. EVID. 1101(d)(1).

80. See *id.*

81. See FED. R. EVID. 801(d)(2) advisory committee's note.

82. FED. R. EVID. 801(d)(2).

83. *Id.* at advisory committee's note.

such conduct.”⁸⁴ Trustworthiness is derived from the requirement that the declaration be contemporaneous with the conduct that is being explained, qualified, or made understandable.

The Assembly Committee questioned the need for this exception, noting that some commentators do not regard the kinds of the statements contemplated by section 1241 to be hearsay.⁸⁵ For example, under the laws relating to personal property, merely lending a pen to someone does not strip the lender of ownership of the pen; it creates only a bailment. But giving the pen to another can transfer ownership by creating an inter vivos gift. Whether a bailment or inter vivos gift was created depends on the intention of the owner. Thus, if in the act of handing the pen the owner says, “Use my pen,” only a bailment is created. But if the owner says, “I want you to have this pen,” then an inter vivos transfer is effected.

Section 1241 is designed to remove any hearsay barriers to these kinds of statements. Depending on which statement the owner made, the declarations will clarify whether a bailment or inter vivos gift was intended. But closer analysis discloses that no hearsay is involved. These statements are verbal acts. When the substantive law governing the action invests certain utterances with legal significance, then proof of those utterances does not violate the hearsay rule.

The Federal Rules do not contain a hearsay exception for contemporaneous statements, most likely because there is no need for an exception for these kinds of statements. Instead, Federal Rule of Evidence 803(1) creates an exception for present sense impressions, statements “describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”⁸⁶ The Law Revision Commission recommended an exception for present sense impressions,⁸⁷ but the Legislature rejected the recommendation and adopted only the exception for contemporaneous statements.

The Code looks inwardly, creating an exception for statements reflecting the declarant’s state of mind regarding his own conduct.⁸⁸ The Rules focus outwardly, providing an exception for statements describing external phenomena. The present sense impressions contemplated by Rule 802(1) are much closer to excited utterances.

84. CAL. EVID. CODE § 1241 (West 1995).

85. See *id.* at cmt.

86. FED. R. EVID. § 803(1).

87. See COMMISSION REPORTS, *supra* note 14, at APPENDIX 471 (1964).

88. See CAL. EVID. CODE § 1241.

However, present sense impressions differ from excited utterances under the Federal Rules in two significant respects. First, while excited utterances can be made at any time during the excited state, present sense impressions must be made while the declarant is perceiving the event or shortly thereafter.⁸⁹ Moreover, under the Rules, excited utterances need only relate to the startling event that gives rise to the declaration; present sense impressions are limited to statements describing or explaining the event or condition.⁹⁰ "[In] the absence of a startling event, [they] may extend no farther."⁹¹

Although a hearsay exception is not necessary for the kind of statements contemplated by section 1241, it should be retained to the extent that confusion may still abound about the hearsay status of such statements. On the other hand, an exception is needed for present sense impressions. As in the case of contemporaneous statements, the requirement of the event's and the statement's substantial contemporaneity diminish the likelihood of deliberate and conscious misrepresentation.⁹² The Code should be conformed to the Rules by providing an exception for present sense impressions.

F. Excited Utterances

Both the Code and the Rules create a hearsay exception for spontaneous utterances made while the declarant was under the stress of an exciting or startling event.⁹³ The scope of the exceptions is not identical, however. Under the Code, the exception is limited to those statements that purport "to narrate, describe, or explain an act, condition, or event perceived by the declarant,"⁹⁴ while under the Rules, the statement only needs to relate to the startling event or condition.⁹⁵

California cases have not applied the limitation in section 1240. Statements admitted under the California exception include a declaration in which the declarant identified his assailant as an acquaintance and drug customer of his roommate⁹⁶ and a statement by a rape victim in which the victim reported that the accused had confessed to

89. See FED. R. EVID. 803(1) advisory committee's note.

90. See *id.*

91. *Id.*

92. See *id.*

93. See FED. R. EVID. 803(2); CAL. EVID. CODE § 1240(b) (1993).

94. CAL. EVID. CODE § 1240(a).

95. See FED. R. EVID. 803(2).

96. See, e.g., *People v. Farmer*, 254 P.2d 940, 950 (Cal. 1989).

a murder in the course of raping her.⁹⁷ In light of the liberal interpretation given to the Code, section 1240 should be amended to include statements relating to the startling event.

G. State of Mind Declarations

1. Declarations Regarding Then Existing Mental State

The Code and the Rules provide a hearsay exception for declarations in which the declarant describes a then existing state of mind.⁹⁸ The insistence on contemporaneity furnishes the exception with trustworthiness. Expressions of existing feelings and discomforts—as opposed to narratives of past feelings and miseries—are likely to be sincere and spontaneous.⁹⁹ The need for this kind of evidence also justifies the exception, since it is difficult to divine what people think unless they tell us. Nonetheless, reservations about the reliability of these expressions caused the Code framers to include a provision empowering trial judges to exclude them if they find that the declarations “were made under circumstances such as to indicate [their] lack of trustworthiness.”¹⁰⁰ The Federal Rule does not contain this limitation.

The Code makes clear that declarations of a then existing state of mind can be offered to prove the declarant’s state of mind at that time or at any other time when the mental state itself is an issue in the action.¹⁰¹ Accordingly, the declaration can be offered as circumstantial evidence that the declarant had a similar state of mind prior to or subsequent to the time period embraced in the declaration. The Federal Rule does not contain a similar provision, but the Rules’ relevance provisions should permit a similar use of the declarations in federal court.

The Code also contains a provision expressly allowing a declaration of a then existing mental state to be used to prove or explain acts or conduct of the declarant.¹⁰² An example would be the use of a declaration regarding future plans to prove that the declarant implemented those plans. Again, the Federal Rule does not contain an analogous provision, but such use is allowed by the Rules’ relevance provisions.

97. See *People v. Arias*, 913 P.2d 980, 1017 (Cal. 1996).

98. See FED. R. EVID. 803(3); CAL. EVID. CODE § 1250 (West 1995).

99. See COMMISSION REPORTS, *supra* note 14, at APPENDIX at 505.

100. CAL. EVID. CODE § 1252 (West 1995).

101. See CAL. EVID. CODE § 1250(a)(1).

102. See *id.* § 1250(a)(2).

Declarations concerning future plans are controversial because often they include the future plans of individuals other than the hearsay declarant. In *People v. Alcalde*¹⁰³ the accused was tried for murdering a woman he had been seeing socially. At issue was the admissibility of a declaration made by the victim on the day of the killing in which she stated that she was “going out with Frank” that evening.¹⁰⁴ “Frank” was the accused’s first name. The accused objected that the victim’s declaration was inadmissible to prove *his* future plans to see the victim. The California Supreme Court upheld the use of the declaration, noting that in overruling the objection the trial judge had taken “the precaution to state in the presence of the jury that the evidence was admitted for the limited purpose of showing the decedent’s intention.”¹⁰⁵ The Code, which was enacted after *Alcalde*, underscores the point by limiting these declarations to proving or explaining the acts or conduct of the *declarant*.¹⁰⁶

The California courts, however, have not abided by this limitation. Although the California Supreme Court has declined to rule on whether the Evidence Code limits *Alcalde* to proving only the declarant’s future plans,¹⁰⁷ some lower courts have mistakenly construed another Supreme Court case, *People v. Morales*,¹⁰⁸ as allowing the use of a declaration regarding future plans to prove the plans of others in addition to those of the declarant.¹⁰⁹

103. 148 P.2d 627 (Cal.1944).

104. *Id.* at 630.

105. *Id.*

106. See CAL. EVID. CODE § 1250(a)(2).

107. See *People v. Melton*, 750 P.2d 741, 755 (Cal. 1988).

108. 770 P.2d 244 (Cal. 1989).

109. See, e.g., *People v. Han*, 93 Cal. Rptr. 2d 139, 147 (Ct. App. 2000) (declarant’s statement that she wanted to arrange her sister’s murder was admissible to prove that the declarant and the accused conspired to murder the sister).

In *Morales*, the accused was prosecuted for murder. The prosecution’s theory was that the accused had killed the victim as part of a conspiracy. Over a defense hearsay objection, a witness was allowed to testify to overhearing the declarant, Ortega, state that he intended to kill the victim and would enlist the accused’s aid. See *id.* The California Supreme Court approved the use of the declaration. Ortega’s declaration concerning his plan to kill the victim with the accused’s aid fell within the exception for state of mind declarations regarding future plans. The declaration was probative of his soliciting the accused to help him kill the victim, and in the court’s view, such a solicitation in turn was probative of a conspiracy between the accused and Ortega to kill the victim. See *id.* at 257. While this relevance analysis is correct, it still raises disturbing questions. If Ortega had said that he intended to conspire with the accused to kill the victim, then under *Alcalde* and the plain language of the Code, the statement would have been admissible only to prove Ortega’s participation in such a conspiracy but not the accused. *Morales* makes no mention of *Melton*.

The Federal Rule does not contain the limitation found in the Code. However, in approving the Federal Rule, the House Committee on the Judiciary expressed agreement with such a limitation. In its report the committee stated its intent that Federal Rule of Evidence 803(3) “be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon* . . . so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.”¹¹⁰ *Hillmon* is the classic case exploring the use of declarations regarding future plans. Despite the House’s unambiguous position, some appellate federal courts, including the Ninth Circuit, have approved the use of the declarations to prove the future conduct of others.¹¹¹ The Code should retain the limitation.

2. Declarations Regarding a Past State of Mind

As a general rule, the Code and the Rules prohibit the use of a statement of memory or belief to prove the fact remembered or believed.¹¹² Otherwise, the hearsay rule might be inadvertently repealed since any statement of a past event is a statement of the declarant’s then existing state of mind regarding the past event.

The Code, however, creates a hearsay exception for declarations of past state of mind in three circumstances. First, the Code creates an exception where the previous mental state is itself an issue in the case and the declaration is not offered to prove any fact other than that mental state, and the declarant is unavailable to testify.¹¹³ The Rules do not contain an equivalent provision.

Second, the Code creates an exception where the statement was made for purposes of medical diagnosis or treatment and describes medical history, including past as well as present symptoms, insofar as reasonably pertinent to diagnosis or treatment.¹¹⁴ The exception, however, applies only to a statement made by a victim when the victim is a minor at the time of proceedings, “provided the statement was made when the victim was under the age of 12 describing any act, or attempted act, of child abuse or neglect.”¹¹⁵ This exception is merely a truncated version of Federal Rule of Evidence 803(4).

110. FED. R. EVID. 803(3) Report of House Committee on the Judiciary.

111. See, e.g., *United States v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977); *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976).

