

1 **CLANCY LITIGATION GROUP**
Patrick E. Clancy, SBN 60805
2 Dr. Demosthenes Lorandos, SBN 177644
1600 S. Main St., Suite 185
3 Walnut Creek, CA 94596
Tel: (925) 256-4600
4 eFax: (888) 802-5089

5 Attorneys for Defendant

6
7 SUPERIOR COURT OF CALIFORNIA, COUNTY OF

8 THE PEOPLE OF THE STATE OF) Case No.
9 CALIFORNIA,)
10 Plaintiff,) MOTION IN LIMINE TO
11 Vs.) EXCLUDE EVIDENCE OF
12 Defendant.) PRIOR SEX OFFENSE
13) PURSUANT TO EVIDENCE
14) CODE SECTION 352
Date:
Time:
Dept:

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

17 The defense requests that any evidence concerning
18 his/her commission of prior sex offense(s) be excluded pursuant
19 to Evidence Code §352 based on the following points and
20 authorities.

21 I

22 THE PRIOR OFFENSE(S) AT ISSUE

23 **Put a brief description of the prior offense(s) the People
24 propose to introduce into evidence**

25 II

26 **ADMISSION OF OTHER SEXUAL OFFENSE EVIDENCE IN**
27 **THIS CASE PURSUANT TO EVIDENCE CODE §1108**
VIOLATES EVIDENCE CODE §352.

28 Evidence Code section 1108 provides in pertinent part:

1 "(a) In a criminal action in which the defendant
2 is accused of a sexual offense, evidence of the
3 defendant's commission of another sexual offense
 or offenses is not made inadmissible by Section
 1101, if the evidence is not inadmissible
 pursuant to Evidence Code section 352."

4 The reviewing court in **People vs. Fitch** (1997) 55 Cal.App.4th 172
5 held this section did not violate a defendant's right to due
6 process and equal protection, finding that other sex acts
7 evidence is still subject to exclusion pursuant to Evidence Code
8 §352 which provides "a safeguard against the use of uncharged sex
9 offenses in cases where the admission of such evidence could
10 result in a fundamentally unfair trial." (**Id.**, at p. 183.) The
11 constitutionality of Evidence Code §1108 is presently pending in
12 the California Supreme Court. (**People vs. Ritson** S071200; **People**
13 **vs. Falsetta** S071521.) Defendant has waged a constitutional
14 attack on this section in a separate motion, and will assume for
15 purposes of this motion that §1108 passes constitutional muster.

16 In **People vs. Harris** (1998) 60 Cal.App4th 727, the
17 appellate court set forth the manner in which the balancing test
18 of §352 should be applied to other sex crimes evidence sought to
19 be admitted under §1108. In recognition that all cases
20 discussing the application of §352 to other crimes evidence
21 predated §1108, the **Harris** court emphasized that §352 "preserves
22 the accused's right to be tried for the current offense," i.e.
23 for what he did, not who he is. (**Id.**, at p. 737.) The court
24 determined:

25 "The factors we consider are derived from
26 the text of section 352 and the cases which
27 have arisen in the context of the use of
28 prior conduct admitted under section 1101.
 We recognize that different considerations
 may apply in the context of section 1108.

1 However, section 1108 functions as another
2 albeit much broader exception to the general
3 rule of exclusion of other crimes evidence."
4 (*Id.*, at p. 737.) (Also see **People vs. Soto**
5 (1998) 64 Cal.App.4th 966, 75 Cal.Rptr.2d
6 605, 617.)

7 **Harris** then considered essentially the same §352 balancing
8 factors that the California Supreme Court enumerated in **People**
9 **vs. Ewoldt** (1994) 7 Cal.4th 380. These factors, as described in
10 **Harris** include:

- 11 1. The inflammatory nature of the evidence;
- 12 2. The probability of confusion if the defendant's prior
13 sex offense did not result in a criminal conviction;
- 14 3. The remoteness in time of the uncharged act from the
15 charged offenses;
- 16 4. The consumption of time of evidence pertaining to the
17 uncharged offense;
- 18 5. The probative value of the evidence which can include
19 "consideration [of] the degree of similarity of the prior and
20 current offenses, as similarity would tend to bolster the
21 probative force of the evidence." (**Harris, supra**, 60 Cal.App.4th
22 at p. 740; **Ewoldt, supra**, 7 Cal.4th at pp. 404-405.)

23 Application of the factors enumerated in **Harris** compel
24 the conclusion that admission of the prior offense evidence in
25 the case at bar would be contrary to Evidence Code §352. ****Now**
26 **you have to argue the Harris factors in conjunction with the**
27 **particular facts in your case. Review Harris to see how the**
28 **Court of Appeal concluded that admission of the prior sex crimes**
in that case violated 352.**

CONCLUSION

