

1 **ATTORNEY INFORMATION DELETED**

2 Attorney for CLIENT NAME DELETED

3  
4 IN THE SUPERIOR COURT OF CALIFORNIA  
5 FRESNO COUNTY

6 PEOPLE OF THE STATE OF

7 CALIFORNIA,

8 Plaintiff,

9 vs.

10 CLIENT NAME DELETED,

11 Defendant.

Case number: **CASE NUM. DELETED**

MOTION TO ALLOW ADMISSION OF  
EXTRAJUDICIAL STATEMENTS OF  
NON-TESTIFYING PERSONS

12  
13 **SUMMARY OF ARGUMENTS**

14 The defense seeks to admit extrajudicial statements of certain non-testifying  
15 persons for purposes other than the truth of the matter asserted in those statements. The  
16 prosecutor and the court have stated that extrajudicial statements of non-testifying  
17 persons fall under the Hearsay Rule and therefore are inadmissible.

18 The statements of the prosecutor and court are incorrect as a matter of law.

19 Only extrajudicial statements which are offered for the truth of the matter  
20 asserted are hearsay; extrajudicial statements which are *not* offered for the truth of the  
21 matter are *not* hearsay.<sup>1</sup> Even if the statements were hearsay, there are exceptions to the  
22 hearsay rule for statements which count as admissions against penal interest and for  
23 statements intended to show the state of mind of a hearer.

24 **ARGUMENTS**

25 **I**

26  
27  
28 <sup>1</sup> This is a straightforward application of De Morgan's "Law" and the concept of double negation. (Kopi, Introduction to Logic (Sixth Ed. 1982) p. 316.)

1           **EXTRAJUDICIAL STATEMENTS ARE NOT INADMISSIBLE MERELY**  
2           **BECAUSE THEY ARE EXTRAJUDICIAL STATEMENTS**

3           Extrajudicial statements are statements made outside the courtroom. (Black’s  
4 Law Dict. (7th Ed. 1999) p. 606, col. 1.) According to Evidence Code § 1200(a):

5                     “Hearsay evidence” is evidence of a statement that was made other  
6                     than by a witness while testifying at the hearing and that is offered to  
7                     prove the truth of the matter stated.

8           Generally speaking, “a statement that was made other than by a witness while  
9           testifying at the hearing” is also extrajudicial, because, almost by definition, it was made  
10          outside the courtroom. In order to be *hearsay*, however, the statement must be not just  
11          “extrajudicial” – that is, made outside the courtroom, or by someone “other than...a  
12          witness while testifying” – it must *also* be “offered to prove the truth of the matter  
13          stated.” (Evid. Code § 1200(a).) ““The Hearsay rule excludes extrajudicial utterances  
14          only when offered for a special purpose, namely, as *assertions to evidence the truth of*  
15          *the matter asserted.*”” (*People v. Putty* (1967) 251 Cal.App.2d 991, 996 [59 Cal.Rptr.  
16          881], quoting 6 Wigmore, Evidence (3d ed. 1940), § 1766, p. 178. (Italics in original.))

17          It is particularly noteworthy that *Putty* contains this example:

18                     Wherever an utterance is offered to evidence the state of mind which  
19                     ensued in another person in consequence of the utterance, it is  
20                     obvious that no assertive or testimonial use is sought to be made of it,  
21                     and the utterance is therefore admissible, so far as the Hearsay rule is  
22                     concerned.

23          (*Putty, supra*, 251 Cal.App.2d at 996, quoting 6 Wigmore, Evidence (3d ed.  
24          1940) p. 235.)

25          Therefore, if a statement is *not* offered to prove the truth of the matter asserted, it  
26          is not hearsay, regardless of whether it was uttered outside the courtroom, or by someone  
27          other than a witness while testifying.

28          NAME DELETED wishes to admit certain extrajudicial statements.  
VILLAPANDO does not propose to admit these statements for the truth of the matters  
asserted in the statements. Therefore, the statements which NAME DELETED wishes

1 to have admitted are not hearsay. They are therefore not *excludable* under the Hearsay  
2 Rule.

