

# 1 California Evidence (5th), Hearsay

## I. IN GENERAL

A. [§1] Reasons for Exclusion.

B. [§2] Evidence Code.

C. [§3] Federal and Uniform Rules.

### D. Nature and Scope of Rule.

1. [§4] Statement of Rule.

2. [§5] Statement Must Be Offered To Prove Truth.

3. [§6] Multiple Hearsay.

4. [§7] Assertive Conduct.

5. [§8] Other Exclusionary Rules and Impeachment.

6. [§9] Analysis of Hearsay Problem.

### E. Illustrations of Inadmissible Hearsay.

1. Self-Serving Statements.

(a) [§10] In General.

(b) [§11] Statements in Judicial Proceedings.

2. [§12] Reports and Similar Writings.

3. [§13] Court's Interlocutory Order.

4. [§14] Proceedings at Coroner's Inquest.

5. [§15] Invoice, Bill, and Receipt.

6. [§16] Recording of Nonparty's Statement.

7. [§17] Hearsay Introduced by Cross-Examination or Redirect.

### F. Unavailable as a Witness.

1. [§18] In General.

2. Privilege.

(a) [§19] Statutory Rule and Distinction.

(b) [§20] Privilege Against Self-Incrimination.

(c) [§21] Self-Incrimination Privilege Invoked Because of Fear of Perjury Prosecution.

3. [§22] Death, Insanity, or Illness.

4. [§23] Contumacious Witness.

5. [§24] Witness Afraid for Safety.

6. [§25] Witness Killed or Kidnaped.

7. [§26] Witness Victim of Wrongdoing.

8. [§27] Elder or Dependent Witness.

9. Absence.

(a) [§28] Statutory Rules.

(b) [§29] Witness Out of Jurisdiction.

(c) [§30] Diligent Search for Witness.

(d) [§31] When Search for Witness Should Begin.

## II. STATEMENTS NOT WITHIN THE RULE

### A. Words That Are Part of Issue.

1. [§32] General Principle.

2. Illustrations: Civil Cases.

(a) [§33] Formation of Contract or Novation.

- (b) [§34] Defamation or Deceit.
- (c) [§35] Other Examples.
- 3. [§36] Illustrations: Criminal Cases.

**B. Statements That Are Relevant as Circumstantial Evidence.**

- 1. [§37] In General.
- 2. Evidence of Mental State of Declarant.
  - (a) [§38] Inference as to Belief, Intent, or Motive.
  - (b) [§39] Civil Cases.
  - (c) [§40] Criminal Cases.
- 3. Evidence of Mental State of Recipient.
  - (a) [§41] In General.
  - (b) [§42] Knowledge.
  - (c) Belief.
    - (1) [§43] Civil Cases.
    - (2) [§44] Criminal Cases.
  - (d) Good Faith or Reasonableness of Conduct.
    - (1) [§45] Civil Cases.
    - (2) [§46] Criminal Cases.

**C. Nonassertive Conduct.**

- 1. [§47] Nature of Problem.
- 2. [§48] Uniform Rules and Evidence Code.
- 3. [§49] Proof of Bookmaking.
- 4. [§50] Proof of Selling Illegal Drugs.

**D. [§51] Statements Admitted To Provide Context.**

**III. EXCEPTIONS TO THE RULE**

**A. Confession of Defendant.**

- 1. In General.
  - (a) [§52] Nature and Admissibility.
  - (b) Exclusionary Rules.
    - (1) [§53] Theories and Grounds.
    - (2) [§54] Incapacity of Defendant.
    - (3) [§55] Involuntary Confession.
    - (4) [§56] Evidence Obtained Through Involuntary Confession.
    - (5) [§57] Distinction: Voluntary Second Confession.
  - (c) Limiting Rules.
    - (1) [§58] Standing To Challenge Admission of Third Party's Statement.
    - (2) [§59] Voluntary False Confession.
    - (3) Confession of Codefendant.
      - (aa) [§60] In General.
      - (bb) [§61] Editing of Confession.
      - (cc) [§62] Interlocking Confessions.
      - (dd) [§63] Improper Substantive Use Against Defendant.
    - (d) [§64] Confession of Accomplice Offered for Nonhearsay Purpose.
- 2. Involuntary Confessions.
  - (a) [§65] Physical Abuse or Threat of Abuse.

