

To: Judge Fenstermacher

From: Julie Woods

Re: Financial Elder Abuse

### **Memorandum of Law**

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#### **Definition of Financial Elder Abuse and Basics**

An "elder" is any person residing in California who is 65 years of age or older. (Welf. & Inst. Code, § 15610.23.)

Financial elder abuse is a cause of action or remedy. (Welf. & Inst. Code, §§ 15657.5, 15657.7.)

There is a four year statute of limitations on a cause of action for financial elder abuse. (Welf. & Inst. Code, § 15657.7; see also *Drake v. Pinkham* (2013) 217 Cal.App.4th 400.)

"Financial abuse" occurs when a person or an entity assists in or does any of the following: takes, secretes, appropriates, obtains, or retains real or personal property of an elder for a wrongful use or with intent to defraud, or both. (Welf. & Inst. Code, § 15610.30, subs. (a)(1)–(2).) It may also occur when a person or entity takes, secretes, appropriates, obtains, or retains real or personal property of an elder by undue influence, as defined in Welfare and Institutions Code section 15610.70. (Welf. & Inst. Code, § 15610.30, subd. (a)(3).)

"Taking" means the deprivation of any property right, whether prospective or actual. (*Bounds v. Superior Court* (2014) 229 Cal.App.4th 468.) The abuse may be done, for example, by means of an agreement, donative transfer or testamentary bequest. (Welf. & Inst. Code, § 15310.30, subd. (c).)

#### **Elder Abuse by Undue Influence**

Undue influence, as defined in Welfare and Institutions Code section 15610.70, means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in an inequity. (*Compare*, California has three definitions of undue influence: Welf. & Inst. Code, § 15610.70 and Prob. Code, § 56; Civ. Code, § 1575; and common law.)

In determining whether a result is produced through the means of undue influence, all of the following shall be considered:

- (1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.
- (2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.
- (3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:



## **CODE OF CIVIL PROCEDURE - CCP**

**PART 1. OF COURTS OF JUSTICE [35 - 286]** (*Part 1 repealed and added by Code Amendments 1880, Ch. 35.*)

**TITLE 1. ORGANIZATION AND JURISDICTION [35 - 155]** (*Title 1 repealed and added by Code Amendments 1880, Ch. 35.*)

**CHAPTER 1. Courts of Justice in General [100 - 1500]** (*Chapter 1 added by Code Amendments 1880, Ch. 35.*)

- 36.** (a) A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings:
- (1) The party has a substantial interest in the action as a whole.
  - (2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.
- (b) A civil action to recover damages for wrongful death or personal injury shall be entitled to preference upon the motion of any party to the action who is under 14 years of age unless the court finds that the party does not have a substantial interest in the case as a whole. A civil action subject to subdivision (a) shall be given preference over a case subject to this subdivision.
- (c) Unless the court otherwise orders:
- (1) A party may file and serve a motion for preference supported by a declaration of the moving party that all essential parties have been served with process or have appeared.
  - (2) At any time during the pendency of the action, a party who reaches 70 years of age may file and serve a motion for preference.
- (d) In its discretion, the court may also grant a motion for preference that is accompanied by clear and convincing medical documentation that concludes that one of the parties suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months, and that satisfies the court that the interests of justice will be served by granting the preference.
- (e) Notwithstanding any other provision of law, the court may in its discretion grant a motion for preference that is supported by a showing that satisfies the court that the interests of justice will be served by granting this preference.

(f) Upon the granting of such a motion for preference, the court shall set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Any continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party.

(g) Upon the granting of a motion for preference pursuant to subdivision (b), a party in an action based upon a health provider's alleged professional negligence, as defined in Section 364, shall receive a trial date not sooner than six months and not later than nine months from the date that the motion is granted.

*(Amended by Stats. 2008, Ch. 218, Sec. 1. Effective January 1, 2009.)*

## **Trial Preference Pursuant to CCP §36**

### **(Elder Party)**

#### **Law**

Code of Civil Procedure Section 36(a) allows a party to a civil action, who is over 70 years of age, to petition the court for trial preference.

The court shall grant the petition if the court makes both of the following findings:

1. The elder party has a substantial interest in the action as a whole;  
and
2. The health of that party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.

#### **Procedure/Standard**

Code of Civil Procedure Section 36(c) states that unless a court orders otherwise, a party may file and serve a notice motion or *ex parte* application for preference.

The motion should include a declaration by the moving party that all essential parties have been served or have appeared in the case.

