HOUSE COMMITTEE ON JUDICIARY

Full Committee

July 7, 1981 1:30 p.m. 354 State Capitol

Members Present:	Representative Tom Mason, Chairperson Representative Bill Rutherford, Vice Chairperson Representative Joyce Cohen Representative Peter Courtney Representative Margie Hendriksen Representative Kip Lombard Representative Dick Springer Representative Norm Smith
Excused:	Representative Ted Bugas
Staff:	Stephen L. Griffith, Legal Counsel Kristena LaMar, Legal Counsel, Senate Justice Pearl Bare, Committee Assistant
Witnesses:	The Honorable Robert E. Jones, Fourth Circuit Jim McCandlish, Oregon Criminal Defense Lawyers Association Bill Gary, Solicitor General John Bradley, Mutlnomah County District Attorney's office Jerry Cooper, Washington County District Attorney's office The Honorable Richard L. Unis, Fourth Circuit
MEASURE:	HB 2030 - Relating to evidence
Tapes:	H-81-JUD-530, Sides A and B H-81-JUD-531, Side A

Tape 530
Side A

002 CHAIRPERSON MASON opened the work session at 1:30 p.m.

He noted that the bill was brought forward from the subcommittee.

024 STEPHEN L. GRIFFITH, Legal Counsel, stated that Federal Rule 613 should be considered because without any rule that will bring a prior inconsistent statement to the attention of the witness, the witness never has a change to explain the reasons why the statements are not as inconsistent as they appear. Judge Unis and Judge Jones agree.

061 THE HONORABLE ROBERT E. JONES, Fourth Circuit, stated Federal Rule 613 is a relaxed version. It does not have the restrictive requirements of present Oregon law on foundation. The Federal

commentary says the rigid foundation is a needless impediment to cross-examination.

077 MOTION: REP. RUTHERFORD moved adoption of Federal Rule 613.

081 MOTION PASSED: There were no objections.

082 The committee discussed the wording of the effective date of the bill.

149 MOTION: REP. LOMBARD moved conceptually that the applicability section be amended to conform to that section of the Federal Rules of Evidence.

People know months in advance when their cases will come to court and will know how to prepare.

172 MOTION PASSED: There were no objections.

178 The committee discussed the form of the commentary. No decision was reached.

297 REP. HENDRIKSEN stated that Rule 412 is an erosion of the Rape Victim Shield Law, especially Rule 412(3)(c) because a defense lawyer will present whatever evidence he wants and say it is constitutionally required. If the trial judge agrees, there is no appeal by the state. She would prefer that paragraph be deleted.

If (c) is not deleted, she suggested a sub (4) allowing the state to take an appeal in pre-trial hearing to any order admitting evidence under that subsection.

With Rule 609, the victim's pass sexual history may be brought in but the defendant's passed rape convictions cannot be brought in.

She could not support the bill with these provisions.

385 JIM McCANDLISH, representing the Oregon Criminal Defense Lawyers Association, stated that this change was suggested to bring it back into conformance with Oregon law (State v. Jalo).

There is a loophole left to catch those situations not covered by the statute.

Tape 531
Side A

033 REP. HENDRIKSEN stated that there is also no defintion as to what is constitutionally required.

046 BILL GARY, Solicitor General, stated that the problem Rep. Hendriksen's is raising is really a question of the state's right to appeal. The question is should a single judge be determining what is constitutionally required on an issue that is that sensitive. He felt the suggestion to add a section giving the state a right to appeal was the easiest solution.

088 MOTION: REP. HENDRIKSEN moved to add a sub 3(d) granting the state a right to appeal any order admitting evidence under that subsection.

She was still concerned with evidence admitted during the trial.

121 MR. GARY pointed out that a trial judge who is confronted with a constitutional issue is going to have to rule on it whether the statute provides for it or not. He felt 412(3)(a) limited evidence in trial to newly discovered evidence that could not be have been obtained earlier through the exercise of due diligence.

136 MR. GRIFFITH stated the sub (c) is a statement of the obvious. He suggested adding a sentence in 3(c), instead of a new sub (d), allowing the state a right to appeal if the ruling of the court on a motion under subsection 3 is that the evidence shall be admitted.

168 REP. HENDRIKSEN asked if that would apply to all of subsection 3.

172 MR. GRIFFITH stated that was a question of policy.

177 In response to REP. SMITH, REP. HENDRIKSEN replied this would just be involved in rape cases.

200 REP. HENDRIKSEN stated that she did not support Rule 609 as adopted by the committee. It was too restrictive.

239 REP. LOMBARD asked if this would be inviting automatic appeals in almost every case.

260 REP. HENDRIKSEN stated that this issue will not be a part of some rape or sodomy cases. There will not be a huge number of cases. This will maintain the integrity of the Rape Victim Shield Act enacted in 1975.

279 MR. GARY stated that the decision for the state to appeal rests of the Attorney General. The state does not take losing appeals very frequently. The credibility of the Attorney General's office has to be a concern. It is a red herring to suggest that there will be appeals merely for the purpose of delay.

304 REP. LOMBARD asked if there was going to be a large volume of appeals.

320 JOHN BRADLEY, Multnomah County District Attorney's office, stated that the number of appeals would be slight.

326 JERRY COOPER, Washington County District Attorney's office, stated that if the state can appeal, judges are going to be very careful in making their decisions. If the state cannot appeal, and there is any doubt, judges will rule against the state.

337 JUDGE UNIS stated that was true. With the right of appeal, judges are much more cautious in their rulings.

His own view is that if he is wrong, he wanted to be appealed. There are very few instances of appeal by the state unless they feel the judge was really wrong. He feels discretion has been used by the state.

377 MOTION PASSED: Aye - Cohen, Hendriksen, Lombard, Smith, Springer. No - Courtney, Rutherford, Mason. Excused - Bugas.

392 MOTION: REP. LOMBARD moved to adopt the Advisory Committee proposal on Rule 609.

The rule adopted by the committee will cause a lot of extra in camera rulings about whether a particular crime is one of dishonesty or false statement and extra appeals. The ODAA requested that the Advisory Committee proposal be adopted. Judge Jones felt that the committee should also adopt something other than what it did.

460 JUDGE JONES stated that Judge Unis would rather have the committee use the Federal Rule and the interpretations and case law developed by the eight circuits.

Tape 530
Side B

022 THE HONORABLE RICHARD L. UNIS, Fourth Circuit, stated that this is going to be an area of tremendous concern as to time of trial. He did not feel time of trial should be expanded on an evidentiary ruling such as impeachment. There should be a workable rule that is fair to both sides and a rule that could be quickly administered.

Ideally, impeachment should be left to those things that bear upon the propensity of the witness to tell the truth. It should be narrowly construed to crimes which are of dishonesty and false statement as construed in the federal rules.

046 REP. HENDRIKSEN felt the rule was too narrow. She wanted all felonies.

100 REP. LOMBARD felt there would be fewer appeals with the Advisory Committee proposal.

122 CHAIRPERSON MASON stated that he did not think all felonies went to the truth or veracity of the witness.

All it does is introduces an incredible element of prejudice.

146 MOTION AMENDED: REP. HENDRIKSEN moved to amend Rep. Lombard's motion by deleting "or punishable by death".

163 JUDGE JONES did not know if that would make any difference. A capital case is not a sentence to a prison term. He knew of no crime that was punishable only by death. He felt it would be safer to leave it in.

182 REP. HENDRIKSEN stated that it does not talk about sentencing; it talks about punishable by.

202 MOTION FAILED: Aye - Hendriksen. No - Cohen, Courtney, Lombard, Mason, Rutherford, Smith, Springer. Excused - Bugas

205 MOTION FAILED (to adopt Advisory Committee Rule 609): Aye - Hendriksen, Lombard, Smith, Springer. No - Cohen, Corutney, Mason, Rutherford. Excused - Bugas.

208 MOTION: CHAIRPERSON MASON moved HB 2030 to the floor with a do pass as amended recommendation.

216 MOTION PASSED: Aye - Cohen, Courtney, Hendriksen, Lombard, Mason, Rutherford, Smith, Springer. Excused - Bugas.

226 CHAIRPERSON MASON stated that the decision on the commentary would be made after the Senate amends the bill.

227 CHAIRPERSON MASON adjourned the meeting at 3:10 p.m.

Submitted,

Pearl Bare

Pearl Bare
Committee Assistant

HOUSE COMMITTEE ON JUDICIARY

Joint Meeting of House Judiciary Subcommittee 1 and Senate Justice Committee

January 22, 1981 3:15 p.m. 350 State Capitol

Members Present:	Senator Jan Wyers, Co-Chairperson Senator Walter Brown Representative Joyce Cohen Representative Peter Courtney Senator Jim Gardner Senator Ed Fadeley Senator Ken Jernstedt Senator Ted Kulongoski Representative Kip Lombard Representative Bill Rutherford Senator Bob Smith Representative Dick Springer
Excused:	Representative Tom Mason, Co-Chairperson
Staff:	Stephen Griffith, Legal Counsel, House Judiciary Christena LaMar, Legal Counsel, Senate Justice Pearl Bare, Committee Assistant, House Judiciary
Witnesses:	The Honorable Robert E. Jones, Circuit Court Judge Fourth Judicial District The Honorable L. Unis, Circuit Court Judge Fourth Judicial District Elliott Lynn, Oregon Trial Lawyers Association Al Smith, Oregon District Attorneys Association Jim McCandlish, Oregon Public Defenders Association
MEASURE:	HB 2030 - Relating to evidence law (Article I and II, and Sections 21, 22 and 23 (Article IV)
Tapes:	H-81-JUD-17 HB-81-JUD-18

002 CHAIRPERSON WYERS called the meeting to order at 3:15 p.m.

009 <u>HB 2030 - Relating to Evidence Law.</u>

CHAIRPERSON WYERS stated that Articles I and II, and sections 21, 22 and 23 of Article IV would be heard.

Article I. General Provisions

024 THE HONORABLE ROBERT E. JONES, Circuit Court Judge, Fourth Judicial District, stated that the first sections in Article I deal with routine matters. He commended to the committee Laird Kirkpatrick's commentary from The Oregon Law Review (Exhibit C, HB 2030). Mr. Kirkpatrick makes some suggestions for improvements.

The evidence code will cover all actions, suits and proceedings and will set forth certain exceptions. The exceptions are not controversial except as to what evidence will be admissible at preliminary hearings. The recommendation has been to have the formal rules of evidence apply to preliminary hearings. This is the general practice in the state. Professor Kirkpatrick feels this is an impediment to preliminary hearings and would tempt the district attorneys to waive preliminary hearings and indite under, thus depriving discovery to the defendant.

A considerable amount of preliminary hearing testimony comes into circuit court. It is offerred under the former testimony exception to the hearsay rule. It was the feeling of the Advisory Committee that the rules should be followed.

066 THE HONORABLE RICHARD L. UNIS, Circuit Court Judge, Fourth Judicial District, stated that the summary contained in the Proposed Oregon Evidence Code (Exhibit A, HB 2030) gives the reason for this. It is a policy decision.

070 JUDGE JONES stated that Judge Lenon has settled that the formal rules of evidence would apply to adjudication aspects of juvenile proceedings but not to disposition aspects.

080 JUDGE UNIS stated that there is no intention for these proposed rules to wipe out years of common law development in the field of evidence. The contrary is true. The proposed rules contain many omissions. The court will have to rely on common law principles to resolve questions on these omissions.

The basic question that had to be addressed by the Advisory Committee was: Should the rules even be codified? The feeling was that it would be a great service to the legal profession. It would also bring about certain consistency between the Oregon courts and the federal courts. About half the states now have codified evidence codes.

Article I contains one section he believes warrants consideration (page 10, Exhibit A, HB 2030). It suggests retaining ORS 41.880 with certain amendments and rejecting Federal Rule of Evidence 106 (See

Exhibit B, HB 2030). The Oregon Supreme Court in Black v. Nelson, 246 OR 164, said that ORS 41.880 is not to be given literal interpretation. The rule is that when a conversation or writing in part is received in evidence from one party, the remainder of the writing or conversation to be competent must be material and affect in some way the part already given in evidence. The court has construed the statute, despite its langauge, very much like the rule of completeness which is codified in Federal Rule 106. Federal Rule 106 is based upon misleading impressions created by taking matters out of context and the inadequacy of repair work when delayed to a later point at trial.

The troubling part about page 10 (Exhibit A, HB 2030) is that it relates to conversation. He has found language in the Oregon Supreme Court decisions which suggests that this is the "part/whole hearsay exception". The statute has never been given that broad of interpretation. Professor Kirkpatrick in the Oregon Law Review (Exhibit C, HB 2030) believes that the Legislature should consider adoption of Federal Rule 106 instead of the language in ORS 41.880 because ORS 41.880 tells lawyers they can do something that the court has said they cannot do.

