



1-1-1989

## Evidence

University of the Pacific; McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Legislation Commons](#)

---

### Recommended Citation

University of the Pacific; McGeorge School of Law, *Evidence*, 20 PAC. L. J. 645 (1989).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol20/iss2/23>

This Greensheet is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

# Evidence

## Evidence; dispute resolution programs

Business and Professions Code § 467.5 (repealed and new).

SB 2224 (Beverly); 1988 STAT. Ch. 188

Sponsor: Department of Consumer Affairs

Existing law provides for the establishment, funding, and administration of dispute resolution programs as an alternative to formal court proceedings.<sup>1</sup> Prior law specified that any proceeding conducted by a dispute resolution program was subject to section 1152.5 of the Evidence Code.<sup>2</sup> In contrast, Chapter 188 specifies that all proceedings conducted by a dispute resolution program including mediations, arbitrations, and conciliations are subject to section 1152.5 of the Evidence Code.<sup>3</sup>

JMS

---

1. CAL. BUS. & PROF. CODE §§ 467-467.6 (establishment and administration of dispute resolution programs). *See id.* § 465 (legislative finding and declaration regarding dispute resolution).

2. 1986 Cal. Stat. ch. 1313, sec. 1, at \_\_\_\_ (enacting Cal. Bus. & Prof. Code § 467.5). *See* CAL. EVID. CODE § 1152.5 (limits the admissibility of certain evidence, documents, and admissions made pursuant to, or in the course of, a mediation). *See generally* California Law Revision Commission, *Recommendation Relating to Protection of Mediation Communications*, 18 CAL. L. REV. COMM'N REPORTS 241 (1986) (section 1152.4 of the California Evidence Code does not attempt to define "mediation" because the variety of means and methods of mediation).

3. CAL. BUS. & PROF. CODE § 467.5. 1988 Cal Stat. ch. 188, sec. 1, at \_\_\_\_ (repealing CAL. BUS. & PROF. CODE § 467.5).

## Evidence; psychotherapist-patient privilege

Evidence Code § 1010 (amended).

AB 3768 (Chacon); 1988 STAT. Ch. 488

Existing law creates a privilege<sup>1</sup> between a patient<sup>2</sup> and a psychotherapist<sup>3</sup> that allows either to refuse to disclose their confidential<sup>4</sup> communications.<sup>5</sup> In apparent response to *People v. Gomez*,<sup>6</sup> Chapter 488 expands the definition of psychotherapist and extends the privilege to: (1) a person exempt from the Psychology Licensing Law;<sup>7</sup> (2) a psychology intern;<sup>8</sup> or (3) a counselor trainee.<sup>9</sup> The expanded definition does not affect any criminal proceedings.<sup>10</sup>

JAH

---

1. See *Cutter v. Brownbridge*, 183 Cal. App. 3d 836, 846, 228 Cal. Rptr. 545, 551 (1986) (the privilege to withhold evidence is part of a patient's constitutional right to privacy and exceptions to the privilege are constitutional only when narrowly limited and directly relevant); *Grey v. Superior Court*, 62 Cal. App. 3d 698, 703, 133 Cal. Rptr. 318, 320 (1976) (the privilege is designed to encourage people to confide all information that will lead to professional aid for their benefit).

2. CAL. EVID. CODE § 1011 (definition of a patient).

3. *Id.* § 1010 (definition of a psychotherapist includes registered psychological assistants supervised by either a licensed psychologist or certified psychiatrist, registered marriage, family and child counselors, and apprentice social workers).

4. *Id.* § 1012 (definition of a confidential communication).

5. *Id.* § 1014 (the psychotherapist-patient privilege can be invoked by the patient, an authorized person, or the psychotherapist). *But see id.* §§ 1027 (providing an exception to the privilege if the patient is a victim of a crime and under the age of 16, then the psychotherapist can only claim the privilege by stating disclosure is not in the child's best interest), 1024 (no privilege if psychotherapist has reasonable cause to believe the patient is dangerous to himself or others); see also *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 435, 131 Cal. Rptr. 14, 23, 551 P. 2d 334, 344 (1976) (all therapists have a duty to communicate threats which indicate the patient is dangerous to society); *People v. Lakey*, 102 Cal. App. 3d 962, 977, 162 Cal. Rptr. 653, 662 (1980) (privilege ends where public peril begins). See generally V. Lee, *Dangerous Patient Exception and the Duty to Warn: Creation of a Dangerous Precedent* 9 U.C. DAVIS L. REV. 549 (1976) (the legal aspects of requiring therapists to warn of dangerous patients).

6. 134 Cal. App. 3d 874, 880-881, 185 Cal. Rptr. 155, 158-159 (1982) (in a murder trial, student interns were forced to give testimony about threats made by the defendant during marriage counseling since the psychotherapist-patient privilege did not extend to student interns).

