

## **TRAINING BULLETIN: Legal Update**

### **Child Abuse and Molest – Two New Laws**

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#### **Evidence Code section 1109**

For several years now we have been able to introduce evidence of prior sexual offenses under Evidence Code section 1108 to show “propensity”, that is, that a defendant is likely to have committed the charged sex offense because he had committed sex offenses in the past. Evidence Code section 1109 did the same for prior acts of domestic violence. Batters and child molesters therefore went to trial only at the risk of seeing prior victims return to testify against them. Conspicuous by its absence was any similar provision for child abusers.

Effective January 1, 2006, Evidence Code section 1109 has some new and very helpful language. Evidence Code section 1109(a)(3) now states: “Except as provided in subdivision (e) or (f) and subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, in a criminal action in which the defendant is accused of an offense involving child abuse, evidence of the defendant’s commission of child abuse is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352. Nothing in this paragraph prohibits or limits the admission of evidence pursuant to subdivision (b) of Section 1101.”

Here’s the translation into plain English, without those wretched double negatives. Evidence Code section 1101 generally prohibits admission evidence of prior acts, not charged in the present offense, to prove the charged crime. Just because a defendant robbed nine banks in the past does not mean he robbed *this* bank, the only one currently charged. However, under Evidence Code section 1101(b) prior acts could come in if it was relevant to prove another issue, such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or a belief that the victim was consenting to a sex act. Thus if the bank robber had a signature M.O., the prior offenses could be admitted to show identity.

Evidence Code section 1109(a)(3) now creates an exception to the general prohibitions of Evidence Code Section 1101, and allows in prior, uncharged acts of child abuse, whether or not those prior acts resulted in an arrest or criminal charges. The prior acts must have occurred within ten years of the charged offense. The key is how to define “child abuse” as used in Section 1109.

Subdivision (d)(2) of section 1109 defines “child abuse” as “an act proscribed by Section 273d of the Penal Code.” Fine, we will now connect the dots to Penal Code Section 273d, which makes it a crime (wobbler) to “willfully [inflict] upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition.” Let us all give thanks for that preposition, “or”, because it is almost impossible to get a jury to unanimously agree beyond on a reasonable doubt on what constitutes “cruel and unusual punishment.” It is fairly easy to prove that the defendant inflicted an injury resulting in a “traumatic condition”, such as swelling, a cut, a bruise, or any other injury. “Traumatic condition” is not the same thing as “great bodily injury.”

Because Evidence Code section 1109 is a procedural rule concerning admission of evidence, and not a substantive rule defining a crime, it is effective in all trials immediately, regardless of when the charged crime occurred.

Unfortunately, Evidence Code section 1109 shares the same deficit as Penal Code section 273ab, the child homicide statute. It doesn’t include child neglect. Evidence Code section 1109 cannot be used to introduce evidence of acts of neglect or endangerment, such as caretakers who spend their money on drugs instead of baby food, who leave medical conditions in their children untreated and who stash their drugs in the baby’s

crib figuring the police will never look there. For those prior acts we must go back to Evidence Code section 1101(b) and try to prove that the prior acts establish knowledge or motive.

### **Penal Code section 801.1**

One of the difficult realities of child molestation is that victims keep the secret for as long as they can stand it, often for years. When they do disclose, often the statute of limitations has expired and no charges can be filed. The California legislature tried to fix this problem by allowing charges to be filed within a year of disclosure for certain sex offenses even if the statute of limitations had run out. This language still appears in your Penal Code in section 803(f), but unfortunately the United States Supreme Court has ruled it unconstitutional (*California v. Stogner* [2003] 539 U.S. 607).

Effective January 1, 2006, Penal Code section 801.1 prosecution for Penal Code sections 261 (rape), 286 (sodomy), 288 (child molesting), 299.5 (continuous sexual abuse of a child) 288a (oral copulation) or 289 (penetration with a foreign object) can commence at any time before the victim's 28<sup>th</sup> birthday, if the victim was under age 18 at the time of the crime.

While we can't apply this rule retroactively to sex crimes that have already occurred, we can apply it to the enumerated sex crimes occurring on and after January 1, 2006. As the years go by it will become increasingly important to determine whether the crime occurred before January 1, 2006 (in which case the ordinary time period of six years applies) or after January 1, 2006, when the new rule takes effect.

Of course, another solution is to charge Penal Code section 269, aggravated sexual assault of a child, when it applies. That section applies to rape, sodomy, oral copulation and penetration with a foreign object when committed by force on a victim under the age of 14 years by a person at least ten years older than the victim. Because the punishment is 15 years to life, Penal Code section 799 applies and there is no statute of limitations, just like there is no time limit on filing murder charges.

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***Please consult with your department policy and County Legal Counsel in your respective county for precise legal guidance before applying any of the techniques or suggestions in this training bulletin.***

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