147 JUDGE JONES stated that if something is offerred in writing, the opponent should be able to give the rest of the writing at that time so that the writing can be heard in context. Someone suggested that it should also be extended to oral statements. That is how this occurred.

176 JUDGE UNIS suggested that the committee look at adopting Federal Rule 106 rather than the misleading language in ORS 41.880.

In response to Sen. Brown's question about a basic rule of relevancy underlying Rule 106, JUDGE UNIS stated that he did not know. He had not heard of the part/whole hearsay exception until he read the Oregon Supreme Court case of Meyer v. Cessna Aircraft Company, 275 OR 501, p. 524. It does present some troublesome questions.

The rule of completeness is a rule a fairness. It is accomplished by Federal Rule 106.

206 JUDGE JONES stated that Federal Rule 106 would also cover someone reading a deposition out of context. That is traditionally where it comes up. This gives the opponent the opportunity to read the balance of the deposition at that time. Both portions must pass the rule of relevancy.

221 The committee discussed the procedure to be gone through in adopting the evidence code.

285 SEN. FADELEY asked why the judge's were now recommending Federal Rule 106 when the Interim Committee did not adopt it.

309 JUDGE JONES stated that the Interim Committee felt that if it were good for written statements it should be good for oral statements. Judge Unis feels that may be logical, but the Supreme Court has not interpreted it that way.

338 JUDGE UNIS stated that Article I was non-controversial. He was not aware of the statement in Black v. Nelson at the time of the discussion on this rule.

Page 11 (Exhibit A, HB 2030) expresses the view of the Advisory Committee. The Oregon statute is broader.

The statute should express whatever the Legislature wants.

397 SEN. GARDNER stated that it could be written in such a way that oral conversation will be covered. Judge Unis is saying that by simple using the language in the ORS, this would not occur because the courts have already construed that not to include oral conversation. Something else would have to be done to clarify that.

The issues that have been raised in this article are whether the Federal Rule should be used which covers writings and recorded statements and whether the rules of evidence should be applicable to preliminary hearings.

420 JUDGE UNIS stated that one other issue was the juvenile area.

436 JUDGE JONES stated that one very important statement in this section that has not been discussed is that this section does not change the existing Oregon law that error is presumed to be prejudicial. The statement in the code (Exhibit A, HB 2030) on page 5, Rule 103, says that error may not be predicated on a ruling that omits or excludes evidence unless a substantial right of the party is affected.

The Supreme Court has stated that it was going to presume that any error was prejudicial. Ex-Justice Howell feels that is a bad way to look at it. The error should be looked at and an independent judgment should be made as to whether it was prejudiced.

Tape 18
Side A

022 JUDGE JONES continued that he would commend that also for the trial judges. The committee could just state that it intended to change the law and that there would be no presumptive error. The long-run effect of that would be fewer reversals.

036 JUDGE UNIS stated that the way he read the commentary, under current Oregon law in civil cases, the court will presume that any found error is prejudicial. Under the Oregon Constitution, it is indicated

that if the error does not affect the substantial rights of the parties, the appellate courts can only affirm the judgment.

061 In response to CHAIRPERSON WYERS, JUDGE JONES indicated that Meyer v. Harvey Aluminum could be reversed in stating that as part of the legislative intent by passing this rule. The rule could be left as is and the commentary could indicate that presumptive error was not believed in and the intent was to reverse that case.

068 CHAIRPERSON WYERS asked if something were to added to ORS 41.880 and there is nothing in the rule to make evidence admissible that would not otherwise be admissible as to hearsay, would that go toward alleviating the problem seen by JUDGE UNIS.

073 JUDGE UNIS responded that the basic intent of this rule is completeness. The statute has been interpreted as dealing with opening the door. It would be well at this time to find out what the court has said the statute means. If it is the desire of the committee to retain Oregon law, language should be incorporated rather than continuing with language that says one thing and means something else.

He did not think this area was controversial; it just needs more examination.

He has never had a lawyer attempting to use the statute on oral, but apparently the issue has come up.

There is a doctrine that if one party gets in inadmissible evidence, the other party is permitted to come in with similar type of evidence to refute it.

120 SEN. GARDNER asked what sort of common law will supplement the code. He thought the code was to be the whole thing.

125 JUDGE UNIS stated that the code by no means touches all the rules of evidence. It just touches the major rules and will give a guide to the trial judges and lawyers. There will still be much interpretation.

138 SEN. GARDNER asked if there would be hearsay exceptions that are not in the code.

140 JUDGE UNIS replied that the hearsay exceptions give examples. The criteria is set forth.

145 The committee and witnesses discussed the format of the evidence code. The intent is to have the rules in the ORS and the commentary available elsewhere.

219 In response to REP. COURTNEY, JUDGE UNIS stated that he believed the Legislature would be safe if it adopted Federal Rule 106.

223 The committee continued its discussion of the format of the code.

238 In response to SEN. BROWN, JUDGE UNIS stated that as Federal Rule 106 is being interpreted, for practical reasons it is limited to writings and recorded statments. It does not apply to conversations. That is in the commentary to the Federal Rules of Evidence (Exhibit B, HB 2030).

If the committee desires to include oral statements, that should be added.

291 JUDGE JONES showed the committee the Federal Rules (Exhibit B, HB 2030) and explained the format.

311 SEN. KULONGOSKI stated that if the committee adopts the rules as presented, the printed proposed code (Exhibit A, HB 2030) could be used as is for the commentary. If any changes are made in the rules, changes will have to be made in the commentary in the proposed code.

316 JUDGE UNIS stated that some of the commentary is inaccurate. Because of changes through Legislative Counsel, there is commentary to sections and to requirements that have been deleted.

The commentary in the proposed evidence code (Exhibit A, HB 2030) is, in many cases, identical to the commentary in the Federal Rules (Exhibit B, HB 2030).

373 SEN. SMITH stated that he hoped there would only be one commentary for each rules to explain what the intent was, rather than the way the proposed evidence code and the Federal Rules are.

393 SEN. BROWN stated that if the committee were to adopt Federal Rule 106 with the addition of the words "at this time", the Federal Rule commentary could be used with the addition of an explanation of the words "at that time".

411 JUDGE UNIS stated that the commentary could also refer to Black v. Nelson.

The twenty states that have a code have taken the Federal Rules of Evidence commentary and changed it to conform with their local laws. New York's commentary is a beautiful piece of work. It used a good format.

440 SEN. WYERS stated that he was comtemplating using the federal commentary with the changes, but having only one commentary.

466 JUDGES JONES recommended not allowing oral statements and using Federal Rule 106. The federal commentary could then be used as it is.

Tape 17
Side B

017 SEN. WYERS stated that the procedure on the code would be to have a work session after the hearing on each article. The work session would apparently have to include changes in the commentary.

034 The committee continued discussion of the format of the commentary.

101 ELLIOTT LYNN, representing the Oregon Trials Lawyers Association, stated that his comments were directed to section 6(a), page 10 (Exhibit A, HB 2030). The Interim Committee rejected Federal Rule 106 because it was not broad enough. It was the committee's decision to broaden it to acts, conversations or writings and to allow the completion at that time, rather than at a later time.

He felt that if the committee just adopted Federal Rule 106 because it is easier, it would lose sight of the Oregon trial practice. The Interim Committee's intention was to broaden the rule and to reject Federal Rule 106.

Under section 6(a), the evidence would have to be admissible otherwise.

The Oregon Trial Lawyers Association (OTLA) recommends adopting section 6(a) because of its broadness.

134 SEN. GARDNER asked if Mr. Lynn accepted Judge Unis' statement about Black v. Nelson narrowing the Oregon law.

136 MR. LYNN replied that he had not read that case.

Section 6(a) broadens what is allowable at trial in terms of admitting additional evidence. This section will allow a greater degree of fairness in the courts.

167 SEN. GARDNER pointed out that if Judge Unis is right, to accomplish what Mr. Lynn wants would require more than just reiterating the existing law.

185 SEN. BROWN suggested just adding "at that time" to the Federal Rule.

187 MR. LYNN stated that he did not believe that would take care of it.

193 SEN. KULONGOSKI asked that witnesses submitting amendments have them in writing.

204 ALLISON SMITH, representing the Oregon District Attorneys Association (ODAA), stated that the association had some concern about the applicability of this code in preliminary hearings in criminal cases. The association does not think those types of hearings should be exempt from the application of the code, but it is concerned about hearsay in certain instances. For instance, if a car is stolen in the eastern part of the state and recovered in the western part, in order to hold a preliminary hearing and to apply strictly the hearsay rules, it would be necessary to bring the person from eastern Oregon to western Oregon to testify that permission to take the car was not given.

The hearsay exceptions that appear in sections 803 and 804 are not quite broad enough to take care of that sort of problem. The use of hearsay varies widely from county to county. The problem needs to be addressed, but a change in the substance of any of the rules in Article I is not the way to do it.

The language in the commentary on page 5 (Exhibit A, HB 2030) may give too strict of an impression as to what will ultimately be suggested in the hearsay area.

The denial of an accussed's right to examine adverse witnesses if hearsay evidence is admitted at a preliminary hearing is a right that has not been observed very strictly. The purpose of a preliminary hearing is to establish probable cause that a crime was committed, not to prove beyond a reasonable doubt.

He stated that the association could submit alternate language for that part of the commentary. He also expected to have suggested changes in the hearsay exceptions. The commentary change would be to reference the hearsay changes.

270 JIM McCANDLISH, representing the Criminal Defense Association, stated that his association shares Laird Kirkpatrick's concern with respect to the preliminary hearings about the possibility that prosecutors might change over to the grand jury system, as Lane County has.

That has been analyzed by the criminal defense bar, and it is his association's position that it would like to insure that preliminary hearings do follow the rules of evidence, but not to the exclusion of the instances where it doesn't make sense because the hearsay is reliable and desirable.

The arguments and disagreements on the juvenile adjudicatory phase were ironed out during the interim. His association strongly supports the existing practice in the state of Oregon that the rules of evidence do apply.

The granting of probation would be covered by sentencing, so the words "granting or" in Rule 101(4)(e) are redundant. Probation is a

bifuracted proceeding, just as the adjudicatory and dispositional phase in juvenile court and the sentencing in criminal court. In a huge majority of the probation revocation proceedings, the defendant does not contest the basis of the revocation. That puts it into the adjudicatory phase. There are a small number of cases where it is extremely important to factually go over the basis of the revocation recommendation. If there are any arguments on the facts, most judges would stop the proceedings until the person can be brought in. As this is written, it would appear that the committee is sanctioning the use of hearsay in that situation. He did not think that was the practice of the majority of courts. It is not a desirable practice to allow that hearsay. The commentary could make that clear. There is an analogous situation in Rule 101(4)(d) and the commentary to that.

In the vast majority of sentencing and of probation violation proceedings, it is a waste of time to get bogged down in evidentiary matters. In those cases where it is important, it would appear to be desirable to preserve the right to object. He suggested making that a little clearer.

In Rule 101(4), it says sections 1-31 and 42-78 (Rules 514 - 1008). Rule 514 is the last rule of the privileges section. It is not a rule intended to change anything; it is a rule that basically recognizes that the ORS is a massive set of rules. If the rules are not repealed by this section, the code is not applicable to them.

Rule 514 is basically a disclaimer, but in the interrelationship of sections 3 and 4, Rule 101, it would appear there is a substantive impact with respect to proceedings that are exempted from coverage by the evidence code.

Tape 18
Side B

023 MR. McCANDLISH continued that the law could be changed by excluding the unknown privileges from the proceedings that are being excluded. It could allow certain kinds of privileged matter to come into proceedings. For example, there is a specific statute which does not allow use of income tax forms except for certain agencies in certain contexts. As he reads this, the district attorney could then subpena the information from the Department of Revenue and use it in parole revocation proceedings. There are all kinds of possibilities just by including Rule 514 as is done in sections 3 and 4. He suggested that it would be better to amend that section in the bill on line 22, page 1, by deleting "513" and inserting "514"and on line 24 by deleting "514" and inserting "601". That would comport with what the committee was trying to do.

With respect to section (4)(c), the statute sets forth the kinds of evidence that are necessary. The courts have interpreted the

statutes fairly strictly. He suggested referencing the statute. The commentary mentions that changes are not intended. This would be consistent with (b).

068 JUDGE JONES agreed with Mr. McCandlish's suggestion of changing "514" to "601". That was just a scrivener's error.

070 Article II - Judicial Notice

076 JUDGE JONES stated that judicial notice was just a way of dispensing with formal proof. The Federal Rules were followed and expanded. Judicial notice was restricted to adjudicative fact. Judicial notice of legislative fact will be left to the appellate courts. Laird Kirkpatrick (see Exhibit C, HB 2030) suggests that in section 12, sub 2, that in criminal court, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed against the accused.

What facts should be noticed are clarified. Judicial notice will be taken of all state law and foreign law. Municipal ordinances should be pleaded by the date of the act.

