

# SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPERIOR COURT  
FILED

DEC 10 2009

Frederick K. Onitch Clerk

RANDOLPH CLIFTON KLING,	)	Deputy
	)	COURT NO.
Petitioner,	)	S176171
	)	
vs.	)	
	)	(Court of Appeal
SUPERIOR COURT OF VENTURA COUNTY,	)	No. B208748)
	)	
Respondent;	)	(Superior Court
	)	No. 2005045185)
THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Real Party in Interest.	)	
	)	

## MOTION FOR JUDICIAL NOTICE

Hon. Rebecca S. Riley  
Judge of the Ventura County Superior Court

GREGORY D. TOTTEN, District Attorney  
County of Ventura, State of California  
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Attorneys for Real Party in Interest

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RANDOLPH CLIFTON KLING, )  
 ) COURT NO.  
 ) Petitioner, ) S176171  
 )  
 ) vs. )  
 ) (Court of Appeal  
 ) SUPERIOR COURT OF VENTURA COUNTY, ) No. B208748)  
 )  
 ) Respondent; ) (Superior Court  
 ) No. 2005045185)  
 )  
 ) THE PEOPLE OF THE STATE OF CALIFORNIA, )  
 )  
 ) Real Party in Interest. )  
 )  
 \_\_\_\_\_ )

**MOTION FOR JUDICIAL NOTICE**

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to Evidence Code section 459 and California Rules of Court, rules 8.252(a) and 8.520(g), Real Party in Interest, the People of the State of California, respectfully requests that the court take judicial notice of the following documents, copies of which are attached hereto:

1. Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1249 (2003-2004 Reg. Sess.) as amended June 9, 2004. (This document was obtained from the

official web site of the Legislative Counsel of California, [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_1201-1250/ab\\_1249\\_cfa\\_20040623\\_120527\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1201-1250/ab_1249_cfa_20040623_120527_sen_floor.html).) As discussed in our Opening Brief on the Merits, p. 13, this document is relevant to show the legislative intent of amending Evidence Code 1560 and Penal Code section 1326, i.e., to require judicial review of documents produced in response to a subpoena duces tecum in criminal cases to protect against the release of confidential consumer information.

2. Assem. Floor Concurrence in Senate Amendments, Assem. Bill No. 1249 (2003-2004 Reg. Sess.) as amended June 9, 2004. (This document was obtained from the official web site of the Legislative Counsel of California, [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_1201-1250/ab\\_1249\\_cfa\\_0040629\\_181228\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1201-1250/ab_1249_cfa_0040629_181228_asm_floor.html).) As discussed in our Opening Brief on the Merits, p. 14, this document is relevant to show the legislative intent of providing for in camera review of defense counsel's justification for receiving records pursuant to a subpoena duces tecum pursuant to Penal Code section 1326, subdivision (c), i.e., to protect the defendant's attorney-client privilege.

3. Assem. Comm. on Judiciary, Comment to Stats. 1965, ch. 299, enacting Evidence Code section 916. This document is quoted in 29B (Pt. 3A) West's Ann. Evid. Code (2009 ed.) foll. § 916, p. 264. As discussed in our Opening Brief on the Merits, p. 33, this document is relevant to show the legislative intent of Evidence Code 916, which we argue is analogous to Evidence Code section 1560 and Penal Code section 1236, i.e., for judicial review to protect the holder of a privilege when he is not available to protect his own interest.
  
4. Superior Court docket report (long format) for proceedings of September 1, 2009, through December 4, 2009. The docket entry for September 1, 2009, shows that pursuant to the opinion of the Court of Appeal, the Honorable Kevin J. McGee, Presiding Judge of the Superior Court, issued an order vacating the order of June 18, 2008. The docket entries for October 23, 2009, show the current status of the case, i.e., motion for new trial and sentencing set for December 28, 2009. The entries for December 2, 2009, show that respondent superior court has returned to its practice of not identifying the source of subpoenaed records placed in the court file. We refer

to above information on page 9 of the Opening Brief on the Merits.

5. Letter dated September 11, 2009, from Michael D. Planet, Executive Officer and Clerk of the Ventura County Superior Court. The letter, referred to on page 9 of our Opening Brief on the Merits, demonstrates that the current matter is not moot because, in response to the Court of Appeal opinion in this matter, the superior court has changed its procedures so that the third party from whom subpoenaed documents are received is not identified.

“Statements in legislative committee reports concerning the statutory objects and purposes which are in accord with a reasonable interpretation of the statute are legitimate aids in determining legislative intent.” (*Southern Cal. Gas Co. v. Public Utilities Com.* (1979) 24 Cal.3d 653, 659; *In re Rottanak K.* (1995) 37 Cal.App.4th 260, 267-268.) A reviewing court may take judicial notice of legislative history, including legislative committee reports, as official acts of the legislative department. (*Ste. Marie v. Riverside County Regional Park & Open-Space Dist.* (2009) 46 Cal.4th 282, 291.)

Judicial notice of the court docket attached as Item 4 is appropriate as the records of a court of this state. (Evid. Code, § 452, subd. (d)(1).)

Judicial notice of the letter attached as Item 5 is appropriate as a records of, and a rule of court of, a court of this state. (Evid. Code, § 452, subd. (d)(1) & (e)(1).)