- (b) Other Threats or Inducements.
    - (1) [§66] General Principle and Distinction.
    - (2) [§67] Confessions Inadmissible.
    - (3) [§68] Confessions Admissible.
  - (c) [§69] Psychological Coercion.
  - (d) Fraud.
    - (1) [§70] Confessions Admissible.
    - (2) [§71] Confessions Inadmissible.
  - (e) Prolonged Questioning.
    - (1) [§72] Questioning Without Coercion.
    - (2) [§73] Questioning as Coercion.
  - (f) Illegal Detention.
    - (1) [§74] In Federal Trials.
    - (2) [§75] In State Trials.
  - (g) [§76] Defendant Kept Incommunicado.
  - (h) Failure To Advise of Miranda Rights.
    - (1) [§77] In General.
    - (2) [§78] Interrogation After Right to Silence Is Invoked.
    - (3) [§79] Interrogation After Right to Counsel Is Invoked.
    - (4) Statements Admissible.
      - (aa) [§80] Statement That Is Not Result of Interrogation.
      - (bb) [§81] Second Statement That Is Not Tainted by Prior Violation.
3. Procedure in Determining Voluntariness.
- (a) [§82] Constitutional Requirements.
  - (b) [§83] Former California Practice.
  - (c) [§84] Final Determination by Judge.
  - (d) [§85] Hearing Without Jury Present.
  - (e) [§86] Evidence and Ruling.
  - (f) [§87] Standard of Proof.
  - (g) [§88] Review by California Courts.
  - (h) [§89] Review by U.S. Supreme Court.
4. [§90] Harmless or Reversible Error.

## **B. Admission of Party.**

- 1. In General.
  - (a) [§91] Nature and Theory.
  - (b) [§92] Affirmative Evidence.
  - (c) [§93] Classifications and Distinctions.
  - (d) [§94] Declarant's Interest Is Immaterial.
  - (e) [§95] Personal Knowledge Is Not Required.
  - (f) [§96] Opinion Rule Is Not Applicable.
  - (g) [§97] Statement Containing Additional Matters.
- 2. Admissions in Judicial and Administrative Proceedings.
  - (a) Pleadings in Civil Cases.
    - (1) [§98] Same Case.
    - (2) [§99] Prior Case.

- (b) [§100] Guilty Plea in Criminal Case.
- (c) Stipulations and Other Attorneys' Admissions.
  - (1) [§101] Judicial Admissions.
  - (2) [§102] Evidentiary Admissions.
- 3. Adoptive Admissions in Civil Cases.
  - (a) [§103] Nature of Admission.
  - (b) Adoption by Conduct.
    - (1) [§104] In General.
    - (2) [§105] Silence or Evasive Response in Negligence Action.
    - (3) [§106] Ignoring Written Communications.
- 4. Other Admissions by Conduct.
  - (a) Flight, Resistance, or Escape of Accused.
    - (1) [§107] In General.
    - (2) [§108] Flight.
    - (3) [§109] Instruction Where Fleeing Person's Identity Is in Issue.
    - (4) [§110] Attempted Escape From Custody.
  - (b) [§111] False Excuse or Alibi.
  - (c) Attempt To Corrupt Witness or Suppress Evidence.
    - (1) [§112] In General.
    - (2) [§113] Threats.
    - (3) [§114] Attempt by Unauthorized Person.
  - (d) Employer's Precautionary Rules.
    - (1) [§115] Operating Rules of Carrier.
    - (2) [§116] Safety Rules.
    - (3) [§117] Distinction: Labor Code Regulations.
  - (e) [§118] Contradictions in Testimony.
  - (f) [§119] Miscellaneous Examples.
- 5. Vicarious Admissions.
  - (a) Persons Authorized.
    - (1) [§120] Theory and Test of Admissibility.
    - (2) [§121] Independent Proof of Authority.
    - (3) [§122] Scope of Authority.
    - (4) [§123] Statement Admitting Tort Liability.
    - (5) [§124] Statement Admitting Contract Liability.
    - (6) [§125] Other Statements.
    - (7) [§126] Interpreters.
    - (8) [§127] Distinctions.
  - (b) Declarant Whose Liability Is in Issue.
    - (1) [§128] General Principle.
    - (2) [§129] Exception for Employer's Tort Liability.
  - (c) Declarant Whose Right or Title Is in Issue.
    - (1) [§130] Nature of Rule.
    - (2) [§131] Time of Statements.
  - (d) [§132] Declarant in Action for Injury or Death.
  - (e) Coconspirators.
    - (1) [§133] General Rule.

