SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No:	SB 1171	**Hearing Date:**	April 26, 2022
Author:	Caballero		
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Urgency:	No	**Fiscal:**	No
Consultant:	SJ		

Subject: ***Hearsay evidence: exceptions: medical diagnosis or treatment***

HISTORY

Source: California District Attorneys Association

Prior Legislation: SB 1944 (Solis), Ch. 1001, Stats. 2000
AB 2068 (Richter), Ch. 416, Stats. 1996

Support: California Sexual Assault Forensic Examiners Association

Opposition: ACLU California Action; California Attorneys for Criminal Justice; California Public Defenders Association

PURPOSE

The purpose of this bill is to create a new exception to the hearsay rule for statements made by a domestic violence victim describing any act, or attempted act, of domestic violence for the purposes of medical diagnosis or treatment.

Existing law provides the right of the accused in a criminal case to face their accuser. (U.S. Const. amend. VI; Cal. Const., art. 1, §15.)

Existing law defines "hearsay evidence" as 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. Provides that hearsay evidence is inadmissible, except as provided by law. (Evid. Code, § 1200.)

Existing law provides that evidence of a statement pertaining to mental or physical state is inadmissible if the statement was made under circumstances such as to indicate its lack of trustworthiness. (Evid. Code, § 1252.)

Existing law provides, subject to Section 1252, that evidence of a statement is not made inadmissible by the hearsay rule if the statement was made for purposes of medical diagnosis or treatment and describes medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. Provides that this hearsay exception only applies to a statement made by a victim who is a minor at the time of the proceedings, provided the statement was made when the victim was under the age of 12 describing any act, or attempted act, of child abuse or neglect. (Evid. Code, § 1253.)

Existing law provides that evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:

- The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
- The declarant is unavailable as a witness.
- The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.
- The statement was made under circumstances that would indicate its trustworthiness.
- The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official. (Evid. Code, § 1370, subd. (a).)

Existing law defines "unavailable as a witness" to mean that the declarant is any of the following:

- Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.
- Disqualified from testifying to the matter.
- Dead or unable to attend or to testify at the hearing because of then-existing physical or mental illness or infirmity.
- Absent from the hearing and the court is unable to compel his or her attendance by its process.
- Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.
- Persistent in refusing to testify concerning the subject matter of the declarant's statement despite having been found in contempt for refusal to testify.
  (Evid. Code, § 240, subd. (a).)

Existing law provides that circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:

- Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
- Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
- Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this provision of law. (Evid. Code, § 1370, subd. (b).)

Existing law provides that a statement is admissible under the above circumstance only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement. (Evid. Code, § 1370, subd. (c).)

Existing law provides that "domestic violence" is defined in Section 6211 of the Family Code and may include acts defined in specified sections of the Penal Code. (Evid. Code, § 1107, subd. (c).)

Existing law provides that "domestic violence" is abuse perpetrated against any of the following persons: a spouse or former spouse; cohabitant or former cohabitant, as defined; a person with whom the respondent is having or has had a dating or engagement relationship; a person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent; a child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected; or any other person related by consanguinity or affinity within the second degree. (Fam. Code, § 6211.)

Existing law prohibits a court from imprisoning or otherwise confining or placing in custody the victim of a sexual assault or domestic violence crime for contempt if the contempt consists of refusing to testify concerning that sexual assault or domestic violence crime. (Code of Civ. Pro., § 1219, subd. (b).)

This bill provides that the existing exception to the hearsay rule for statements made for the purpose of medical diagnosis or treatment and which describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment applies to a statement made by a domestic violence victim describing any act, or attempted act, of domestic violence.

This bill provides that "domestic violence" has the same meaning as provided in the Family Code.

COMMENTS

1. Need for This Bill

According to the author:

> …Victims of domestic violence face incredible pressure – economic, social, emotional – to deny the abuse. As such victims will often deny the source of their injuries, claiming instead that the injury resulted from a fall or other accident. Moreover, victims often refuse to testify at all – but those victims still want and deserve protection and justice.
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> In these instances, where victims cannot speak for themselves, SB 1171 would allow victims' truths to be heard.
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> This bill would create a hearsay exception in domestic violence cases for statements made for purposes of medical diagnosis. Medical hearsay would be critical and effective tool to counteract an abuser's manipulations and threats that prevent victim testimony. The Federal Rules of Evidence and several states already offer this option.
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> Admission of the victim's statements to their medical care providers would mean the victim could refuse to testify, thus shielding themselves from abuse as a result of testifying, but the true source of the victim's injury could still be proven to the jury or judge.

Consistent and effective prosecution of domestic abuse has a proven track record of decreasing the incidence of domestic abuse. But effective prosecution requires compelling evidence. This bill allows prosecutors to effectively prosecute domestic violence, thereby protecting victims from further abuse, while honoring a victim's choice not to testify.

Federal Rules of Evidence already provide for a hearsay exception for Statements Made for Medical Diagnosis or Treatment under Rule 803(4). California Evidence Code section 1253 currently permits introduction of statements made for medical diagnosis or treatment, but only in child abuse cases. This proposal seeks to permit such evidence in domestic violence cases.