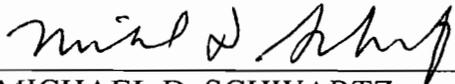
Judicial notice of these matters was not requested in the superior court. In the Court of Appeal, we attached a copy of item number 2 as Exhibit 15 to our Return to Petition for Peremptory Writ of Prohibition, and on page 34, footnote 5, requested that the Court of Appeal take judicial notice of it. The court made no ruling on that request. We have not previously requested judicial notice of the remaining items. Items 4 and 5 are the only items that relate to proceedings after the order or judgment that is the subject of the appeal.

Respectfully submitted,

GREGORY D. TOTTEN, District Attorney  
County of Ventura, State of California

Dated: December 8, 2009

By:

  
MICHAEL D. SCHWARTZ  
Special Assistant District Attorney

**ITEM 1**

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-----
|SENATE RULES COMMITTEE | AB 1249|
|Office of Senate Floor Analyses | |
|1020 N Street, Suite 524 | |
| (916) 445-6614 Fax: (916) | |
|327-4478 | |
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```

THIRD READING

Bill No: AB 1249  
 Author: Pacheco (R)  
 Amended: 6/9/04 in Senate  
 Vote: 21

SENATE PUBLIC SAFETY COMMITTEE : 1-0, 6/17/03

AYES: McPherson

NOTE: This bill was heard in Senate Public Safety Committee on June 17, 2003 and it failed by vote of 1-0, and reconsideration was granted. At that time there was opposition to this bill and the current amendments added to this bill on June 9, 2004 and June 23, 2004 have removed that prior opposition.

SENATE PUBLIC SAFETY COMMITTEE : 4-0, 6/22/04

AYES: McPherson, Vasconcellos, Margett, Romero  
 NO VOTE RECORDED: Burton, Sher

ASSEMBLY FLOOR : 74-0, 5/1/03 - See last page for vote

SUBJECT : Criminal procedure: subpoenas

SOURCE : California District Attorneys Association

DIGEST : This bill makes it clear that in a criminal case, documents requested through a subpoena duces tecum shall be returned to the court and not to the requesting attorney.

ANALYSIS : Existing law provides the right to a defendant in a criminal case to compel the attendance of witnesses on  
 CONTINUED

□

AB 1249  
 Page

2

his or her behalf.

Existing law provides for a subpoena duces tecum to be served upon the custodian of records or other qualified business in an action in which the business is neither a party nor the place where the alleged action arose and sets forth how the records shall be delivered to the trial court and that they should be opened in the presence of the parties.

Existing law provides that instead of having records requested by a subpoena duces tecum delivered to the court, the subpoenaing party may direct the witness make the records available for inspection or copying by the party's attorney.

This bill makes the alternative of having the witness make the records available to the attorney only available in civil cases.

Existing law provides that the process used to compel attendance of a witness is a subpoena. The process used to compel production of documents is a subpoena duces tecum, which requires specified documents to be produced in court.

Existing law allows subpoenas to be issued and signed by the district attorney, his or her investigator, or the attorney of record for the defendant.

This bill provides that a subpoena duces tecum issued to the custodian of records of a business in a criminal action must provide that the records be delivered to the court as provided for in Evidence Code section 1560(b) and the alternative of making the records available to the attorney shall not be available in criminal cases.

This bill provides that where a defendant is issued a

subpoena to a person or entity who is not a party, for the production of books, papers, documents, or records, or copies thereof, the court may order an in camera hearing to determine whether or not the defense is entitled to receive the documents.

This bill provides that the court may not order the

□

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Page

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documents disclosed to the prosecution except as required under Penal Code section 1054.3 which governs necessary disclosures to the prosecution.

This bill provides that this section shall not be construed to prohibit obtaining books, papers, documents, or records with the consent of the person to whom the books, papers, documents, or records related.

FISCAL EFFECT : Appropriation: No Fiscal Com.: No  
Local: No

SUPPORT : (Verified 6/23/04)

California District Attorneys Association (source)  
Judicial Council of California  
Los Angeles District Attorney

ARGUMENTS IN SUPPORT : According to the author, "this bill is needed to protect against the release of confidential consumer information in criminal cases. Under criminal discovery law, the Penal Code requires that subpoenaed records be provided directly to the court under the seal, and opened by the court and reviewed by a judge before release. This process protects against the release of confidential consumer information such as financial, employment or privileged medical records.

"There has been misuse of civil discovery procedures that is allowing some criminal attorneys to receive confidential consumer information without judicial oversight. Some practitioners are interpreting a portion of the civil discovery law, Section 1560(e) of the Evidence Code as applying to criminal cases. This provision was intended to only apply to civil cases. In civil discovery, it allows an attorney to issue a deposition subpoena in order to receive personal consumer records directly from businesses without judicial oversight. This abuse of the discovery process infringes upon the privacy rights of third parties whose information is released.

"Compounding the problem, criminal discovery law does not require notice to be given to affected consumers."