112. See FED. R. EVID. 803(3); CAL. EVID. CODE § 1250(b) (West 1995).

113. See CAL. EVID. CODE § 1251 (West 1995).

114. See CAL. EVID. CODE § 1253 (West Supp. 2002).

115. *Id.*

Finally, the Code creates an exception where the statement consists of the declarant's contention that they have or have not made a will, or have or have not revoked a will.¹¹⁶ The Rules contain a similar provision.¹¹⁷ Under the Code, however, the declaration is not admissible if the declarant is available to testify.¹¹⁸ The Rules do not impose this limitation.

Unlike the Code, the Rules contain a broad hearsay exception for statements made for purposes of medical diagnosis or treatment. Rule 803(4) provides an exception for statements made "for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."¹¹⁹ Unlike the California exception, the Federal Rule is not limited to statements made by minors describing acts or attempted acts of child abuse and neglect.

Rule 803(4) is a marked and generous departure from the common law. It includes present as well as past symptoms, and it is immaterial whether the physician was consulted for treatment or for the purpose of enabling the doctor to testify. The declarant's motive goes to the statements weight, not admissibility.¹²⁰ Moreover, it is not indispensable for the statement to be made to a doctor. "Statements to hospital attendants, ambulance drivers, or even members of the family" can be included if reasonably pertinent to diagnosis or treatment.¹²¹

Under Rule 803(4), statements of causation are also admissible if reasonably pertinent to diagnosis or treatment.¹²² Knowing what caused an injury can assist a doctor in making the proper diagnosis or formulating the appropriate treatment. Thus, even a child's statement about the identity of the person who molested her is admissible if made for purposes of medical diagnosis or treatment.¹²³ The fact that the statement may embrace the identity of the perpetrator does not detract from its reliability: a "patient can be expected to tell the truth about her injury because she will want to be diagnosed correctly and

116. See CAL. EVID. CODE § 1260 (West 1995).

117. See FED. R. EVID. 803(3).

118. See CAL. EVID. CODE § 1260.

119. FED. R. EVID. 803(4).

120. See *id.* at advisory committee's note.

121. *Id.*

122. See *id.*

123. See *Territory of Guam v. Ignacio*, 10 F.3d 608, 613 (9th Cir. 1993).

treated appropriately.”¹²⁴ But even under the Federal Rule, statements relating to fault do not generally qualify: “Thus a patient’s statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light.”¹²⁵

The Legislature has taken one step toward the federal approach in enacting section 1253. The Legislature should take the additional step of replacing section 1253 with the federal rule.

H. Past Recollection Recorded

Although using a different language, the Code and the Rules provide a hearsay exception for recorded recollection if the witness has insufficient recollection to testify fully and accurately.¹²⁶ The Code, however, includes an additional limitation: Only those recorded statements that would have been admissible if made by the witness while testifying are admissible.¹²⁷ Presumably, the same outcome would be obtained in federal court since the Federal Rule does not preclude the opponent from using other grounds to object to the admissibility of the recorded statement. The California limitation prevents confusion on this point and should be retained.

I. Business Records

Evidence in the form of testimony that otherwise might be barred by the hearsay rule may be admissible under the exception for business records. The justification is rooted in the legal acceptance of businesses practices as well as necessity. If businesses rely on business records “in the most important undertakings of mercantile and industrial life,” then such records should be sufficiently trustworthy for use in court.¹²⁸ There is substantial overlap between the California and federal exceptions for business records. Both define a business broadly¹²⁹ and require the entry to be made in the regular course of

124. *Id.* If the statement, however, was not made for the purposes of diagnosis or treatment, then it is not admissible under the Federal Rule. In *Ignacio*, for example, the victim’s statement to the doctor was admissible because it was made for these purposes, but not her statement to a social worker who was simply trying to ensure the victim’s safety. The record was devoid of any evidence indicating that the child made the statements to the social worker for medical purposes.

125. FED. R. EVID. 803(4) advisory committee’s note.

126. See FED. R. EVID. 803(5); CAL. EVID. CODE § 1237 (West 1995).

127. See CAL. EVID. CODE § 1237.

128. FED. R. EVID. 803(6) advisory committee’s note.

129. See FED. R. EVID. 803(6); CAL. EVID. CODE § 1270 (West 1995).

business at or near the time the recorded event took place.¹³⁰ In addition, both dispense with the need to call a witness to identify the record and testify about the record's mode of preparation under specified circumstances.¹³¹ There are some differences between the California and federal approaches, however.

First, the Federal Rule requires the proponent to show that it was the regular practice of the business to create the record, not just that it was created in the course of regularly conducted business activity.¹³² Second, the Code and the Rules give the judge the power to exclude a record otherwise satisfying the foundational requirements if the judge determines that the sources of information used to create the record, or the method and circumstances of preparation, indicate lack of trustworthiness. In California, however, over objection the proponent must show that the record is trustworthy.¹³³ In federal court, it is the opponent who must persuade the judge of the record's untrustworthiness.¹³⁴ Admissibility is assumed in the first instance under the Rules.

Third, the Federal Rule explicitly states that an opinion or diagnosis can qualify as an admissible entry. The Code omits these terms, but the opponent can always object to an entry on the ground that it constitutes an inadmissible opinion.

Whether opinions in business records can be received as part of the record depends on the application of the opinion rule. In California and federal courts, a lay witness may not testify in the form of an opinion unless the opinion is rationally based on the witness's perception and is helpful to a clear understanding of the witness's testimony.¹³⁵ An officer's statement in a police report that "it was raining" would qualify. The officer's conclusion would be based on his own perception and would surely help the fact finder understand the officer's perception of the weather conditions.

An expert, on the other hand, may not testify in the form of an opinion unless (1) the expert is qualified to give the opinion, and (2) the fact finder needs the opinion in resolving important factual issues.¹³⁶ In a personal injury case, for example, an important question

130. See FED. R. EVID. 803(6), CAL. EVID. CODE § 1271 (West 1995).

131. See FED. R. EVID. 803(6); CAL. EVID. CODE §§ 712, 1560-1566, 1567 (West 1995).

132. See FED. R. EVID. 803(6).

133. See CAL. EVID. CODE §§ 1271(d), 405 cmt.

134. See FED. R. EVID. 803(6) advisory committee's note.

135. See FED. R. EVID. 701; CAL. EVID. CODE § 800 (West 1995). Section 800 also permits lay witnesses to testify in the form of an opinion to the extent "permitted by law."

136. See FED. R. EVID. 702; CAL. EVID. CODE § 801 (West 1995). Other limitations also apply. Federal judges, for example, may exclude opinions that are not scientifically valid.

may be whether the injuries suffered by the plaintiff are permanent. It is unlikely that a jury listening to the plaintiff's complaints can resolve this issue. An opinion by a qualified physician would help. Accordingly, such an opinion in a medical report otherwise admissible under the exception would be admissible.

The point is that nothing in the exception for business records favors or disfavors opinions.¹³⁷ Whether a particular opinion is admissible depends in the first instance on whether it would be admissible through the hearsay declarant if the declarant testified at the hearing.

The California courts, however, have taken a more restrictive approach. Opinions in business records should be limited to readily observable acts, events or conditions.¹³⁸ Thus, an opinion that the plaintiff suffered a broken leg should be admitted, but not an opinion that he suffers from a psychiatric condition.¹³⁹ The greater the thought process required to reach an opinion, the greater the need for cross examining the hearsay declarant.¹⁴⁰

The Federal Rules take a more expansive approach. "Opinions" and "diagnoses" may be admitted as part of business records if such opinions would be admissible through the hearsay declarant as a witness.¹⁴¹

The Code and the Federal Rule retain the business duty rule. The rule requires the proponent to show that observations reflected in a record emanate from percipient witnesses who had a duty to observe and report their observations. Neither rule incorporates the business duty rule explicitly, but the commentary to both makes clear that application of the business duty rule is required.¹⁴²

California judges may exclude opinions based on novel scientific principles or techniques that have not been generally accepted by the pertinent scientific community. *See generally*, MÉNDEZ, *supra* note 14, at §1604.

137. The fact that Federal Rules of Evidence 803(6) includes "opinions" and "diagnoses" among the matters that are admissible in business records does not mean that in fact they must be admitted in a given record.

138. *See* *People v. Reyes*, 526 P.2d 235-36 (Cal. 1974); *see also* *People v. Campos*, 38 Cal. Rptr. 2d 113, 114-15 (Ct. App. 1995) (holding that records containing opinions concerning the accused's mental state were not admissible as business or official records of acts, conditions, or events).

139. *See Reyes*, 526 P.2d at 225.

140. *See id.*

141. *See* FED. R. EVID. 803(6).

142. *See* FED. R. EVID. 803(6) advisory committee's note; CAL. EVID. CODE § 1271 cmt. (West 1995).

J. Absence of Entry in Business Records

Just as entries in business records may be used to prove the occurrence of an act or event, or the existence of a condition, the absence of such entries may be offered to prove their nonoccurrence or non-existence. A creditor, for example, may prove nonpayment by evidence that his records do not reflect that payment was received. The use of records for this purpose may not violate the hearsay rule. The creditor, for example, probably does not intend his failure to make a payment entry to substitute for the statement that the debtor has failed to make the payment. Most likely, the creditor did not make the entry because no payment was received. But because the question has not been free of controversy, the Law Revision Commission and the framers of the Federal Rules opted for creating a hearsay exception for the absence of entries.¹⁴³ As in the case of business records, the Federal Rule assumes admissibility if the foundational requirements are satisfied, unless the opponent convinces the judge of the record's lack of trustworthiness.¹⁴⁴ Under the Code, it is the proponent who, over objection, must establish the record's trustworthiness.¹⁴⁵

K. Official Records

Although the Code and the Rules create a hearsay exception for official records, each takes a radically different approach to their admissibility. Under the Code, a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if the writing was made by and within the scope of duty of a public employee, the writing was made at or near the time of the act, condition, or event recorded, and the sources of information and method and time of preparation were such as to indicate trustworthiness.¹⁴⁶ Because the same showing of trustworthiness is required of California official records as for California business records, the limitations imposed on business records apply to official ones as well. Official records are equally subject to the opinion rule and the rule requiring those who impart information to the preparer to be under a duty to provide such information. In *People v. Baeske*,¹⁴⁷ for example, a police report offered

143. See FED. R. EVID. 803(7) advisory committee's note; CAL. EVID. CODE § 1272 cmt. (West 1995).

144. See FED. R. EVID. 803(7).

145. See CAL. EVID. CODE §§ 405 cmt., 1272(b) (West 1995).

146. See CAL. EVID. CODE § 1280 (West 1995).

147. 130 Cal. Rptr. 328, 335 (Ct. 1976).

to prove a license number was excluded because the individual who provided the number was “not a public employee with any duty either to observe facts correctly or to report her observations accurately to the police department.”¹⁴⁸ But as in the case of business records, other hearsay exceptions may supply the required reliability. In *Jackson v. Department of Motor Vehicles*,¹⁴⁹ the issue was the admissibility of a statement in a police report in which the plaintiff admitted driving a car. Although the officer who took the statement did not see who drove the car, the statement was nonetheless admitted for the truth of the matter stated. The plaintiff’s statement fell within the admissions exception to the hearsay rule, and the officer had firsthand knowledge of what the plaintiff said as well as a duty to record the information.¹⁵⁰ As in the case of business records, the entrant does not have to have firsthand knowledge of the information contained in the official record. If the exception’s other requirements are satisfied, the trustworthiness requirement can be established by showing that the official record is based upon the observations of public employees who have a duty to observe the facts recorded and to report their observations correctly to those making the entries.¹⁵¹

The federal exception for public records and reports has three distinct parts. Part (A) creates a hearsay exception for the records of public offices and agencies setting forth the activities of the office or agency; part (B) creates a hearsay exception for records of public offices and agencies setting forth matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, but excluding in criminal cases matters observed by police officers and other law enforcement personnel; part (C) creates a hearsay exception for records of public offices and agencies setting forth in civil actions and proceedings, and against the Government in criminal cases, factual findings resulting from an investigation made pursuant

148. *Id.* at 385; *see also* *People v. Hernandez*, 63 Cal. Rptr. 2d 769, 779 (Cal. 1997) (holding that a computer printout which was prepared by a crime analyst from police reports and which identified the accused as the probable perpetrator of the rapes being tried was inadmissible as an official or business record, because the persons who furnished the information contained in the reports were under no duty to do so); *Behr v. County of Santa Cruz*, 342 P.2d 987, 992 (Cal.1959).

