

**RESOLUTION 03-01-2020**

**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:

1 § 1271

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

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

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

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

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

12

13 § 1280

14 Evidence of a writing made as a record of an act, condition, or event is not made  
15 inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the  
16 act, condition, or event if all of the following applies:

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

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

21 (c) The sources of information and method and time of preparation were such as to  
22 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.

#### **AUTHOR AND/OR PERMANENT CONTACT:**

Lara Kislinger, phone (213) 893-9797, e-mail [lkislinger@pubdef.lacounty.gov](mailto:lkislinger@pubdef.lacounty.gov)

**RESPONSIBLE FLOOR DELEGATE:** Lara Kislinger

**RESOLUTION 03-02-2020 - CORRECTED**

**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:

1 § 996

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

4           (a) The patient;

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

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

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

10

11 § 1016

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

14           (a) The patient;

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

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

18           (d) The plaintiff in an action brought under Sections 376 or ~~377~~ 377.10 to 377.62 of the  
19 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 Code 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.

**AUTHOR AND/OR PERMANENT CONTACT:**

D. Robert Dieringer, 402 West Broadway, Suite 1950, San Diego, CA 92101; phone: 619-831-6984; fax: 619-239-7800; email: rdieringer@gbflawyers.com

**RESPONSIBLE FLOOR DELEGATE:** D. Robert Dieringer