As far as he knows, there is nothing controversial in the judicial notice field.

110 MR. LYNN stated that under section 11, judicial notice may be taken at any stage of the proceeding. Section 10 allows an opportunity to be heard by anyone opposing the judicial notice. If the Court of Appeals takes judicial notice, that would mean taking additional evidence in the Court of Appeals and an opportunity to be heard for the person opposing the taking of judicial notice.

162 JUDGE JONES stated that the criminal problem is taken care of in the commentary. The second paragraph on page 19 (Exhibit A, HB 2030) states that the jury shall pass on facts that are judicially noticed. This could not be done if the notice were taken for the first time when the case was on appeal.

174 SEN. GARDNER stated he did not believe that something could be judicially noticed for the first time on appeal.

190 JUDGE UNIS stated that there is an Oregon case which says that it would be unfair and improperfor the appellate court, particularly in a criminal case, to take judicial notice of questions that should be decided by a jury.

The sections have to be read together.

201 In response to SEN. SMITH, MR. LYNN stated that he felt if this were to be restricted in criminal cases, the code should say so.

Section 12 really does not take care of the problem of section 11. If the fact is judicially noticed in the Court of Appeals, there is no jury and no instruction to the jury whatsoever.

224 JUDGE UNIS stated that he thought the problem was taken care of. Since a jury cannot be told that it may find either way, it cannot be judicially noticed on appeal. The is why 201(g) and 201(f) are read together. In a criminal case, the appellate court cannot take judicial notice of something that a trial court could have found either way on.

231 SEN. GARDNER stated that the problem could be taken care of by a statement in the commentary that the committee agrees with the holding of the Jones decision.

261 JUDGE UNIS stated that the reason for instructing a jury that it "may" rather than "must" is because a series of cases say that the jury has the right under the system to find contrary to well-known facts. The jury has the right to be arbitrary. To tell a jury it must accept a certain fact is like directing it of a verdict on an essential element of the defense.

286 Article IV - Relevancy, Sections 21, 22, and 23

301 JUDGE JONES stated that section 21 is the adoption of the definition of the Federal Rule of relevancy. It eliminates the distinction between "relevant" and "material". Professor Kirkpatrick concurred that it was good to eliminate that distinction.

Rule 402 simply concludes that evidence which is not relevant is not admissible.

Rule 403 is the balancing effect. Even if evidence is relevant, it may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues or misleading the jury or by considerations of undue delay or repetition of cumulative evidence. The Federal Rule said that it could be excluded if the judge considered it a waste of time. The trial lawyers on the Advisory Committee did not want judges telling them their evidence was a waste of time. The Advisory Committee took out the "waste of time" expression and the element of surprise.

342 JUDGE UNIS stated that these three sections are noncontroversial.

There is no attempt by the evidence code to, in any way, rule on constitutional issues.

363 JUDGE JONES stated that there is some symmetry and some commentary that needs to be cleaned up. There will be some debate when it comes to impeachment with prior crimes.

392 CHAIRPERSON WYERS closed the hearing at 4:40 p.m.

Submitted,

Pearl Bare
Committee Assistant

EXHIBITS

Exhibit A, HB 2030 - Proposed Oregon Evidence Code, submitted by staff
Exhibit B, HB 2030 - Federal Rules of Evidence, submitted by staff
Exhibit C, HB 2030 - Oregon Law Review, submitted by staff

FOR EXHIBITS - See State Archives File: OVER-SIZED EXHIBITS

HOUSE COMMITTEE ON JUDICIARY

Subcommittee 1

January 29, 1981 8:30 a.m. 350 State Capitol

Members Present:	Representative Bill Rutherford, Chairperson Representative Kip Lombard Representative Dick Springer Representative Tom Mason
Excused:	Representative Joyce Cohen Representative Peter Courtney
Staff:	Steve Griffith, Legal Counsel Ellen Rogers, Committee Assistant
Measures:	HB 2330 - Relating to motor vehicles HB 2331 - Relating to motor vehicles HB 2332 - Relating to motor vehicles
Witnesses:	Malcolm MacEwan, Oregon Peace Officers Association & Oregon Association of Chiefs of Police Harris Kirby, Oregon State Police Gil Bellamy, Oregon Traffic Safety Commission Neil Lathen, Oregon Trial Lawyers Association Marcy Hertzmark, Metropolitan Public Defenders Jim Hunter, Motor Vehicles Division Ralph Lidman, Alcohol Safety Program
Tapes:	H-81-JUD-31 H-81-JUD-32

TAPE 31
SIDE A

002 CHAIRPERSON RUTHERFORD called the subcommittee to order at 8:35 a.m. and opened the public hearing.

HB 2330, HB 2331 and HB 2332 - Relating to motor vehicles

010 MALCOLM MACEWAN, Oregon Peace Officers Association and Oregon Association of Chiefs of Police, stated that he was in favor of the bill.

019 HARRIS KIRBY, Oregon State Police, testified in favor of the bill (Exhibit A, HB 2330). MR. KIRBY told the committee that the State Police did not have their teeth set on making the violation a felony. They just wanted to see an increased penalty for attempt to elude. MR. KIRBY explained that it was currently a Class A misdemeanor.

046 CHAIRPERSON RUTHERFORD asked Mr. Kirby how that penalty could be increased without making it a felony.

048 MR. KIRBY suggested a minimum mandatory sentence.

051 REP. SPRINGER asked what guidance the officer has in different jurisdictions when it comes to eluding.

061 MR. KIRBY explained that they usually didn't know from the start what the circumstances were.

102 GIL BELLAMY, Oregon Traffic Safety Commission, spoke in suuport of the bills (Exhibit A, Motor Vehicles). MR. BELLAMY stated that these three bills (HB 2330, HB 2331 and HB 2332) were drafted before the Judge Burns' decision.

The Commission believes that tough penalties known in advance are a deterrant.

GIL BELLAMY pointed out that a felony can be prosecuted as a misdemeanor. Their impression is that an overwhelming majority of cases that could be prosecuted as Class C felonies actually go through as misdemeanors. In cases where it is deemed to be necessary it could go through as a felony.

404 REP. LOMBARD thought that HB 2331 and HB 2332 would pertain to the tougher charges but he couldn't understand what they were trying to do in HB 2330.

416 GIL BELLAMY replied that they were trying to reduce those because there are more attempts to elude today than there have been in passed years. He was concerned that criminals who try to elude would not stop.

He realized that there is a problem with the 17-year-old kid who gets scared and just takes off. That is where the general statute comes in where it could be prosecuted as a misdemeanor.

TAPE 32
SIDE A

015 CHAIRPERSON RUTHERFORD felt that the eluding criminal would not be deterred by a 5-day sentence in the county jail. The person who would consider that would be the high school kid on the chase. The thing that is most important to him would be the driver's license.

023 GILL BELLAMY stated that many people who are picked up for eluding police are eluding because they are already suspended.

036 REP. SPRINGER was concerned with what kind of sentence is received now when there is conviction.

051 GIL BELLAMY suggested confiscating the automobiles. He felt that would reach the 17-year-old kid. The Commission would leave the penalties open to the committee but they felt that something needed to be done.

085 NEIL LATHEN, Attorney representing Oregon Trial Lawyers Association, spoke against the bill. He felt that all three bills proposed were trying to take away from the good jury and judge system that we have in this state. He felt that the judges are very fair and they look at all the facts.

The judge's discretion includes a lot of things such as the judge having to take a person's license under a reckless conviction. On a drunk driving conviction, the license can be suspended for a year and a $1000.00 fine imposed. On the second offense, the license is automatically suspended for 1 year. It is much the same for eluding.

119 CHAIRPERSON RUTHERFORD asked if the suspension of the license was mandatory.

120 MR. LATHEN replied that he didn't know about eluding but he was sure about reckless and drunk driving.

On the third drunk driving offense in a five-year period you loose your license for three years. If you are convicted of three of these violation in a five-year period or have 20 moving violations in a five-year period, you loose your license for 10 years.
There are ramifications besides the jail and the monitary fines.

Before the presents law are thrown out, the committee should look to see if the present laws are appropriate and working well.

MR. LATHEN stated according to Mr. Bellamy's statment, they would be adding 300 more people to the penitentiary each year. MR. LATHEN was concerned about the overcrowding of the prisons.

151 MR. LATHEN felt that the forest camps were not a functioning process right now.

158 CHAIRPERSON RUTHERFORD asked what Mr. Lathen thought about the forfeiture of the automobile.

158 MR. LATHEN stated that they used to do that in drug cases which caused a big problem in Marion County. He felt that it wouldn't be equitable because of the differences in the cost of cars. It may deter someone with a $6000.00 car but not the kid that has a $50.00 car. He didn't feel that it was equal justice.

174 MR. LATHEN felt that another possibility on sentencing would be to give them community service jobs. All these things the judges have at their disposal right now.

184 MR. LATHEN didn't feel that Mr. Bellamy's statement on waging a war against the misfits was quite accurate. He has defended people who have been arrested for D.U.I.I. who are in the legislative system. He didn't consider those people as misfits.

231 MARCY HERTZMARK, Metropolitan Public Defenders, stated that they would like to go on record as being opposed to all three of the bills proposed. Their reasons were basically the same as Mr. Lathen's.

She felt that the impact on the counties would be great. According to HB 2331 and HB 2332, a person can also be charged with assault.

253 REP. LOMBARD stated that Traffic Safety is trying to come up with a better deterrent. He felt that creative sentencing just made more of a guessing game. If there are so many options that range from the very lax to the very heavy, there would be little or no deterrent in the penalties. He asked Ms. Hertzmark if she felt that allowing for a Class C felony would have any deterring effect.

274 MARCY HERTZMARK didn't feel that it would be much of a deterrent.

298 JIM HUNTER, Motor Vehicles Division, stated that there is currently mandatory license suspension for 90 days on a first reckless or first elude. A second offense within a two year period is a mandatory license revocation, which is a year sanction. The second offense, if it is not in the two-year period, becomes a one-year license suspension. A third offense is a three-year license suspension.

313 REP. SPRINGER asked if a person was illegible for an occupational license when his license is suspended.

318 MR. HUNTER replied that they would be illegible in the case of suspensions. In the case of the 1-year revocation for a second reckless within two years they would not be illegible unless the judge recommends the license reinstatement to the Motor Vehicles Division or to the Governor.

If the court sends them a recommendation on a revocation they will not fully reinstate the license. They will, based on other circumstances or prior record, issue an occupational license.

MR. HUNTER stated that out of about 16,000 first DUII convictions in 1979 there were about 400 court-ordered license suspensions. It is not a sanction that is used very often.

377 RALPH O. LIDMAN, director of the Oregon State Council on Alcoholism, spoke in favor of the bill (Exhibit A, HB 2332).

TAPE 31
SIDE B

MR. LIDMAN stated that he would like to see a percentage of the money collected from fines be sent to a new alcohol division rather than to the Motor Vehicles Division. His reason for that is offenders can shop around for the kind of treatment they want to get to get their driver's license back. They have a working method to treat alcoholism but the problem is motivation.

045 GIL BELLAMY wanted to emphasize that the proposed bill states that DUII is a felony when there is an accident and an injury to another person besides the driver. If there is a fatality, it is covered by negligent homicide.

There is a hole in the law as far as injuries are concerned. Five percent of DUII arrests are made at the scene of the accident and they figure that 2 1/2 percent of all DUII arrests involve an injury to another person. Those were rough estimates.

The bill doesn't replace any other DUII law that is on the books nor is it incompatible with other DUII proposals. It just covers injury to another person besides the driver when the driver is under the influence of alcohol.

060 REP. SPRINGER asked what the definition of physical injury was. He was worried about someone who just got a scrape coming under this definition.

064 MR. BELLAMY replied that the bill was a copy of an existing California law and it would mean if medical attention were required.

065 REP. SPRINGER felt that it was leaving a lot of discretion in the charging.

068 REP. LOMBARD felt that it could track with current code provisions that relate to serious physical injury.

076 CHAIRPERSON MASON (after having assumed the Chair)closed the public hearing and opened the work session.

HB 2330 - Relating to motor vehicles

084 REP. LOMBARD stated that he had some problems with the bill because the law encompasses such a broad range.

107 REP. RUTHERFORD felt that the only thing that would be an alternative to making it a felony would be the forfeiture of the car and he had problems with that too because you would have to pay storage.

113 REP. LOMBARD felt that the vehicle forfeiture would run afoul with Article 1, Section 16, of the Constitution.

He felt that if there is a high-speed chase, you would have the option of reckless. If they could come down harder on reckless, they wouldn't have to have a stiffer penalty on eluding.

141 REP.SPRINGER stated that he has seen cases of an individual who sees the lights, pulls to the curb and jumps out of car and runs. He stated that he had seen a uniform traffic citation on elude. In these circumstances he wondered when the prosecutorial discretion entered in.

