RESOLUTION 03-01-2020

DIGEST
Criminal and SVP Evidence: Police Reports Not Admissible as Business or Official Records
Amends Evidence Code sections 1271 and 1280 to prevent the use of the business and official record hearsay exceptions to admit police reports in criminal and sexually violent predator cases.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Evidence Code sections 1271 and 1280 to prevent the use of the business and official record hearsay exceptions to admit police reports in criminal and sexually violent predator cases. This resolution should be disapproved because it would not effectively restrict admission of police reports, and would impose unintended limits on the defense's use of reports.

Police reports constitute hearsay. (*Lake v. Reed* (1997) 16 Cal.4th 448, 461.) However, they often qualify for the official record hearsay exception, at least to the extent the information contained in a report was observed by the officer who wrote the report. (See *id.*; *Coe v. City of San Diego* (2016) 3 Cal.App.5th 772, 788.) Older cases held that police reports could also qualify for the business record exception. (See, e.g., *Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114, 126.) More recent cases have called those holdings into doubt. (See *People v. McVey* (2018) 24 Cal.App.5th 405, 415-416 ["[a]s a general rule, police reports do not fall under the business records exception."; citing *People v. Sanchez* (2016) 63 Cal.4th 665, 695, fn. 21].)

In criminal prosecutions, police reports typically are not admitted into evidence against the defendant, even if they otherwise qualify for a hearsay exception, because the Confrontation Clause of the Sixth Amendment to the United States Constitution bars the admission of so-called "testimonial hearsay." (*Crawford v. Washington* (2004) 541 U.S. 36, 68 [testimonial hearsay violates Confrontation Clause regardless of common law hearsay exceptions]; *Sanchez, supra*, 63 Cal.4th at pp. 694-695 [police reports constitute testimonial hearsay].) But the Sixth Amendment applies only to criminal prosecutions, and thus *Crawford* does not extend to civil commitment proceedings under the sexually violent predator law. (Health and Safety Code section 6600 et seq.; *People v. Angulo* (2005) 129 Cal.App.4th 1349, 1367-1368.) Also, within a criminal prosecution, the confrontation right does not apply to preliminary hearings to determine probable cause in felony cases (*Whitman v. Super. Ct.* (1991) 54 Cal.3d 1063, 1081); motions to suppress (*People v. Martinez* (2005) 132 Cal.App.4th 233, 242); non-capital sentencing hearings (*People v. Arbuckle* (1978) 22 Cal.3d 749, 754); and may not apply to hearings on competency to stand trial (*People v. Perry* (Cal.App. March 17, 2008) 2008 WL 698924 (unpub)). Nor does *Crawford* apply to non-prosecution proceedings involving a criminal defendant, such as probation or parole revocation hearings or petitions for resentencing. (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411 [probation revocation]; *Morrissey v. Brewer* (1972) 408 U.S. 471, 480 [parole revocation]; *People v. Hall* (2019) 39 Cal.App. 5th 831, 844 [resentencing during

probation or redesignation after probation].) In such proceedings, the admissibility of a police report is governed by the hearsay rule, as well as rules specific to certain proceedings.

This resolution would amend the business and official record hearsay exceptions to provide that they would not apply to police reports in a "criminal case or civil commitment pursuant to the Penal Code or Welfare and Institutions Code section 6600 et seq." This language would prevent the use of these hearsay exceptions for the introduction of police reports in sexually violent predator civil commitment proceedings to prove either mental disorder or likelihood of future predatory acts. However, police reports cannot be admitted in civil commitment proceedings for these purposes under current law, because both determinations require opinions of mental health experts. (*People v. Burroughs* (2016) 6 Cal.App.5th 378, 402.) The resolution would not prevent the admission of police reports for the purpose of proving the details of the underlying convictions—the most likely use for police reports in these cases—because they would still be admissible under Health and Safety Code section 6600, subdivision (a)(3). (*Id.* at p. 410.)