149. 27 Cal. Rptr. 2d 712 (Ct. App. 1994).

150. *See id.* at 718; *see also* *Ruff v. Yan*, 102 Cal. Rptr. 2d 157, 172 (Ct. App. 2000) (holding a party’s admissions to a police officer, which the officer incorporated into his report, are admissible if the report meets the requirements of the official record’s exception to the hearsay rule).

151. *See Baeske*, 130 Cal. Rptr. at 38.

to authority granted by law.¹⁵² As in the case of business records, the Federal Rule assumes admissibility if all of the foundational requirements are met, unless the opponent persuades the judge that the sources of information or other circumstances indicate lack of trustworthiness.¹⁵³

The federal approach to official records departs from that of the Code in two significant respects. First, the Rules limit the admissibility of such records when offered against the accused in criminal cases, and, second, the Rules expand the admissibility of reports containing opinions in civil cases and in criminal cases, when offered against the government.

1. Criminal Cases

Federal Rule of Evidence 803(8) creates a hearsay exception for reports "in any form, of public offices or agencies, setting forth . . . (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel"¹⁵⁴ In *United States v. Oates*,¹⁵⁵ the Second Circuit held that this provision required excluding a government chemist's report offered against the accused. Reasoning that the chemist was a member of the law enforcement team, the court concluded that the report fell within the prohibition of the rule.¹⁵⁶

The government contended that the use of the report was proper because the report also satisfied the federal exception for business records.¹⁵⁷ While not denying that the report qualified as a business record,¹⁵⁸ the Second Circuit rejected the government's argument.¹⁵⁹ In the court's view, extensive amendments by Congress to the exception for official records evidenced Congress's concern with trying criminal defendants by police report. Though not holding that the use of the chemist's report would violate the accused's right of confrontation,¹⁶⁰ the court refused to permit the government to circum-

152. See FED. R. EVID. 803(8)(A)-(C).

153. See FED. R. EVID. 803(C).

154. FED. R. EVID. 803(8)(B).

155. 560 F.2d 45 (2d Cir. 1977), *on remand*, 445 F. Supp. 351 (E.D.N.Y. 1978), *aff'd*, 591 F.2d 1332 (2d Cir. 1978).

156. See 560 F. 2d at 67-68.

157. See *id.* at 74.

158. See *id.* at 75.

159. See *id.* at 78.

160. See *id.* at 80.

vent the balance struck by Congress in Rule 803(8) by allowing the government to resort to other hearsay exceptions.¹⁶¹ Other circuits, though not all, have embraced *Oates*.¹⁶²

The California exception for official records is devoid of any language limiting the use of the records when offered against the accused. In California, the accused would have to object on Sixth Amendment grounds.

Some circuits have drawn a distinction between reports prepared by law enforcement personnel who were in an adversarial position to the accused, and those prepared by personnel who were indifferent to the accused. In *United States v. Orozco*,¹⁶³ for example, the Ninth Circuit upheld the use of border crossing cards by immigration officials to prove that a car registered to the accused had crossed from Mexico into the United States shortly before narcotics were found in the car. While conceding that the immigration officials could be deemed law enforcement personnel, the court nonetheless upheld the use of the cards on the ground that they were trustworthy.¹⁶⁴ The cards had been prepared as part of a routine practice and at a time when the government and its agents were not in an adversarial position vis-à-vis the accused.¹⁶⁵

2. Civil Cases

Federal Rule of Evidence 803(8) creates a hearsay exception for records “in any form, of public offices or agencies, setting forth . . . (c) in civil actions and proceedings . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or circumstances indicate lack of trustworthi-

161. See *id.* at 84. The Second Circuit, however, has retreated somewhat from this position. In *United States v. Yakobov*, 712 F.2d 20, 25–26 (2d Cir. 1983), it held that *Oates* did not preclude the government from offering a record to prove the absence of an entry under Federal Rule of Evidence 803(10), even though the record would be inadmissible as an official record.

162. See *United States v. Cain*, 615 F.2d 380 (5th Cir. 1980). The Seventh Circuit agrees but would allow the use of another hearsay exception if the preparer of the record takes the stand. See *United States v. King*, 613 F.2d 670 (7th Cir. 1980). The Eighth Circuit allows the use of other hearsay exceptions. See *United States v. Baker*, 855 F.2d 1353 (8th Cir. 1988).

163. 590 F.2d 789, 794 (9th Cir. 1979).

164. See *id.* at 793–94. This provision allows defendants in criminal cases to offer factual findings in investigative reports against the government. But it does not authorize the government to offer such findings against defendants in criminal cases. Accordingly, this provision was unavailable to the government in *Oates* to justify the admission of the chemist’s report.

165. See *id.*

ness”¹⁶⁶ The broad scope of this exception was examined by the United States Supreme Court in *Beech Aircraft Corp. v. Rainey*,¹⁶⁷ a wrongful death action brought by the spouses of two pilots killed in an aircraft accident against the manufacturer of the plane. The plaintiffs’ theory was that the accident had been caused by engine failure. The manufacturer countered that the accident had been caused by pilot error. The question before the Court was the admissibility of a Judge Advocate General’s report in which the investigator concluded, among other matters, that the “most probable cause of the accident was the pilots [*sic*] failure to maintain proper interval.”¹⁶⁸

In upholding the admissibility of the report, the Court rejected the argument that the “factual findings” contemplated by the rule excluded factually based conclusions or opinions:¹⁶⁹ “[P]ortions of investigatory reports otherwise admissible under Rule (8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule’s trustworthiness requirement, it should be admissible along with other portions of the report.”¹⁷⁰

The Advisory Committee lists four factors federal judges should consider in determining the reliability of investigative reports: (1) the timeliness of the investigation; (2) the investigator’s skill or experience; (3) whether a hearing was held and the level at which it was conducted; and (4) possible bias when reports are prepared with a view to possible litigation.¹⁷¹

In reaching its decision, the Court was influenced by the Rules’ approach to admissibility. Under the exceptions for business and official records, admissibility is assumed unless the opponent raises serious questions of reliability.¹⁷² Under the Code, it is the proponent who must satisfy the judge that the business or official record is trustworthy.¹⁷³

166. FED. R. EVID. 803(8)(C).

167. 488 U.S. 153 (1988), *on remand*, 868 F.2d 1531 (11th Cir. 1989).

168. 488 U.S. at 157.

169. *See id.* at 164.

170. *Id.* at 170. The Court declined to rule on the admissibility of conclusions of law under the Rules.

171. *See* FED. R. EVID. 803(8) advisory committee’s note; *see also* *Beech v. Rainey*, 488 U.S. at 168 n. 11.

172. *See* FED. R. EVID. 803(8) advisory committee’s note.

173. *See* CAL. EVID. CODE §§ 1271(d), 1280(c), 405 (West 1995).

Would such a report be admissible in California? In *Elsworth v. Beech Aircraft Corp.*,¹⁷⁴ the judge admitted a report of a Congressional committee which in turn referred to a study prepared by an employee of the General Accounting Office. The study stated that the FAA had considered withdrawing Beech's authorization to participate in an airworthiness certification process because Beech had failed to comply with enumerated obligations imposed by the FAA. The California Supreme Court held that the study was inadmissible.¹⁷⁵ The holding, however, is not dispositive of the question. Because the court found, among other matters, that the proponent had failed to produce evidence of the author's identity,¹⁷⁶ it held that the judge lacked a basis for finding that the study was prepared from sources of information that indicate trustworthiness.¹⁷⁷

A better guide to the admissibility of "factual findings" in California can be found in the court's approach to the admissibility of opinions in business or official records. As discussed above, the court has taken a cautious approach. The court has not taken the unequivocal position that opinions in records should be admissible if the opinions satisfy the conditions of admissibility imposed by the opinion rule.¹⁷⁸ Rather, the court seems to favor a rule limiting opinions in records to readily observable acts, events, or conditions.¹⁷⁹ In *People v. Reyes*¹⁸⁰ the court suggested that an opinion that an individual suffered a broken leg should be admitted but not an opinion that he suffered from a psychiatric condition.¹⁸¹ In the court's view, the greater the thought process required to reach an opinion or conclusion, the greater the need for cross examining the hearsay declarant.¹⁸² Applying this test, a California judge might well conclude that findings or opinions based on extensive investigations should not be received through an official or business record. Perhaps this is why early cases expressed the view that "records of investigations and inquiries conducted either voluntarily or pursuant to requirement of law by public officers concerning causes and effects, and involving the exercise of judgment

174. 691 P.2d 630 (Cal. 1984).

175. *See id.* at 638.

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. 526 P.2d 225 (Cal. 1974).

181. *See id.* at 235-36.

182. *See id.*

and discretion, expression of opinion, and the making of conclusions, are not admissible in evidence as public records."¹⁸³

L. Judgments of Conviction

In California, 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.¹⁸⁴ It is immaterial whether the judgment is based on a guilty verdict, a finding of guilt, a plea of guilty, or a plea of *nolo contendere*.¹⁸⁵

A hearsay exception is required because the judgment is a proxy for the evidence which the prosecution offered or would have offered in its case-in-chief to make out a *prima facie* case. The purpose of the exception is not to prove the fact of conviction—the business or official records exceptions can be used for that purpose—but to prove the misconduct underlying the conviction.

