April 15, 2025

TO: Members, Senate Judiciary Committee

SUBJECT: SB 303 (SMALLWOOD-CUEVAS) EVIDENCE: PRIVILEGES AND EXCLUSIONS
OPPOSE – AS INTRODUCED FEBRUARY 10, 2025
SCHEDULED FOR HEARING – APRIL 22, 2025

The California Chamber of Commerce and the undersigned respectfully **OPPOSE SB 303 (Smallwood-Cuevas)** as introduced February 10, 2025.

We do not oppose **SB 303** because of any disagreement with bias mitigation training as a topic. Our opposition to **SB 303** comes from (1) concern that creating evidentiary privileges around certain types of workplace training (but not other similar training) is a troubling precedent; (2) our belief that the evidentiary privilege being proposed should apply logically to both public workplaces and private workplaces – or neither.

Context: The Rarity of Privileges and Presently Existing Privileges

Evidentiary privileges are incredibly rare because they make our justice system less accurate and less fair.[1] As an example of that rarity: despite the importance of many familial relationships, a parent has no privilege to refuse to testify honestly in a matter involving their own child, or to refuse to testify against a sibling. The reason privileges are so rare is that they hide evidence from our courts. By hiding that evidence, privileges increase the odds of the wrong party being held liable, or of an innocent person being found guilty.[2]

California law recognizes a few specific evidentiary privileges, which serve to allow certain types of communications to be kept out of evidence in litigation. They include the attorney-client privilege, the spousal privilege, the physician-patient privilege, the psychotherapist-patient privilege, the sexual assault counselor-victim privilege, the domestic violence counselor-victim relationship, and the clergy-penitent privilege.[3] These privileges are, generally, based around relationships where the freedom to speak honestly is absolutely necessary for the relationship to function. As an example: an attorney cannot represent a client unless the client can be honest with them. Similarly, honest confession cannot be made to a priest if the priest could then be compelled to share every admitted sin in court.

Substantively, **SB 303** creates a privilege for public employees or employers to refuse to disclose records of whether an employee took part in "bias mitigation training," with a particular focus on any "assessment, admission, or acknowledgement of bias held by a public employee," or any "strategy developed to address a public employee's bias." Notably, there is no apparent critical relationship requiring total honesty at issue here such as attorney-client privilege, or physician-patient privilege.

SB 303 Inappropriately Creates an Unnecessary Privilege to Avoid Embarrassment – Which is Not Traditionally a Legal Concern Justifying Such a Privilege.

It appears that **SB 303** was written to avoid personal embarrassment or potential future litigation over a particular type of training record–bias training–when a whole range of other similar records would not be privileged and could be used in subsequent litigation.

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[1] Under California law, all privileges are statutory, and can be found in California Evidence Code Section 900 *et seq*.
[2] As the Supreme Court has noted: privileges are "exceptions to the demand for every man's evidence [and] are not lightly created nor expansively construed, for the are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974).
[3] *See* California Evidence Code Sections 954, 980, 994, 1014, 1035.8, 1037.5, 1033, and 1034.

For example: a police officer's bias training records would be inadmissible, but personnel records related to repeatedly failing gun safety training would be admissible. For a public truck driver, records related to any training about not driving under the influence of alcohol would be admissible, but records related to bias training would not be. Obviously, in both these examples, liability or embarrassment could flow from the discussed records – for a truck driver who is sued for driving drunk, records of prior instances and repeated re-training on driving under the influence would be relevant and potentially significant in the case ... and might lead to liability for both the driver and their employer, to the extent the employer was aware of the bad conduct and continued to retain the driver. But similarly, employment records related to bias training might be relevant in a case where, for example, one employee is terminated for repeatedly using racial slurs against another employee – then sues the employer to challenge the termination. Or, in a lawsuit by a plaintiff against a city or county alleging that the city *was aware of* the workplace harassment and racial comments made by a manager, but still continued to put that manager in a place of power – such records would certainly be relevant to whether the city or county was aware of the manager's conduct and took proper steps to require improvement from the manager. Under **SB 303**, these records of prior misconduct related to bias would be inadmissible, and both the employee and public entity could refuse to disclose them – but any other personnel records related to any other training would be admissible.

Another example helps illustrate the point: we do not see why, as a matter of policy, sexual harassment prevention training should be treated as non-privileged when bias mitigation is treated as privileged. In both cases, the content may be emotionally sensitive. In both cases, an employee's repeated incorrect responses in a quiz or test on the topic might be embarrassing. In both cases, the results of such materials could be interpreted to show troubling character by the employee. But, under **SB 303**, only one would be privileged.

California Evidence Law Already Allows Irrelevant, Unfairly Prejudicial Materials to be Excluded at Trial.

California evidence law already allows courts to exclude such evidence where the information at issue might be so embarrassing as to inappropriately affect the outcome at trial. In other words: if embarrassment over potential training records related to bias is the issue – California evidence law already allows a balancing of whether such records are relevant to the case or, alternatively, if they would be unfairly prejudicial by turning the jury against a party. Specifically, California Evidence Code Section 352 already allows a court to "exclude evidence if its [relevance] is substantially outweighed by the probability that its admission will … (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." With that evidence code in place, and irrelevant but embarrassing training information shielded where appropriate, it is unclear what gap in law **SB 303** is intended to fill.

SB 303 Treats Similar Workers and Workplaces Differently by Giving Public Employees a Privilege to Avoid Personnel Records in Litigation (of Bias Training) But Provides No Similar Privilege for Private Employees or Employers.

If we accept the premise of **SB 303** as true (employees may be less likely to want to pursue training if the related records might be embarrassing), we are still left with a critical question: why are *public* employees and employers worthy of protecting from embarrassment or liability in this situation, but *private* employees and employers are not? We see no reason for such a difference in treatment. Notably, doctors are required to undergo implicit bias training pursuant to 2019 legislation (SB 464 – Mitchell). **SB 303** would appear to shield the records of doctors employed at public hospitals, but not the records of doctors working at private hospitals.

To further illustrate this strange distinction: if we were to apply a similar distinction to existing privileges, the results would shock the conscience. Imagine if physician-patient privilege only applied to public hospitals and public employees, but not private hospitals or employees. Imagine if the priest-penitent privilege applied to certain faiths, but not others. Such distinctions are inconceivable – and would potentially create different outcomes in cases with exactly the same facts because different evidence would be admissible despite the very same conduct in the workplace.

For these reasons, we must **OPPOSE SB 303**.

Sincerely,

Robert Moutrie
Senior Policy Advocate
on behalf of

Associated General Contractors of California, Matthew Easley
Associated General Contractors, San Diego Chapter, Matthew Easley
California Chamber of Commerce, Robert Moutrie
California Retailers Association, Sarah Pollo Moo

cc: Legislative Affairs, Office of the Governor
Consultant, Senate Judiciary Committee
Christopher Morales, Office of Senator Smallwood-Cuevas
Morgan Branch, Consultant, Senate Republican Caucus

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