- (2) [§134] Independent Proof of Conspiracy.
- (3) [§135] Statement Made During Conspiracy.
- (4) [§136] Statement Made To Further Objective.
- 6. Excluded Admissions in Criminal Cases.
  - (a) Involuntary Admissions.
    - (1) [§137] Inadmissible as Evidence or Impeachment.
    - (2) [§138] Illustrations.
  - (b) Ineffective or Withdrawn Plea.
    - (1) [§139] Penal Code and Case Law.
    - (2) [§140] Evidence Code and Federal Rules.
  - (c) Silence or Equivocal Reply to Charge of Crime.
    - (1) [§141] Former Law.
    - (2) [§142] Effect of Miranda and Griffin Rules.
  - (d) [§143] Admissions of Codefendant.

**C. Declarations Against Interest.**

- 1. [§144] Modern Expanded Rule.
- 2. Conditions of Admissibility.
  - (a) [§145] Against Interest.
  - (b) [§146] Declarant Unavailable.
  - (c) [§147] Trustworthiness and Knowledge.
- 3. Illustrations.
  - (a) [§148] Declarations Against Pecuniary Interest.
  - (b) [§149] Declarations Against Proprietary Interest.
  - (c) Declaration Involving Criminal Liability.
    - (1) [§150] Modern Rule of Admissibility.
    - (2) [§151] Preliminary Fact Determination.
    - (3) [§152] Distinctions.
  - (d) [§153] Declaration Against Social Interest.
  - (e) [§154] Other Declarations.

**D. [§155] Sworn Statement Regarding Gang-Related Crime.**

**E. Prior Statements of Witnesses.**

- 1. Prior Inconsistent and Consistent Statements.
  - (a) [§156] Former Law and Code Changes.
  - (b) Prior Inconsistent Statements.
    - (1) [§157] In General.
    - (2) [§158] Rule in Criminal Cases.
    - (3) [§159] Absent Witness.
    - (4) [§160] Forgetful or Amnesiac Witness.
    - (5) [§161] Uncooperative Witness.
  - (c) [§162] Prior Consistent Statements.
- 2. [§163] Past Recollection Recorded.
- 3. Prior Identification.
  - (a) [§164] Independent Evidence.
  - (b) [§165] Conditions of Admissibility.
  - (c) [§166] Methods of Identification.
  - (d) [§167] Sufficiency and Weight.

4. Complaint of Victim in Sex Case.
  - (a) [§168] In General.
  - (b) [§169] Freshness Requirement Abandoned.
  - (c) [§170] Inadmissibility of Details.
  - (d) [§171] Testimony by Alleged Victim.