The Federal Rule differs from the Code in several respects. First, the Federal Rule retains the traditional approach of excluding from the exception felony grade convictions based on a plea of *nolo contendere*.¹⁸⁶ 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. The California Legislature amended the Code in 1982 to remove this exclusion in order to facilitate suits by crime victims.

Second, the Federal Rule allows the use of judgments of convictions in criminal and civil trials.¹⁸⁷ But to avoid constitutional concerns, the Federal Rule does not allow the use of a judgment of conviction of a third person when offered by the prosecution against the accused.¹⁸⁸ For example, under the Federal Rule the prosecution may not use a thief's conviction to prove that the accused possessed stolen postage stamps.¹⁸⁹ California avoids the problem by limiting the use of such judgments to civil cases.

183. *Pruett v. Burr*, 257 P.2d 690, 698 (Cal. 1953); see FED. R. EVID. 803(7) advisory committee's note.

184. See CAL. EVID. CODE § 1300 (West 1995).

185. See *id.*

186. See FED. R. EVID. 803(22).

187. See *id.*

188. See *id.*

189. See *id.* at advisory committee's note.

M. Judgments Against Persons Entitled to Indemnity

The Code creates a hearsay exception for final judgments offered by a judgment debtor to prove any fact which was essential to the judgment in an action seeking to recover partial or total indemnity or exoneration for money paid or liability incurred on account of the judgment, to enforce a warranty to protect the judgment debtor against liability determined by the judgment, or to recover damages for breach of a warranty substantially the same as the warranty determined by the judgment to have been breached.¹⁹⁰ The Federal Rules do not contain an equivalent exception.

N. Judgments Determining the Liability of a Third Person

When the liability, obligation, or duty of a third person is an issue in a civil action, the Code creates a hearsay exception for a final judgment against that person when offered to prove such liability, obligation, or duty.¹⁹¹ The Rules do not contain an equivalent exception.

O. Former Testimony

Under the Code and the Rules, former testimony may be admissible if the proponent first establishes the unavailability of the witness at the hearing in which the testimony is offered.¹⁹² The Code and the Rules provide a hearsay exception for testimony given by a witness at another hearing of the same or different proceeding, or in a deposition taken in another action if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.¹⁹³ In addition, the Code allows the use of former testimony against a party in a civil action who was not a party to the original action if the party to the original action had the right and opportunity to cross-examine the witness with an interest and motive similar to those which the opponent has at the current hearing.¹⁹⁴ The Federal Rule allows the use of the testimony in such circumstances only if the opponent's "predecessor in interest" had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.¹⁹⁵

190. See CAL. EVID. CODE § 1301 (West 1995).

191. See FED. R. EVID. 804(b)(1); CAL. EVID. CODE § 1291 (WEST 1995).

192. See *id.*

193. See *id.*

194. See CAL. EVID. CODE § 1292 (West 1995).

195. See FED. R. EVID. 804(b)(1).

The meaning of the term "predecessor in interest" is uncertain.¹⁹⁶ The Code avoids the term and, instead, describes with particularity the circumstances which the former testimony may be offered against a party who was not a party to the original action.¹⁹⁷ The Code's approach should be retained because (simple summary would be helpful here).

As a general rule, the Code and the Rules allow the party opposing the former testimony to object to a question or answer on the same grounds as if the declarant were on the stand testifying.¹⁹⁸ But where the former testimony is offered against a party to the former proceeding, the Code precludes the opponent from objecting to the form of the question unless the opponent objected on that ground at the former hearing.¹⁹⁹ The justification is that the proponent should not lose the answer on account of the defect in the question, since the opponent had an opportunity to object on that ground at the former hearing.²⁰⁰ The Federal Rule is silent on this point. Presumably, under the Rules, there is no need for the opponent to preserve any objection by objecting at the former hearing.

Under the Code, depositions offered in the action in which they are taken do not qualify as former testimony.²⁰¹ Only depositions taken in another action qualify.²⁰² Accordingly, the admissibility of depositions offered in the action in which taken depends not on the former testimony exception to the hearsay rule but on the provisions of the California Civil Procedure Code governing the use of depositions at trial. If the deposition qualifies as former testimony, then its admissibility depends on the Evidence Code, not the Civil Procedure Code. The distinction is important because the waiver provisions of the Civil Procedure Code are broader than those found in the Evidence Code. In the absence of stipulations, the Civil Procedure Code requires parties opposing the deposition at trial to show that they objected to the question or answer on the same grounds whenever the

196. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.99 (2d ed. 1999).

197. See CAL. EVID. CODE § 1292.

198. See FED. R. EVID. 804(b)(1); CAL. EVID. CODE §§ 1291(b), 1292(b).

199. See CAL. EVID. CODE § 1291(b)(1).

200. See *id.* cmt. Moreover, had the opponent objected at the former hearing, the proponent might have easily cured the defect by rephrasing the question.

201. See *id.* § 1290(c).

202. See *id.*

defect might have been cured if promptly presented at the deposition.²⁰³

As prescribed by the Supreme Court, the Federal Rule of Evidence, like the California rule, exempted from the definition of former testimony depositions offered in the case in which they are taken.²⁰⁴ Under the court's rule, the admissibility of the depositions would depend initially on the Federal Rules of Civil Procedure, not the Federal Rules of Evidence. Congress, however, amended the rule to include as former testimony depositions offered in the action in which they are taken. Two complications resulting from this change merit discussion.

First, the unavailability grounds prescribed by the Federal Rule of Evidence are not identical to the grounds enumerated under the Federal Rules of Civil Procedure.²⁰⁵ Satisfaction of a ground listed only in the Federal Rules of Civil Procedure raises questions as to whether such a ground satisfies the unavailability requirements of the Federal Rule of Evidence.²⁰⁶ Second, the Federal Rule of Evidence is silent about whether parties opposing the former testimony must show that at the former hearing they objected on the same grounds to a question or answer the proponent seeks to prove at the current hearing. In the absence of such stipulations, the Federal Rules of Civil Procedure impose this requirement to the extent that the defect in the question or answer could have been cured if promptly presented at the deposition.²⁰⁷

The requirement imposes no additional burden on the proponent when the deposition was taken in the action offered. Even under the rule approved by the Supreme Court, the proponent would have been subject to the limitations imposed by the Federal Rules of Civil Procedure. Those rules, not the exception for former testimony, would have governed the use of the deposition at trial. That, however, would not have been true in the case of depositions not taken in the action offered. Such a deposition would have been governed exclusively by the federal rule on former testimony, not the Federal Rules

203. See CAL. CIV. PROC. CODE § 2025(m)(2) (West 1995).

204. See FED. R. EVID. 804 federal judicial center note.

205. Compare FED. R. EVID. 804(a) with FED. R. CIV. P. 32(a)(3)(B).

206. The questions arise because by including depositions offered in the action taken in the definition of former testimony, Congress made those depositions subject to the unavailability provisions of the former testimony exception to the hearsay rule when the deponent is unavailable to testify at the hearing. The enumeration of unavailability grounds under Federal Rule of Evidence 804(a) is not inclusive.

207. See FED. R. CIV. P. 32(d)(3)(B).

of Civil Procedure. As noted, the federal exception for former testimony contains no waiver provisions. A question, then, is whether by subjecting both types of depositions to the exception for former testimony and subjecting one kind—those taken in the action offered—to the limitations of the procedural rules, Congress inadvertently opened the door to imposing the same limitations on the other kind as well. The Federal Rules of Civil Procedure are not dispositive. The waiver provisions of Rule 32 apply to depositions offered “[a]t the trial.”²⁰⁸ Whether “trial” refers only to the trial of the action in which the deposition was taken is not entirely clear.²⁰⁹

The Code avoids these uncertainties by exempting from the definition of former testimony those depositions offered in the action in which they are taken. The Code approach is sound and should be retained.

P. Former Testimony by a Minor at a Preliminary Hearing

The Code, but not the Rules, creates a hearsay exception for testimony given by a complaining witness at a preliminary hearing if the witness was a minor, the former testimony is offered at a hearing to declare the minor a dependent child under the Welfare and Institutions Code, and the issues are such that the defendant at the preliminary hearing had the right and opportunity to cross-examine the minor with a motive and interest similar to those which the parent or guardian against whom the testimony is offered has at the dependency hearing.²¹⁰

At the dependency hearing, the parent or guardian may object to any question or answer as though the child were testifying at the hearing.²¹¹ In addition, the parent or guardian may challenge the admissibility of the former testimony on the ground that issues are substantially new and different from those raised at the preliminary hearing.²¹²

208. *Id.* 32(a).

209. Some commentators believe that a deposition not taken in the action offered is admissible under Rule 32 if the testimony given was such “that the party-opponent in [the other action] had the same interest and motive in his cross-examination that the present opponent now has.” CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 2150, at 191 (West 1994). The question, however, is not whether such a deposition should be admissible under Rule 32 but whether its use should be governed exclusively by the federal former testimony exception to the hearsay rule.

210. *See* CAL. EVID. CODE § 1293 (West 1995).

211. *See id.*

212. *See id.*

The purpose of the exception is to spare the minor the necessity of testify twice to substantially similar matters, once at the preliminary hearing and a second time at the dependency hearing. California should retain the exception because.

Q. Former Testimony and Prior Inconsistent Statements

Sometimes, a witness who has given helpful information to the police recants when called to testify at the preliminary hearing. A witness, for example, who tells the police that the accused was the assailant, may claim at the preliminary hearing that she did not see the assailant. Under those circumstances, the prosecution may call to the stand the officer who took the statement to repeat the witness' statement. In California, the statement can be received to impeach the witness and, more importantly, to prove that the accused was the assailant.²¹³

If the witness then fails to appear at the trial, may the prosecution offer the witness's and the officer's preliminary hearing testimony as former testimony? If at the preliminary hearing the witness had identified the defendant as her assailant, then that portion of her testimony would have been admissible against the accused at the trial if the witness were shown to be unavailable to testify. But where, as in the example, the witness recants her out of court identification at the preliminary hearing, then at the trial her out of court statement to the officer will not be admissible for the truth in the absence of an applicable hearsay exception.²¹⁴ Since the witness does not appear at the trial, the use of the hearsay exception for prior inconsistent statements is problematical. Under sections 770 and 1235, a prior inconsistent statement may be offered for the truth only if the witness is afforded an opportunity to explain or deny the statement before the close of the evidence.²¹⁵ A hearsay declarant who does not appear at the trial is not afforded such an opportunity.²¹⁶ To solve this problem,

213. See CAL. EVID. CODE. § 1235 (West 1995).

214. A hearsay declarant may be impeached with a statement made by the declarant that is inconsistent with the hearsay declaration received in evidence. See CAL. EVID. CODE § 1202 (West 1995). However, unless the declaration falls within an exception, it may not be received for the truth of the matter stated.