□

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Page

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ASSEMBLY FLOOR :

AYES: Aghazarian, Bates, Benoit, Berg, Bermudez, Bogh, Calderon, Campbell, Canciamilla, Chan, Chavez, Chu, Cohn, Corbett, Correa, Cox, Daucher, Diaz, Dutra, Dutton, Dymally, Firebaugh, Frommer, Garcia, Harman, Haynes, Jerome Horton, Shirley Horton, Houston, Jackson, Keene, Kehoe, Koretz, La Malfa, La Suer, Laird, Leno, Leslie, Lieber, Liu, Longville, Lowenthal, Maddox, Maldonado, Matthews, Maze, McCarthy, Montanez, Mountjoy, Mullin, Nakanishi, Nakano, Nation, Negrete McLeod, Oropeza, Pacheco, Parra, Pavley, Plescia, Reyes, Richman, Ridley-Thomas, Runner, Salinas, Samuelian, Simitian, Spitzer, Strickland, Vargas, Wiggins, Wolke, Wyland, Yee, Wesson

NO VOTE RECORDED: Cogdill, Goldberg, Hancock, Levine, Nunez, Steinberg

RJG:sl 6/23/04 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

\*\*\*\* END \*\*\*\*



**ITEM 2**

AB 1249  
Page 1

CONCURRENCE IN SENATE AMENDMENTS  
AB 1249 (Pacheco)  
As Amended June 9, 2004  
Majority vote

ASSEMBLY:	74-0	(May 1, 2003)	SENATE:	37-0	(June 28, 2004)
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Original Committee Reference: PUB. S.

SUMMARY : Prohibits attorneys in criminal matters from directing custodians of records to make the subpoenaed records available for inspection or copying at the custodian's business address and requires, instead, that subpoenaed records be delivered directly to the court for inspection by the court and the parties. Makes certain technical changes to Evidence Code Section 1326 in order to make the statute gender-neutral.

The Senate amendments require the court to allow the attorney for the defendant an ex parte opportunity to review the subpoenaed records if the court finds disclosure of the records would violate the attorney client privilege.

EXISTING LAW :

- 1) Provides the right to a defendant in a criminal case to compel the attendance of witnesses on his or her behalf.
- 2) Provides that the process used to compel attendance of a witness is a subpoena. The process used to compel production of documents is a subpoena duces tecum (SDT), which requires specified documents to be produced in court.
- 3) Allows subpoenas to be issued and signed by the district attorney, his or her investigator, or the attorney of record for the defendant.
- 4) States that the Supreme Court specifically has held that it is implicit in statutory law that a criminal defendant may issue SDTs to private persons.
- 5) Provides that the issuance of a SDT is purely a ministerial act and does not entitle the person on whose behalf it is issued to obtain access to the records described therein until a judicial

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Page 2

determination has been made that the person is legally entitled to receive them.

- 6) Provides that a SDT in a criminal case requires the witness to appear before a judge and to bring the described books, papers or documents. The Judicial Council SDT form allows the subpoenaing party to offer the witness the option of not appearing before the judge in person. To exercise this option, the witness must place a copy of the records in a sealed envelope, place that envelope inside another envelope and mail it to the clerk of the court not to the subpoenaing party.
- 7) Requires the records of a third party delivered to the trial court under seal be opened in the presence of the parties.
- 8) States that while Evidence Code Section 1560(e) allows direct delivery of records to a party, in civil matters the subpoenaing party must comply with provisions requiring notice to third parties and an opportunity to object or move to quash the subpoena.

AS PASSED BY THE ASSEMBLY , this bill:

- 1) Amended Penal Code Section 1560(e) which allows delivery of subpoenaed records directly to the subpoenaing party to expressly limit its application to civil matters.
- 2) Amended Penal Code Section 1326(a)(1) through (3), adding the words "or her" immediately after "his" in order to make the language gender-neutral.
- 3) Added Penal Code Section 1326(b) to expressly require a custodian of records who receives a SDT in a criminal matter to deliver by mail or otherwise a copy of all documents the subject of a SDT to the court or to the court's clerk.
- 4) Added Penal Code Section 1326(c) to expressly prohibit attorneys

in a criminal matter or their representatives from issuing a SDT or requesting in documents from a custodian of records in a manner inconsistent with the provisions of this bill.

5) Added Penal Code Section 1326(e) to allow a party to obtain documents with the consent of the person to whom documents relate.

FISCAL EFFECT : None

□

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Page 3

COMMENT : According to the author, "This bill is needed to better protect the privacy rights of third-party citizens and litigants alike when subpoenas are issued and served in criminal cases, and to re-establish and strengthen judicial control over the release of privileged and confidential records to prosecutors and criminal defendants in criminal cases.

"Currently, some criminal law practitioners are using deposition subpoenas, which is a civil discovery tool, to gain access to private records from third parties without judicial oversight infringing on consumer privacy. To make matters worse, the law is being interpreted by some to not require notice be given to consumers when their personal information is subject to release.

"This bill is necessary to correct a problem with Judicial Council Form 982(a)(16). In interpreting amendments to Evidence Code Section 1560(e) as applying to criminal discovery, the Judicial Council changed its subpoena form to apply to criminal cases. This interpretation goes beyond the historically accepted principle of law that depositions are not authorized in California criminal cases. The Judicial Council has been approached but declined to correct this problem without legislative action amending the law to specifically state that deposition subpoenas are prohibited in criminal cases.

"The Legislature should amend the law in order to limit deposition subpoenas to civil cases, with all of the procedural and substantive protections which the civil deposition subpoena procedure entails. The Legislature should also amend relevant provisions of the Penal Code which regulate the procedures of subpoenas in criminal cases to ensure that the unauthorized subpoena practices abuses described above, which violate the privacy rights of litigants and third parties alike, are corrected."

Please see the policy committee analysis for a full discussion of this bill.