In a criminal prosecution, police reports are already inadmissible in preliminary hearings (*People v. Superior Court (Couthren)* (2019) 41 Cal.App.5th 1001, 1018), in hearings on motions to suppress (*People v. Johnson* (2006) 38 Cal.4th 717, 723), and against the defendant at trial (*Crawford*, *supra*, 541 U.S. at p. 68; *Sanchez*, *supra*, 63 Cal.4th at pp. 694-695.) This resolution would extend these limitations to competency hearings (*cf. Perry*, *supra*, 2008 WL 698924) and sentencing hearings (*cf. People v. Dyas* (1979) 100 Cal.App.3d 464, 469), and would prohibit a criminal defendant from using the business or official record exceptions to introduce a police report into evidence at trial. It would not, however, apply to post-sentence redesignation proceedings such as the one in *Hall* (cited in the resolution), for three reasons. First, the resolution applies only to "criminal cases," which extend through the end of a period of probation or parole, but not after a sentence or probation has been completed. (See *People v. Fin. Cas. & Sur., Inc.* (2018) 18 Cal.App.5th 1183, 1190 [probation]; *Bontilao v. Super. Ct.* (2019) 37 Cal.App.5th 980, 999 [parole]). Second, the resolution applies only to criminal cases "pursuant to the Penal Code," and thus would not extend to the drug crimes covered by the Health and Safety Code at issue in *Hall* (or to crimes listed under other codes). Third, more broadly, the resolution would not preclude the admission of police reports in *any* probation or parole revocation, resentencing, or redesignation proceedings, because hearsay evidence is admissible in such proceedings even in the absence of a specific hearsay exception, so long as it is deemed "reliable." (*People v. Maki* (1985) 39 Cal.3d 707, 709 [probation revocation]; *In re Miller* (2006) 145 Cal.App.4th 1228, 1235 [parole revocation]; *People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095 [resentencing]; *Hall*, *supra*, 39 Cal.App.5th at p. 845 [redesignation].)

This resolution would not broaden the prohibition on using police reports. In sexually violent predator proceedings, it would not prevent the use of police reports on the only topic for which they are likely to be offered. In criminal cases, the resolution is unnecessary for preliminary hearings, hearings on motions to suppress, or trial, and would not prevent the use of police reports in probation or parole revocation, resentencing, or redesignation hearings, or in any proceedings on crimes not listed in the Penal Code. Moreover, the resolution would hamper defendants in admitting police reports when it is to their advantage.

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Evidence Code sections 1271 and 1280, to read as follows:

§ 1271

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made in the regular course of a business, but not including, in a criminal case or civil commitment pursuant to the Penal Code or Welfare and Institutions Code section 6600 et seq, a police report;

(b) The writing was made at or near the time of the act, condition, or event;

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

§ 1280

Evidence of a writing made as 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 all of the following applies:

(a) The writing was made by and within the scope of duty of a public employee, but not including, in a criminal case or civil commitment pursuant to the Penal Code or Welfare and Institutions Code section 6600 et seq, a police report.

(b) The writing was made at or near the time of the act, condition, or event.

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Police reports have always been considered hearsay, not subject to an exception. This has been confirmed by the United States Supreme Court (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305) and the California Supreme Court (*People v. Sanchez* (2016) 63 Cal.4th 665), which have rejected claims that police reports constitute business/official records, because they are prepared in anticipation of litigation.

Despite this, there are cases outside of the criminal context – DMV context specifically – saying that if the police report memorializes what the officers themselves actually observed, it qualifies as an official record. (*McNary v. Department of Motor Vehicles* (1996) 45 Cal.App.4th 688; *Gananian v. Zolin* (1995) 33 Cal.App.4th 634.)

Recently, in *People v. Hall* (2019) 39 Cal.App.5th 831 – a criminal case – the court cited *Gananian v. Zolin* for the proposition that arrest reports are admissible "to the extent they fall within the official records exception to the hearsay rule." (*Id.* at 842-843.)

This flies in the face of not only all jurisprudence to the contrary, but all common sense. Through the advent of body-worn video, we've seen example after example of police reports that do NOT accurately reflect what occurred. A police report is completely different from a medical record, a supermarket receipt, a phone record, or a court minute order, to name a few. They are not objective documents, particularly when offered against a defendant in a criminal case.

The Solution: This resolution would bring the California rules of evidence in line with the Federal Rules of Evidence, under which records of matters observed by law enforcement personnel do not qualify as official records in criminal cases. This resolution explicitly extends that exception to quasi-criminal (i.e. civil commitment) cases as well, since they are more akin to a criminal case than a DMV hearing. It is otherwise narrower than the federal exception because it applies only to documentary evidence and does not limit real evidence (e.g. video and audio recordings) that is otherwise admissible.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

SDCBA

The SDCBA Delegation recommends Disapproval of Resolution 03-01-2020. The long-standing evidentiary rules governing business and official records should not be amended without a compelling rationale. The Statement of Reasons identifies no situation or circumstance where the interests of justice would be served by this amendment.