215. See CAL. EVID. CODE §§ 770, 1235 (West 1995). Multiple hearsay is admissible if each hearsay statement meets the requirements of an exception to the hearsay rule. See CAL. EVID. CODE § 1201 (West 1995). This rule is unavailable because the inconsistent statement does not meet the requirements of the exception for inconsistent statements.

216. To satisfy the inconsistency requirement of the exception, the prosecution first would have to offer that portion of the witness's preliminary hearing testimony at which the witness denied having seen the assailant.

section 1294 of the Evidence Code allows the prosecution at the trial to offer the witness's statement to the officer for the truth of the matter asserted after offering the witness's recantation at the preliminary hearing.²¹⁷

At the trial, the prosecution is limited to proving the witness's former testimony by videotape or a transcript. If, at the preliminary hearing, the inconsistent statement was offered through a videotape taken by the police, then the prosecution may offer the videotape at the trial. If the statement was offered through the testimony of the officer who took the statement, then the prosecution may offer that portion of the transcript of the preliminary hearing containing the statement.²¹⁸

The accused may object to the introduction of the inconsistent statement on the grounds that the statement to the officer was not properly received at the preliminary hearing as a prior inconsistent statement, or that the videotape or transcript does not qualify as former testimony.²¹⁹ If the statement is received at the trial, the accused retains the right to call and cross-examine the witnesses who appeared at the preliminary hearing to testify about the prior inconsistent statement.²²⁰

The Federal Rules of Evidence do not appear to contain a solution to this problem.²²¹ Thus, the California provision should be retained.

R. Declarant's Unavailability Caused by the Accused

Both the Code and the Rules recognize the need for a hearsay exception for damaging statements made by declarants who are prevented by a party from testifying. The Federal Rules provide an exception for a statement offered against a party who "has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."²²² Under the Federal Rules, the statement may be offered against any party in a criminal or

217. See CAL. EVID. CODE § 1294 (West 1995). The exception also applies to inconsistent statements received at a previous trial of the same criminal matter.

218. See *id.*

219. See *id.*

220. See *id.*

221. Indeed, under the Rules a prior inconsistent statement needs to be made under oath in some kind of proceeding in order to be received for the truth. See FED. R. EVID. 801(d)(1). The exception for statements of identification presuppose the presence of the hearsay declarant for cross-examination.

222. FED. R. EVID. 804(b)(5).

civil proceeding, so long as the proponent proves the foundational facts by a preponderance of the evidence.²²³

The Code places more restrictions on the use of these declarations. They are admissible only in prosecutions charging a serious felony if, among other matters, the proponent proves by clear and convincing evidence that the declarant's unavailability was "knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution" of that party.²²⁴ In addition, the proponent must prove by clear and convincing evidence that the declarant's unavailability is the result of kidnapping or death by homicide.²²⁵

Other limitations include proof by a preponderance of the evidence that the statement was made under circumstances which indicate it is trustworthy and not made as the result of promise, inducement, threat, or coercion.²²⁶ Corroboration is also required. The proponent must corroborate the statement by evidence tending to connect the party against whom the statement is offered "with the commission of the serious felony with which the party is charged."²²⁷ Proof that merely shows the commission of the offense or its circumstances is insufficient.²²⁸ The proponent must also show that the statement was memorialized in a tape recording made by a law enforcement official or in a statement prepared by a law enforcement official and signed and notarized by the declarant in the presence of the law enforcement official.²²⁹

Procedural safeguards include a requirement that the prosecution serve a written notice upon the accused of its intent to use the statement at least ten days prior to the hearing or trial at which the statement is to be offered, unless the prosecution shows good cause for the failure to provide the notice.²³⁰ If good cause is shown, the accused is entitled to a reasonable continuance of the hearing or trial.²³¹

If the statement is offered during the trial, the judge must determine its admissibility at a hearing out of the presence of the jury. If

223. *See id.* at advisory committee's note.

224. CAL. EVID. CODE § 1350(a)(1) (West 1995).

225. *See id.* § 1350(a)(3).

226. *See id.* § 1350(a)(6).

227. *Id.*

228. *See id.*

229. *See id.* § 1350(a)(3).

230. *See id.* § 1350(b).

231. *See id.*

the accused testifies at the hearing, the judge must exclude all persons, except for the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the accused, and defense counsel.²³² The accused's testimony is not admissible in any other proceeding, and if a transcript is made, it must be sealed and transmitted to the clerk of the court in which the action is pending.²³³

A final limitation is that hearsay declarations by others that are included in the admitted statement are inadmissible unless they fall within an exception to the hearsay rule.²³⁴

The numerous California limitations evince an abundance of caution when abolishing the right of criminal defendants to object to hearsay even when they have been charged with bringing about the hearsay declarant's unavailability as a witness. In contrast, the federal exception can be applied against any party, including the prosecution, in both civil and criminal cases. Moreover, under the Rules the wrongdoing behind the declarant's unavailability does not have to amount to a criminal act.²³⁵

S. Statements By Dead Declarants Regarding Gang Activities

California has a limited hearsay exception for sworn statements by dead declarants regarding gang related crimes.²³⁶ The purpose of the exception is to discourage gang members from eliminating potential witnesses in prosecutions for gang crimes. California makes it a separate offense for a gang member to promote or assist any felonious criminal activity by members of gangs.²³⁷

The statements may be used only in anti-gang prosecutions and are subject to numerous restrictions. Chief among these are that the declarant die from other than natural causes, that the statement relate to acts or events within the personal knowledge of the declarant, that the statement be made under oath or affirmation in an affidavit or at a deposition, preliminary hearing, grand jury hearing, or other hearing under penalty of perjury, and that a verbatim transcript or copy, or record of the statement, exists.²³⁸

232. *See id.* § 1350(c).

233. *See id.*

234. *See id.* § 1350(e).

235. *See* FED. R. EVID. 804 and advisory committee's note.

236. *See* CAL. EVID. CODE § 1231 (West 1995).

237. *See* CAL. PENAL CODE § 186.22(a) (West 1999).

238. *See* CAL. EVID. CODE § 1231.

In addition, the exception requires the proponent to notify the opponent of the intent to use the statement in advance of the hearing in which the statement will be offered.²³⁹ The proponent must also persuade the judge that the statement was made under circumstances that indicate its trustworthiness and render the declarant's statement particularly worthy of belief.²⁴⁰ Among the circumstances the judge can take into account are whether the statement was made in contemplation of a pending or anticipated criminal or civil matter in which the declarant had an interest other than as a witness, whether the declarant had a bias or motive to fabricate the statement, whether the statement is corroborated by evidence other than the statements that are admissible under the exception, and whether the statement was a declaration against the declarant's interest.²⁴¹

The Federal Rules do not contain an equivalent exception. The California exception is designed to meet a special need in gang prosecutions and should be retained.

T. Dying Declarations

The Code and the Rules provide a hearsay exception for deathbed declarations regarding the cause and circumstances of death if the declarant made the statement while under a sense of impending death.²⁴² Under the Code, the declarations can be offered in a civil or criminal proceeding.²⁴³ Under the Rules, they can also be offered in a civil proceeding, but Congress amended the rule prescribed by the United States Supreme Court to limit their admissibility in criminal cases to homicide prosecutions.²⁴⁴ According to the House Judiciary Committee, dying declarations are not "among the most reliable forms of hearsay."²⁴⁵ But if that is the case, one would expect the declarations to be excluded precisely in those cases—homicides—where the stakes are highest, and that call for using only the most reliable evidence against the accused.

239. See CAL. EVID. CODE § 1231.1 (West 1995).

240. See CAL. EVID. CODE § 1231. The United States Supreme Court requires hearsay admitted against the accused under a novel hearsay exception to be "particularly worthy of belief." *Idaho v. Wright*, 497 U.S. 805, 817 (1990).

241. See CAL. EVID. CODE § 1231. For additional limitations on the use of the statements offered under 1231, see §§ 1231.2–1231.4.

242. See FED. R. EVID. 804(b)(2); CAL. EVID. CODE § 1242 (West 1995).

243. See CAL. EVID. CODE § 1242.

244. See FED. R. EVID. 804(b)(2) Report of House Committee on the Judiciary.

245. *Id.*

Under the Code, the proponent does not have to establish the declarant's unavailability as a condition of admissibility. Accordingly, dying declarations should be admissible in attempted murder prosecutions and personal injury actions even if the declarant unexpectedly survives and is available to testify. The Rules do require the proponent to establish the declarant's unavailability,²⁴⁶ but since the grounds of unavailability are not limited to death,²⁴⁷ the declarations should be admissible in a civil case even if the declarant survives.

California should retain its rule.

U. Declarations Against Interest

The Code and the Rules provide a hearsay exception for declarations against interest if the declarant is unavailable to testify.²⁴⁸ One difference is that only the Code creates an exception for declarations against social interest.²⁴⁹ Congress deleted this category from the rule proposed by the United States Supreme Court.²⁵⁰ Another difference is that under the Federal Rule 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."²⁵¹ No such limitation is imposed by the Code.

The Federal Rules also take a different, more stringent, approach to unavailability. In addition to such usual grounds of unavailability as death or illness, in the case of declarations against interest the proponent must also show that he has been unable to procure the declarant's testimony by process or other reasonable means.²⁵² According to the House, which added this requirement, the "amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable."²⁵³ No such requirement is imposed by the Code.

One aspect of declarations against interest has been especially troubling to judges and scholars. If a declaration is dis-serving of the declarant's interests and also of the interests of a party mentioned in

246. See FED. R. EVID. 804(b)(2).

247. See FED. R. EVID. 804(a).

248. See FED. R. EVID. 804(b)(3); CAL. EVID. CODE § 1230 (West 1995).

249. See CAL. EVID. CODE § 1230.

250. See FED. R. EVID. 804(b)(3) conference committee report.

251. FED. R. EVID. 804(b)(3).

252. See FED. R. EVID. 804(a)(5).

253. *Id.* Report of House Committee on the Judiciary.

the declaration, may the declaration be received against that party? The California Supreme Court resolved this question in *People v. Leach*.²⁵⁴ It held that as a matter of statutory construction the California provision is limited to those statements disserving of the declarant's interest.²⁵⁵

The United States Supreme Court has likewise limited the Federal Rule only to those statements that are disserving of the declarant's interests.²⁵⁶ Thus, the statement, "I am taking the cocaine to Atlanta for Williamson," though against the declarant's penal interests, may not be offered against Williamson in a drug prosecution. Limiting the exception to those statements disserving of the declarant's interests minimizes the risk of offending the accused's confrontation rights.

Any change to the California Code should make this limitation explicit in the rule itself or in the accompanying comment.