Analysis Prepared by : Gregory Pagan / PUB. S. / (916) 319-3744  
FN: 0006376

**ITEM 3**

West's  
ANNOTATED  
CALIFORNIA CODES



EVIDENCE CODE

Sections 800 to 1009

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*Official  
California Evidence Code  
Classification*

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## PRIVILEGES

### Div. 8

inmate's prison rec-  
tatter of law but was  
on of trial court in  
compel prison war-  
th such inmate and  
v. Nelson (App. 1  
205, 27 Cal.App.3d  
6(2)

the attorney client  
tly, conduct that if  
aud. Ekeh v. Hart-  
1999, 39 F.Supp.2d

nera review of attor-  
under crime-fraud  
required to show a  
support a good faith  
n that in camera rec-  
eal evidence that the  
lied. Ekeh v. Hart-  
1999, 39 F.Supp.2d

necessary to support  
ileged attorney-client  
ime fraud exception  
which is not part of  
ations that court is  
7. Hartford Fire Ins.  
Supp.2d 1216. Wit-

attorney-client privi-  
ception has burden  
g that there is reason-  
at attorney's services  
ce of ongoing unlaw-  
utford Fire Ins. Co.,  
2d 1216. Witnesses

lement, under which  
y of judgment in ex-  
to execute against in-  
se suspicion of fraud  
r, which had declined  
in in camera review of  
communications un-  
in order to avoid  
ettlement was judicial-  
did not receive finan-  
ement. Ekeh v. Hart-  
al.1999, 39 F.Supp.2d

ontemplate disclosure  
ruling on crime/fraud  
ient privilege. State  
Co. v. Superior Court  
al.Rptr.2d 834, 54 Cal.  
rehearing denied, re-  
201(2)

## GENERAL PRIVILEGES

### Ch. 3

#### 10. Work product

Statute governing disclosure of privileged ma-  
terial in ruling on claim of privilege does not  
apply to qualified work product privilege. *State  
Farm Fire & Casualty Co. v. Superior Court*  
(App. 2 Dist. 1997) 62 Cal.Rptr.2d 834, 54 Cal.  
App.4th 625, as modified, rehearing denied, re-  
view denied. Pretrial Procedure ⇨ 35

#### 11. Presumptions and burden of proof

Although court generally may not compel dis-  
closure of contents of privileged documents to  
rule on objection to discovery request, court can  
and should determine all facts on which claim  
of privilege depends, and party claiming privi-  
lege has burden to show that communication  
sought to be suppressed falls within terms of  
claimed privilege. *Lipton v. Superior Court*  
(App. 2 Dist. 1996) 56 Cal.Rptr.2d 341, 48 Cal.  
App.4th 1599. Pretrial Procedure ⇨ 406; Pre-  
trial Procedure ⇨ 410; Pretrial Procedure ⇨  
411

Party opposing privilege must bear burden of  
showing that claimed privilege does not apply  
or that exception exists or that there has been  
express or implied waiver such that documents  
are discoverable. *Lipton v. Superior Court*  
(App. 2 Dist. 1996) 56 Cal.Rptr.2d 341, 48 Cal.  
App.4th 1599. Pretrial Procedure ⇨ 33

#### 12. Review

Trial court acted within its discretion in con-  
ducting its own in camera review of sealed  
materials regarding search warrant application,  
affirming magistrate's determination that seal-  
ing of entirety of materials was necessary to

implement People's assertion of informant's  
privilege, and thereafter denying defendant's  
motions to reverse and quash search warrant;  
circumstances bearing on informant's veracity  
were fully known to magistrate, and nothing in  
sealed or public portions of record suggested  
that any misrepresentations were made by affi-  
ant in applying for warrant. *People v. Hobbs*  
(1994) 30 Cal.Rptr.2d 651, 7 Cal.4th 948, 873  
P.2d 1246. Criminal Law ⇨ 627.10(8); Rec-  
ords ⇨ 32; Searches And Seizures ⇨ 199

Conducting in camera evidentiary hearing to  
determine whether psychotherapist-patient privi-  
lege applied to audiotape recording of psycho-  
therapist's notes was not abuse of discretion.  
*Menendez v. Superior Court* (1992) 11 Cal.  
Rptr.2d 92, 3 Cal.4th 435, 834 P.2d 786, modi-  
fied on denial of rehearing. Witnesses ⇨ 223

Trial court's refusal to allow city to give ex-  
planatory information by experts in testing field  
in in camera hearing prior to granting employ-  
ees access to interviewers' rating sheets pro-  
duced in connection with promotional examina-  
tion constituted abuse of discretion requiring  
remand for further consideration of matter on  
its merits; city's showing that challenged docu-  
ments constituted testing materials, rather than  
type of data belonging in personnel file, for  
purpose of Labor Code provision granting city  
employees access to personnel file, was suffi-  
cient to entitle them to present explanatory in-  
formation during in camera hearing. *Brutsch  
v. City of Los Angeles* (App. 2 Dist. 1992) 4  
Cal.Rptr.2d 456, 3 Cal.App.4th 354, review de-  
nied. Records ⇨ 63

## § 916. Exclusion of privileged information where persons authorized to claim privilege are not present

(a) The presiding officer, on his own motion or on the motion of any party, shall exclude information that is subject to a claim of privilege under this division if:

(1) The person from whom the information is sought is not a person authorized to claim the privilege; and

(2) There is no party to the proceeding who is a person authorized to claim the privilege.

(b) The presiding officer may not exclude information under this section if:

(1) He is otherwise instructed by a person authorized to permit disclosure; or

(2) The proponent of the evidence establishes that there is no person authorized to claim the privilege in existence.