**F. [§172] Statement of Victim of Child Abuse or Neglect.**

**G. [§173] Child Dependency Hearsay Exception.**

**H. Spontaneous Statements.**

1. Modern Development of Doctrine.
  - (a) [§174] Theory of Admissibility.
  - (b) [§175] Evidence Code and Federal Rules.
  - (c) [§176] Relation to Other Exceptions.
  - (d) [§177] Effect of Other Rules.
2. [§178] Statement Related to Act, Condition, or Event.
3. Spontaneous Statement During Excitement.
  - (a) [§179] Statement in Response to Questioning.
  - (b) [§180] Importance of Time Element.
  - (c) [§181] Statement Immediately After Event.
  - (d) Statement Some Time Afterward.
    - (1) [§182] Statements Held Admissible.
    - (2) [§183] Statements Held Inadmissible.

**I. Contemporaneous Explanatory Statement (Verbal Act).**

1. [§184] Theory of Admissibility.
2. [§185] Illustrations: Statements Accompanying Acts.
3. [§186] Subsequent Statements Are Inadmissible.

**J. Dying Declarations.**

1. [§187] In General.
2. [§188] Evidence Code and Federal Rules.
3. [§189] Instructions to Jury.
4. Conditions of Admissibility.
  - (a) [§190] Relation to Cause of Death.
  - (b) Hope of Life Abandoned.
    - (1) [§191] Test.
    - (2) [§192] Foundation.
    - (3) [§193] Where Victim Chooses To Die.
5. [§194] Other Applicable Rules.

**K. Statements of Mental or Physical State.**

1. [§195] In General.
2. Physical Condition.
  - (a) [§196] Declarant's Then Existing Condition.
  - (b) [§197] Declarant's Previously Existing Condition.
  - (c) [§198] Diagnosis or Treatment of Child Abuse.
3. Mental State.
  - (a) General Principles.
    - (1) [§199] Nonhearsay and Admissible Hearsay.
    - (2) Declarant's Then Existing State.

- (aa) [§200] Present Mental State in Issue.
- (bb) [§201] Continuing Mental State.
- (cc) [§202] Mental State Not in Issue.
- (3) [§203] Declarant's Previously Existing State.
- (4) [§204] Statement of Memory or Belief Is Inadmissible.
- (b) Illustrations: Belief, Knowledge, or Emotion.
  - (1) [§205] Belief.
  - (2) [§206] Knowledge.
  - (3) Affection or Dislike.
    - (aa) [§207] Husband and Wife.
    - (bb) [§208] Testator.
    - (cc) [§209] Victim.
  - (4) Victim's Fear.
    - (aa) [§210] Admissibility.
    - (bb) [§211] Former Limitations Abolished.
    - (cc) [§212] Adequacy of Limiting Instructions.
- (c) Illustrations: Intent.
  - (1) [§213] Declarations of Grantor or Donor.
  - (2) [§214] Self-Serving Declarations of Defendant.
  - (3) [§215] Other Declarations.
- (d) Intention as Evidence of Future Act.
  - (1) [§216] General Rule of Admissibility.
  - (2) [§217] Intention To Commit Suicide.
  - (3) [§218] Intention To Go to or Leave Place.
  - (4) [§219] Intention To Go With Person.
  - (5) [§220] Threats of Accused or Victim.

**L. [§221] Statements Concerning Physical Abuse.**

**M. Statements Concerning Wills and Trusts.**

- 1. [§222] In General.
- 2. [§223] Declaration on Making or Revocation.
- 3. [§224] Declaration on Kind of Will or No Will.
- 4. [§225] Distinction: Declaration on Contract.

**N. [§226] Decedent's Statement in Action Against Estate.**

**O. Business Records.**

- 1. In General.
  - (a) [§227] Common Law.
  - (b) [§228] Uniform Act, Evidence Code, and Federal Rules.
- 2. [§229] Business, Profession, or Other Activity.
- 3. What Is Admissible Business Record.
  - (a) [§230] Any Kind of Record.
  - (b) [§231] Computer Records.
  - (c) [§232] Special Reports.
  - (d) [§233] Hospital Records.
  - (e) [§234] Accident Reports Prepared for Litigation.
  - (f) [§235] Absence of Business Entry.
  - (g) [§236] Miscellaneous Inadmissible Evidence.