V. Statements By Minors Describing Acts or Attempted Acts of Child Abuse or Neglect

The Code, but not the Rules, provides a hearsay exception for a statement made by minor victim under age twelve describing any act or attempted act of child abuse or neglect upon the child.²⁵⁷ The statement is admissible only at a criminal prosecution if at the time of the criminal proceeding the victim is still a minor, the statement is not otherwise admissible by statute or court rule, the judge finds at a hearing outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability, and the proponent informs the adverse party of its intention to offer the statement.²⁵⁸

To be admissible, the minor must testify at the hearing, unless the minor is shown to be unavailable as witness.²⁵⁹ If the minor is unavailable, the statement may not be received unless the judge finds that the statement is corroborated by evidence of child abuse or neglect.²⁶⁰

254. 541 P.2d 296 (Cal. 1975).

255. *See id.* at 310. *Leach's* holding was reaffirmed by the California Supreme Court in *People v. Duarte*, 12 P.3d 1110, 1116 (Cal. 2000).

256. *See Williamson v. United States*, 512 U.S. 594, 600-01 (1994).

257. *See CAL. EVID. CODE* § 1360 (West 1995).

258. *See id.*

259. *See CAL. EVID. CODE* §1360(a)(3)(B).

260. *See id.*

The California provision was enacted in response to increased prosecutions for child abuse and neglect. It should be retained.

W. Statements By Crime Victims Relating Threats

Declarations describing the infliction of physical injury do not fall within the California exception for state of mind statements if offered to prove the injuries remembered.²⁶¹ Neither do declarations relating threats by others to injure the declarant if offered to prove the threat remembered.²⁶² Following the murder acquittal of O. J. Simpson, the legislature enacted a new hearsay exception for these kinds of declarations if the declarant is unavailable to testify.²⁶³

To be admissible, the declaration must be made at or near the time of the infliction or threat of physical injury.²⁶⁴ In addition, the declaration must be made in writing, be electronically recorded, or be made to a physician, nurse, paramedic, or law enforcement official, and under circumstances indicating trustworthiness.²⁶⁵

In assessing its trustworthiness, the judge may consider, among other matters, whether the declaration was made in contemplation of pending or anticipated litigation in which the declarant had an interest, whether the declarant had a bias or motive for fabricating the declaration, and whether the declaration is corroborated by evidence other than by the kind of declarations admissible under the exception.²⁶⁶

The declaration may not be received unless the proponent informed the adverse party of its intention to offer the declaration sufficiently in advance of the hearing in which it is to be offered, so as to provide the adverse party with a fair opportunity to prepare to oppose the declaration.²⁶⁷

The Rules do not contain an equivalent provision.

X. Declarations By Elders and Dependent Adults

California law punishes certain crimes committed against elders and dependent adults.²⁶⁸ Elders are persons who are sixty-five or

261. See CAL. EVID. CODE § 1370(a)(1) (West 1995).

262. See *id.*

263. See § 1370 (a)(2).

264. See § 1370(a)(3).

265. See § 1370(a)(5).

266. See § 1370(b).

267. See § 1370(c).

268. See CAL. PENAL CODE § 368 (West 1995).

older.²⁶⁹ Dependent adults are persons between the ages of eighteen and sixty-four who have physical or mental limitations that restrict their ability to carry out normal activities. The definition includes persons with physical or developmental disabilities, or whose physical or mental abilities have declined with age.²⁷⁰

The Evidence Code facilitates the prosecution of these crimes by providing a hearsay exception for declarations made by elders and dependent adults who are unavailable to testify.²⁷¹ In addition to meeting the unavailability requirements of the Code, the proponent must show that at the time of the criminal proceeding the declarant, if not dead, suffers from the infirmities of aging as manifested by advanced age or organic brain damage or other physical, mental, or emotional dysfunctions that impair the declarant's ability to provide adequately for his or her care and protection.²⁷²

A number of other limitations apply. Pretrial notice by the proponent of the intent to use the declaration is required.²⁷³ The question of the declarant's unavailability must be determined out of the presence of the jury.²⁷⁴ If the accused elects to testify at the hearing as to the admissibility of the declaration, the hearing must be closed to the public,²⁷⁵ and the defendant's testimony may not be used in any other proceeding.²⁷⁶

Only statements made by an elder/dependent adult victim are admissible, and then only if the entire statement has been memorialized in a videotape made by a law enforcement official prior to the death or disabling of the victim.²⁷⁷ The statement must be supported by corroborative evidence.²⁷⁸ In addition, the proponent must persuade the judge that the circumstances attending the making of the statement render it particularly worthy of belief and that the statement was not the result of promise, inducement, threat, or coercion.²⁷⁹ Finally, there must be no evidence that the unavailability of

269. See § 368(g).

270. See *id.*

271. See CAL. EVID. CODE § 1380(a) (West 1995).

272. See § 1380(a)(6)(b).

273. See § 1380(b).

274. See CAL. EVID. CODE § 1380(c).

275. See *id.*

276. See *id.*

277. See § 1380(a)(3).

278. See § 1380(a)(5).

279. See § 1380(a)(1).

the declarant was caused, aided, solicited by, or procured on behalf of the proponent.²⁸⁰

The Rules do not contain an equivalent provision. The need to facilitate prosecutions against victims who suffer from serious age or developmental disabilities justifies the exception. The numerous limitations are designed to ensure reliability. The California rule should be retained.

Y. Dead Man's Statute

California at one time recognized the Dead Man's Statute which prohibited a party who sued on a claim against a decedent's estate from testifying about any matter occurring before the decedent's death. Dissatisfaction with the statute led the Law Revision Commission to recommend repealing the statute. The Code now allows a party to testify to these matters but balances the advantage by creating a hearsay exception for those statements of decedents embracing matter made upon personal knowledge at a time when the matter had been recently perceived and while the decedent's recollection was clear.²⁸¹ The judge may still exclude the statement if it was made under circumstances indicating lack of trustworthiness.²⁸²

The Rules do not contain an equivalent provision. Repeal of the Dead Man's Statute was good policy. The Code provision should be retained.

Z. Proof of Business Records By Affidavit

Ordinarily, the proponent must call a qualified witness to establish the foundation for the introduction of business records. The witness will identify the record as that of a particular entity and will then describe the mode of preparation of those kinds of records, including the time frame for their preparation and the sources of information customarily used in their preparation. The Code contains a number of provisions allowing a party to bypass the necessity of calling the witness by offering instead an affidavit containing the foundational information. The most notable provision allows the use of affidavits in the case of business records which have been subpoenaed.²⁸³ In addition, the Code allows a party to use an affidavit by a qualified technician to

280. See § 1380(a)(2).

281. See CAL. EVID. CODE § 1261 and cmt. (West 1995).

282. See *id.*

283. See CAL. EVID. CODE §§ 1560-1562 (West 1995).

prove the technique used in taking a blood sample.²⁸⁴ It also allows a party to use an employer's income and benefit form in a proceeding to modify or terminate an order for child, family, or spousal support if certain conditions are met.²⁸⁵

The Rules do not contain equivalent hearsay exceptions for these kinds of documents. In the case of the broadest category—business records—production of the custodian can still be compelled in California if the party requesting the records demands the custodian's appearance in the subpoena duces tecum. The California exceptions should be retained.

AA. Records of Conviction

The Code provides a hearsay exception for felony convictions used to impeach a witness.²⁸⁶ The Code also creates a hearsay exception for felony convictions offered in a civil action to prove the conduct underlying the conviction.²⁸⁷ When a party must prove the fact of a conviction, the party may rely on the exceptions for official or business records.²⁸⁸

Sometimes, however, a party (usually the prosecution) must prove as true other matters recited in a conviction record. The Code provides a hearsay exception for recitals in copies of conviction records offered to prove the commission, attempted commission, or solicitation of an offense, service of a prison term, "or other act, condition, or event recorded by the record," if the original meets the foundational requirements of the hearsay exception for official records and the copy meets the certification requirements for writings in the custody of public entities.²⁸⁹

The proliferation of recidivist statutes in California often requires prosecutors to prove facts other than just that of conviction.²⁹⁰ The Code provision attempts to ease the proof of such facts. The Rules have no equivalent. The Code provision should be retained.

284. See CAL. EVID. CODE § 712 (West 1995).

285. See CAL. EVID. CODE § 1567 (West 1995).

286. See CAL. EVID. CODE § 788 (West 1995).

287. See CAL. EVID. CODE § 1300 (West 1995).

288. See CAL. EVID. CODE §§ 1271, 1280 (West 1995).

289. CAL. EVID. CODE § 452(b) (West 1995).

290. See, e.g., CAL. PENAL CODE §§ 667(d)-(e), § 1197.7 (West 1995).

BB. Findings of Death By Federal Employees

The Code provides a hearsay exception for a written finding of death by a federal employee authorized to make such a finding under the Federal Missing Persons Act.²⁹¹ The finding may also include the date, circumstances, and place of the decedent's disappearance.²⁹²

The Federal Rules do not contain an equivalent provision. The Code provision should be retained.

CC. Federal Missing Person Records

The Code creates a hearsay exception for official reports or records prepared by an employee of the United States who is authorized to make such a report or record to prove that a person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, besieged by a hostile force, detained in a foreign country against his or her will, or is dead or alive.²⁹³

The Federal Rules do not contain an equivalent provision. The Code provision should be retained.

DD. Records of Vital Statistics

Both the Code and the Rules create a hearsay exception for records of birth, fetal death, death, or marriage.²⁹⁴ The Rules require only that the record be made to a public office pursuant to the requirements of law.²⁹⁵ Under the Code, the maker must be required by law to file the record in a designated public office, and the record must be made and filed as required by law.²⁹⁶ The difference is probably immaterial.

EE. Statement of Absence of Public Record

The Code creates a hearsay exception for a written statement by a public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record when offered to prove the absence of a record in that office.²⁹⁷ The Rules contain a similar exception but require the written statement to be in

291. See CAL. EVID. CODE § 1282 (West 1995).

292. See *id.*

293. See CAL. EVID. CODE § 1283 (West 1995).

294. See FED. R. EVID. 803(9); CAL. EVID. CODE, § 1281 (West 1995).

295. See FED. R. EVID. 803(9).

296. See CAL. EVID. CODE § 1281.

297. See CAL. EVID. CODE § 1284 (West 1995).

the form of a certificate.²⁹⁸ The Rules allow the proponent to offer testimony in lieu of the certificate.²⁹⁹ The Code does not expressly authorize the use of testimony, but neither does it prohibit its use.

The Rules allow the use of the certificate or testimony to prove the absence of an entry in a public record to prove the nonoccurrence or nonexistence of a matter if such entries were regularly made and preserved by the public office or agency.³⁰⁰ Both the Rules and the Code provide a similar exception for the absence of entries in business records.³⁰¹ The Code should be amended to allow for the proof of the nonoccurrence of an event by the absence of an entry in a public record if such entries were regularly made and preserved by the public office.

