

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

6
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 FOR THE COUNTY OF _____

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10) Case No.
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Plaintiff,)
Vs.)
Defendant.)

MOTION TO EXCLUDE
HEARSAY TESTIMONY DUE
TO DECLARANT'S
INCOMPETENCE

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

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

23 List the statements and to whom and when they were made

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27 **A CHILD WITNESS'S "TRUTH INCOMPETENCE"**
28 **REQUIRES EXCLUSION OF HIS OR HER HEARSAY**
STATEMENTS FOR THEIR TRUTH

1 **IF THERE ARE NO OTHER INDICIA**
2 **OF THEIR RELIABILITY OR THEY ARE**
3 **OTHERWISE UNCORROBORATED.**

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

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

1 by leading or suggestive questioning; (c) whether independent
2 evidence exists that is consistent with the statement; (d)
3 whether the child's various recitations of the statement were
4 consistent; (e) whether the wording of the statement reflects
5 lack of coaching; (f) the lack of accusations against other
6 adults of the opposite sex with whom the child has contact; and
7 (g) the absence of a motive to lie or exaggerate. (Id., at p.
8 855; In re Nemis M. (1996) 50 Cal.App.4th 1344, 1354.)

9 More recently, in In re Cindy L. (1997) 17 Cal.4th 15,
10 our state high court ruled that when the hearsay exception at
11 issue requires a child's statement to be particularly
12 trustworthy, as did the judicially created child dependency
13 exception therein, truth incompetence will not bar the admission
14 of said statement but is a factor in determining its reliability.
15 (Id., at p. 1352.) The court explained:

16 ". . .in the case of the child hearsay exception
17 we recognize today, the fact of the child's
18 incompetence to testify does not prevent a court
19 from finding that the various circumstances
20 surrounding the statement-not only its spontaneity,
21 but also the precociousness of the child's knowledge
22 sexual matters, the lack of motive to lie, and
23 other factors outlined above-lead to the conclusion
24 that the statement bears special indicia of
25 reliability and is therefore admissible. The
26 requirement of either corroboration, or availability
27 for cross-examination additionally safeguards
28 against the possibility that the child is merely
fabricating the statement." (Id., at p. 1353.)¹

Here is where you have to put in your own argument based on the
particular facts in your case. First, show that truth

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

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

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

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

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22 Dated:

Respectfully submitted,

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LAW OFFICE OF PATRICK E. CLANCY, ESQ.

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By _____

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Attorney for Defendant

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