

1 Innocence Legal Team
1600 S. Main St., Suite 195
2 Walnut Creek, CA 94596
3 Tel: 925 948-9000

4 Attorney for Defendant

5 SUPERIOR COURT OF THE STATE OF CALIFORNIA
6 FOR THE COUNTY OF ____
7

8) Case No.
9)
10)
11) MOTION TO EXCLUDE
12) HEARSAY TESTIMONY DUE
13) TO DECLARANT'S
14) INCOMPETENCE
15)
16)
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Plaintiff,)
Vs.)
Defendant.)

18 TO: All parties and to their attorneys of record, and to the
19 Honorable Judge of the Superior Court:

20 Based on the following points and authorities, Defendant requests that
21 certain hearsay statements by the child victim(s) in this case be excluded due to
22 his/her/their incompetence. The statements at issue include:

23 List the statements and to whom and when they were made
24
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1
2 **A CHILD WITNESS'S "TRUTH INCOMPETENCE"**
3 **REQUIRES EXCLUSION OF HIS OR HER HEARSAY**
4 **STATEMENTS FOR THEIR TRUTH**
5 **IF THERE ARE NO OTHER INDICIA**
6 **OF THEIR RELIABILITY OR THEY ARE**
7 **OTHERWISE UNCORROBORATED.**

8 As set forth in Evidence Code §701, a witness is not competent to testify if
9 he or she is incapable of expressing himself or herself concerning the matter to be
10 understood or if he or she is incapable of understanding a witness's duty to tell the truth.
11 In In re Basilio T. (1992) 4 Cal.App.4th 155, 166-167, the reviewing court found that the
12 hearsay statements of a truth incompetent child witness contained in a social services
13 report should have been excluded in the absence of any showing that the child had the
14 ability to differentiate between truth and lies at the time the statements were made. The
15 Basilio T. court recognized two exceptions to the rule that a hearsay declarant must be
16 competent when an out of court statement. These are spontaneous statements and
17 fresh complaints. (Id., at pp. 166-167.)

18
19 Subsequent to Basilio T., several cases determined that the hearsay
20 statements of a child witness whose incompetence is the result of fear of the formality of
21 the court proceedings are not subject to exclusion if it can be demonstrated that the
22 statements were reliable when they were made. (In re Dirk S. (1993) 14 Cal.App.4th
23 1037; In re Kailee B. (1993) 18 Cal.App.4th 719; In re Carmen O. (1994) 28 Cal.App.4th
24 908.) The Carmen O. court set forth factors to be considered in determining if the
25 statement in question is reliable. These include (a) whether the child is very young,

1 such that it is unlikely that the statement were fabricated or simply the product of his or
2 her imagination; (b) whether the accusatory statement was spontaneous or elicited by
3 leading or suggestive questioning; (c) whether independent evidence exists that is
4 consistent with the statement; (d) whether the child's various recitations of the statement
5 were consistent; (e) whether the wording of the statement reflects lack of coaching; (f)
6 the lack of accusations against other adults of the opposite sex with whom the child has
7 contact; and (g) the absence of a motive to lie or exaggerate. (Id., at p. 855; In re
8 Nemis M. (1996) 50 Cal.App.4th 1344, 1354.)
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10 More recently, in In re Cindy L. (1997) 17 Cal.4th 15, our state high court
11 ruled that when the hearsay exception at issue requires a child's statement to be
12 particularly trustworthy, as did the judicially created child dependency exception therein,
13 truth incompetence will not bar the admission of said statement but is a factor in
14 determining its reliability. (Id., at p. 1352.) The court explained:

15 ". . .in the case of the child hearsay exception
16 we recognize today, the fact of the child's
17 incompetence to testify does not prevent a court
18 from finding that the various circumstances
19 surrounding the statement-not only its spontaneity,
20 but also the precociousness of the child's knowledge
21 sexual matters, the lack of motive to lie, and
22 other factors outlined above-lead to the conclusion
23 that the statement bears special indicia of
24 reliability and is therefore admissible. The
25 requirement of either corroboration, or availability

1 for cross-examination additionally safeguards
2 against the possibility that the child is merely
3 fabricating the statement." (Id., at p. 1353.)¹

4 Here is where you have to put in your own argument based on the particular facts in
5 your case. First, show that truth incompetence, not fear incompetence is the problem
6 with the child witness. Next show that the hearsay exception involved in your case does
7 not have special trustworthiness requirements. Then show, how the factors outlined in
8 the preceding quote from In re Cindy L. plus the factor of truth incompetence work
9 together to demonstrate unreliability of the statement, e.g., the statement was not
10 spontaneous, the sexual detail in the statements was not beyond what a child of that
11 age would know, the child had a motive to lie, and there was no corroboration.

12
13 Because the foregoing factors weigh against a finding of the reliability of
14 (insert child witness's name) hearsay statement(s) in this case, it must be excluded
15 based on his/her truth incompetence.

16 Filed in conjunction with this motion is a motion requesting a psychiatric
17 evaluation of (insert name of witness) on the issue of competency. As more fully set
18 forth in that motion, failure to grant it and afford Defendant equal access to (insert name
19 of witness) would deprive him/her of his federal and state constitutional rights to due
20 process and equal protection.

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1 In re Cindy L. was recently cited with approval
25 in In re Lucero L. (2000) 2000 WL 655647, *12, *14.

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Dated:

Respectfully submitted,

LAW OFFICE OF PATRICK E. CLANCY, ESQ.

By _____

Attorney for Defendant