A party who reaches 70 years of age during the pendency of the action may, at any time during the pendency of the action, file and serve the motion for preference.

Pursuant to Code of Civil Procedure Section 36(d), the court has discretion to grant a motion for preference that is accompanied by clear and convincing medical records which conclude that one of the parties suffers from an illness or condition that raises substantial medical doubt that the party will survive beyond six months and that satisfies the court that the interests of justice will be served by granting the preference.

Code of Civil Procedure Section 36.5 allows an attorney to sign a declaration for the party seeking preference based on the attorney's information and belief as to the medical diagnosis and prognosis of any party. However, that declaration cannot be admissible for any other

purpose other than to support a motion for preference pursuant to Code of Civil Procedure Section 36(a).

Trial priority is not mandatory merely due to a party's age. The court has discretion to determine the extent of the requisite two findings necessary to grant the motion.

Attorneys may raise the issue of preference at any case management conference. [CRC 3.727(12)]

The court must also take into consideration a party's right to right to preference. [CRC 3.729(2)]

### **Considerations**

If the motion is granted, pursuant to Code of Civil Procedure Section 36(f), the court shall "set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Any continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party."

# PRE-TRIAL ORDER AND INSTRUCTIONS For Department 15

Before the trial of any issue, the parties are ordered to comply with the following requirements. Failure to comply may result in sanctions, including issue sanctions.

*30 days before the date set for trial:*

Discovery: Discovery must be complete 30 days before trial, except that any expert witness may be deposed as late as 10 days before trial.

Expert Witnesses: Unless demanded earlier pursuant to CCP §2034.230, disclose in writing any expert witnesses. The written disclosure shall include a time estimate for testimony, a summary of the testimony, a summary of the expert's qualifications, and a copy of the expert's report, if one has been prepared.

*14 days before the date set for trial:*

Serve and file a list of all non-expert witnesses.

*7 days before the date set for trial:*

Exhibits: Serve exhibits on the other party. The exhibits are to be pre-marked with exhibit stickers (numbers for Plaintiff/Petitioner, letters for Defendant/Respondent), and include the case number on each sticker. The exhibits must be submitted in binders with an exhibit list (Please see reverse side for a sample exhibit list format). **PLEASE DO NOT LODGE EXHIBITS WITH THE COURT IN ADVANCE OF THE TRIAL – BRING THEM WITH YOU ON THE TRIAL DATE.** Please provide copies of the exhibits for the witness and for yourself. Do not file exhibits with the clerks' office.

Trial Briefs: Serve on the other party and file with the Court.

*Additional Requirements:*

Stipulations: Before trial, the parties shall meet and confer and attempt to stipulate to facts, and admissibility or authenticity of evidence.

Manner of Service: Any document served on another party 7 days or fewer before trial must be served by hand delivery, or, only if the receiving party has agreed, by electronic mail or fax.

Court Reporters: The civil courts in Contra Costa County no longer provide court reporting services. (Local Rule 24.) If you wish to have your matter reported, you must obtain the Civil Protocols for Use of Private Pro Tempore Court Reporters packet and comply with all the requirements therein.

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January 2020

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- (A) Controlling necessities of life, medication, the victim's interactions with others, access to information, or sleep.
  - (B) Use of affection, intimidation, or coercion.
  - (C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.
- (4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.
- (b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence.
- (Welf. & Inst. Code, § 15610.70, subds. (a)(1)–(4), (b).)

### **Assessing Capacity**

Testamentary capacity is defined in Probate Code section 6100.5.

Contractual capacity or the capacity to create a trust is defined in Probate Code sections 810 through 812.

The two leading cases on assessing capacity are *Andersen v. Hunt* (2011) 196 Cal.App.4th 722, and *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346. These cases stand for the recent shift in decisional authority which states that capacity should be measured on a sliding scale depending on the complexity of the amendment or change to the estate plan. The more complex the change, the higher the capacity standard should be that is applied, i.e., contractual capacity under Probate Code sections 810 through 812. Vice versa, the less complex the change, the lower the capacity standard should be that is applied, i.e., testamentary capacity under Probate Code section 6100.5.

### **Available Remedies for Financial Elder Abuse**

General damages – recovery of what was lost

Actual loss or depreciation, plus interest

Profits made, plus interest

Lost profits that would have accrued

General damages against trustee, Prob. Code, § 16440; against conservator, Prob. Code, § 2401.3

Double damages (Prob. Code, § 859)

If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property, or has done so by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, the person shall be liable for twice the value of the property recovered by an action under this part.