2. Hearsay Rule

Under both the U.S. and California constitutions, criminal defendants have the right to confront witnesses against them. (U.S. Const., amend. VI; Cal Const. art. 1, Sect. 15.) Hearsay statements made by an absent witness are presumptively inadmissible because they violate this right to confront and cross-examine witnesses. Under the hearsay rule, an out-of-court statement offered to prove the truth of the matter stated is generally inadmissible unless one of the established exceptions applies. (Evid. Code, § 1200.) The primary reasons for excluding hearsay evidence are that the statements are not made under oath, the adverse party has no opportunity to cross-examine the person who made them, and the jury cannot observe the person's demeanor as he or she makes them. (6 Witkin, Cal. Evid. § 1.) Protection of the constitutional right of confrontation is an additional justification for the exclusion of hearsay. (*Id*.)

3. Specific Exceptions to the Hearsay Rule

Existing law recognizes several exceptions to the hearsay rule. One exception to the hearsay rule allows statements made for purposes of medical diagnosis or treatment by a minor under 12 that describe any act, or attempted act, of child abuse or neglect. (Evid. Code, § 1253.) This exception to the hearsay rule is subject to the requirement in section 1252 that a statement made pertaining to mental or physical state was made under circumstances that indicate its trustworthiness. (Evid. Code, §§ 1252, 1253.) Section 1253 is modeled after Rule 803(4) of the Federal Rules of Evidence which provides that a statement that is made for and is reasonably pertinent to medical diagnosis or treatment, and describes medical history, past or present symptoms or sensations, their inception, or their general cause is not excluded by the rule against hearsay regardless of whether the declarant is available as a witness. This bill creates a new exception to the hearsay rule for statements made by a domestic violence victim describing any act, or attempted act, of domestic violence for the purposes of medical diagnosis or treatment.

Opponents of the bill argue that it is unnecessary because Evidence Code section 1370 provides for the admissibility of statements related to the infliction of physical injury. Specifically, Evidence Code section 1370 provides that evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: the statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant; the declarant is unavailable as a witness; the statement was made at or near the time of the infliction or threat of physical injury; the statement was made under circumstances that would indicate its trustworthiness; and the statement was made in writing, electronically recorded, or made to a physician, nurse, paramedic, or a law enforcement official. (Evid. Code, § 1370, subd. (a).) "Unavailable as a witness" means that the declarant is any of the following: exempted or

precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant; disqualified from testifying to the matter; dead or unable to attend or to testify at the hearing because of then-existing physical or mental illness or infirmity; absent from the hearing and the court is unable to compel his or her attendance by its process; absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process; or persistent in refusing to testify concerning the subject matter of the declarant's statement despite having been found in contempt for refusal to testify. (Evid. Code, § 240, subd. (a).) Proponents of the bill contend that in many cases, a domestic violence survivor's refusal to testify does not deem the person to be "unavailable" for purposes of sections 240 and 1370.

4. Argument in Support

According to the bill's sponsor, California District Attorneys Association:

> Victims of domestic violence are among the most vulnerable in our population, and unfortunately, crimes committed against them are the most difficult to prosecute. There are few witnesses to this type of abuse which occurs almost exclusively behind closed doors. Enormous pressure is often brought upon victims of domestic violence, frequently from their abusers or families, to deny the abuse they are enduring. In many instances a medical professional may be the only person to whom a victim discloses the extent of the abuse or injury.
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> Our laws recognize these pressures and thus shield victims of domestic violence who refuse to testify from penal consequences (see Civ. Pro. Code, 1219, 128.) Refusing to testify is not, however, indicative of a desire to be left unprotected, and so we continue to prosecute offenders without forcing victims to the stand where they might put themselves in greater danger for abuse or isolation.

5. Argument in Opposition

The California Public Defenders Association writes:

> Although protecting victims of domestic violence is important, SB 1171 would do so at the cost of the basic rights and protections that our laws afford to those accused of crimes. SB 1171 would allow an individual to be convicted of a crime and sent to state prison without the accuser ever testifying.
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> SB 1171 would greatly expand criminal prosecutions and convictions in domestic violence cases, including cases where the victim elected not to come to court, recanted their testimony, was uncooperative, and/or could not be located, by allowing medical providers to testify about statements the victims made while receiving medical treatment. Making these hearsay statements admissible would deprive persons accused of domestic violence of their right to confront their accusers.
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> Further, Evidence Code Section 1370 already provides a hearsay exception for statements concerning the infliction or threat of physical injury that are made to medical providers or law enforcement. Unlike SB 1171, however, Evidence Code Section 1370(a) provides additional safeguards before the hearsay statements may

be used including: that the person who made the statements be unavailable as a witness and that the statements be made at or near the time of the injury and be recorded.

Evidence Code Section 1370(b) also lists circumstances relevant to the determination that a statement be deemed trustworthy. Evidence Code Section 1370(c) also requires that a party be given fair notice of the intent to admit the statement, while SB 1171 makes no such requirement. Without amending SB 1171 to include the same aforementioned protections contained in Evidence Code Section 1370, it imposes too high a cost on the rights of persons accused of crimes, allowing them to be convicted without a fair trial in violation of their basic rights to confront the witnesses against them and of due process of law.

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