181 CHAIRPERSON MASON stated that he had real problems with the bill.

182 MOTION: REP. LOMBARD moved to table HB 2330.

183 Voting Aye: Rep. Lombard, Rep. Rutherford, Rep. Springer and Rep. Mason. Excused: Rep. Cohen and Rep. Courtney. The motion passed.

HB 2331 - Relating to motor vehicles

188 REP. LOMBARD felt that this bill should track with other provisions in the Oregon Code that deal with serious physical injury. He stated that he was willing to come down harder on cases where serious physical injury has occurred.

204 CHAIRPERSON MASON asked Mr. Bellamy why they couldn't be charged with assault.

211 MR. BELLAMY explained that assault requires a dangerous weapon. Prosecutors have problems with assault because it is so difficult to prove.

242 The committee had some discussion on making the penalty a Class A misdemeanor rather than a felony.

257 JIM HUNTER explained that there would not be that much difference as far as license sanctions go going from a Class B misdemeanor to a Class A misdemeanor. There would not be any difference under present statutes as far as the suspension period.

273 REP. RUTHERFORD stated that he would go for a Class A misdemeanor but he wasn't sure about a Class A felony.

275 CHAIRPERSON MASON felt that every felony that is created will increase prison use and have an impact on the court system.

284 REP. LOMBARD suggested some mandatory time in a county jail.

314 MOTION: REP. RUTHERFORD moved to change "Class C felony" to "Class A misdemeanor" on line 8 of the bill.

355 Hearing no discussion or objection the motion was so ordered.

359 The committee wanted the staff to work on some "physical injury" language and bring it to the full committee.

362 REP. LOMBARD stated that since they have changed "Class C felony" they may not want to change "physical injury". He felt that it tracked with assault four.

376 CHAIRPERSON MASON didn't feel that it needed to be made "serious physical injury".

389 MOTION: REP. LOMBARD moved conceptually to add a subparagraph 4, where a person causing serious physical injury to another person by reckless driving the person committs a Class C felony. He felt that it tracked with assault in the third degree. The serious physical injury language is in the Assault Chapter 163.165 subsection (a).

446 Hearing no objections or discussion on the motion it was so ordered.

449 MOTION: REP. LOMBARD moved HB 2331 to the full committee with a do pass recommendation as amended.

455 Voting Aye: Rep. Lombard, Rep. Rutherford, Rep. Springer and Rep. Mason (with a possible reservation later). Excused: Rep. Cohen and Rep. Courtney. The motion passed.

TAPE 32
SIDE B

HB 2332 - Relating to motor vehicles

016 MOTION: REP. LOMBARD moved that in HB 2332, subparagraph 3, "Class C felony" be changed to "Class A misdemeanor" and that a new subparagraph 4 be added to track with ORS 160.165 subsection (a), concerning committing a Class C felony.

038 Hearing no discussion or objection the motion was adopted.

039 MOTION: REP. LOMBARD moved HB 2332 as amended to the full committee with a do pass recommendation.

040 Voting Aye: Rep. Lombard, Rep. Rutherford, Rep. Springer and Rep. Mason (with reservations). Excused: Rep. Cohen and Rep. Courtney. The motion passed.

HOUSE COMMITTEE ON JUDICIARY

Joint Meeting of House Judiciary Subcommittee 1 and Senate Justice Committee

February 5, 1981 3:10 p.m. 350 State Capitol

WORK SESSION

Members Present:	Senator Jan Wyers, Co-Chairperson Representative Tom Mason, Co-Chairperson Senator Walter Brown Representative Joyce Cohen Representative Peter Courtney Senator Jim Gardner Senator Ed Fadeley Senator Ken Jernstedt Senator Ted Kulongoski Representative Kip Lombard Representative Bill Rutherford Senator Bob Smith Representative Dick Springer
Staff:	Stephen Griffith, Legal Counsel, House Judiciary Christena LaMar, Legal Counsel, Senate Justice Pearl Bare, Committee Assistant, House Judiciary
Witnesses:	Elliott Lynn, Oregon Trial Lawyers Association
MEASURE:	HB 2030 - Relating to evidence law (Article I)
Tapes:	H-81-JUD-45 H-81-JUD-46

Tape 45
Side A

001 CHAIRPERSON WYERS called the meeting to order and opened the work session.

Rule 101(g)

017 CHRISTENA LaMAR presented the committee with the proposed and adopted changes to HB 2030 (Exhibit D, HB 2030). This details what the committee has adopted to this time.

The first proposed amendment is 101(g). There was discussion and alternate proposals for the application. The committee adopted the

proposals of the Ad Hoc Committee on Evidence from the Oregon State Bar.

The proposed 135.133 is attached on page 2 (Exhibit D, HB 2030). This is the first half of the Ad Hoc Committee's tentative rule of evidence. The second half is an amendment to ORS 135.185. Those two proposals contain all of the substance of the Ad Hoc Committee's tentative draft on the code of prearraignment procedure.

She recommended the proposal rather than including this into the evidece code.

059 CHAIRPERSON WYERS stated this would be a minor addition to the evidence code of putting preliminary hearings subject to an ORS reference. It makes reference to the section in ORS that the committtee would be adding.

070 MOTION: CHAIRPERSON WYERS moved the proposed addition to Rule 101(g) as set forth in the proposal (Exhibit B, HB 2030).

075 MOTION PASSED: Hearing no objection, the CHAIR so ordered.

085 MOTION: REP. MASON moved adoption of page 2 of the proposal (Exhibit D, HB 2030).

089 MOTION PASSED: Hearing no objection, the CHAIR so ordered.

100 Rule 103

101 MS. LaMAR stated that the committee adopted, in principle, an amendment to Rule 103. The committee was concerned about the rules reflecting an over over-ruling of Myers v. Harvey Aluminum in which the Supreme Court indicated there was a presumption. This presumption is designed to overcome that ruling in that evidentiary area presumed to be prejudicial in a civil case. A sentence in the commentary (Exhibit E, HB 2030) was added to reflect that.

111 MOTION: REP. MASON moved the language in the proposal for Rule 103 (Exhibit D, HB 2030).

117 MOTION PASSED: Hearing no objection, the CHAIR so ordered.

119 Rule 106

121 CHAIRPERSON WYERS stated that Rule 106 was adopted at the last meeting. The question now is if the committee wants to reconsider it.

138 MR. GRIFFITH stated that there was a consensus of the committee members present on the adoption at the last meeting. The House did not have a quorum.

142 ELLIOTT LYNN, representing the Oregon Trial Lawyers Association (OTLA), stated that his association's proposal was given at the last meeting. It is in the proposal from staff (Exhibit D, HB 2030).

His proposal now is that line 3, page 3, HB 2030, should read "conversation or writing is given in evidence by one party, the whole on the same subject as long as otherwise admissible". (Exhibit F, HB 2030). He is changing his proposal because legal counsel raised the issue of privilege being involved. That would require waiver of the privilege and that other evidence that is not admissible be admitted.

190 CHAIRPERSON WYERS stated this was cleaning up an Oregon statute. The other option is to go with the federal rule, which is in the bill.

204 MR. GRIFFITH suggested the language "the whole on the same subject, where otherwise admissible".

215 SEN. GARDNER asked what the current law is with respect to privilege in this context. Can privileged material come in under ORS 41.880?

224 MS. LaMAR stated that Rule 511 is the rule that caused her to suggest that there should be a limitation on the extent to which Rule 106 would apply. The Interim Committee added language (page 96, Exhibit A, HB 2030) which goes to the issue of voluntary disclosure. The attempt was to clarify that by the language on the last two lines of the rule: "and testifying on direct examination". It was added to make certain that a witness could not inadvertently waive an otherwise privileged communcation by testifying on, for example, cross-examination.

If Rule 105 were applied without any restriction of "otherwise admissible" language, a party could attempt to admit privileged material.

This is a fairly unclear area insofar as the privilege rule and the extent to which privilege is waived.

271 REP. MASON asked why the federal rule was not adopted by the Interim Committee. The federal rule (Exhibit B, HB 2030) says "introduction of any part or any other writing which ought in fairness to be considered contemporaneously with it".

285 MS. LaMAR stated that she could only say that the judges felt there was no reason to make a change.

301 CHAIRPERSON WYERS stated that he did not think the law would be very different no matter which way the committee went.

312 MR. LYNN stated that the reason given for the Interim Committee not adopting Federal Rule 106 speaks just to introduction of evidence with respect to writings or recorded statements. The evidence rule

in Oregon has been ORS 41.880, which allows act, declarations, converstaions or writings. He read from ORS 41.880.

The feeling of the Interim Committee was that ORS 41.880 was broader than the federal rule and if the reason for introducing the evidence was for fairness and completeness, a broadening of the rule would be in the greater interest of justice than a narrowing of the rule.

338 SEN. FADELEY stated that Rule 511 tries to take care of the problem of broadening this so far that it interfers with the privilege. He does not think Rule 106 modifies or changes the rule of privilege. He did not think the problem was inherent. Using the words "unless otherwise admissible" is trying to counteract a thought-up problem.

He did not believe this rule opens the admissibility as much as other people believe. The proposal from the Interim Judiciary Committee does not reduce the amount of evidence which would be available. It would not change the law in a restrictive way so that there would be less evidence at a given time.

The difficulty with the federal rule is that it does not mention oral statements.

389 REP. MASON asked why OTLA needed the amendment.

394 MR. LYNN stated that his proposal is to keep Oregon law the way it is. The present ORS 41.880 reads almost the same as Rule 106 except it reads "may, at that time,". The emphasis is to admit the evidence at the time that the other part of the act, conversation or other thing is admitted. As long as the evidence was otherwise admissible, it would allow the evidence in at that time and allow a greater understanding of the evidence given.

He proposed the "otherwise admissible" language because of the decision in Balck v. Nelson in which the Supreme Court said that ORS 41.880 would not be given literal interpretation. The writing in that case contained a hearsay statement which was clearly not admissible.

438 MOTION: CHAIRPERSON WYERS moved the language in the bill on lines 2 through 6 of page 3 with, after the word "whole", the addition of the words "on the same subject, where otherwise admissible".

457 SEN. BROWN stated that the law is such that if part of the writing is not admissible as an exception to the hearsay rule, the hearsay rule will always dominate. Those rules cannot be read out of context. The requirement of admissibility is always going to be present.

He did not think that the amendment was necessary.

Tape 46

Side A

040 MOTION PASSED: In response to a roll call vote, the CHAIR delcared the amendment adopted. VOTING AYE: Cohen, Courtney, Gardner, Fadeley, Jernstedt, Kulongoski, Lombard, Rutherford, Smith, Springer, Mason, Wyers. VOTING NO: Brown.

041 Commentary Approval

042 Rule 100

043 REP. MASON moved adoption of the proposed commentary to Rule 100 (Exhibit G, HB 2030).

044 MOTION PASSED: Hearing no objection, the CHAIR declared the commentary approved.

045 Rule 102

047 MR. GRIFFITH stated that the Advisory Committee's commentary in all the proposed commentaries has been amended by referring to rule as sections. Headings have been deleted. The commentaries have also been changed so that there is only a single commentary showing the legislative intent, rather than the way the commentary is in the proposed code (Exhibit A, HB 2030). All commentary on a given section appears together. The subections are discussed in numerical order. Corrections for grammer, gender and clarity have been made.

The proposed commentary to Oregon Rule of Evidence (ORE) 102 (Exhibit H, HB 2030) simply changes references from rules to sections. It omits the comment concerning referring to the California Evidence Code and the New Jersey Evidence Rule.

077 MOTION: REP. MASON moved adoption of the commentary to Rule 102 (Exhibit H, HB 2030).

080 MOTION PASSED: Hearing no objection, the CHAIR declared it adopted.

082 Rule 103

083 MR. GRIFFITH stated that the proposed commentary (Exhibit E, HB 2030) comes from the proposed code (Exhibit A, HB 2030). The one exception referred to in the first paragraph is the decision by the committee to over-rule the holding in Myer v. Harvey Aluminum which is explained in paragraph 3.

He explained the grammar and gender changes in the proposed commentary, the changes for clarity and the changes to acommodate the exception referred to.

130 MOTION: CHAIRPERSON WYERS moved adoption of the proposed commentary to Rule 103 (Exhibit E, HB 2030).

133 MOTION PASSED: Hearing no objection, the CHAIR declared the commentary adopted.

135 Rule 104

136 MR. GRIFFITH explained the changes in the proposed commentary (Exhibit I, HB 2030). Counsel deleted the word "not" which appears on page 9 of the proposed code (Exhibit A, HB 2030). The indication is that if it is a matter of conditional relevancy, the court makes a preliminary determination whether or not there is sufficient evidence to allow the jury to find that the conditional fact exists. The commentary in the proposed code (Exhibit A, HB 2030) is in error by including a second negative in one of the sentences. The commentary has been submitted to Judge Jones and if the judge finds the proposed commentary (ERxhibit I, HB 2030) in error, MR. GRIFFITH will inform the committee.