Except as otherwise required by law, the person may, in the court's discretion, be liable for reasonable attorney fees and costs.

The remedies provided in this section shall be in addition to any other remedies available.

Punitive damages for fraud, oppression, or malice (Civ. Code, § 3294)

Against an individual: must prove by clear and convincing evidence that the defendant is guilty of fraud, oppression, or malice.

Treble damages for unfair/deceptive practices against seniors (Civ. Code, § 3345)

When a trier of fact is authorized by statute to impose a fine or other civil penalty, the purpose of which is to punish and deter (i.e. punitive damages), the trier of fact may impose a fine or other remedy up to three times greater than it would in the absence of that finding if:

- (1) Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons.
- (2) Whether the defendant's conduct caused one or more senior citizens or disabled persons to suffer: loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person.
- (3) Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.  
(Civ. Code, § 3345, subs. (b)(1)–(3).)

Attorney fees (Welf. & Inst. Code, § 15657.5)

If a petitioner proves financial abuse by a preponderance of the evidence, in addition to all other remedies, the court must award the plaintiff reasonable attorney fees and costs.

The term "costs" includes, but is not limited to, reasonable fees for services of a conservator, if any, devoted to the litigation of claims brought under the Elder Abuse statutes of the Welfare & Institutions Code.

Pain and suffering (Welf. & Inst. Code, § 15657.5, subd. (b))

Under Civil Code section 377.34, in actions or proceedings by a decedent's personal representative or successor in interest on the decedent's cause of action, damages are limited to loss or damage that the decedent sustained or incurred before death, including

any penalties or punitive damages, but does not include damages for pain, suffering, or disfigurement.

Under Welfare and Institutions Code section 15657.6, once financial abuse is established and it is proven by clear and convincing evidence that the defendant has been guilty of fraud, oppression, or malice, the limitations imposed by Civil Code section 377.34 do not apply.

Thus, even if the victim is deceased, if financial abuse is established under Welfare and Institutions Code section 15657.5, subdivision (b), pain and suffering damages may be awarded.

#### Perpetrator deemed to have predeceased victim (Prob. Code, § 259)

A person shall be deemed to have predeceased a decedent to the extent of the property, damages, or consists that are awarded in the action where all of the following apply:

- (4) It has been proven by clear and convincing evidence that the person is liable for physical abuse, neglect, or financial abuse of the decedent, who was an elder or dependent adult.
- (5) The person is found to have acted in bad faith.
- (6) The person has been found to have been reckless, oppressive, fraudulent, or malicious in the commission of any of these acts upon the decedent.
- (7) The decedent, at the time those acts occurred and thereafter until the time of his or her death, has been found to have been substantially unable to manage his or her financial resources or to resist fraud or undue influence.  
(Prob. Code, § 259, subs. (a)(1)–(4).)

Any person found liable under subdivision (a) . . . shall not (1) receive any property, damages, or costs that are awarded to the decedent's estate in an action described in subdivision (a) or (b), whether that person's entitlement is under a will, a trust, or the laws of intestacy; or (2) serve as a fiduciary as defined in Probate Code section 39, if the instrument nominating or appointing that person was executed during the period when the decedent was substantially unable to manage his or her financial resources or resist fraud or undue influence. (Prob. Code, § 259, subd. (c).)

#### **850 Petition Brought with Financial Elder Abuse Action**

A claim pursuant to Probate Code section 850 is used to recover real or personal property held by another, but belonging to a trust or conservatee. The claim must be evaluated in the context of related civil claims. (See Prob. Code, §§ 854–856.5.)

Probate Code section 859 includes enhanced remedies, namely, double damages and attorneys' fees.

When the court is to make an order regarding real property, Probate Code section 856 states: "Except as provided in Sections 853 and 854, if the court is satisfied that a conveyance, transfer,

or other order should be made, the court shall make an order authorizing and directing the personal representative or other fiduciary, or the person having title to or possession of the property, to execute a conveyance or transfer to the person entitled thereto, or granting other appropriate relief.”

### **Rescission**

Rescission for undue influence (Civ. Code, §§ 1689, subd. (b)(1), 1575, 1566)

Rescission for fraud (Civ. Code, § 1689, subd. (b)(1)) – consider seeking rescission in the sale of real property if the note has not been transferred and there is no bona fide purchaser in cases involving fraud; if successful, the lender must credit all payments and return all fees as well (see Civ. Code, § 1692)

Rescission for mistake (Civ. Code, § 1577.)