(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

**Comment—Assembly Committee on Judiciary**

Section 916 is needed to protect the holder of a privilege when he is not available to protect his own interest. For example, a third party—perhaps the lawyer's secretary—may have been present when a confidential communication to a lawyer was made. In the absence of both the holder himself and the lawyer, the secretary could be compelled to testify concerning the communication if there were no provision such as Section 916 which requires the presiding officer to recognize the privilege.

Section 916 is designed to protect only privileged information that the holder of the privilege could protect by claiming the privilege at the hearing. It is not designed to protect unprivileged information. For example, if the statement offered in evidence is a declaration against the penal interest of the declarant, Section 916 does not authorize the presiding officer to exclude the evidence on the ground of the

declarant's privilege against self-incrimination. If the declarant were present, his self-incrimination privilege would merely preclude his giving self-incriminating testimony at the hearing; it could not be asserted to prevent the disclosure of previously made self-incriminating statements.

The erroneous exclusion of information pursuant to Section 916 on the ground that it is privileged might amount to prejudicial error. On the other hand, the erroneous failure to exclude information pursuant to Section 916 could not amount to prejudicial error. See Evidence Code § 918.

Section 916 may be declarative of the existing law. No case in point has been found, but see the language in *People v. Atkinson*, 40 Cal. 284, 285 (1870) (attorney-client privilege).

**Cross References**

**Definitions,**

- Evidence, see Evidence Code § 140.
- Person, see Evidence Code § 175.
- Presiding officer, see Evidence Code § 905.
- Proceeding, see Evidence Code § 901.

**Law Review and Journal Commentaries**

- California Evidence Code Section 771: Conflict with privileged communications. 6 Pac. L.J. 612 (1975).
- Physician-patient privilege: Absent patient. 27 Hastings L.J. 99 (1975).

**Library References**

- Privileged Communications and Confidentiality ¶19, 29.
- Westlaw Topic No. 311H.

**Research References**

**Encyclopedias**

- 45 Am. Jur. Proof of Facts 2d 595, Protected Communication Between Physician and Patient.
- CA Jur. 3d Evidence § 476, Claim and Determination.
- CA Jur. 3d Evidence § 477, Who May Invoke Privilege.

**Treatises and Practice Aids**

- Rutter, Cal. Practice Guide: Civil Trials & Evidence Ch. 8E-A, A. Privileges.
- McCormick on Evidence § 55, Waiver of Objection.
- Simons California Evidence Manual § 5:10, Exclusion of Privileged Information on Court's Motion.
- Simons California Evidence Manual § 5:51, When Must Physician or Psychotherapist Claim the Privilege?
- 2 Witkin Cal. Evid. 4th Witnesses § 63, Distinction: Consular Privilege Under Treaty.

- 2 Witkin Cal. Evid. 4th Witnesses § 92, (S 92) Exclusion by Presiding Officer.
- 2 Witkin Cal. Evid. 4th Witnesses § 94, Claim Overruled in Prior Proceeding.
- 23 Wright & Miller: Federal Prac. & Proc. § 5426, General Rule--Newsmen's Privilege.
- 24 Wright & Miller: Federal Prac. & Proc. § 5496, Privilege Claimants--Client.
- 25 Wright & Miller: Federal Prac. & Proc. § 5537, Privilege Claimants--"Holder".
- 25 Wright & Miller: Federal Prac. & Proc. § 5540, Privilege Claimants--Personal Representative.
- 25 Wright & Miller: Federal Prac. & Proc. § 5590, Privilege Claimants--Personal Representative.
- 26A Wright & Miller: Federal Prac. & Proc. § 5684, The Freedom of Information Act--Claimants.
- 26A Wright & Miller: Federal Prac. & Proc. § 5741, Statutory History.

- 26A Wright & Miller: 1 § 5742, Policy of Rejection.
- 26A Wright & Miller: 1 § 5744, Disclosure--'to Claim'.

**Consent or permission to Construction and application of Consular privilege 3 Presumptions and burden Prosecutorial input 4**

**1. Construction and application**

Trial court was required to apply privilege, as established in *People v. Mexican Consular Relations*, into evidence, in criminal proceeding. Mexican consul testified, which stated that he was not responsible for anything he learned in confidential communications with Mexican government; Mexican consul was sole holder of privilege, and was not to be compelled to testify in proceeding. *People v. Mexican Consular Relations* (1989) 259 Cal.Rptr. 524, review denied. *Ambassador v. Mexican Consular Relations*

Trial court was required to apply physician-patient privilege on behalf of victim of various mental health service records and did not assert that exception applied. *People v. Mexican Consular Relations* (1988) 248 Cal.Rptr. 240, Witnesses ¶ 223

Under provision of this Code, duty of presiding officer, to determine if any party to exclusion motion to claim privilege, trial court required on its own motion to order district attorney to exclude order privileged records and respect to psychiatric or mental health information of arresting officer; as to such officers' acts of force or acts demonstrating or prejudice. *Lemelle v. Orange County* (App. 4 Rptr. 450, 77 Cal.App.3d ¶ 627.8(5))

**2. Consent or permission to**

Mexican government's equivocal assertion of confidentiality constitute consent to admission into evidence. *People v. Mexican Consular Relations*