4. [§237] Time of Entry.
5. Sources of Information and Method of Preparation.
  - (a) [§238] In General.
  - (b) [§239] Hospital Records.
  - (c) [§240] Police and Other Accident Reports.
  - (d) [§241] Report of Test.
  - (e) [§242] Other Records and Reports.
6. Laying Foundation by Authenticating Witness.
  - (a) [§243] Custodian or Other Qualified Witness.
  - (b) [§244] Laying the Foundation.

**P. Official Records and Writings.**

1. [§245] In General.
2. Report of Public Employee.
  - (a) [§246] What Constitutes Official Record.
  - (b) [§247] Conditions of Admissibility.
  - (c) [§248] Relation to Presumption of Official Duty.
  - (d) [§249] Public Employee Record Containing Other Employee's Observations.
  - (e) [§250] Inadmissible Reports and Statements.
3. Report of Vital Statistics.
  - (a) [§251] Admissible Public Records.
  - (b) [§252] Knowledge and Opinion Rule.
4. [§253] Federal Finding of Presumed Death.
5. [§254] Federal Report of Missing Person.
6. [§255] Statement of Absence of Public Record.

**Q. Former Testimony.**

1. In General.
  - (a) [§256] Nature and Theory of Exception.
  - (b) [§257] Former Law.
  - (c) [§258] Evidence Code and Federal Rules.
2. Former Proceeding.
  - (a) [§259] Prior Civil Proceeding.
  - (b) Prior Criminal Proceeding.
    - (1) [§260] Prior Criminal Trial.
    - (2) [§261] Preliminary Examination.
    - (3) [§262] Testimony of Minor Victim.
  - (c) [§263] Deposition in Civil or Criminal Case.
  - (d) [§264] Administrative or Arbitration Proceeding.
3. Parties.
  - (a) Evidence Against Former Party.
    - (1) [§265] In General.
    - (2) [§266] Evidence Offered Against Opponent.
  - (b) [§267] Evidence Against Person Not Former Party.
4. Methods of Proof.
  - (a) [§268] In General.
  - (b) [§269] Videotape of Preliminary Examination.



5. [§270] Objections.

**R. Judgments.**

1. Judgment of Felony Conviction.
  - (a) [§271] Traditional Rule of Exclusion.
  - (b) [§272] Evidence Code and Federal Rules.
  - (c) [§273] Scope of Statutory Rule.
2. [§274] Judgment Against Person Entitled to Indemnity.
3. [§275] Judgment Determining Liability of Third Person.

**S. Family History.**

1. In General.
  - (a) [§276] Necessity of Hearsay.
  - (b) [§277] Evidence Code and Federal Rules.
  - (c) [§278] Facts of Family History.
2. Declarations.
  - (a) [§279] Declarant's Own Family History.
  - (b) [§280] Declarant Related to Family.
  - (c) [§281] Declarant Intimately Associated With Family.
  - (d) [§282] Circumstances Indicating Trustworthiness.
3. Admissible Evidence.
  - (a) [§283] Entries in Family Records.
  - (b) [§284] Reputation in Family.
  - (c) [§285] Community Reputation.
  - (d) [§286] Church Records.
  - (e) [§287] Marriage, Baptismal, and Similar Certificates.

**T. Reputation.**

1. [§288] Community History.
2. [§289] Public Interest in Property.
3. [§290] Boundary or Custom Affecting Land.
4. [§291] Character.

**U. [§292] Statement Concerning Boundary.**

**V. [§293] Recitals in Dispositive Instruments.**

**W. [§294] Recitals in Ancient Writings.**

**X. [§295] Commercial and Similar Lists.**

**Y. Treatises, Maps, and Charts.**

1. [§296] Noncontroversial Publications.
2. [§297] Medical Texts.

**Z. [§298] Affidavits.**