Rescission for lack of capacity (Civ. Code, §§ 38–39, 1556; Prob. Code, § 812)

### **Constructive Trust**

A constructive trust is an equitable remedy imposed to prevent a party in possession of property from being unjustly enriched. (*Martin v. Kehl* (1983) 145 Cal.App.3d 228, 237)

One who wrongfully detains a thing (Civ. Code, § 2223) or gains a thing by “fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act” (Civ. Code, § 2224) is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. Under these statutes, the only conditions necessary for imposition of a constructive trust are: (a) the existence of a *res*, (b) the right of the plaintiff to that *res*, and (c) some wrongful acquisition or detention of the *res* by a party who is not entitled to it. (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 990.)

In addition to the typical grounds for setting aside a trust (such as undue influence, fraud, or mistake), a constructive trust will be imposed when there has been a violation of a trust or a breach of a confidential or fiduciary relationship. (*South v. Wishard* (1956) 146 Cal.App.2d 276, 284.)



## Checklist of Objections

Objections listed below are covered in detail in *California Trial Objections* (Cal CEB) by Edwin A. Heafey, Jr. and Stephen G. Blitch.

### Objections to Competence To Testify

Cannot be understood	Evid C §701(a). See chap 18.
Does not understand duty to tell truth	Evid C §701(a)(2). See chap 18.
No personal knowledge	Evid C §702(a). See Evid C §800; chap 18.
Juror cannot give subjective evidence impeaching verdict	Evid C §1150. See chap 18.
Juror at this trial	Evid C §704(b). See chap 18.
Judge at this trial	Evid C §703. See chap 18.

### Objections to Form of Question

Ambiguous or unintelligible	See Evid C §765(a); chap 7.
Argumentative	See Evid C §765(a); chap 14.
Assumes fact not in dispute or not in evidence	See Evid C §§210, 765(a); chap 15.
Calls for narrative answer	See Evid C §765(a); chap 10.
Calls for speculation	See Evid C §§702, 800 (matter not in witness's personal knowledge), 801 (question calls for improper opinion); chap 16.
Compound	See Evid C §765(a); chap 8.
Has been asked and answered	See Evid C §765(a); chap 11.
Leading	See Evid C §765(a); chap 13.
Misquotes a witness	See Evid C §765(a); chap 12.
Too general	See Evid C §765(a); chap 9.

### Objections Concerning Experts

Improper hypothetical question	See <i>Guardianship of Jacobson</i> (1947) 30 C2d 312, 324, 182 P2d 537; chap 20.	Subject matter not beyond experience of ordinary witness	Evid C §801(a). See chap 20.
Information will not help trier of fact	Evid C §801(a). See chap 20.	Use of new scientific technique that does not satisfy <i>Kelly</i> test	<i>People v Leahy</i> (1994) 8 C4th 587, 34 CR2d 663. See chap 20.
Insufficient foundation to qualify as expert	Evid C §§720, 801. See chap 20.	Witness is basing opinion on material that may not reasonably be relied on	Evid C §801(b). See chap 20.
Should give basis of opinion before stating opinion	Evid C §802. See chap 20.		

### Objections to Offered Evidence

Corpus delicti not proved	<i>People v Diaz</i> (1992) 3 C4th 495, 529, 11 CR2d 353. See chap 27.	Improper impeachment	Evid C §§352, 780, 785, 789, 1101-1103. See chap 22.
Cross-examination exceeds scope of direct examination	Evid C §§761, 773. See chap 26.	Improper rehabilitation	Evid C §§780, 785, 789-791. See chap 23.
Cumulative evidence	See Evid C §352. See chap 31.	Inadmissible opinion of lay witness	Evid C §§800, 802-803. See chap 20.
Evidence of subsequent repairs or subsequent remedial conduct	Evid C §1151. See chap 32.	Inadmissible parole evidence	CCP §1856. See chap 25.
Evidence that party has liability insurance	Evid C §1155. See chap 32.	Insufficient foundation	Evid C §403 or §405. See chap 21.
Hearsay	Evid C §1200. See chap 19.	Irrelevant evidence	Evid C §§210, 350-351. See chap 17.
Illegally obtained evidence	US Const amends IV, XIV; Cal Const art I, §13 (objection normally must be made before trial); chap 28.	Party's offer to compromise, or admissions made during compromise negotiations	Evid C §1152. See chap 32.
Improper evidence of prior sexual conduct in rape case	Evid C §782. See chap 22.	Writing not (properly) authenticated	Evid C §1401. See chap 21.