FF. Church Records Concerning Family History

Doubts about whether the hearsay exception for business records would cover all of the information customarily included in church records relating family history prompted the Law Revision Commission to recommend a hearsay exception for church records.³⁰² Under the Code, a church record meeting the requirements of the business records exception can be offered to prove a person's birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, and other similar facts of family history.³⁰³ The Rules contain a similar exception.³⁰⁴

GG. Marriage, Baptismal, and Similar Certificates

The Code and the Rules permit the use of marriage, baptismal, and similar certificates to prove the same kinds of facts that can be proved by church records.³⁰⁵ The exception is not limited to certificates issued by religious organizations and includes those issued by public officials who are authorized to issue them.³⁰⁶

298. See FED. R. EVID. 803(10).

299. See *id.*

300. See *id.*

301. See FED. R. EVID. 803(7); CAL. EVID. CODE § 1272 (West 1995).

302. See CAL. EVID. CODE § 1315 cmt. (West 1995).

303. See § 1315.

304. See FED. R. EVID. 803(11).

305. See FED. R. EVID. 803(12); CAL. EVID. CODE § 1316 (West 1995).

306. See *id.*

HH. Entries in Family Records

The Code and the Rules allow the use of entries in family Bibles and charts, as well as engravings on rings, family portraits, urns, crypts, tombstones, and the like to prove the same kinds of facts that can be proved by church records.³⁰⁷ The Code differs from the Federal Rule in that it includes a nonexclusive list of the kinds of family facts that can be proved under the exception.³⁰⁸ The Advisory Committee views the Federal Rule as substantially identical to the Code provision.³⁰⁹

II. Recitals in Writings Affecting Property

The Code and Rules create a hearsay exception for recitals in dispositive instruments, such as wills and conveyances.³¹⁰ To be admissible under the exception, the statements in the recitals must be germane to the purpose of the instrument, and the dealings with the property must have been consistent with the instrument.³¹¹

JJ. Records of Documents Affecting an Interest in Property

The Rules create an exception for the record of a document purporting to establish or affect an interest in property when offered as proof of (1) the content of the original document and (2) its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.³¹² The Advisory Committee explains that the exception is needed to overcome the lack of firsthand knowledge by the recorder when the record is offered as proof of execution and delivery.³¹³

The Code does not contain a similar exception. Its need in California is undetermined.

KK. Recitals in Ancient Writings

The Code and the Rules provide a hearsay exception for statements in ancient writings.³¹⁴ The California exception is more stringent. The writing must be more than thirty years old, as opposed to no

307. See FED. R. EVID. 803(13); CAL. EVID. CODE § 1312 (West 1995).

308. See CAL. EVID. CODE § 1312.

309. See FED. R. EVID. 803(13) advisory committee's note.

310. See FED. R. EVID. 803(15); CAL. EVID. CODE § 1330 (West 1995).

311. See *id.*

312. See FED. R. EVID. 803(14).

313. See *id.* advisory committee's note.

314. See FED. R. EVID. 803(16); CAL. EVID. CODE § 1331 (West 1995).

less than twenty years under the Rules, and the proponent must show that the statement has been generally acted upon as true by persons having an interest in the matter.³¹⁵

In California, the age of the document alone is an insufficient guarantee of trustworthiness to justify the exception. The California provision should be retained.

LL. Commercial Publications

The Federal Rules create a hearsay exception for market quotations, tabulations, lists, directories, and other published compilations used and relied upon by the public or by persons in particular occupations.³¹⁶ California provides a more limited exception. It excludes opinions and does not expressly include market quotations.³¹⁷ The federal requirement of reliance by persons in particular occupations is probably the equivalent of the California requirement of reliance by a business as defined by in the hearsay exception for business records.³¹⁸ Reliance by a "business," however, has been construed to include reliance by the public.³¹⁹

Reliance by the public or segments of it and the motivation of the compiler to foster reliance by being accurate justify the exception.³²⁰

MM. Statements in Learned Treatises

Statements in books of science, art, and history often coincide with the kinds of statements that should be offered by experts who are subject to cross-examination. Receiving these statements under a hearsay exception can deprive the opponent of the opportunity to test their validity through cross-examination. Accordingly, the Code exception for statements in learned treatises is limited to those statements made by persons who are indifferent between the parties, when offered to prove facts of general notoriety and interest.³²¹

The general notoriety requirement has been narrowly construed to include only facts that are not subject to dispute.³²² Such facts in-

315. See CAL. EVID. CODE § 1331.

316. See FED. R. EVID. 803(17).

317. See CAL. EVID. CODE § 1340 (West 1995).

318. See *id.*

319. In re Michael G., 24 Cal. Rptr. 2d 260, 262 (Ct. App. 1993).

320. See FED. R. EVID. 803(17) advisory committee's note.

321. See CAL. EVID. CODE § 1341.

322. See *Gallagher v. Market St. R.R. Co.*, 6 P. 869 (1885). Although *Gallagher* was decided eighty years before the adoption of the Code, it construed a provision virtually identical with section 1341.

clude definitions found in dictionaries, life expectancies found in actuarial tables, information found in tables of weights and measures, and information found in currency, annuity, and interest tables.³²³ Facts of general notoriety do not include statements in medical treatises, as "medicine is not considered one of the exact sciences."³²⁴ Medicine is, instead, the kind of field in which knowledge changes; consequently, "if [medical] treatises were to be held admissible, the question at issue might be tried, not by testimony, but upon excerpts from works presenting partial views of variant and perhaps contradictory theories."³²⁵

The fact that experts can be cross-examined about the content of learned treatises does not affect the limitations on the admissibility of statements in such works. Under the Code, expert witnesses, including medical experts, may be cross-examined about the content or tenor of any scientific journal or treatise if one of three conditions is satisfied: (1) the expert referred to, considered, or relied upon the publication in arriving at or in forming the expert opinion; (2) the publication has been admitted in evidence; or (3) the publication has been established as a reliable authority by the testimony or admission of the expert or another expert, or by judicial notice.³²⁶ But the right to conduct such a cross-examination does not mean that the portion of the publication used is in evidence for the truth of the matter stated.³²⁷ The pertinent statements may not be read to the jury for the truth of the matter stated unless the publication has been admitted or qualifies for admission under a hearsay exception, such as the one for learned treatises.³²⁸

The Federal Rules take a more generous approach to the admissibility of information contained in learned treatises. There, statements contained in such treatises (including medical ones) may be admitted for the truth of the matter asserted if (1) such statements are established as reliable authority by expert testimony or judicial notice, and (2) the treatise was relied upon by an expert witness on direct examination or was called to the expert's attention on cross-examination.³²⁹ Thus, when a treatise has been established as authoritative, appropriate passages may be offered in evidence so long as an expert is on the

323. *See id.* at 871.

324. *Id.*

325. *Id.* at 872.

326. *See* CAL. EVID. CODE § 721(b) (West 1995).

327. *See id.* cmt.

328. *See* § 721(b).

329. *See* FED. R. EVID. 803(18).

stand and available to explain and assist in applying the treatise.³³⁰ If admitted, the passages may be read into evidence but may not be received as exhibits.³³¹ This limitation is designed "to prevent jurors from overvaluing the written word and from roaming at large through the treatise thereby forming conclusions not subjected to expert explanation and assistance."³³²

In federal court, the cross-examiner does not have to show that the expert relied on the treatise. The Rules thus avoid the possibility that the outset the expert might block cross-examination at the outset by refusing to concede reliance on the treatise.³³³

The concerns giving rise to the California limitations on the use of statements in learned treatises appear to be taken into account fully by the more generous and practical treatment accorded such statements by the Federal Rule. Consideration should be given to replacing the California provision with the Federal Rule.

NN. Reputation Concerning Character

A reputation witness does not necessarily offer an out of court statement for the truth of the matter stated. Instead, the reputation witness offers a conclusion about whether an individual enjoys a particular reputation based on what the witness has heard others say or not say about the conduct at issue. The classic example is the testimony of a qualified witness who states that another witness's reputation for truth and veracity is good or poor. Although the purpose of the offer is to prove that the other witness has the kind of character the witness is reputed to have, the reputation witness is not asked on direct examination to repeat what he or she overheard others say about the other witness. But because the reputation witness's conclusion is based on what the witness has heard others say, the Code and the Rules resolve doubts about the hearsay status of reputation evidence by creating an exception.³³⁴ Both permit the conclusion to be based on what associates or community members say or do not say about the pertinent character trait.³³⁵

The differences between the California and federal provisions are not material. California, however, emphasizes that reputation among

330. *See id.* advisory committee's note.

331. *See* FED. R. EVID. 803(18).

332. MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803.18 (3d ed. 1991).

333. *See* FED. R. EVID. 803(18) advisory committee's note.

334. *See* FED. R. EVID. 803(21); CAL. EVID. CODE § 1324 (West 1995).

335. *Id.*

associates should be limited to those with whom a person habitually associates.³³⁶

OO. Reputation Concerning Family History

The Rules create a hearsay exception for reputation concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, ancestry, or other similar fact of personal or family history.³³⁷ The reputation can be based on what family members, associates, or community members say about the pertinent personal or family fact.³³⁸

The Code, on the other hand, has two separate provisions: one relates to reputation among family members,³³⁹ and the other to reputation among community residents.³⁴⁰ Reputation among community residents is limited to the date of birth or fact of birth, marriage, divorce, or death of a person.³⁴¹ Reputation among associates is not expressly included under either provision.

PP. Reputation Concerning Boundaries

The Code and the Rules create a hearsay exception for reputation in a community concerning boundaries of or customs affecting land in the community provided the reputation arose before the controversy.³⁴² The provisions are substantially identical.

QQ. Reputation Concerning Community History

The Code and the Rules create a hearsay exception for reputation concerning an event of general history important to the community, state or nation in which the event took place.³⁴³ The provisions are substantially identical.

RR. Reputation Concerning Public Interest in Property

The Code, but not the Rules, creates a hearsay exception for reputation in a community concerning the interest of the public in property in the community if the reputation arose before the

336. See CAL. EVID. CODE § 1324.

337. See FED. R. EVID. 803(3).

338. *Id.*

339. See CAL. EVID. CODE § 1313 (West 1995).

340. See CAL. EVID. CODE § 1314 (West 1995).

341. *Id.*

342. See FED. R. EVID. 803(20); CAL. EVID. CODE § 1322 (West 1995).

343. See FED. R. EVID. 802(20); CAL. EVID. CODE § 1320 (West 1995).

controversy.³⁴⁴ The California provision was designed to codify existing law.³⁴⁵

SS. Statements Concerning Boundaries

The Code, but not the Rules, creates a hearsay exception for statements concerning the boundary of land if the declarant is unavailable to testify and had sufficient knowledge of the subject.³⁴⁶ The judge is expressly empowered to exclude the statement if it was made under circumstances indicating a lack of trustworthiness.³⁴⁷ The California provision was designed to codify existing law.³⁴⁸

TT. Judgments Concerning Personal, Family, or General History, or Boundaries

The Rules create a hearsay exception for judgments when offered as proof of matters of personal history, family or general history, or boundaries, essential to the judgment, if those matters would be provable by evidence of reputation.³⁴⁹ The federal provision is justified by the belief that judgments offered for these purposes are as reliable as reputation evidence offered for the same purposes. The Rules create a hearsay exception for reputation evidence offered to prove such matters.³⁵⁰

California does not have an equivalent provision.