## 3 II

### 4 **EXTRAJUDICIAL STATEMENTS ARE NOT INADMISSIBLE MERELY BECAUSE** 5 **THE DECLARANT DOES NOT TESTIFY**

#### 6 **A. Extrajudicial statements are admissible to show state of mind, even though the** 7 **declarant does not testify.**

8 Extrajudicial statements are not inadmissible merely because the declarant is not  
9 available to testify or be cross-examined.

10 In *People v. Livingston* (1969) 271 Cal.App.2d 628, 636-637 [77 Cal. Rptr. 53],  
11 for example, certain extrajudicial statements made by the victim were admitted over the  
12 objection of the defendant. The Court held that the statements were admissible to prove  
13 the state of mind of the declarant. (*Id.* at 636.) The declarant did not testify. She was  
14 dead. (*Id.* at 637.)

15 Similarly, in *People v. Smithey* (1999) 20 Cal. 4th 936, 971-972 [86 Cal.Rptr.2d  
16 243], although the defense complained that certain statements were “irrelevant hearsay,”  
17 the Court found the statements were admissible for the purpose of showing the state of  
18 mind of a victim. The defendant had stated “that he had a friendly relationship with  
19 Cheryl.” (*Id.* at 972.) The statements were admitted to show that Cheryl, the victim,  
20 suspected the defendant stole from her, thus impeaching him on the issue of their  
21 friendly relationship. (*Ibid.*) Although Cheryl was the declarant whose statements were  
22 admitted, she did not testify. She was dead. (*Id.* at 952.)

23 Nor is it a requirement that the non-testifying declarant be dead. In *People v.*  
24 *Mendoza* (1992) 8 Cal.App.4th 504, 514 [10 Cal.Rptr.2d 312], the statements of a non-  
25 testifying declarant were admitted to show the state of mind of the defendant-appellant.

26 Therefore, the extrajudicial statements of non-testifying persons is admissible in  
27 order to show state of mind.  
28

1 In the instant case, NAME DELETED wishes to introduce certain extrajudicial  
2 statements of non-testifying persons in order to show state of mind. Therefore, the  
3 statements NAME DELETED wishes to have admitted are not inadmissible because  
4 they are extrajudicial and the declarant is not testifying.

5  
6 **B. Extrajudicial statements are admissible when they are admissions against penal  
interest, even though the declarant does not testify.**

7 Evidence Code § 1230 not only allows the admission of extrajudicial statements  
8 which are declarations against interest, it *requires* unavailability of the witness:

9 Evidence of a statement by a declarant having sufficient knowledge  
10 of the subject is not made inadmissible by the hearsay rule if the  
11 declarant is unavailable as a witness and the statement, when made,  
12 was so far contrary to the declarant's pecuniary or proprietary  
13 interest, or so far subjected him to the risk of civil or criminal  
14 liability, or so far tended to render invalid a claim by him against  
15 another, or created such a risk of making him an object of hatred,  
16 ridicule, or social disgrace in the community, that a reasonable man  
17 in his position would not have made the statement unless he believed  
18 it to be true.

16 As the Ninth Circuit Court of Appeals has noted with respect to California  
17 Evidence Code § 1230, “[T]here are certain foundational requirements for the  
18 declaration against interest exception to the hearsay rule. Among these is the  
19 requirement that the declarant must be shown to be unavailable.” (*Janich Bros., Inc. v.*  
20 *American Distilling Co.* (1977) 570 F.2d 848, 859.)

21 In the instant case, NAME DELETED wishes to introduce the extrajudicial  
22 statements made by certain persons against their penal interest, who are unavailable to  
23 testify. Such statements are not made inadmissible because they are extrajudicial. Nor  
24 are they inadmissible because the declarant is unavailable; indeed, that is one of the  
25 requirements.

26  
27 **CONCLUSION**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

There is no reason to deny admission of statements NAME DELETED wishes to have admitted merely because they are extrajudicial statements of non-testifying persons.

Dated: December 19, 2007

\_\_\_\_\_  
ATTORNEY DELETED,  
Attorney for NAME DELETED