206 MOTION: CHAIRPERSON WYERS moved adoption of the proposed commentary to Rule 104 (Exhibit I, HB 2030).

215 MOTION PASSED: Hearing no objection, the CHAIR declared the commentary adopted.

216 Rule 105

217 MR. GRIFFITH stated that the proposed commentary (Exhibit J, HB 2030) reorganizes the commentary of the proposed evidence code (Exhibit A, HB 2030).

220 MOTION: CHAIRPERSON WYERS moved adoption of the proposed commentary (Exhibit J, HB 2030).

224 MOTION PASSED: Hearing no objection, the CHAIR declared the commentary adopted.

242 MOTION: CHAIRPERSON WYERS moved that the Senate members introduce a bill with identical language to HB 2030 so that the committee could deal with the quorum problem. (A majority of the House members had to leave because of a meeting conflict.)

262 MOTION PASSED: Hearing no objection to the motion, the CHAIR so ordered. Senate members present: Gardner, Jernstedt, Brown, Kulongoski, Wyers. Senate member excused: Smith, Fadeley.

265 CHAIRPERSON WYERS adjourned the meeting at 3:55 p.m.

Submitted,

Pearl Bare,
Committee Assistant

EXHIBITS

Exhibit A, HB 2030 - Proposed Evidence Code (See Over-Sized Exhibits)
Exhibit B, HB 2030 - Federal Rules of Evidence (See Over-Sized Exhibits)
Exhibit D, HB 2030 - Proposed and adopted changes to HB 2030, Article 1, presented by staff
Exhibit E, HB 2030 - Proposed commentary to ORS 103 presented by staff
Exhibit F, HB 2030 - Proposed changes in Articles II, III & IV of the Proposed Oregon Evidence Code, HB 2030, presented by Elliott Lynn
Exhibit G, HB 2030 - Proposed comentarry to ORE 100 presented by staff
Exhibit H, HB 2030 - Proposed commentary to ORE 102 presented by staff
Exhibit I, HB 2030 - Proposed commentary to ORE 104 presented by staff
Exhibit J, HB 2030 - Proposed commentary to ORE 105 presented by staff

Chairperson:
SEN. JAN WYERS
Vice-Chairperson:
SEN. ROBERT SMITH

Staff:
FELICIA M. GNIEWOSZ
KRISTENA A. LaMAR
Legal Counsel
HARRIET CIVIN
Chief Committee Assistant
GLENDA HARRIS
VERA J. MOISEVE
Committee Assistants

SENATE COMMITTEE ON JUSTICE
Room 347, State Capitol
SALEM, OREGON 97310
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Members:
SEN. WALT BROWN
SEN. EDWARD FADELEY
SEN. JIM GARDNER
SEN. KENNETH JERNSTEDT
SEN. TED KULONGOSKI

Joint Meeting of the House Judiciary Subcommittee 1 and Senate Committee on Justice

February 12, 1981 3 p.m. ROOM 350

HOUSE BILL 2030 -- PROPOSED EVIDENCE CODE

Members Present: Senator Walter F. Brown
Representative Peter Courtney
Senator Kenneth Jernstedt
Senator Ted Kulongoski
Rep. William Rutherford
Senator Robert Smith
Rep. Dick Springer
Senator Jan Wyers, Co-Chairperson
Rep. Tom Mason, Co-Chairperson

MEMBERS EXCUSED: Represenative Joyce Cohen
Senator Jim Gardner
Senator Edward Fadeley
Representative Kip Lombard

STAFF PRESENT: Kristena LaMar, Legal Counsel, Senate Committee on Justice
Harriet G. Civin, Chief Committee Assistant, Senate Justice

Witnesses: Tape 3A
023 - Elliott Lynn, Trial Lawyers Association
036 - James McCandlish, Oregon Criminal Defense Lawyer's Association.
069 - Allison Smith, Oregon District Attorney's Association

METER READING GIVEN FOR INITIAL TESTIMONY OF EACH WITNESS. ADDITIONAL TESTIMONY OFTEN FOLLOWS.

MINUTES WERE RECORDED ON 60 MINUTES CASSETTE TAPES. METER READINGS INDICATE MINUTES ON EACH SIDE.

MINUTES

SENATE COMMITTEE ON JUSTICE AND HOUSE JUDICIARY SUBCOMMITTEE 1
PROPOSED EVIDENCE CODE

February 12, 1981 — 3 p.m. — ROOM 350

MEMBERS PRESENT: Senator Walter Brown
Representative Peter Courtney
Senator Kenneth Jernstedt
Senator Ted Kulongoski
Rep. William Rutherford
Senator Robert Smith
Representative Dick Springer
Senator Jan Wyers, Co-Chairperson
Representative Tom Mason, Co-Chairperson

MEMBERS EXCUSED: Representative Joyce Cohen
Senator Jim Gardner
Senator Edward Fadeley
Representative Kip Lombard

STAFF PRESENT:
Kristena LaMar, Legal Counsel, Senate Committee on Justice
Harriet G. Civin, Chief Committee Assistant, Senate Justice

TAPE 3A

008 Meeting was called to order at 3:15 p.m. in Room 350 by Representative Tom Mason, CHAIRPERSON.

RULE 106:

THE CHAIR said the first order of business would be the adoption of the commentary of Rule 106. He called attention to EXHIBIT D which was prepared by staff.

023 ELLIOTT LYNN, Trial Lawyers Association. Called attention to the fifth line in the commentary of Rule 106. He said he would suggest "only if the remaining evidence is otherwise admissible."

026 NO OBJECTION AND THE COMMENTARY TO RULE 106 WAS ADOPTED.

030 RULE 101(4)(e). Granting or revoking probation. (Exhibit A, p. 2). (Exhibit E).

036 JAMES McCANDLISH, Oregon Criminal Defense Lawyer's Association. (Exhibit E). The standard set forth in these proposed amendments would adopt the standards set forth in Gaymon v. Scarpelli 441 US 778, 93 SCt 1756, 36 L.Ed 2d 656 (1973). He called attention, particularly, to footnote 5. Footnote 5 is that opinion which closely tracks the Morrisey v. Brewer opinion and parole violation proceedings. The finding is that due process doesn't apply to probation violation proceedings.

The proposal put forth by the Oregon Criminal Defense Lawyer's Association (Exhibit E) is an attempt to codify Gaymon. It basically sets forth a two-factor test in order to admit one of the three types of hearsay evidence. Whether or not the judge finds that the requirement to appear would impose an unreasonable hardship on one of the parties and, secondly, that the judge is convinced of the reliability of the information.

This is the change from the original proposal put forth the first week of the session.

069 ALLISON SMITH, OREGON DISTRICT ATTORNEY'S ASSOCIATION. Mr. Smith said in reference to the proposed amendments, p. 2(3) ". . .hearsay evidence in the form of an affidavit, deposition or documentary evidence may be admitted. . . ,"

(Exhibit E) he reads that to mean you could not have a probation officer explain what had happened. It would have to be done by some document and presumably submitted in advance. MR. SMITH said he did not think that was too desirable. He explained that in most of the cases you did not really know whether they were going to be contested or not. In some instances it is going to require a number of affidavits or depositions being prepared for what may turn out not be an issue. He feels the probation officer who has spoken with the employer should be allowed to make his recommendations for revocation.

MR. SMITH said he had a second problem with (5). He explained that Mr. McCandlish had not addressed himself to that as yet. It says "the conditions of probation have been violated." There is an inference there that all of the conditions have been violated and it should say "a" condition. He explained this was not part of the evidence code but it seemed to be changing part of the probation procedures.

CHAIRPERSON MASON asked whether Mr. Smith was reading this as saying the probation officer could not testify as he or she would normally testify presently. That this would require an affidavit.

MR. SMITH said that was the way he read it. The way Exhibit E is written it would exclude the oral testimony of the probation officer or whoever else it might be.

SENATOR BROWN asked whether Mr. Smith did not think that documentary evidence would be available in any event. He thought "documentary evidence" would sound like a police report. He wondered whether it would not almost always be the case that you would have something in hand other than a phone conversation, etc.

MR. SMITH answered that usually they have something in hand that is called a "pink slip". It is a report recommending probation revocation.

THE CHAIR asked Mr. McCandlish whether he agreed that the language found on lines 3 and 4 of Exhibit E be deleted. The language to be deleted would be on page 2, lines 3 and 4 "in the form of an affidavit, deposition or documentary evidence".

MR. McCANDLISH felt the deletion would create substantial havoc with the proposed amendment. He explained there had been quite a bit of debate on this in the Board meeting which had taken place yesterday.

SENATOR WYERS asked whether documentary evidence could include a letter from an employer.

MR. McCANDLISH said he would think not. An example of documentary evidence would a heroin urinalysis.

SENATOR WYERS asked how the probation officer would prove that the person lost his job without bringing the employer.

MR. McCANDLISH said that if it was not an unreasonable hardship, they would have to bring in the employer.

REPRESENTATIVE SPRINGER raised a procedural question. He said this rule was considered previously. He wanted to know if this was not a belated attempt to reconsider what has already been considered by this forum and voted upon.

MS. LaMAR, legal counsel, explained that the committee had considered this and indicated they would like to reconsider the issue if the judges indicated that

Page 3

they followed a procedure other than that. The committee was assuming they followed a procedure which was essentially in compliance with the changes Mr. McCandlish suggested. As of today's mail, counsel had not received a response from the judges -- Judge Jones and Judge Unis. She explained that they had really not had time to respond to the specific language being suggested. In principal the judges had agreed but had not studied the proposed language.

MS. LaMar called attention to the first paragraph of Exhibit E (first page of the actual proposed amendments and not the cover letter). Other than that proposal, no other changes had been suggested for that statute. There were no other changes suggested with reference to the criminal procedure code or the evidence code.

MR. SMITH said that as rule 104(e) presently stands the District Attorneys Association had no complaint with it. However, Mr. McCandlish had proposed some changes and Mr. Smith had objected to those proposed changes. Presently, there is still some argument as to whether the McCandlish suggestions should be adopted.

REPRESENTATIVE SPRINGER felt he had not had sufficient information from the court or the judges on this issue. He said he did not feel comfortable to proceed without having that input from the judges.

The committee decided to postpone action on this question until the input mentioned above was available.

T 3-A

SECTION 7. Rule 201(a). Scope. (EXHIBIT A, p. 13).

220 SENATOR WYERS MOVED ADOPTION OF RULE 201(a).
NO OBJECTION AND IT WAS SO ORDERED.

SECTION 8. Rule 201(b). Kinds of facts. (EXHIBIT A, p. 16).

THE CHAIR pointed out that Professor Kirkpatrick (Exhibit C) had made a suggestion that there be added "including facts for which notice is provided by statute".

COUNSEL LaMAR pointed out that Professor Kirkpatrick had written his article at some point during the interim judiciary committee proceedings. It would seem to counsel that paragraph (2) of rule 201(b) may well be interpreted to cover facts by which notice is provided by statute.

In response to a question from Senator Brown, Chairperson Mason explained that although Professor Kirkpatrick wanted to broaden this, Ms. LaMar was saying that the definitions are in the statute."Sources whose accuracy cannot reasonably be questioned" would include that which the Professor was suggesting.

In answer to a question from Senator Wyers for an example of the fact that is notice by statute, the Chair gave the presumption of legitimacy.

MS. LaMAR said that presumption might be at least changed by the adoption of this. In some of the other substantive areas of law, worker's compensation for one, there are fact which create presumptions.

MS. LaMAR told the committee that Professor Kirkpatrick's article (Exhibit C) does not explain what other facts he has concern about being recognized.

Page 4

281 SENATOR WYERS MOVED THAT ON SECTION 201(b)(2), THE PHRASE BE ADDED "INCLUDING FA FOR WHICH NOTICE IS PROVIDED BY STATUTE."

The Chair said he thought the phrase should be added by deleting the period at the end of the sentence and inserting the word "and".

NO OBJECTION AND THE MOTION WAS ADOPTED.

301 THE CHAIR MOVED THE ADOPTION OF THE FULL RULE - SECTION 8, Rule 201(b).
NO OBJECTION AND IT WAS SO ADOPTED.

312 SECTION 9. Rules 201(c) and 201(d). When mandatory or discretionary.

SENATOR WYERS MOVED THE ADOPTION OF Rules 201(c) and (d).

MS. LaMAR explained that she thought these rules had been written as one because they had been combined out of the Federal Rules (Exhibit B) and the same pattern was continued in the Oregon Rules.

NO OBJECTION AND IT WAS ADOPTED.

