

## POLICE REPORTS: LET THEM IN OR KEEP THEM OUT



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Whether it is a domestic violence restraining order or an OSC for custody, it is not uncommon for the police report to be stapled to the application as exhibit A. That police report can either make or break the case. But before it does, you must make sure that it is admissible evidence. If it is not admissible or if a part of it is not admissible, you must make a timely objection.

Like many types of documentary evidence, there are at least three major evidentiary hurdles that must be overcome before a court can properly consider the contents of a police report. These hurdles are relevance, authentication, and hearsay. Some parts of the police report are inadmissible hearsay while other parts fit within one or more exceptions to the hearsay rule.

A police report, like any other document or writing, is authenticated by “(a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it to be or (b) the establishment of such facts by any other means provided by law.”<sup>1</sup> Authenticating the report can be accomplished through the direct testimony of the police officer who prepared the report or the testimony of the custodian of records who maintains the report on behalf of the police department. If the report is subpoenaed from the police department, a declaration from the custodian of records regarding the authenticity of the subpoenaed documents is sufficient to authenticate the report. Attorneys also have the option of seeking opposing counsel’s stipulation as to the authenticity of the police report to avoid incurring the costs to subpoena witnesses or prepare declarations. Many attorneys routinely enter into such stipulations as a professional courtesy.

Now that the police report has been authenticated, you still must get it admitted into evidence, or at least the sections of the report that support your case. However, all of the contents of the report are hearsay, and much of the report is probably multiple hearsay. If you are not prepared to address hearsay issues and exceptions, you can only properly use the report to prove that a report was made, which may or not be relevant. Hearsay is defined as “evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.”<sup>2</sup> Hearsay statements are not admissible unless they satisfy one of the hearsay exceptions provided under the law.

California case law has applied both the business record exception<sup>3</sup> and the official record exception<sup>4</sup> to police reports in dealing with the first level of hearsay, i.e. that the entire contents of the report are hearsay because every word contained in the report was written by someone while they were not a witness testifying in court. These sections both provide that the contents of a writing are not made inadmissible by the hearsay rule if the writing was made by someone in the scope of their employment, it was made at or near the time of the event it is recording, and the sources of the information and method and time of preparation indicate that the record is trustworthy. The business record exception has the additional requirement that the custodian of records of the business or other qualified witness testifies to the document’s identity and mode of preparation. The official records exception does not require testimony as to the mode of preparation of the document because the court is permitted to take judicial notice that the writing of a public employee was prepared in such a manner as to assure its trustworthiness.<sup>5</sup>

“In a proper case the business records exception to the hearsay rule is applicable to public documents, such as police reports.”<sup>6</sup> However, these exceptions do not make the entire contents of the report admissible. Typically, police reports contain interviews with witnesses, mixed in with observations of the officer making the report. The statements of witnesses contained in a police report can create another level of hearsay, or multiple hearsay, and if “multiple hearsay is offered, an exception for each level of hearsay must be found in order for the evidence to be admissible.”<sup>7</sup>

For example, once you have met the statutory requirements for either the business record or official record exceptions to the hearsay rule, and the police report at issue in your case starts by describing the officer's observations when he or she arrives on the scene, those observations are admissible so long as they are relevant. However, if the report moves on to describe contact and interviews with witnesses, the statements made by those witnesses are multiple hearsay, and must qualify for another hearsay exception, unless they are not offered to prove the truth of the matter they are asserting. The statements of witnesses are not made admissible by the business record or official records exception because they are based upon the observations of people who have no official duty to observe and report relevant facts.<sup>8</sup>

Domestic violence incidents require special analysis. If you are trying to prove an allegation of domestic violence and you have a police report from an incident, the report might describe how the victim and suspect appeared physically, or whether or not injuries were visible. Those observations would be admissible because they are relevant and would fall within the portion of the report made admissible by the official record exception to the hearsay rule, i.e. they are observations of the officer making the report. Normally the interviews with the victim would be multiple hearsay and would not be admissible under the official records exception. However, if the victim is under the "stress of excitement" from the incident while spontaneously describing what happened, those statements might qualify as a spontaneous statement under California Evidence Code § 1240. Your police report might also contain the admission of a party opponent, as many domestic violence calls result in everyone at the scene wanting to tell their side of the story.<sup>9</sup> Therefore, it is possible that each instance of multiple hearsay would have an exception and the entire report could be admissible.

Furthermore, you must always remember that not all out of court statements are considered hearsay. If your report has met the business record or official records exception to the hearsay rule, and contains an interview with a witness who states to the officer taking the report, "Officer, there are pink elephants flying against the walls." this statement is admissible and does not need to qualify for an additional hearsay exception. You are not going to



be offering the statement to the court to prove that there were pink elephants flying against the walls at the time of the incident, but rather to prove that the witness was hallucinating at the time, which might or might not be relevant to your case. Since the statement is not being offered for the truth of the matter asserted, there is no hearsay issue with this out of court statement.

When you are faced with a police report, you must familiarize yourself with the ways to authenticate a document and the various exceptions to the hearsay rule. Even if you are able to authenticate the report and pass through the hearsay hoops, those portions of the report must be relevant to your case. Law enforcement officers are considered by most to be reliable third party witnesses, so if evidence supporting your position can be found in a police report, getting that evidence admitted can win your case.

A police report is admissible in a family law proceeding only if you can overcome the hurdles of relevancy, authentication, and hearsay. The hearsay rule is the largest hurdle. That hurdle can be overcome by addressing the multiple levels of hearsay methodically. Now that evidence of domestic violence is relevant on the issue of support, as well as custody and in domestic violence proceedings it is more important than ever to master the rules of evidence.

1. California Evidence Code § 1400.
2. California Evidence Code § 1200.
3. California Evidence Code § 1271.
4. California Evidence Code § 1280.
5. Law Revision Commission Comments to Evidence Code § 1280.
6. Taylor v. Centennial Bowl, Inc. (1966) 65 Cal.2d 114, 126.
7. Alvarez v. Jacmar Pacific Pizza Corporation (2002) 100 Cal.App.4th 1190, 1205.
8. People v. Hernandez (1997) 55 Cal.App.4th 225.
9. California Evidence Code § 1220