**ITEM 4**



VCIJIS Court Docket Reporting

Case#: 2005045185     F  A    Name: Kling, Randolph Clifton

Date Range: Start 00/00/00    End 00/00/00    Seq Ilbr Range:    From    To    Docket Category: All Categories

Show Date Entered:     Show User:     Show Suppressed Codes:     Report Type:  Short  Long

Dt Action	Seq Ilbr	Code	Text
09/01/09	1	FCRAF	Opinion and Order Granting Petition for Writ of Prohibition (Certified for Publication) is received and forwarded to Judge Riley, Rebecca S.
	2	FCFREE	Pursuant to the Opinion of the Court of Appeal of the State of California, Second Appellate District in Case No. B208748 the court order of June 18, 2008, granting the People's motion to unseal reporters transcripts of in camera hearings conducted pursuant to section 1326 of the Penal Code is hereby vacated. People's motion is denied. Order signed by Kevin McGee Presiding Judge for Judge Rebecca Riley.
09/23/09	1	FCRAF2	Letter from District Attorney of San Joaquin County re: Petition for Review is received and forwarded to the file.
	1	FCRAF	Ex Parte Petition for Access to Juror Identifying Information is received and forwarded to Judge Riley, Rebecca S.
09/24/09	1	FCRAF	Copy from the Office of the District Attorney San Joaquin County to Chief Justice George is received and forwarded to Judge McGee, Kevin J.
	2	FCRAF	Copy from the Office of the District Attorney San Joaquin County to Chief Justice George is received and forwarded to Judge Riley, Rebecca S.
09/29/09	1	FLD3	Notice of petition for access to juror information by the defense filed on 09/29/09.
10/01/09	1	FCRAF2	Letter from District Attorney of Orange County re: Petition for Review is received and forwarded to the file.
10/02/09	1	FLD3	Notice of hearing filed on 10/02/09.
	1	FLREQH	Request for hearing re: Notice of Hearing filed by Public Defender.
	2	FCRCD	Ex-Parte petition for access to juror identifying information (CCP 237) is received



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Case# 2005045185    F A    Name: Kling, Randolph Clifton

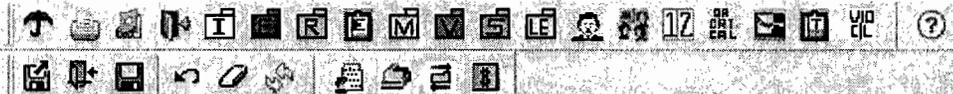
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Dt Action	Seq Ilbr	Code	Text
10/02/09	3	FLREQH	Request for hearing re: Amended Notice of Hearing filed by Public Defender.
	4	FCRCD	Ex-Parte petition for access to juror identifying information (CCP 237) is received.
	5	FCREC	Notice and Amended Notice sent to Records to be attached to file.
10/05/09	1	HHELD	Miscellaneous Motion Heard in Courtroom 46 on Oct 05, 2009 at 08:30 AM.
	2	OFJUD	Judge - Riley, Rebecca S.
	3	OFJA	Judicial Assistant - Vasquez, E.
	4	OFREP	Court Reporter - Lewis, Sharon L is present.
	5	PP	The defendant is present in court.
	6	PPD	Public Defender Melanie Miles is present in court.
	7	PPDA	Deputy District Attorney Cheryl Temple present.
	8	FCFREE	Jay Carrott present at counsel table
	9	RQCONT	Defense request for continuance is granted.
	10	FCFREE	People object to the continues
	11	MOD	Defense Oral motion, for continues is granted.
	12	CLCONT	Case continued to 10/23/09 at 08:30 AM in Courtroom 46 for Sentencing.
	13	FCFREE	And motions

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Case# 2005045185  F  A Name: Kling, Randolph Clifton

Date Range: Start 00/00/00 End 00/00/00 Seq Ilbr Range: From To Docket Category All Categories

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Dt Action	Seq Ilbr	Code	Text
10/05/09	14	FCFREE	Court orders both counsel to provide copies of their presentation or power point of their opening statements and closing arguments to the court and to each other by Friday 10/9/09.
	15	CLVAC	Calendar line set for 10/19/09 at 08:30 AM in Courtroom 46 for Sentencing is now vacated.
	16	BLCURS	Defendant is remanded to the custody of the Sheriff's Office. Bail remains as previously set in the amount of No Bail.
	17	BLOTA	The court orders you to appear.
	18	PRINT	
	19	PRINT	
	20	FLD3	Notice of petition for access to juror information by the defense rescheduled from October 19 to October 23, 2009 filed on 10/05/09.
10/06/09	1	FCFREE	Search Warrant Identification - Capital Case mailed to to District Attorney.
10/08/09	1	FLD3	Filing 67 Defense Guilt and Penalty Powerpoint slides Per Court Order of October 5, 2009 filed on 10/08/09.
	2	FLD3	People's Powerpoint slides opening statement and closing argument. Also for (Penalty Phase) filed on 10/08/09.
10/15/09	1	FLD3	Filing 67 remarked as Filing 70: Defense motion to continue filed on 10/15/09.
	1	FLD3	Filing 67: Defense motion for continues filed on 10/15/09.
10/16/09	1	FCRCD	Sealed Probation Officer Report is received.
	2	FCRCD	Sealed Probation Officer Report sent to Judicial Assistant Division to be