331 SECTION 10. Rule 201(e). Opportunity to be heard. (Exhibit A, p. 18).

341 THE CHAIR MOVED THE ADOPTION OF RULE 201(e).
NO OBJECTION AND IT WAS SO ORDERED.

353 SECTION 11. Rule 201(f). Time of taking notice. (Exhibit A, p. 18).

354 SENATOR WYERS MOVED THE ADOPTION OF RULE 201(f).

MS. LaMAR pointed out there were two proposals for change. (1) Oregon Criminal Defense Organization (Exhibit F), (2) Oregon Trial Lawyer's Association (Exhibit G).

400 ELLIOTT LYNN, OREGON TRIAL LAWYERS. He said they objected to this rule because it allowed judicial notice to be taken above the trial court level. This raises problems different in a criminal trial than a civil trial. In a criminal trial it obviously raises the problem that the defendant, if a judicated fact were judicially noticed at the appellate court level and a fact that must be proved by the prosecution at the trial court level in order to convict someone, this would deprive the defendant of the right to have the jury pass upon that fact. This example would create constitutional problems that would probably require reversal of cases and have to have them sent back down for another trial.

Present law in Oregon seems to be working fairly well even though there is no specific statutory law except one reference in the statutes to judicial notice ORS 41.410. Presently in the state of Oregon there is an open question as to whether judicial notice can be taken above the trial court level. It creates problems in the criminal as well as the civil law.

Page 5

4 SENATOR WYERS MOVED RULE 201(f) ADDING THE WORD "TRIAL" BEFORE THE WORD"PROCEEDING" AT THE END OF THE SENTENCE.

SENATOR WYERS explained he would withdraw the motion if there was objection to it. His purpose was to get the question before the group.

SENATOR SMITH asked for both parties to comment on the question.

461 ALLISON SMITH, DISTRICT ATTORNEYS ASSOCIATION, said he had not comment.

REPRESENTATIVE RUTHERFORD said he thought the court would be aware of circumstances in which to recognize a fact, judicially, would deprive the person of a jury trial and therefore the court would not apply it. On the other hand, there may be cases in which the recognition of the judicial fact on appeal might very well save a lot of time, effort, etc.

MR. LYNN felt those would be isolated cases. The rest of the practice in Oregon might be "mucked up" just for those few isolated cases.

REPRESENTATIVE RUTHERFORD pointed out it was identical to the Federal Rules and it has not disturbed the federal practice.

MR. LYNN felt there might be something about the federal practice that we do not have in the state of Oregon.

TA 4-A
028 MR. LYNN called attention to an example in the commentary in Exhibit A (Rule 201(f) where the Federal Court refused to take judicial notice for criminal jury trials.

REPRESENTATIVE RUTHERFORD explained that that was exactly the point he was making. The Federal Court recognized that the application of judicial notice in a criminal trial would be wrong and it has not done so. However, they do not say that they won't do it in other cases. He said he was saying that that might be an appropriate standard to give the court especially in light of this case and take this case as a statement of the legislative intent.

MR. LYNN argued that would deal with the criminal law area. He did not feel it would solve the problem by any means. It would help if there were some commentary in that direction to show that a judicially noticed fact could not be taken into criminal trial above the trial court level.

MR. LYNN said that as rule 201(f) is set out, it doesn't say anything about taking judicial notice of criminal versus civil. It just says you can take judicial notice at any stage of the proceedings.

REPRESENTATIVE RUTHERFORD wondered whether the Federal Rule could be adopted and say that by doing so the legislative intent is that the case of United States v. Jones would be governing in this area.

MR. LYNN asked what would then be done about the civil section where the Court of Appeals or the Supreme Court takes judicial notice of an adjudicative fact that is important that then requires under the proposed statute notice of the taking of judicial notice and requires an opportunity for a hearing. Those levels of court--appellate and Supreme Court--are not the areas lending themselves well to taking evidence and bringing in witnesses.

Page 6

REPRESENTATIVE RUTHERFORD was not suggesting trials at at the appellate level. What he was suggesting was that the court on the civil side go through the same reasoning process it has used in United States v. Jones.

REPRESENTATIVE COURTNEY wondered whether some of the problems raised by Representative Rutherford could be dealt with in the commentary. He suggested that it be restricted in the way Rutherford was suggesting without restricting it by putting the word "trial".

SENATOR BROWN called attention to p. 19 of Exhibit A, the commentary. He said there was a whole series of cases which have gone one way and some the other way. He would feel the Federal Rule should be adopted as it is originally written and let the courts put additional gloss on it.

REP. RUTHERFORD felt the commentary could state that it is not legislative intent to deprive anyone of a jury trial.

ROLL CALL:

Senator Walter Brown		No
Representative Courtney		No
Senator Jernstedt		No
SEnator Kulongoski	Aye	
Representative Smith		No
Representative Rutherford		No
Representative Springer	Aye	
Senator Jan Wyers	Aye	
Representative Mason, CHAIR PERSON	Aye	

MOTION FAILED.

121 SENATOR WYERS MOVED RULE 201(f) unamended. NO OBJECTION AND IT WAS ADOPTED.

The question still remains as to its relationship to existing law. Senator Brown has rightfully noted that Oregon law is confusing on the subject.

COUNSEL LaMAR called attention to the commentary in the Federal Rule (EXHIBIT B). There is a one sentence commentary that says "In accordance with the usual view judicial notice may be taken at any stage of the proceedings whether in trial court or on appeal." She felt there were no explanations for the questions raised above in the Federal Rules commentary.

REP. RUTHERFORD felt that our commentary should state the adoption of the rule is not intended to deprive a litigant of their right to a jury trial as to a fact that is being adjudicated.

MOTION PASSED AND THE ACTUAL WORDING WAS LEFT TO COUNSEL.

147 SECTION 12. Rule 201(g). Instructing the jury. (Exhibit A, p. 19).

Professor Kirkpatrick had proposed that a phrase "in favor of the prosecution" be added. (Exhibit C). This would be after sentence in (2).

MS. LaMAR said there had been discussion at the public hearing of the first session of this joint committee. In criminal cases (according to the discussion) the court could not have, essentially, what has been being discussed here about judicially noticing a fact that operates against the defense. Rather than say "against the defendant", Professor Kirkpatrick used, the phrase "in favor of the prosecution."

Page 7

This would operate against the defendant.

CHAIRPERSON MASON asked whether there could be a judicially noticed fact which operates in favor of the defendant and not be in favor of the prosecution. THE CHAIR said he was a bit uncomfortable with the specificity of his language in that it almost reads as if you can only have judicially noticed facts in a criminal case all but qualified and that they are not conclusive. That they can only be for the prosecution. It seemed to Representative Mason by adding the Kirkpatrick language that only the prosecution would have the benefit of it.

SENATOR WYERS said that he thought the defendant had to be protected against judicially noticed facts being conclusive but the state does not have to be protected from that in a prosecution.

SENATOR BROWN asked whether it could be conclusive in a civil case against the defendant.

SENATOR WYERS said the paragraph started out with "In criminal cases. . . ."

192 SENATOR KULONGOSKI MOVED PROFESSOR KIRKPATRICK'S AMENDMENT.

COUNSEL LAMAR recalled for the committee that Judge Jones had indicated the judges would have no objection to the addition of the Kirkpatrick language.

NO OBJECTION AND THE MOTION WAS ADOPTED.

THE CHAIR MOVED ADOPTION OF RULE 201(g) as amended.

MR. McCANDLISH pointed out that the way this has been drafted, the fact that it is judicially noticed against the state in favor of the defendant in a criminal case would follow the same prescriptions of subsection (1). However, it doesn't say that.

MS. LaMAR was asked if that could be reflected in the commentary and she said it certainly could be.

227 SECTION 13. Rule 202. Kinds of Law. (EXHIBIT A, p. 20).

Professor Kirkpatrick had a proposed amendment. (Exhibit C). Delete from (7) the phrase "when pleaded and referred to by its title, if any, or by its commonly accepted name, and the date of its approval when approval is necessary to render it effective."

MS. LaMAR read from Professor Kirkpatrick's article. (Exhibit C). He feels that Rule 202 is too restrictive since it requires of the person seeking to have a municipal ordinance judicially recognized is more stringent than the actual rules require.

231 SENATOR BROWN MOVED THE AMENDMENT AS PREVIOUSLY READ BY THE CHAIR.

MOTION WAS ADOPTED.

255 SENATOR BROWN MOVED RULE 202. NO OBJECTION AND THE RULE WAS ADOPTED.

260 SENATOR KULONGOSKI asked whether Rule 202(5) was existing law.

Page 8

279 MR. McCANDLISH said he had spoken with Judge Jones on this question and about this Section and what his interpretation of it meant. They discussed (5) -- with particular emphasis on what a court record is. A court rule is quite easy to figure out but a court record is not. The case in the commentary that is expressly over-ruled and, therefore, the law would be changed in the state of Oregon by this proposal is State ex rel. Juvenile Dept. v. Martin, 271 Or 603, 533 P2d 780. (Exhibit A, p. 23). MR. McCANDLISH went into some detail concerning this case and the ruling made by the judge. The judge had read into the record material dealing with commitment proceedings saying that he was taking notice of the contents of the files. This was specifically over-ruled by the appellate court. What is being done by the proposal before the committee is letting in any other file under the prescription of relevancy. It has to be relevant in order for it to come in as a judicially notice of fact.

MR. McCANDLISH said that even though the intent of the section does not change anything but procedures, it could have a very substantive impact. Judge Jones informed Mr. McCandlish that his intention or the intention of the committee when they drafted it was to only allow that evidence from the record which would be otherwise admissible. In other words, if it was hearsay, it would be admissible.

SENATOR KULONGOSKI expressed concern with the words "record of the court". He was concerned with how broad it would actually be interpreted as.

MR. McCANDLISH said that was also their concern.

SENATOR KULONGOSKI said he did not have a language which would limit his concern However, he thinks is an extremely broad definition of judicial notice. He is more concerned about the civil cases even though examples had been given in criminal cases.

CHAIRPERSON MASON called attention to page 23 of Exhibit A and read from (5).

384 SENATOR KULONGOSKI MOVED RECONSIDERATION OF THE VOTE ON RULE 202. MOTION TO RECONSIDER WAS ADOPTED.

401 SENATOR KULONGOSKI MOVED DELETION OF (5) Rule 202.

REP. RUTHERFORD objected to the deletion. It seemed to him the rule would make court proceedings more efficient. The case raised by Mr. McCandlish, Rep. Rutherford would not be allowed by these rules. Those records were apparently case workers records and files that were used in the case cited by Mr. McCandlish. That would seem to him to be hearsay. The alternative is to say that all these records become authenticated. That seemed to him to be too cumbersome.

SENATOR KULONGOSKI suggested he delete the word "records" and leave "rules" in.

NO OBJECTION AND IT WAS SO ORDERED.

SENATOR KULONGOSKI was concerned that you would open up a search of all the filings and they are all subject to judicial notice. He feels existing law making it relevant to the items and file in the case.

REP. RUTHERFORD did not like being limited to the one case. He wanted to know why could not notice that another case had been filed or that it had been completed.

Page 9

SENATOR KULONGOSKI said the word "records" is much broader than notice that a case has been filed.

REP. SPRINGER said that he noticed under rule 202 that what it seems to create in this category is kinds of law and law judicially noticed is defined as. If we are getting into records, we are not talking about law but we are talking about facts. He felt we ought to give the court discretion before it is opened up.

REP. COURTNEY said that he is of the opinion that judicial notice is pretty structured, restrictive type of doctrine. The discussion by Senator Kulongoski points up that perhaps we are unstructuring it to the extent that he would be nervous of what he had done prior to this. Therefore, he was going to support Senator Kulongoski's motion because he wanted to be sure that doctrine if we choose judicial notice on appeal.

TAPE 3-B
033

SENATOR KULONGOSKI HAD MOVED THAT (5) BE AMENDED TO THE EXTENT THAT THE FIRST TWO WORDS "RECORDS AND" BE DELETED WHICH WOULD LEAVE THE PARAGRAPH READING "RULES OF ANY COURT OF THIS STATE OR ANY COURT RECORD OF THE UNITED STATES OR ANY STATE TERRITORY OF THE JURISDICTION OF THE UNITED STATES." THE COMMENTARY SHOULD BE AMENDED TO REFLECT THE MOTION.

ROLL CALL:	Senator Brown	Aye	
	Representative Courtney	Aye	
	Senator Jernstedt	Aye	
	Senator Kulongoski	Aye	
	Representative Rutherford		NO
	Representative Springer	Aye	
	Senator Wyers	Aye	
	REP. MASON, CHAIRPERSON	Aye	

MOTION PASSED.

MS. LaMAR pointed out an ambiguity in paragraph 4 of Rule 202. On the second line in Exhibit A, p.21 the words are used "public entity of the United States."

MS. LaMAR said that "public entity" is not a particularly widely recognized term. There is ambiguity between the text of subsection (4) and the commentary. The commentary indicates that the intent of the rule is to recognize the regulations, ordinances and similar legislative enactments issued by any state, territory or possession of the United States rather than the language "public entity."