7. CAL. EVID. CODE § 1010(h) (persons exempt from the Psychology Licensing Law defined in Business and Professions Code section 2909(d)). See CAL. BUS. & PROF. CODE § 2909(d) (must meet educational requirements and one year experience requirement or be employed and registered by a nonprofit community agency that receives 25% of its financial support from government organizations).

8. CAL. EVID. CODE § 1010(i) (a psychological intern as defined by Bus. & Prof. Code section 2911), BUS. & PROF. CODE § 2911 (a psychological intern means a person enrolled in psychology or social psychology doctoral program).

9. CAL. EVID. CODE § 1010(j). See BUS. & PROF. CODE § 4980.03 (a counselor trainee means a person enrolled in a master's or doctor's degree program as specified in Evidence Code section 4980.40).

10. CAL. EVID. CODE § 1010(k). See generally D. HERN, *Prosecutorial Discovery in California after People v. Colliers: Need for Legislation*, 23 SANTA CLARA L. REV. 543-586 (1986) (analyzing the need for criminal discovery).

## Evidence; public employment—AIDS presumption

Government Code § 31720.6 (new); Labor Code § 3212.8 (new).  
AB 3049 (Zeltner); 1988 STAT. Ch. 1501

Chapter 1501 establishes a presumption that specified public employees,<sup>1</sup> who make claims for service related<sup>2</sup> disability retirement<sup>3</sup> due to permanent incapacity<sup>4</sup> resulting from AIDS contracted the AIDS disease in the course of employment.<sup>5</sup> The employee must bring the claim under the County Employees Retirement System<sup>6</sup> or the Worker's Compensation<sup>7</sup> benefit system. The presumption applies if the employee can show the board<sup>8</sup> written documentation<sup>9</sup> that an instance of possible exposure occurred while in the service of the employer.<sup>10</sup> Written documentation must be filed within 30 days of

---

1. CAL. GOV'T CODE § 31720.6 (specified members include: (1) Safety members, (2) fire members, (3) active law enforcement members who are also safety members of a retirement system, (4) emergency medical technicians I, (5) emergency medical technicians II, (6) members whose duties are conducted in the emergency room, and (7) emergency medical technicians-P); CAL. LAB. CODE § 3212.8 (specified members include: (1) Patrol members as defined by section 20017 of the California Government Code or peace officer/firefighter members as designated by section 830.5 of the California Penal Code who are employed by the Department of Corrections or the Department of Youth Authority, (2) emergency medical technicians I, (3) emergency medical technicians II, (4) emergency medical technicians P, and (5) members whose duties are performed in an emergency room).

2. Compare CAL. GOV'T CODE § 31727.4 (service related disability) with *id.* §§ 31727, 31727.7 (non-service related disability). The amount of an employee's pension varies depending on whether the disability is service related or non service related. *Hoffman v. Board of Retirement*, 42 Cal. 3d 590, 591, 724 P.2d 511, 512, 229 Cal. Rptr. 825, 826 (1986).

3. See CAL. GOV'T CODE §§ 31720-31791 (disability and death benefits covered by the County Employees Retirement Law of 1937); CAL. LAB. CODE §§ 4650-4755 (disability and death benefits covered by Worker's Compensation).

4. CAL. GOV'T CODE § 31720(a) (if the injury or disease arose out of and in the course of employment, the employee may retire regardless of age).

5. *Id.* § 31720.6; CAL. LAB. CODE § 3212.8 (establishing a presumption that the AIDS virus was contracted in the course of employment). Compare CAL. GOV'T CODE § 31720.6 (AIDS presumption for specified individuals) with *id.* § 31720.5 (presumption that a specified member's heart attack arose out of the course of employment). Section 31720.5 of the California Government Code was enacted to alleviate the problem of an individual's fate, regarding disability pension or retirement compensation, being decided by a battle between the experts. *City and County of San Francisco v. Worker's Compensation Appeals Board*, 22 Cal. 3d 103, 110-111, 583 P.2d 151, 155-156, 148 Cal. Rptr. 626, 630-631 (1978).

6. CAL. GOV'T CODE §§ 31450-31898 (County Employees Retirement Law of 1937).

7. CAL. LAB. CODE §§ 3201-6149 (Workmen's Compensation and Insurance Law).

8. CAL. GOV'T CODE § 31459 (Board of Retirement); CAL. LAB. CODE § 3205.5 (Workers Compensation Appeals Board of the Division of Industrial Accidents).

9. CAL. GOV'T CODE § 31720.6; CAL. LAB. CODE § 3212.8 (the employee must have filed an incident or accident report or made a report to the employee health service at the workplace).