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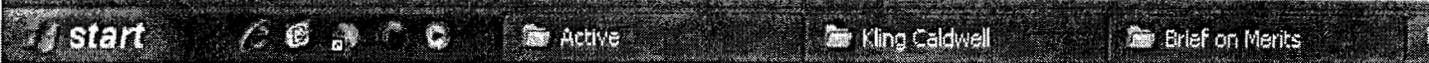
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Dt Action	Seq Ilbr	Code	Text
10/16/09	2	FCJA	Sealed Probation Officer Report sent to Judicial Assistant Division to be attached to the file.
10/20/09	1	FLD3	Filing #69 - Defense application for an order sealing a record filed on 10/20/09.
	2	FLD3	Filing #68 - Defense supplemental motion to continue. (Conditionally under seal) filed on 10/20/09.
10/23/09	1	HHELD	Sentencing Heard in Courtroom 46 on Oct 23, 2009 at 08:30 AM.
	2	OFJUD	Judge - Riley, Rebecca S.
	3	OFJA	Judicial Assistant - Vasquez, E.
	4	OFREP	Court Reporter - Lewis, Sharon L is present.
	5	PP	The defendant is present in court.
	6	PPD	Public Defender Cynthia Ellington is present in court.
	7	PPDA	Deputy District Attorney Cheryl Temple present.
	8	FCFREE	Danny Thompson investigator present at counsel table
	9	FCFREE	Court addresses the Petition for Juror information. Court orders this hearing closed to the public. Hearing ordered sealed.
	10	FCFREE	Juror 9,1,2,12,7,4 present in court. Each juror in court opposes the release of information and request not to be contacted.
	11	FLD3	Letter pursuant to 237 from Juror seat #11 filed on 10/23/09.
	12	FLD3	Letter pursuant to 237 from juror seat #10 filed on 10/23/09.

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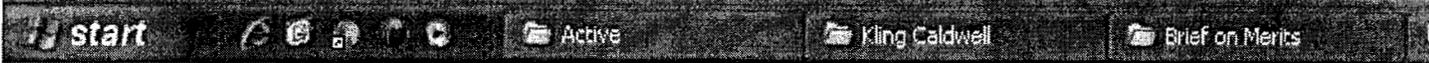
Case#: 2005045185    F    A    Name: Kling, Randolph Clifton

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Dt Action	Seq Ilbr	Code	Text
10/23/09	13	FLD3	Letter pursuant to 237 from juror seat #6 filed on 10/23/09 .
	14	FLD3	Letter pursuant to 237 from Juror #12 filed on 10/23/09 .
	15	FLD3	Letter pursuant to 237 from Juror #3 filed on 10/23/09 .
	16	FLD3	Letter pursuant to 237 from juror #5 filed on 10/23/09 .
	17	FLD3	Letter pursuant to 237 from (alternate juror replacing juror #10) filed on 10/23/09 .
	18	FLD3	Letter pursuant to 237 from Juror #1 filed on 10/23/09 .
	19	FLD3	Letter pursuant to 237 from juror #7 filed on 10/23/09 .
	20	EXMRK	Court Special exhibit # A is marked for identification.
	21	EXSEAL	Court Special exhibit # A , is sealed.
	22	FCFREE	Defense argues the request to be able to talk and contact the jurors.
	23	FCFREE	People oppose the request.
	24	FCFREE	Court denies the request to obtain juror information and any contact
	25	FLD3	Defense ex-parte petition for access to juror identifying information (sealed) filed on 10/23/09 .
	26	FLD3	Copy of appellate search warrant identification. filed on 10/23/09 .
	27	FLD3	Copy of acknowledgment of receipt and answer of garnishee filed on 10/23/09 .
	28	FLD3	Filing 73. Notice of motion and motion for order to release property. Order

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Case#: 2005045185    **F** **A**    Name: Kling, Randolph Clifton

Date Range: Start 00/00/00    End 00/00/00    Seq Ilbr Range:    From    To    Docket Category: All Categories

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Dt Action	Seq Ilbr	Code	Text
10/23/09	28	FLD3	Filing 73: Notice of motion and motion for order to release property: Order filed on 10/23/09 .
	29	FCFREE	Defense request to correct filing #67 to be filing #70
	30	FCFREE	Amended Notice of Hearing should be filing 72
	31	FCFREE	Defense application for sealing order and Petetion is granted.
	32	FCFREE	Defense motion for New Trial is continued to 12/28/09. Defense to file Points and Authorities by 12/14/09.
	33	FCFREE	Court allows Dect Carrott to be able to have access to the sealed search warrants for 3/2/04, 3/19/04, 4/2/04, 2/7/05, and 6/7/06 to obtain information needed.
	34	FCFREE	Defendant waives his right not to be present in court on 11/9/09 hearing to go over transcripts.
	35	CLCONT	Case continued to 11/09/09 at 09:00 AM in Courtroom 46 for Miscellaneous Motion .
	36	CLCONT	Case continued to 12/28/09 at 08:30 AM in Courtroom 46 for Sentencing .
	37	FCFREE	And motions
	38	BLCURS	Defendant is remanded to the custody of the Sheriff's Office. Bail remains as previously set in the amount of No Bail .
11/09/09	1	HHELD	Miscellaneous Motion Heard in Courtroom 46 on Nov 09, 2009 at 09:00 AM .
	2	OFJUD	Judge - Riley, Rebecca S .
	3	OFJA	Judicial Assistant - Mccarty, F .



