

EVIDENCE FOR IDIOTS

Creative Expression and Lady Justice

By Gary A. Watt
and Stella Padilla

Daily Journal Staff Writer

California Evidence Code section 352.2 became effective January 2023. Section 352.2 effectuates the Legislature's recognition that despite Evidence Code section 352's relevance and probative value limitations, the symbolic blindfold might be slipping and undue prejudice arising through the admission of creative works at trial. That's right, art. Section 352.2 expressly modifies section 352 (in criminal cases) by creating a presumption that "creative expression" has minimal probative value. Why did this happen, and should this presumption be expanded to civil cases?

Evidence Code sections 352 and 352.2

As almost every litigator knows, section 352 allows a court—whether criminal or civil—in its discretion, to exclude evidence if "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Among other things, a trial court can determine whether any potentially prejudicial effect, outweighs the probative value. *People v. Jones*, 51 Cal.4th 346, 373 (2011). The "prejudice" section 352 refers to is supposed to apply to "evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues," however, undue prejudice is not synonymous with merely "damaging" evidence.



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People v. Bolin, 18 Cal.4th 297, 320 (1998) (internal quotation marks and citation omitted). Nonetheless, in the Legislature's view, when it comes to creative expression, section 352 has been susceptible to admission of evidence triggering racial and other biases.

To address this section 352 problem, section 352.2 requires the court to consider, among other things:

- "[T]he probative value of such [creative] expression for its literal truth or as a truthful narrative is minimal unless that expression is created near in time to the charged crime or crimes, bears a sufficient

level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available";

- "[U]ndue prejudice includes, but is not limited to, the possibility that the trier of fact will, in violation of Section 1101, treat the expression as evidence of the defendant's propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings[.];" and

- Whether "Experimental or social science research demonstrat[es] that the introduction of a particular

type of expression explicitly or implicitly introduces racial bias into the proceedings." § 352.2(a) & (b).

Section 352.2 also requires the court to decide the admissibility of creative expression outside the presence of the jury.

The Legislature initially intended section 352.2 to preclude the introduction of unduly prejudicial music (particularly rap) lyrics. But the term "creative expression" was ultimately given much wider meaning including "the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements,

or symbols, including, but not limited to, music, dance, performance art, visual art, poetry, literature, film, and other such objects or media.” § 352.2(c).

It is clear that by enacting section 352.2, the Legislature did not intend to entirely prohibit the use of creative or artistic expression as evidence, but instead, to foreclose introduction where it would introduce undue prejudice, most likely in the form of racial and other stereotypes and biases. Therefore, unless a prosecutor can demonstrate the creative expression was “created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available,” it is now less likely such creative expression will be admitted.

People v. Venable & People v. Coneal

In *People v. Venable*, 88 Cal.App. 5th 445 (2023), the Court of Appeal ordered a new trial because the prosecution relied heavily on a rap video and its lyrics, in which the defendant appeared. Venable held that section 352.2 is retroactive, and that the trial court should not have admitted the video, particularly because there was scant other evidence of defendant’s guilt and the video was the means by which the prosecution linked the defendant to the crime. *Id.* at 458.

Venable explained that the “Legislature [added Section 325.2] to address the problem of introducing racial stereotypes and bias into criminal proceedings by allowing rap lyrics into evidence” and that “[a] substantial body of research shows a significant risk of unfair prejudice when rap lyrics are introduced” *Venable*, 88 Cal.App.5th at 454 (internal quotations and citations omitted). “[R]ap lyrics and other creative expressions get used as racialized character evidence: details or personal traits prosecutors use in insidious ways playing up racial stereotypes to imply guilt. The resulting message is that the defendant is that type of Black (or Brown) person...” *Id.* (internal quotations and citations omitted). In doing this, “[t]here’s always this bias that this young Black man, if they’re rapping, they must only be saying what’s autobiographical and true, because they can’t possibly be creative.” *Id.* at 454-55 (internal quotations and citations omitted).

Admitting the evidence against the defendant raised concerns over the “precise effects the Legislature sought to avoid[,]” namely, the injection of racial bias. *Id.* at 455.