10. CAL. GOV'T CODE § 31720.6; CAL. LAB. CODE § 3212.8. The employee must show that the employment substantially contributed to the incapacity. CAL. GOV'T CODE § 31720(a). "Contributes substantially to the incapacity" means more than "any" and less than the principal result of an employment caused injury or loss. *Gatewood v. Board of Retirement*,

the instance of alleged exposure.<sup>11</sup> The board is bound by the presumption unless controverted by other evidence.<sup>12</sup>

CEL

---

175 Cal. App. 3d 311, 318, 220 Cal. Rptr. 724, 727 (1985). The court noted that there must be substantial evidence of at least a small part of a causal connection between the job and the disability. *DePuy v. Board of Retirement*, 87 Cal. App. 3d 392, 399, 150 Cal. Rptr. 791, 796 (1978). See also *Gelman v. Board of Retirement*, 85 Cal. App. 3d 92, 97, 149 Cal. Rptr. 225, 228 (1978) (requiring a material and traceable connection between the employment and the disability).

11. CAL. GOV'T CODE § 31720.6; CAL. LAB. CODE § 3212.8 (requiring employee accident report).

12. CAL. GOV'T CODE § 31720.6; CAL. LAB. CODE § 3212.8 (the presumption is rebuttable). See 55 Op. Cal. Att'y Gen. 24, 27 (1972) (evidence to the contrary is reasonably certain proof that would convince an ordinary person that the presumption had been rebutted). See also *Robinson v. Board of Retirement*, 140 Cal. App. 2d 115, 118, 294 P.2d 724, 726 (1956) (more than a mere possibility is needed to overcome a presumption, a probability is required).

### Evidence; testimonial incompetence—arbitrators

Evidence Code § 703.5 (amended).

AB 4549 (Wright); 1988 STAT. Ch. 281

Under existing law, individuals who preside at judicial or quasi-judicial proceedings are prohibited from testifying at subsequent civil proceedings, except in certain instances.<sup>1</sup> Chapter 281 extends this prohibition to include arbitrators.<sup>2</sup>

CLB

---

1. CAL. EVID. CODE § 703.5. Individuals may provide testimony regarding a statement or conduct at the prior proceeding when such statement or conduct: (1) May lead to a civil or criminal contempt action; (2) would constitute a crime; (3) would be the subject of investigation by the State Bar or Commission on Judicial Performance; or (4) would lead to disqualification proceedings under certain provisions of the Code of Civil Procedure. *Id.* See generally CAL. CIV. PROC. CODE § 170(a)(5) (disqualification proceedings when judge shown to be biased or prejudiced).

2. Cal. Evid. Code § 703.5.

### Evidence; witnesses—procurement of unavailability

Evidence Code § 240 (amended).

AB 3524 (Mojonnier); 1988 STAT. Ch. 485

Existing law classifies a witness as unavailable under specified

circumstances.<sup>1</sup> In addition, existing law declares that a witness is not unavailable if the specified circumstances have been brought about or procured by the proponent of the hearsay statement.<sup>2</sup> With the enactment of Chapter 485, the proponent of the hearsay statement will not be deemed to have procured the inability or unavailability of the witness by merely introducing expert testimony that the witness is physically unable to testify or is unable to testify without suffering substantial trauma.<sup>3</sup>

CEL

---

1. CAL. EVID. CODE §§ 240(a) (“unavailable as a witness” means that the witness is exempted or precluded from testifying on the grounds of: (1) Privilege, (2) disqualification, (3) death, (4) inability to attend due to an existing mental or physical illness, (5) inability of the court to compel attendance, or (6) the proponent of the hearsay statement has exercised reasonable diligence but attendance of the witness has not been procured), 204(c) (includes physically or mentally unable to testify without suffering substantial trauma). See *People v. Macioce*, 197 Cal. App. 3d 262, 265, 242 Cal. Rptr. 771, 784 (1988) (relying on expert testimony, the court ruled “that there is a clear and present danger that requiring this lady to testify would cause her present and future mental and physical harm”).

2. CAL. EVID. CODE § 240(b) (for the purpose of preventing the witness from attending or testifying).

3. *Id.* § 240(c) (in absence of proof to the contrary).

## Evidence; witness oath—minors

Evidence Code § 710 (amended).

AB 3525 (Mojonnier); 1988 STAT. Ch. 486

Sponsor: Judge John Fitch, Fresno Superior Court

Support: Attorney General’s Office; Los Angeles County Municipal Court Judges Association; Chief Probation Officers of California

Existing law requires every testifying witness to take an oath or make an affirmation or declaration in the form provided by law.<sup>1</sup> Chapter 486 allows the court to permit a child under the age of ten to testify if the child promises to tell the truth.<sup>2</sup>

JMS

---

1. CAL. EVID. CODE § 710. See CAL. CIV. PROC. CODE § 2094 (form of oath to witness).

2. CAL. EVID. CODE § 710. See generally J. MYERS, CHILD WITNESS LAW AND PRACTICE §§ 3.7–3.11 (1987) (discussing statutory and case law concerning oath requirements and competency of child witnesses).