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VCIJIS Court Docket Reporting

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Dt Action	Seq Ilbr	Code	Text
11/09/09	3	OFJA	Judicial Assistant - Vasquez, E.
	4	OFREP	Court Reporter - De La O, Kathleen is present.
	5	PPN	The defendant is not present in court.
	6	PPD	Public Defender Melanie Miles is present in court.
	7	PP977	Attorney appearing for the defendant with 977 PC authority.
	8	PPDA	Deputy District Attorney Cheryl Temple present.
	9	FCFREE	Danny Thompson seated at counsel table
	10	FCFREE	Court makes the following order. Court allows District Attorney and Dect. Jay Carrott from Simi Valley Police Dept to have access to all sealed search warrants and logs. List of search warrants as follows: SW 117-04, SW 118-04, SW119-04, SW123-04, SW124-04, SW167-04, SW168-04, SW188-04, SW195-04, SW121-04, SW277-04, SW276-04, SW349-04, SW373-04, SW330-04, SW081-05, SW121-05, SW252-06
	11	FCFREE	Court and counsel go over transcripts to correct any errors or corrections that need to be done on the record.
	12	CLREM	The court date of 12/28/09 remains as previously ordered.
	13	BLCURS	Defendant is remanded to the custody of the Sheriff's Office. Bail remains as previously set in the amount of No Bail.
	14	BLOTA	The court orders you to appear.
11/20/09	1	FLD3	Application for judicially-served defense subpoenans filed on 11/20/09.
	2	FCREC	Annlicatinn sent to Records to be attached to file

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Case#: 2005045185    F A    Name: Kling, Randolph Clifton

Date Range: Start 00/00/00    End 00/00/00    Seq Hbr Range:    From    To    Docket Category: All Categories

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Dt	Action	Seq Hbr	Code	Text
11/09/09		11	FCFREE	Court and counsel go over transcripts to correct any errors or corrections that need to be done on the record.
		12	CLREM	The court date of 12/28/09 remains as previously ordered.
		13	BLCURS	Defendant is remanded to the custody of the Sheriff's Office. Bail remains as previously set in the amount of No Bail .
		14	BLOTA	The court orders you to appear.
11/20/09		1	FLD3	Application for judicially-served defense subpoenans filed on 11/20/09 .
		2	FCREC	Application sent to Records to be attached to file.
		3	FLD3	Public and redacted application for an order sealing records filed on 11/20/09 .
		4	FCREC	Public and redacted applications sent to Records to be attached to file.
12/02/09		1	FCRCD	Subpoenaed Records is received.
		2	FCRCDS2	Subpoenaed records forwarded to Records to place in court file.
12/04/09		1	FLD3	Request for an in camera hearing to demonstrate the entitlement of the defense to subpoenaed records filed on 12/04/09 .
		2	FCREC	Request sent to Records to be attached to file.



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**ITEM 5**



# Superior Court of California

COUNTY OF VENTURA  
Hall of Justice  
800 South Victoria Avenue  
Ventura, CA 93009

**Michael D. Planet**  
*Executive Officer/Clerk  
and Jury Commissioner*

September 11, 2009

Michael C. McMahon  
Chief Deputy Public Defender  
Office of the Public Defender  
County of Ventura  
800 S. Victoria Avenue, Room 207  
Ventura, CA 93009

**Re: DCA Opinion**

Dear Mr. McMahon:

I am writing in response to your letter dated September 1, 2009 regarding the DCA opinion in the *Kling* case.

Judge McGee signed an order vacating Judge Riley's June 18, 2008 order and denying People's motion, and a docket entry has been made. The courtroom staff has been advised that the docket in criminal cases should not identify the third party from whom subpoenaed records have been received. Finally, we have updated the docket code for processing staff so it doesn't identify the party in future instances.

I believe this covers everything in the opinion. Thank you for bringing this matter to my attention.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael D. Planet".

Michael D. Planet  
Executive Officer and Clerk

vjb

cc: Michael D. Schwartz, Office of the Public Defender  
The Honorable Kevin J. McGee, Presiding Judge  
The Honorable Rebecca Riley  
The Honorable Bruce A. Young  
Brenda McCormick, Managing Attorney

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF VENTURA

I am employed in the County of Ventura, State of California. I am over the age of eighteen (18) and not a party to this action; my business address is: Office of the District Attorney, 800 S. Victoria Avenue, Ventura, California 93009.

On December 9, 2009 I served true copies of the attached document, described as:  
MOTION FOR JUDICIAL NOTICE

by personal service on the following:

Receptionist, Public Defender  
ATTN: Michael C. McMahon, Chief Deputy  
800 South Victoria Avenue  
Ventura, CA 93009

Clerk of the Superior Court  
ATTN: Michael Planet, Executive Officer  
800 South Victoria Avenue  
Ventura, CA 93009

Clerk of the Superior Court  
ATTN: Hon. Rebecca S. Riley, Judge  
800 So. Victoria Avenue  
Ventura, CA 93009

and by placing a true copy thereof enclosed in a sealed envelope addressed as follows, and causing such envelope with postage thereon fully prepaid to be placed in the United States Mail at Ventura, California:

Office of the Clerk  
Court of Appeal  
200 E. Santa Clara Street  
Ventura, CA 93001

District Attorney, San Joaquin County  
ATTN: Kevin A. Hicks  
P.O. Box 990  
Stockton, CA 95201

District Attorney, Orange County  
ATTN: Kevin J. Haskins  
P.O. Box 808  
Santa Ana, CA 92701

[ X ] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