UU. Statements Concerning a Declarant's Own Family History

The Code and the Rules create an exception for statements concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, ancestry, race, or other similar fact of family history, even though the declarant had no means of acquiring personal knowledge of the matter stated, if the declarant is unavailable to testify.³⁵¹ The California provision expressly authorizes the judge to exclude the declaration if made under circumstances indicating lack of trustworthiness.³⁵² Accordingly, the declarant's motive to tell the truth or lie goes to admissibility, not just weight.

344. See CAL. EVID. CODE § 1321 (West 1995).

345. See *id.* cmt.

346. See CAL. EVID. CODE § 1323 (West 1995).

347. See *id.*

348. See *id.* cmt.

349. See FED. R. EVID. 803(23).

350. See FED. R. EVID. 803(19)-(20).

351. See FED. R. EVID. 804(4)(A); CAL. EVID. CODE § 1310 (West 1995).

352. See CAL. EVID. CODE § 1310.

The California provision should be retained.

VV. Statements Concerning the Family History of Another

The Code and the Rules create a hearsay exception for statements concerning the birth, adoption, marriage, divorce, legitimacy, relationship by blood, ancestry, race, death or other similar fact of family history of another person, if the declarant is unavailable to testify and the declarant was related by blood or marriage, or was so intimately associated with the other person's family as to be likely to have accurate information about the matter declared.³⁵³ In California, the proponent must also show that the declarant made the statement upon information received from the other person, or from a person related by blood or marriage to the other person, or upon repute in the other person's family.³⁵⁴

A California judge can exclude the statement if made under circumstances indicating lack of trustworthiness.³⁵⁵ The California provision should be retained.

WW. Hearsay Offered at Preliminary Hearings

As a result of Proposition 115,³⁵⁶ hearsay may now be received for the truth of the matter stated at California preliminary hearings if offered under Penal Code Section 872.³⁵⁷ This provision allows a magistrate to base a probable cause finding in whole or in part upon the sworn testimony of a law enforcement officer relating out of court statements.³⁵⁸ Prior to the initiative, the use of hearsay at preliminary hearings was subject to the Evidence Code.

The Federal Rules of Evidence do not apply to federal preliminary examinations.³⁵⁹ The California provision should be retained.

353. See CAL. EVID. CODE § 1311; 803(4)(B) (West 1995).

354. See CAL. EVID. CODE § 1311.

355. See *id.*

356. See Crime Victims Justice Reform Act, Initiative Measure Proposition 115 (approved June 5, 1990) (codified at CAL. CONST. art. I, §§ 14.1, 24, 29, 30; CAL. CIV. PROC. CODE §§ 223, 223.5 (West Supp. 1998); CAL. EVID. CODE § 1203.1 (West 1995); CAL. PENAL CODE §§ 189, 190.2, 190.41, 190.5, 206, 206.1, 859, 866, 871.6, 872, 954.1, 987.05, 1049.5, 1050.1, 1054, 1054.1, 1054.2, 1054.3, 1054.4, 1054.5, 1054.6, 1054.7, 1102.5, 1102.7, 1385.1, 1430, 1511 (West Supp. 1998)).

357. See CAL. EVID. CODE § 1203.1.

358. See CAL. PENAL CODE § 872.

359. See FED. R. EVID. 1101(d)(3).

XX. Residual Exception

The Rules empower the trial judge to fashion new hearsay exceptions for statements not covered by the Rules "but having equivalent circumstantial guarantees of trustworthiness" if the proponent meets certain conditions.³⁶⁰ These include requirements that the statement be probative of a material fact, be more probative of the point for which it is offered than any other available evidence which the proponent can obtain through reasonable efforts, and best serve the interests of justice.³⁶¹ This innovative approach to the hearsay exceptions was prompted by an unwillingness "to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system."³⁶²

The Code does not create a closed system either. Under the Code, exceptions to the hearsay rule may be found either in statutes or in decisional law.³⁶³ But, unlike the Federal Rules, the Code does not empower trial judges to craft an exception for evidence offered in the case being tried. The Code, however, does not strip judges of their common law power to create new exceptions for classes of evidence for which there is a substantial need and which possess such intrinsic reliability as to enable the exceptions to surmount constitutional and other objections that generally apply to hearsay.³⁶⁴

YY. Hearsay and Confrontation

The right of the accused to confront their accusers places some limits on the use of hearsay against criminal defendants. The Code recognizes that hearsay that satisfies the requirements of an exception may nonetheless be excluded if receiving it would violate a defendant's federal and state constitutional rights.³⁶⁵ The Federal Rules do not contain an equivalent provision, as none is necessary to exclude evidence that is inadmissible on constitutional grounds.

360. FED. R. EVID. 807.

361. *See id.*

362. FED. R. EVID. 803(24) advisory committee's note.

363. *See* CAL. EVID. CODE § 1200 cmt. Adoption of the Code did not repeal by implication any other statute relating to hearsay evidence. *See* CAL. EVID. CODE § 1205 (West 1995).

364. *See In re Cindy L.*, 947 P.2d 1340, 1348 (Cal. 1997).

365. *See* CAL. EVID. CODE § 1204 (West 1995).

ZZ. Multiple Hearsay

The Code and the Rules provide that hearsay within hearsay is admissible if each hearsay declaration meets the requirements of an exception.³⁶⁶

IV. Cross-examination of the Hearsay Declarant

When a hearsay declaration is received under an exception, the hearsay declarant in effect has testified even though the declarant may not have appeared as a witness. The jurors, after all, are entitled to consider the hearsay declaration for the truth of the matter asserted. As a rule, then, both the Code and the Federal Rules permit the party opposing the hearsay declaration to impeach the hearsay declarant in the same manner as if the declarant had appeared and testified.³⁶⁷

In the case of declarants who do testify, any statements they have made that are inconsistent with their testimony can be offered to impeach them. Moreover, in California their statements can be offered to prove the truth of the matters stated so long as the declarants are given an opportunity to explain or deny their statements under oath and in the presence of the fact finder before the close of the evidence.³⁶⁸ But when the "witness" to be impeached is a hearsay declarant who does not appear as a witness, two problems arise when the impeaching party seeks to discredit the declarant with statements by the declarant that are inconsistent with the hearsay declaration that has been received in evidence.

One is that the inconsistent statement may not be a *prior* inconsistent statement but must be a *subsequent* one: the declarant may have made the inconsistent statement after making the hearsay declaration that was received in evidence. Both the Code and the Rules nonetheless allow the impeaching party to use the statement.³⁶⁹ Since the declarant did not appear as a witness, the impeaching party did not have an opportunity to examine the declarant about the nature or the circumstances surrounding the making of the hearsay declaration.

366. See FED. R. EVID. 805; CAL. EVID. CODE § 1201 (West 1995).

367. See FED. R. EVID. 806; CAL. EVID. CODE § 1202 (West 1995).

368. The Federal Rules impose additional limits on inconsistent statements offered for the truth of the matter asserted. The statement must be made under oath in some kind of proceeding. See FED. R. EVID. 801(d)(1)(A).

369. See FED. R. EVID. 806; CAL. EVID. CODE § 1202. The impeaching party, however, must be the party against whom the hearsay declaration was offered, *People v. Beyea*, 113 Cal.Rptr. 254, 264 (Ct. App.1974), even though § 1202 does not contain such a limitation and § 785 allows the calling party to impeach his own witnesses.

Therefore, the Code and the Rules recognize that fairness requires allowing the impeaching party to use the inconsistent statement even if the declarant made the statement after making the hearsay declaration that has been received in evidence.

The other problem concerns the interests of the party who offered the hearsay declaration in the first place. When, as in the example, the hearsay declarant does not appear as a witness, the proponent of the hearsay declaration is deprived of an opportunity to have the declarant explain or deny the inconsistent statement attributed by the opponent's witnesses to the declarant. Under the rules governing the use of conventional inconsistent statements, the absence of such an opportunity would be fatal to the introduction of the inconsistent statement.³⁷⁰ But that is not the case when the inconsistent statement is offered to impeach a hearsay declarant. Since the proponent has benefited from the introduction of the absent declarant's hearsay declaration, the opponent will be permitted to use the inconsistent statement even though the proponent may be deprived of the opportunity to have the declarant explain or deny the inconsistent statement.³⁷¹ Under the Code, however, the proponent is entitled to some consolation: unless the impeaching statement falls within a recognized exception to the hearsay rule, the inconsistent statement may be received only for impeachment and not for the truth of the matter stated.³⁷² The Federal Rules are silent on this point. But one can expect the same outcome. Unless the inconsistent statement falls within a recognized exception or exemption to the federal hearsay rule, the statement may be received only to impeach the hearsay declarant.

Although the Code and the Rules focus on the use of inconsistent statements to impeach the hearsay declarant, both permit the use of any impeaching evidence that would have been admissible if the declarant had appeared and testified.³⁷³ Both also allow the credibility of the hearsay declarant to be supported by any evidence that would have been admissible for that purpose if the declarant had testified as a witness.³⁷⁴ Further, they both permit the party opposing the hearsay declaration to call and examine the declarant as if under cross-exami-

370. See FED. R. EVID. 613(b); CAL. EVID. CODE § 770 (West 1995).

371. See FED. R. EVID. 806; CAL. EVID. CODE § 1202.

372. See CAL. EVID. CODE § 1202 and cmt.

373. See FED. R. EVID. 806; CAL. EVID. CODE § 1202; *see, e.g.*, *People v. Stevenson*, 145 Cal. Rptr. 301, 309 (Cl. App. 1978) (the party opposing the hearsay statement may impeach the hearsay declarant with a felony conviction involving dishonesty); *Accord* *People v. Jacobs*, 93 Cal. Rptr. 2d 783, 789 (Cl. 2000).

374. See CAL. EVID. CODE § 1202.

nation.³⁷⁵ The Code, however, does not permit the use of leading questions if the hearsay declarant is a party, a person identified with a party, or a witness who has testified in the action concerning the subject matter.³⁷⁶

The California provision is more comprehensive than the Federal Rule and should be retained.

375. See FED. R. EVID. 806; CAL. EVID. CODE § 1203 (West 1995).

376. See CAL. EVID. CODE § 1203.