## Objections to Misconduct

<b>Misconduct of counsel:</b>	
<ul style="list-style-type: none"> <li>Object to specific acts as misconduct and ask for curative admonition</li> </ul>	Cite specific grounds and authority, e.g., failure to provide required discovery (Pen C §1054.5(b) (criminal); CCP §2023(b) (civil)). See chap 29.
<ul style="list-style-type: none"> <li>Move for mistrial on ground that effect of misconduct is so prejudicial that fair trial is now impossible</li> </ul>	See <i>People v McLain</i> (1988) 46 C3d 97, 112, 249 CR 630; chap 29.
<b>Misconduct of judge:</b>	
<ul style="list-style-type: none"> <li>Object to judge's misconduct, describe it, object as error, and</li> </ul>	ABA Code of Judicial Cond Canon 3(A); <i>People v Perkins</i> (2003) 109 CA4th 1562, 1566, 1 CR3d 271. See chap 29.
<ul style="list-style-type: none"> <li>Move for mistrial on ground that effect of misconduct is so prejudicial that fair trial is now impossible</li> </ul>	See <i>People v Woods</i> (1950) 35 C2d 504, 512, 218 P2d 981; chap 29.
<b>Misconduct of juror (before verdict rendered):</b>	
<ul style="list-style-type: none"> <li>Object to specific acts as duct</li> </ul>	See, e.g., <i>People v miscon-Pierce</i> (1979) 24 C3d 199, 155 CR 657; chap 29.
<ul style="list-style-type: none"> <li>Move for mistrial on ground that effect of misconduct is so prejudicial that fair trial is now impossible</li> </ul>	See <i>People v Daniels</i> (1991) 52 C3d 815, 864, 277 CR 122; chap 29.
<ul style="list-style-type: none"> <li>Request that jury be instructed to disregard misconduct</li> </ul>	See <i>People v Harper</i> (1986) 186 CA3d 1420, 231 CR 414; chap 29.

## Objections Because of Privilege

<b>Against self-incrimination</b>	US Const amends V, XIV; Cal Const art I, §15; Evid C §§404, 940. See chap 46.
<b>Attorney-client</b>	Evid C §§916, 950-962. See chap 34.
<b>Cleric-penitent</b>	Evid C §§1030-1034. See chaps 50-51.
<b>Confidential marital communications</b>	Evid C §§916, 980-987 (when no witness or party can claim privilege). See chap 40.
<b>Counselor-domestic violence victim</b>	Evid C §§1037-1037.7. See chap 39.
<b>Counselor-sexual assault victim</b>	Evid C §§916, 1035-1036.2. See chap 38.
<b>Defendant in criminal case not to be called as witness and not to testify</b>	US Const amends V, XIV; Cal Const art I, §15; Evid C §930. See chap 47.
<b>Identity of informer</b>	Evid C §§1041-1042 (usually pretrial motion). See chap 44.
<b>Journalist's immunity from contempt</b>	Evid C §1070; Cal Const art I, §2(a)-(b). See chap 48.
<b>Not to be called as witness against spouse</b>	Evid C §§970-973. See chap 42.
<b>Not to testify against spouse</b>	Evid C §§970-973. See chap 41.
<b>Official information</b>	Evid C §§1040, 1047. See chap 43.
<b>Physician-patient</b>	Evid C §§916, 990-1004. See chap 36.
<b>Psychotherapist-patient</b>	Evid C §§916, 1010-1027. See chap 37.
<b>Trade secrets</b>	Evid C §§916, 1060. See also CCP §2019(b)(1). See chap 45.
<b>Work product</b>	CCP §2018; Pen C §1054.6. See chap 35.
<b>Voter</b>	Evid C §1050. See chap 49.

## Motions To Strike

<b>Answer contains inadmissible portions (specify what they are)</b>	<i>People v Glass</i> (1954) 127 CA2d 751, 274 P2d 430. See chap 52.	<b>Insufficient opportunity to object to question before witness answered, and question is objectionable on ground (specify)</b>	<i>Wysock v Borchers Bros.</i> (1951) 104 CA2d 571, 581, 232 P2d 531. See chap 52.
<b>Answer was nonresponsive to question</b>	Evid C §766. See chap 52.	<b>No foundation has been proved</b>	Evid C §§403, 405. See chap 52.
<b>Evidence has been shown to be inadmissible</b>	<i>People v Dunn</i> (1956) 46 C2d 639, 297 P2d 964. See chap 52.	<b>Witness unavailable for cross-examination</b>	See <i>People v Reynolds</i> (1984) 152 CA3d 42, 199 CR 379; chap 52.