REP. RUTHERFORD said he preferred the language in the commentary better than the language in the rule.

MS. LaMAR wanted to know whether the committee wanted to substitute the words "state, territory or possession" for "public entity".

NO OBJECTION AND IT WAS SO ORDERED.

TAPE 3B

074 SECTION 21. Rule 401. Definition of "relevant evidence." Exhibit A, p. 39.

CHAIR MOVED ADOPTION OF RULE 401.
NO OBJECTION AND RULE 401 WAS ADOPTED.

085 SECTION 22. RULE 402. Relevant evidence generally admissible. (Exhibit A, p. 41)
CHAIR MOVED ADOPTION OF RULE 402.
NO OBJECTION AND IT WAS SO ORDERED.

091 SECTION 23. RULE 403. Exclusion of relevant evidence on grounds of prejudice, confusion or undue delay.

SENATOR KULONGOSKI called attention to"C.", Exhibit A, p. 43. He called attention to the elimination of surprise as a basis for excluding relevant evidence and wanted to know why that had been deleted.

REP. RUTHERFORD thought it was covered in the discovery statute.

CHAIR MOVED THE ADOPTION OF SECTION 23, RULE 403 and there was no objection and it was adopted.

WORK SESSION CONCLUDED.

122 PUBLIC HEARING:
SECTIONS 24, 25, 26, 27, 28, 29, 30, 31. Rules 404, 405, 406, 407, 408, 409, 41
411, 412. (Exhibit A, pp. 44-65).

133 LEGAL COUNSEL LaMAR reported she was authorized by Judge Jones to indicate that the judges would like to eliminate from the commentary under summary the "archaic," in the words of Judge Jones, "the chastity of a victim under a statute specifying the victim's chastity as an element of the crime of seduction,". (Exhibit A, p. 45).

NO OBJECTION AND IT WAS SO ADOPTED.

143 ELLIOTT LYNN, Oregon Trial Lawyer's Association. (Exhibit H, p. 3). Section 24, Rule 404. (Exhibit A, p. 44).

He called attention to Exhibit A, p. 47. MR. LYNN believed that what was being done with this rule was expanding the use of circumstantial character evidence in civil cases contrary to the material in "DISCUSSION", Exhibit H, p. 3. He called attention to (c) of Rule 404 (Exhibit A, p. 44). It would allow character evidence to come in under this section if it fits within rules 607-609. These rules deal with the opinion evidence of some one.

MR. LYNN expressed the fear that this would create a trial within a trial and cited examples.

MR. LYNN said the Oregon Trial Lawyers do not object to character evidence. They do object to opinion evidence which may be the result of a single occasion.

SENATOR WYERS asked Mr. Lynn what he was proposing be done.

MR. LYNN said he was proposing that evidence of the character of the witness should be eliminated as follows: "as provided in sections 51 to 53". (Exhibit A, p. 44).

Page 11

He called attention to Exhibit A, p. 124. MR. LYNN said you had to look at what is allowed in under Rule 402(4)(c) and look ahead to Rules 51 to 53 to see what is allowed in there.

In response to a question from Representative Rutherford, MR. LYNN said reputation in the community to something that is built up over a period of time. It is not the single occasion where you have met someone, where the dealings turned sour, who now feels that your character for truthfulness is bad. However, in the community as a whole you may be known as a truthful individual.

REP. RUTHERFORD agreed with the theory but gave as an example the Gortmaker trial when one of the key witness against Gortmaker was called and a judge was called and asked what that witnesses character reputation in the legal community was and the judge said it was bad. Rep. RUTHERFORD said he thought only that judge believed that. REP. RUTHERFORD felt that was strictly opinion.

SENATOR KULONGOSKI asked whether a foundation had to be laid for character evidence when a person comes in to testify as to the general reputation of the person.

MR. LYNN said you absolutely had to do so.

THE CHAIR felt we were getting ahead of ourselves since this was really found in a later section.

Meeting adjourned.

Respectfully submitted,

Harriet G. Civin, Chief Committee Assistant
Senate Committee on Justice

EXHIBITS:

Exhibit A - PROPOSED OREGON EVIDENCE CODE, December, 1980. Report of the Legislative Interim Committee on Judiciary. Filed with Archives (1981) session) Senate Committee on Justice Oversized Exhibits.

Exhibit B - FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES (Effective July 1, 1975 -- As Amended to April 1, 1979). Filed with Archives (1981 session) Senate Committee on Justice Oversized Exhibits.

Exhibit C - OREGON LAW REVIEW "Reforming Evidence Law in Oregon". Volume 59, Number 1. University of Oregon. 1980. Laird C. Kirkpatrick. Filed with Archives (1981 session) Senate Committee on Justice Oversized Exhibits.

Exhibit D - Oregon Rule of Evidence 106. Prepared by staff.

Exhibit E - Oregon Criminal Defense Lawyer's Association. Presented by James McCandlish of Metropolitan Public Defender's Office. Dated February 9, 1981.

Exhibit F - Oregon Criminal Defense Lawyers Association. Presented by James McCandlish. (See above).

Exhibit G - Oregon Trial Lawyers. Elliott Lynn

Exhibit H - Oregon Trial Lawyers' Proposals in Articles II, III, IV. Elliott Lynn,

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EXHIBITS (continued):

Exhibit I - Oregon State Bar Ad Hoc Committee on Proposed Code of Evidence.

Exhibit J - Committee Procedure for Evidence Code (HB 2030). Prepared by staff

a true copy of the original document on file and that it was in full force and in effect on a specific date, which is the arrest date. The Supreme Court ruled that it was hearsay testimony.

211 CHAIRPERSON MASON asked if the committee disposed of HB 2447 if Mr. Rupp would be willing to come back on HB 2030. He stated that he agreed with the bill but he wanted to hold the bill over so it could be heard with HB 2030.

220 ALISON SMITH felt that there were two problems with holding the bill over for HB 2030. One is that HB 2030 will have a special effective date if it passes. Secondly, HB 2447 goes a little bit farther than the provisions of HB 2030 in that it opens up the Department of Motor Vehicles records a little bit wider to use in courts than would be permissible under HB 2030 as written now.

The language in HB 2447 is borrowed and tracks with that in the Corporation Commissions Chapter.

238 CHAIRPERSON MASON stated that prior to State vs Harris, nobody ever challenged the documents on those grounds.

239 REP. RUTHERFORD asked what the difference was in sentence one and sentence two of HB 2447. They appeared to be confusing.

246 ALISON SMITH replied that the first sentence says that the documents are admissible in court. The second one says that the documents mentioned in the sentence is the proof of the existence or non-existence of the facts sighted in them.

256 REP. SPRINGER thought that the first sentence relates to the certificate, which is the abstract of the notice. The second sentence attempts to get the certification statement with specific reference to the date in question.

263 REP. RUTHERFORD didn't feel comfortable with the language because it was not understandable. Until he saw amendments to set forth what the intent is, he suggested holding the bill over.

HB 2531 - Relating to vehicles

303 DWIGHT APPLE, Motor Vehicles Division, stated that they have not had time to finish their analysis on the bill, but they are in opposition to HB 2531 because there is an existing bill, HB 2024, which moves the actual implied consent case from the circuit court to the Court of Appeals. He stated that it is part of their budget package before Ways and Means. He stated that this was the exception in Motor Vehicle law where all other cases go to the Court of Appeals.

328 CHAIRPERSON MASON asked if Mr. Apple had checked with the Court of Appeals regarding the bill.

HOUSE COMMITTEE ON JUDICIARY

Subcommittee 1

February 19, 1981 3:15 p.m. 350 State Capitol

MEMBERS PRESENT: Rep. Tom Mason, Chairperson

Rep. Joyce Cohen
Rep. Peter Courtney
Rep. Kip Lombard
Rep. Bill Rutherford
Rep. Dick Springer

STAFF: Stephen Griffith, Legal Counsel
Chris LaMar, Senate Justice Legal Counsel
Pearl Bare, Committee Assistant

MEASURE: HB 2030 - Relating to evidence (Articles III & IV)

WITNESSES: The Honorable Robert E. Jones, Circuit Court Judge
Fourth Judicial District
Elliott Lynn, Oregon Trial Lawyers Association
Allison Smith, Oregon District Attorneys' Association
Jim McCandlish, Oregon Criminal Lawyers Defense Association
Senator Jan Wyers, Chairperson, Senate Justice Committee
Chuck Lee, Deputy District Attorney, Douglas County

TAPES: H-81-JUD-81
H-81-JUD-82
H-81-JUD-83

Tape 81
Side A

008 CHAIRPERSON MASON called the meeting to order at 3:15 p.m.

PUBLIC HEARING

030 ARTICLE III - Burden of Persuasion; Burden of Producing Evidence; Presumptions

032 THE HONORABLE ROBERT E. JONES, Circuit Court Judge, Fourth Judicial District; stated that Article III was prepared by Professor John Strong who authored Cleary and Strong on Evidence and co-authored McCormick on Evidence. He also helped write the federal rules.

Article III was submitted to a special subcommittee of the Advisory Committee.

Professor Lansing has the opposite view in respect to Article III. It is basically a philosophical or legal battle between adopting the Morgan view of burdens of proof and presumptions or the Thayer view.

He suggested that the committee request a written response from Professor Strong and then ask Professor Lansing to speak to the committee.

054 ARTICLE IV - Relevancy

063 ELLIOTT LYNN, representing the Oregon Trial Laywers Association (OTLA), presented the committee with new proposals (Exhibit K, HB 2030). He explained the proposal for Rules 404, 405 and 406.

169 CHAIRPERSON MASON stated that Rule 406 comes down to the philosophical question of whether evidence is to be limited.

172 REP. LOMBARD stated that the rule would not allow evidence of habit to be introduced to disprove an alleged conduct. Evidence that a person always stopped at a stop sign could not be introduced to suggest that the person did stop at that particular stop sign. It is limited to proving that the conduct on a particular occasion was in conformance with what the person always does.

187 MR. LYNN stated that present Oregon law does not allow the introduction of evidence of the general habit of a person when offered for the purpose of showing the nature of the person's conduct on a specific occasion.

The commentary (Exhibit A, HB 2030) is misleading and incorrect. Rule 406 states in the commentary that it specifically rejects the no-eyewitness limitation on the admissibility of evidence of a person's habit. There is no present rule. The only law regarding evidence of habit coming into evidence if there are no eyewitnesses is a specific rule adopted by the Oregon Supreme Court that allows evidence of habit when a death is involved. Fenton v. Aleshire, which is cited in the commentary, did not allow evidence of habit. The Supreme Court said that the only reason they would allow this is if they adopted the rule that evidence of habit could come in in a death case with no eyewitnesses. There was an eyewitness in Fenton v. Aleshire, so evidence of habit was not allowed to come in.

There is no reason to change the Oregon law. If evidence of habit is allowed to come in, everybody is going to want to show it. Witnesses will always be brought in stating that the person never breaks the law. That is of very little probative value in the courtroom.

249 REP. COURTNEY asked if anything could happen on cross examination as to the reputation evidence.

250 MR. LYNN stated that under present law a person can only be asked if they have heard or know of this. Specific instances cannot be

inquired about. It would just test knowledge regarding a person's reputation in the community.

272 REP. COURTNEY asked why Mr. Lynn did not just want the last sentence deleted in Rule 405(1).

Mr. Lynn's amendment would not allow a person to get into his opinion of the reputation or opinion.

286 MR. LYNN stated that opinion deals with something that is specifically known about a person, such as specific bad acts. A foundation does not have to be laid with opinion. If the last sentence were deleted and "opinion" were taken out, there would not be trials within trials. If "opinion" is left in and the last sentence is deleted, there will be trials within trials.

320 REP. COURTNEY stated that striking just the last sentence would not allow trials within trials.

322 MR. LYNN stated that it would tie the defendant's or plaintiff's hands. The attorney could not inquire. If inquiry is allowed, other witnesses will be brought in and that will cause a trial within a trial.

342 CHAIRPERSON MASON stated that he thought that perhaps allowing in reputation was worse than allowing in specific instances. How does the person on the other side rebut bad reputation evidence.

387 MR. LYNN stated that it would be rebutted by bringing in another witness. If MR. LYNN had his way, reputation and opinion would not be allowed in.

394 CHAIRPERSON MASON stated he was uncomfortable without a means to rebut.

419 MR. GRIFFITH stated that Mr. Lynn was proposing deleting "or opinion" in the title, "or by testimony in the form of an opinion" and the last sentence of sub (1). No provisions of sub (2) were suggested to be deleted, but they also refer to specific instances of conduct.

440 REP. COURTNEY asked how the opposing counsel could refute the witness. If witnesses are called in, there will still be a delay just as there is now.

