

ASSEMBLY BILL

No. 939

Introduced by Assembly Member Cervantes

February 17, 2021

An act to amend Section 240 of the Evidence Code, relating to evidence.

LEGISLATIVE COUNSEL'S DIGEST

AB 939, as introduced, Cervantes. Evidence: unavailability of witness. Existing law defines “unavailable as a witness,” for purposes of the Evidence Code, to mean that the declarant is exempted or precluded on the ground of privilege, disqualified, dead or unable to testify because of illness or infirmity, absent for a specified reason, or persistent in refusing to testify despite having been found in contempt for refusal to testify. Existing law provides additional limitations on establishing the unavailability of a witness.

This bill would make nonsubstantive changes to this provision.

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:

1 (1) Exempted or precluded on the ground of privilege from
2 testifying concerning the matter to which ~~his or her~~ *the declarant's*
3 statement is relevant.

4 (2) Disqualified from testifying to the matter.

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

7 (4) Absent from the hearing and the court is unable to compel
8 ~~his or her~~ *the declarant's* attendance by its process.

9 (5) Absent from the hearing and the proponent of ~~his or her~~ *the*
10 *declarant's* statement has exercised reasonable diligence but has
11 been unable to procure ~~his or her~~ *the declarant's* attendance by
12 the court's process.

13 (6) Persistent in refusing to testify concerning the subject matter
14 of the declarant's statement despite having been found in contempt
15 for refusal to testify.

16 (b) A declarant is not unavailable as a witness if the exemption,
17 preclusion, disqualification, death, inability, or absence of the
18 declarant was brought about by the procurement or wrongdoing
19 of the proponent of ~~his or her~~ *the declarant's* statement for the
20 purpose of preventing the declarant from attending or testifying.

21 (c) (1) Expert testimony that establishes that physical or mental
22 trauma resulting from an alleged crime has caused harm to a
23 witness of sufficient severity that the witness is physically unable
24 to testify or is unable to testify without suffering substantial trauma
25 may constitute a sufficient showing of unavailability pursuant to
26 paragraph (3) of subdivision (a). As used in this section, the term
27 "expert" means a physician and surgeon, including a psychiatrist,
28 or ~~any~~ a person described by subdivision (b), (c), or (e) of Section
29 1010.

30 ~~The~~

31 (2) *The* introduction of evidence to establish the unavailability
32 of a witness under this subdivision shall not be deemed
33 procurement of unavailability, in absence of proof to the contrary.

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