

AMENDED IN ASSEMBLY APRIL 9, 2007

CALIFORNIA LEGISLATURE—2007—08 REGULAR SESSION

**ASSEMBLY BILL**

**No. 268**

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**Introduced by Assembly Member Charles Calderon**

February 5, 2007

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An act to ~~add Section 1350.5 to~~ amend Section 240 of, and to add Section 1390 to, the Evidence Code, relating to hearsay evidence.

LEGISLATIVE COUNSEL'S DIGEST

AB 268, as amended, Charles Calderon. Hearsay evidence: unavailable declarant.

*Existing law defines "unavailable as a witness," for purposes of the Evidence Code, to mean that the declarant is, among other things, exempted or precluded on the ground of privilege, disqualified, dead, or absent for a specified reason.*

*This bill would supplement that definition to add the circumstance that the declarant is present at the hearing but refusing a court order to testify, notwithstanding imposition of sanctions, and that refusal was caused by wrongdoing engaged or acquiesced in by the party opposing admission of the witness' testimony.*

*Existing law, known as the "hearsay rule," provides that, at a hearing, evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated is inadmissible. Existing law also provides exceptions to the hearsay rule to permit the admission of specified kinds of evidence.*

*This bill would provide that evidence of a statement that is offered against a party who has engaged or acquiesced in wrongdoing that has caused the unavailability of the declarant as a witness is not made inadmissible by the hearsay rule. The bill would require the party*

*seeking to introduce a statement to establish, by a preponderance of the evidence, that the elements of this provision have been met at a foundational hearing. The bill would provide that hearsay evidence, including the hearsay evidence that is the subject of the foundational hearing, is admissible at the foundational hearing. The bill also would provide that a finding that those elements have not been met shall not be based solely on the uncontroverted hearsay statement of the unavailable declarant, as specified. The bill would provide that, if a statement to be admitted pursuant to these provisions includes a hearsay statement made by anyone other than the unavailable declarant, that other hearsay statement is inadmissible unless it meets the requirements of an exception to the hearsay rule.*

~~Existing law provides, in a criminal proceeding charging a serious felony, that evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, and certain other conditions apply. Those conditions include, among other things, that (1) there is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant, and (2) the statement has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant.~~

~~This bill would provide, in a criminal proceeding charging an act of domestic violence, child abuse, elder abuse, or a prosecution under the Street Terrorism Enforcement and Prevention Act, that evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of the party against whom the statement is to be used. The bill would provide that a party may be deemed to have caused or procured the absence of the declarant, either directly or indirectly, by the use of threatening or violent conduct directed at the declarant with the intention to dissuade the declarant from appearing or testifying at the hearing, or with knowledge that the conduct is reasonably likely to result in the unavailability of the declarant.~~

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1     SECTION 1. Section 240 of the Evidence Code is amended to  
2 read:

3     240. (a) Except as otherwise provided in subdivision (b),  
4 “unavailable as a witness” means that the declarant is any of the  
5 following:

6         (1) Exempted or precluded on the ground of privilege from  
7 testifying concerning the matter to which his or her statement is  
8 relevant.

9         (2) Disqualified from testifying to the matter.

10        (3) Dead or unable to attend or to testify at the hearing because  
11 of then existing physical or mental illness or infirmity.

12        (4) Absent from the hearing and the court is unable to compel  
13 his or her attendance by its process.

14        (5) Absent from the hearing and the proponent of his or her  
15 statement has exercised reasonable diligence but has been unable  
16 to procure his or her attendance by the court’s process.

17        (6) Present at the hearing but refusing a court order to testify,  
18 notwithstanding imposition of sanctions, and that refusal was  
19 caused by wrongdoing engaged or acquiesced in by the party  
20 opposing admission of the witness’ testimony.

21        (b) A declarant is not unavailable as a witness if the exemption,  
22 preclusion, disqualification, death, inability, or absence of the  
23 declarant was brought about by the procurement or wrongdoing  
24 of the proponent of his or her statement for the purpose of  
25 preventing the declarant from attending or testifying.