The reliance on *People v. Hall*, (2019) 39 Cal. App.5th 831, is misplaced. The *Hall* decision held that limited hearsay evidence is admissible in a few evidentiary proceedings that **are not criminal trials**, for instance, when a felon like Mr. Hall asks a trial court to reduce his prior felony conviction to a misdemeanor under newly enacted Proposition 64. (*Id.* at pp. 837-838.) Thus, the *Hall* court did not permit hearsay in a police report to be "offered against a defendant in a criminal case." Nor did the decision defy "all jurisprudence to the contrary" or "common sense." First, *Hall* comports with other legal precedent preventing a prosecutor from using hearsay statements in police reports at a criminal trial (i.e., *People v. Sanchez* (2016) 63 Cal.4th 665, cited by the proponent.) Second, the Hall decision makes good sense. Mr. Hall pled guilty

to transporting drugs for the purposes of sale, a felony, in 1996. Nearly 20 years later, he petitioned the trial court to dismiss his felony. It is not likely that the law enforcement officers were still employed by the same agency, or even still alive, two decades later. Thus, the trial court relied on a probation report to determine the facts of Mr. Hall's case and, based on that report, reduced his conviction to a misdemeanor.

The proposed change will likely result in a variety of unintended consequences that hurt the interests of justice. Trial courts may hesitate, for example, to allow the admission of Computer-Aided Dispatch (CAD) logs used to authenticate 911 calls. 911 operators, who are employees of the police department, create these logs when answering emergency calls. The logs must be admitted for the jury to listen to a 911 call. Where the victim cannot testify, such as in a homicide case, 911 evidence is crucial to giving the jury a fair and accurate picture of the evidence. CAD logs are also routinely introduced during domestic violence trials, where the defendants threaten the victims to prevent them from testifying. This proposed amendment could have a disparate impact on abused women and children. Another example exists of police documentation that may and should be admissible during criminal trials under the business-records exception: Sex Registration logs used to document when registrants comply with their reporting obligations. These logs are crucial to proving when dangerous sexual offenders ignore the requirements of their parole or probation or to validate the individuals in compliance.

The evidentiary rules governing business and official records should not be amended absent a compelling justification. The Statement of Reasons has provided none.

RESOLUTION 03-02-2020

DIGEST
Outdated Evidence Code: Updating Section Reference
Amends Evidence Code sections 996 and 1016 to remove and replace language referencing an outdated Code of Civil Procedure section.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Evidence Code sections 996 and 1016 to remove and replace language referencing an outdated Code of Civil Procedure section. This resolution should be approved in principle because the Code of Civil Procedure sections currently referenced in these Evidence Code sections no longer exist and the proposed language corrects the reference error.

Under current law, Evidence Code sections 996 and 1016 both refer to Code of Civil Procedure section 377. Code of Civil Procedure section 377 was removed in 1992 and replaced by Code of Civil Procedure sections 377.10 through 377.62. This resolution corrects this outdated reference.

Therefore, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Evidence Code section 996 and 1016, to read as follows:

§ 996

There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient;

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or

(d) The plaintiff in an action brought under Sections 376 or ~~377~~ 377.10 to 377.62 of the Code of Civil Procedure for damages for the injury or death of the patient.

§ 1016

There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient;

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or

(d) The plaintiff in an action brought under Sections 376 or ~~377~~ 377.10 to 377.62 of the Code of Civil Procedure for damages for the injury or death of the patient

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: This is a housekeeping measure. Evidence Code sections 996 and 1016, which pertain to exceptions to the physician-patient and psychotherapist-patient privileges, currently refer to Code of Civil Procedure section 377, which has been repealed. Evidence Code sections 996 and 1016 were enacted in 1965, and Cod of Civil Procedure sections 377.10 - 377.62 were enacted to replace Code of Civil Procedure section 377 in 1992. It appears that the 1992 changes to the Code of Civil Procedure, replacing section 377 with sections 377.10 - 377.62, have not been reconciled with the referring statutes in the Evidence Code.

The Solution: This Resolution replaces references to Code of Civil Procedure section 377 in Evidence Code sections 996 and 1016 with references to Code of Civil Procedure sections 377.10 - 377.62.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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