Thus, section 352.2 aims to ensure that the “accused person’s creative expression will not be used to introduce stereotypes or activate bias against the defendant, nor as character or propensity evidence; and to recognize that the use of rap lyrics and other creative expression as circumstantial evidence of motive or intent is not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice.” *Id.* at 455 (internal quotations and citations omitted).

Interestingly, at least one Court of Appeal opinion anticipated section 352.2 long before its enactment. In *People v. Coneal*, 41 Cal. App.5th 951, 953-954 (2019), Division 5 of the First District applied section 352 to five music videos featuring the defendant. Despite an extensive effort by the prosecution’s experts to interpret the videos as either historical references or coded communications about current events, the court found such interpretation to require a leap of faith that was unjustified and lacking any truly persuasive grounds for doing so. As the court noted, such minimal probative value was “substantially outweighed by the highly prejudicial nature of the violent, inflammatory lyrics” *Id.*

Coneal distinguished two prior Court of Appeal opinions which had admitted lyrics (but not actual videos). In those decisions, the reviewing courts found the lyrics sufficiently related to criminal gang activity to make them probative. *See People v. Olguin*, 81 Cal.App. 4th 1355 1373 (1994) [gang membership important enough to outweigh any prejudice from violent lyrics]; *People v. Zepeda*, 167 Cal.App. 4th 25, 35 [lyrics and poems demonstrated gang membership and animosity toward rivals that outweighed any prejudice].

However, unlike those cases, *Coneal* found the videos to be cumulative to other evidence and the lyrics, in particular, extremely prejudicial. *Coneal*, 41 Cal.App.5th at 968. “Absent some meaningful method to determine which lyrics represent real versus made up events, or some persuasive basis

to construe specific lyrics literally, the probative value of lyrics as evidence of their literal truth [wa]s minimal.” *Id.* *Coneal* also anticipated the Legislature’s concerns, expressly noting the differential treatment between rap lyrics and the lyrics of other musical genres by the courts. *Id.* at 969, fn. 16. *Coneal* shows that if applied very carefully, section 352 can prevent injection of racial bias. But at least in criminal cases, the Legislature has given the courts a more discrete path to follow—by enacting section 352.2.

Should Section 352.2 be applied in civil matters?

The iconic image of the blindfolded lady represents the promise of unbiased administration of justice. That promise has never been limited to criminal proceedings, and we live in a time with an upwelling of racial animus. So why should a different rule apply to creative expression in civil matters? If immutable characteristics sometimes tip the scales against justice, as the Legislature recognized when examining section 352, why not extend section 352.2 to civil cases?

Although civil cases involving creative works and undue prejudice might be rare, it’s not hard to think of examples. Take, for instance, a civil suit for misappropriation of company funds where the defendant is a person of color. In this scenario, a disgruntled employee or partner could have written a

song or created some other form of artistic expression regarding stealing company funds, revenge, the demise of the company, animosity toward its leadership, and more. Under section 352, unlike 352.2, admission of such creative expression may open the door to the very same injection of racial bias that section 352.2 can more rigorously prevent.

The employer moves to introduce the former employee’s creative expression as evidence of motive, plan, etc. (if the artistic work was made before or during the alleged incident), or a party admission against interest, or on other grounds, and wants the jury to treat it as additional proof that the defendant actually stole the funds. In a case where there is scant other evidence of the former employee having committed this wrong, prejudice may result in a very manifest injustice. And in California, all it will take is nine jurors to find against the defendant.

What harm would arise by giving judges the same discrete path to follow in civil cases, which they now must follow in criminal cases with respect to works of creative expression? Any burden on the courts in administering section 352.2 in civil cases must surely pale compared to lowering Lady Justice’s veil. Let’s keep her promise instead.

Evidence for Idiots is a quarterly column presented by Hanson Bridgett’s Appellate Group

Gary A. Watt, a partner at Hanson Bridgett LLP, chairs the firm’s Appellate Practice. Gary is a State Bar approved, certified appellate specialist. He can be reached at gwatt@hansonbridgett.com and his blog posts can be read at www.appellateinsight.com. **Stella Padilla**, senior counsel at Hanson Bridgett LLP, is a commercial litigator whose practice includes representing leading companies and financial institutions in complex matters including class actions, enforcement actions, and business disputes. She can be reached at spadilla@hansonbridgett.com.