26        (c) Expert testimony—~~which~~ that establishes that physical or  
27 mental trauma resulting from an alleged crime has caused harm  
28 to a witness of sufficient severity that the witness is physically  
29 unable to testify or is unable to testify without suffering substantial  
30 trauma may constitute a sufficient showing of unavailability  
31 pursuant to paragraph (3) of subdivision (a). As used in this section,  
32 the term “expert” means a physician and surgeon, including a  
33 psychiatrist, or any person described by subdivision (b), (c), or (e)  
34 of Section 1010.

1 The introduction of evidence to establish the unavailability of a  
2 witness under this subdivision shall not be deemed procurement  
3 of unavailability, in absence of proof to the contrary.

4 *SEC. 2. Section 1390 is added to the Evidence Code, to read:*

5 *1390. (a) Evidence of a statement is not made inadmissible*  
6 *by the hearsay rule if the statement is offered against a party who*  
7 *has engaged or acquiesced in wrongdoing that has caused the*  
8 *unavailability of the declarant as a witness.*

9 *(b) (1) The party seeking to introduce a statement pursuant to*  
10 *subdivision (a) shall establish, by a preponderance of the evidence,*  
11 *that the elements of subdivision (a) have been met at a foundational*  
12 *hearing.*

13 *(2) Hearsay evidence, including the hearsay evidence that is*  
14 *the subject of the foundational hearing, is admissible at the*  
15 *foundational hearing. However, a finding that the elements of*  
16 *subdivision (a) have not been met shall not be based solely on the*  
17 *unconfronted hearsay statement of the unavailable declarant, and*  
18 *shall be supported by independent corroborative evidence.*

19 *(3) The foundational hearing shall be conducted outside the*  
20 *presence of the jury. However, if the hearing is conducted after a*  
21 *jury trial has begun, the judge presiding at the hearing may*  
22 *consider evidence already presented to the jury in deciding whether*  
23 *the elements of subdivision (a) have been met.*

24 *(c) If a statement to be admitted pursuant to this section includes*  
25 *a hearsay statement made by anyone other than the declarant who*  
26 *is unavailable pursuant to subdivision (a), that other hearsay*  
27 *statement is inadmissible unless it meets the requirements of an*  
28 *exception to the hearsay rule.*

29 ~~SECTION 1. Section 1350.5 is added to the Evidence Code,~~  
30 ~~to read:~~

31 ~~1350.5.—(a) In a criminal proceeding charging an act of~~  
32 ~~domestic violence, child abuse, elder abuse, or a prosecution under~~  
33 ~~the Street Terrorism Enforcement and Prevention Act (Chapter 11~~  
34 ~~(commencing with Section 186.20) of Title 7 of Part 1 of the Penal~~  
35 ~~Code), evidence of a statement made by a declarant is not made~~  
36 ~~inadmissible by the hearsay rule if the declarant is unavailable as~~  
37 ~~a witness and the unavailability of the declarant was caused by,~~  
38 ~~aided by, solicited by, or procured on behalf of the party against~~  
39 ~~whom the statement is to be used.~~

1     ~~(b) A party may be deemed to have caused or procured the~~  
2 ~~absence of the declarant, either directly or indirectly, by the use~~  
3 ~~of threatening or violent conduct directed at the declarant with the~~  
4 ~~intention to dissuade the declarant from appearing or testifying at~~  
5 ~~the hearing, or with knowledge that the conduct is reasonably likely~~  
6 ~~to result in the unavailability of the declarant.~~

7     ~~(c) In a hearing to establish the unavailability of a declarant~~  
8 ~~under this section, hearsay statements of the declarant are not~~  
9 ~~inadmissible to prove the cause of the declarant's unavailability.~~  
10 ~~The court may determine the cause of the unavailability by a~~  
11 ~~preponderance of the evidence.~~