

AMENDED IN ASSEMBLY MAY 3, 2007

AMENDED IN ASSEMBLY APRIL 9, 2007

CALIFORNIA LEGISLATURE—2007—08 REGULAR SESSION

ASSEMBLY BILL

No. 268

Introduced by Assembly Member Charles Calderon

February 5, 2007

An act to amend ~~Section 240~~ *Sections 240 and 791* of, and to add ~~Section~~ *Sections 1243 and 1390* to, the Evidence Code, relating to hearsay evidence.

LEGISLATIVE COUNSEL'S DIGEST

AB 268, as amended, Charles Calderon. ~~Hearsay evidence: unavailable declarant.~~ *Evidence: admissibility of statements.*

Existing

(1) *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 refuses~~ to testify, notwithstanding imposition of sanctions, and ~~that refusal was caused by the statement is offered against the party that has engaged or acquiesced in wrongdoing engaged or acquiesced in by the party opposing admission of the witness’ testimony that was intended to, and did, procure the unavailability of the declarant as a witness.~~

(2) *Existing* law provides that evidence of a statement previously made by a witness that is consistent with his or her testimony at a

hearing is inadmissible to support his or her credibility, unless it is offered after an inconsistent statement has been admitted for purposes of attacking his or her credibility, as specified, or after an express or implied charge has been made that his or her testimony is recently fabricated or is influenced by bias or other improper motive.

This bill would also except from that general prohibition of inadmissibility, evidence of a statement in which the witness' credibility is an important issue, the probative value of the statement substantially outweighs any attendant probative dangers, and there is independent, corroborating evidence for the truth of the statement.

Existing

(3) *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 is not made inadmissible by the hearsay rule if the statement is offered to describe or explain an event or condition and is made while the declarant was perceiving the event or condition, as specified.

This bill would *further* 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.

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 *(6) If the declarant refuses to testify, notwithstanding imposition*
22 *of sanctions, and the statement is offered against the party that*
23 *has engaged or acquiesced in wrongdoing that was intended to,*
24 *and did, procure the unavailability of the declarant as a witness.*

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

30 (c) Expert testimony that establishes that physical or mental
31 trauma resulting from an alleged crime has caused harm to a
32 witness of sufficient severity that the witness is physically unable
33 to testify or is unable to testify without suffering substantial trauma
34 may constitute a sufficient showing of unavailability pursuant to
35 paragraph (3) of subdivision (a). As used in this section, the term
36 “expert” means a physician and surgeon, including a psychiatrist,
37 or any person described by subdivision (b), (c), or (e) of Section
38 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 791 of the Evidence Code is amended to read:*

5 791. Evidence of a statement previously made by a witness
6 that is consistent with his *or her* testimony at the hearing is
7 inadmissible to support his *or her* credibility, unless ~~it is offered~~
8 ~~after one of the following circumstances exists:~~

9 (a) ~~Evidence~~ *It is offered after evidence* of a statement made by
10 him *or her* that is inconsistent with any part of his *or her* testimony
11 at the hearing has been admitted for the purpose of attacking his
12 *or her* credibility, and the statement was made before the alleged
13 inconsistent statement; ~~or.~~

14 (b) ~~And~~ *It is offered after an* express or implied charge has been
15 made that his *or her* testimony at the hearing is recently fabricated
16 or is influenced by bias or other improper motive, and the statement
17 was made before the bias, motive for fabrication, or other improper
18 motive is alleged to have arisen.

19 (c) *All of the following exist:*

20 (1) *The witness' credibility is an important issue, not merely*
21 *relevant, at the hearing.*

22 (2) *The probative value of the statement substantially outweighs*
23 *any attendant probative dangers.*

24 (3) *There is independent, corroborating evidence of the truth*
25 *of the statement that consists of evidence other than the witness'*
26 *similar statement on direct examination at the hearing.*

27 *SEC. 3. Section 1243 is added to the Evidence Code, to read:*

28 1243. Evidence of a statement is not made inadmissible by the
29 hearsay rule if both of the following conditions are satisfied:

30 (a) *The statement is offered to describe or explain an event or*
31 *condition.*

32 (b) *The statement was made while the declarant was perceiving*
33 *the event or condition, or immediately thereafter.*

34 ~~SEC. 2.~~

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

36 1390. (a) Evidence of a statement is not made inadmissible
37 by the hearsay rule if the statement is offered against a party who
38 has engaged or acquiesced in wrongdoing that has caused the
39 unavailability of the declarant as a witness.

1 (b) (1) The party seeking to introduce a statement pursuant to
2 subdivision (a) shall establish, by a preponderance of the evidence,
3 that the elements of subdivision (a) have been met at a foundational
4 hearing.

5 (2) Hearsay evidence, including the hearsay evidence that is the
6 subject of the foundational hearing, is admissible at the
7 foundational hearing. However, a finding that the elements of
8 subdivision (a) have not been met shall not be based solely on the
9 uncontroverted hearsay statement of the unavailable declarant, and
10 shall be supported by independent corroborative evidence.

11 (3) The foundational hearing shall be conducted outside the
12 presence of the jury. However, if the hearing is conducted after a
13 jury trial has begun, the judge presiding at the hearing may consider
14 evidence already presented to the jury in deciding whether the
15 elements of subdivision (a) have been met.

16 (c) If a statement to be admitted pursuant to this section includes
17 a hearsay statement made by anyone other than the declarant who
18 is unavailable pursuant to subdivision (a), that other hearsay
19 statement is inadmissible unless it meets the requirements of an
20 exception to the hearsay rule.