458 MR. LYNN stated that there is no problem with this now. If it is changed to allow in opinion, it will create a problem. In opinion, it is someone's perception of something and may be incorrect. With reputation in the community, a foundation has to be laid, but the information may still be incorrect. Reputation has been allowed in since the foundation of the colonies and has not worked a great burden on the law. MR. LYNN believes that opinion will. It has not been allowed in Oregon.

Tape 82
Side A

032 MR. LYNN stated that if "habit" is deleted in Rule 406, his suggestion would not make a change in the law.

Rule 608 allows in evidence of character and conduct of the witness and allows opinion. If a person comes in under Rule 608, specific instances of conduct cannot be inquired into under Rule 608.

He believes that Rule 608 agrees with his assessment of Rule 405.

069 ALLISON SMITH, representing the Oregon District Attorneys' Association, explained ODAA's proposed changes (Exhibit L, HB 2030).

ODAA believes that under the proposed Rule 404, there will be no way for the state to rebut. The state cannot introduce evidence that the accused is a barroom fighter in an assault case arising out of the barroom until the accused has put his own peacefulness into issue. If the accused has put in evidence that the victim was an aggressive person, the state cannot, under the proposal, say that the accused is also. ODAA's proposal would allow that.

If the headings are part of the law, ODAA would request that the heading be amended in Rule 405 to correspond with its suggested amendment.

ODAA wants to add "or motive" after line 15, page 7, of HB 2030. An example of the reason for this is phony accident claims.

169 JIM McCANDLISH, representing the Oregon Criminal Lawyers Defense Association, stated that he had no problems with the ODAA amendment (Exhibit L, HB 2030) except for the first one. The problem with that amendment to 404(2)(a) is that it puts the defendant in the bind of having to testify about his character when he may have in fact not taken the stand. The person is put in the position of giving up his fifth amendment right not to testify. This is a constitutional issue.

Other than that, his association would agree with the proposed amendments from ODAA (Exhibit L, HB 2030).

His association was proposing an amendment (Exhibit M, HB 2030) to Rule 404(2)(b). He asked that the law be left as it is now. Professor Kirkpatrick suggests that the person be unavailable, such as the Montana rule.

His association believes that Rule 405 does change Oregon law drastically. He suggested that opinion evidence is much more damaging than reputation evidence. This deals with a situation where a lawyer is trying to cross examine a witness who is hostile to his

client. It is the negative, not the positive, witness. It does get into the trial within a trial.

His association supports OTLA's position on Rule 406. Habit should be limited to the extent possible and the present law should stay.

478 In response to REP. COHEN, MR. GRIFFITH stated that both Rule 405 and Rule 406 draw on the corresponding federal rule.

Tape 81
Side B

100 MR. McCANLDISH stated that his association would support Professor Kirkpatrick's suggestion (Exhibit C, HB 2030) about Rule 412 that the present proposal be amended to clear up what is constitutionally required as far as evidence that can be brought into a sex case trial about the alleged victim's past sexual conduct. His association agrees that the limitations of the present statute are reasonable and propose no changes to expand the availability of such evidence.

There is no objection to the requirement of notice and a decision to be made by the court outside the hearing of the trier of fact as to whether the evidence is admissible. This is a reasonable compromise position between the rights of the accused and the rights of the victim.

The association takes no position on Professor Kirkpatrick's suggestion that notice being served on the victim of the intent to introduce evidence of prior sexual conduct be eliminated. The association's suggestion is to use the present statutory language.

The association's proposal is to delete that portion of the proposal (Rule 412) which sets forth specifics that are required to be admitted and replace them with the existing statute.

One area of specific concern is allowing in evidence that rebuts the injury in the case or semen in the case. That conflicts with the existing statute which says "scientific evidence". It might be read by a court to limit, except for the constitutional question, other scientific evidence, such as a hair.

183 SEN. JAN WYERS, Chairperson of the Senate Justice Committee, stated that his committee is proposing that the House Judiciary Committee work out HB 2030 on its own and pass a bill out. The legal counsel for his committee would continue to work with the Judiciary Committee.

261 JUDGE JONES stated that Rule 405 was proposed because the experience of the members of the Evidence Revision Commission was that expressing an opinion as to someone's character trait is what every witness does anyway.

The opinion rule is the modern trend. Restricting this to striaght reputation would be reverting to the past. The U.S. Supreme Court case of U.S. v. Michaelson (1945) said that the court recognizes that it is an ancient relic of the law.

The Evidence Revision Commission was unanimous among the very experienced trial lawyers.

The OTLA proposal for Rule 406 is to restrict it to business practices by removing personal habits. That is outrageous. Habit evidence is a type of evidence that McCormick, the federal rules (Exhibit B, HB 2030), the scholars and the practitioners recognize as a coming field of law. It deals with persons' idiosyncrasies.

The Commission spent hours working on this. The Commission tightened up the commentary from the federal proposal (Exhibit B, HB 2030) because it did not like the examples in the federal proposal.

The Commission wanted to avoid the evidence of habit of what everyone does, such as stopping at every stop sign. There is nothing unique about that. That is what the commentary reflects.

This was very carefully evaluated by the plaintiff's bar and the defense bar. It is what is suggested in McCormick and it is in the federal rule.

Tape 82
Side B

025 CHAIRPERSON MASON stated that part of the problem is that the word "habit" in the rule itself indicates mundane things. It does not indicate distinctive habits.

033 JUDGE JONES stated that is in the commentary.

037 CHAIRPERSON MASON suggested putting the word "distinctive" into the rule.

037 JUDGE JONES stated that would be fine. It would tighten it up even more.

041 REP. LOMBARD suggested amending that into the definition of "habit" in subparagraph (2).

053 JUDGE JONES stated that he and Judge Unis have discussed these federal rules with thousands of judges across the nation. The feeling is overwhelming that the eyewitness rule is out of date and that habit evidence is a definite part of relevance law.

064 MR. LYNN stated that in Fenton v. Aleshire, the Supreme court stated that a great weight of authority supports a rule that evidence of general habits of a person is not admissible for the purpose of

showing the nature of his conduct upon a specific occasion. It was also stated that numerous courts have made an exception to the rule when there are no eyewitnesses to an accident in which a person is killed.

There are no cases in Oregon which allow the general habits of a person to be admitted into evidence to show that he did a particular thing at a particular time.

074 JUDGE JONES stated that Fenton v. Aleshire is a 1964 case and is old law.

077 MR. LYNN stated that it is cited in the commentary and is what was considered.

There is no no-eyewitness rule in Oregon except where a person is killed.

095 JUDGE JONES stated that Fenton v. Aleshire does not state what the modern law is. Habit evidence is being introduced at this time. The appellate decisions have not caught up with it.

He read the federal commentary (Exhibit B, HB 2030) on page 32 concerning admitting habit evidence.

144 CHAIRPERSON MASON stated that the no eyewitness rule would be moot if the habit was distinctive. Fenton would become moot also.

147 MR. LYNN stated that there is no no-eyewitness rule in Oregon. The proposal would change Oregon law to allow the general habits of a person to show the person acted in a particular manner at a particular time.

155 CHAIRPERSON MASON stated that with the suggested amendment it would not be "general" habit. The commentary also makes this clear.

189 In response to JUDGE JONES, MR. LYNN stated that the proposals were decided on by a committee of the Oregon Trial Lawyers, not the general membership.

206 JUDGE JONES stated that Professor Kirkpatrick states that the no eyewitness requirement is unduly restrictive, especially when the only eyewitness is the opposing party.

In response to REP. COURTNEY, JUDGE JONES stated that the last sentence of Rule 405 allowing inquiry on cross examination into relevant, specific instances of conduct only switches from "Haven't you heard" to "Don't you know".

240 CHAIRPERSON MASON explained the proposed amendments (Exhibit L, HB 2030) to Rule 404 from the ODAA.

289 JUDGE JONES stated that he did not know of any law that allows that.

292 CHUCK LEE, deputy district attorney from Douglas County, stated that this situation comes up in connection with bar fights and who is to be believed regarding who struck the first blow. Under the present statute, the defense can introduce character evidence and opinion evidence that the victim is a violent person. The state is precluded, unless the defendant specifically puts his own character in evidence, from putting in evidence that the victim is also a violent person. These are cases where, under (2)(b), the state does not necessarily want to rebut the evidence that the victim is a violent person. Juries tend to think that the laws are reciprocal and if one side can put on evidence, so can the other. The juries assume, in this situation, that the victim does not have a violent character.

338 MR. GRIFFITH explained the Oregon Criminal Defense Lawyers Association's proposed amendment (Exhibit M, HB 2030) to 404(2)(b).

351 JUDGE JONES stated that none of the Advisory Committee's members had ever incountered this as a practical problem. The vote was almost split as whether to retain it as to homicide cases.

The common law restricts it to homicide. Professor Kirkpatrick suggests restricting it to homicide. The Commission is ambivalent about it.

365 MR. LEE stated that it seemed to him this was also a reciprocity situation.

375 JUDGE JONES stated that the Commission went the way it did because it felt restricting dying declarations to homicide cases did not make any sense.

391 MR. GRIFFITH stated that the recommendation for Rule 411 was to insert in the first line before "evidence", the phrase "except where lack of liability insurance is an element of an offense".

419 JUDGE JONES suggested putting that in as another exception under subsection 2 of that rule.

430 MR. GRIFFITH stated that there was also a suggestion to add "the motive of a witness" in the last phrase of the exceptions.

435 JUDGE JONES stated that would be fine.

The proposal from Mr. McCandlish about revising the text concering scientific evidence was no problem to JUDGE JONES.

Tape 83
Side A

034 JUDGE JONES stated that Rule 412 was based on the federal law.

045 CHAIRPERSON MASON stated that Mr. McCandlish wanted the present statute reflected in the rule.

052 MR. LEE stated that in Rule 412 as proposed, the amendments from Mr. McCandlish to delete line 25 and most of line 26 eliminates the language in the proposed bill that the evidence has to be admitted in accordance with subsection 3. With this amendment, the statute would say that the evidence should be admitted if it is of the categories listed whether or not the court had followed the proposals set out in subsection 3.

He thought it would be better to leave in lines 24, 25 and 26.

He felt that if the amendment is made, the limitation in line 33 would not be limiting on evidence offered under subsection 2.

079 MR. McCANDLISH stated that the "or" should be changed to an "and". That was the intent of his association.

The constitutionally required evidence is to come through the same process.

WORK SESSION

106 Rule 404

112 MOTION: REP. COHEN moved Rule 404 as printed.

130 MOTION PASSED: Voting aye - Cohen, Courtney, Lombard, Rutherford, Mason. Excused - Springer.

133 Rule 405

140 MOTION: REP. RUTHERFORD moved Rule 405 as printed.

149 MOTION PASSED: Voting aye - Cohen, Courtney, Lombard, Rutherford, Mason. Excused - Springer.

150 Rule 406

154 MOTION: CHAIRPERSON MASON moved insertion of "distinctive" between "regular" and "practice" on line 25.

165 MOTION PASSED: There were no objections.

166 JUDGE JONES stated that the association representatives present were going to meet to work our their differences before coming to the committee.

175 MOTION: REP. RUTHERFORD moved Rule 406 as amended.

182 MOTION PASSED: Voting aye - Cohen, Courtney, Lombard, Rutherford, Mason. Excused - Springer.

184 Rule 407

186 MOTION: REP. LOMBARD moved Rule 407.

191 MOTION PASSED: Voting aye - Cohen, Courtney, Lombard, Rutherford, Mason. Excused: Springer.

192 Rule 408

196 MOTION: REP. RUTHERFORD moved Rule 408.

200 MOTION PASSED: Voting aye - Cohen, Courtney, Lombard, Rutherford, Mason. Excused - Springer.

201 Rule 409

202 MOTION: REP. RUTHERFORD moved Rule 409.

206 MOTION PASSED: Voting aye - Cohen, Courtney, Lombard, Rutherford, Mason. Excused - Springer.

207 Rule 410

210 MOTION: REP. COURTNEY moved Rule 410.

214 MOTION PASSED: Voting aye - Cohen, Courtney, Lombard, Rutherford, Mason. Excused - Springer.

214 Rule 411

228 MOTION: REP. RUTHERFORD moved the ODAA amendments to Rule 411 (Exhibit L, HB 2030) with any necessary rewriting by the legal counsel.

240 MOTION PASSED: Voting aye - Cohen, Courtney, Lombard, Rutherford, Mason. Excused - Springer.

242 MOTION: CHAIRPERSON MASON moved Rule 411 as amended.

242 MOTION PASSED: There were no objections.

249 Rule 412

267 MR. McCANDLISH stated that he would prepare a written amendment to take care of the problem with his proposed amendments (Exhibit M, HB 2030) concering line 25.

291 MR. SMITH stated that he was comfortable with the concept of Mr. McCandlish's amendments.

302 CHRIS LaMAR, Senate Justice Legal Counsel, stated that Professor Kirkpatrick has raised the issue that, for example, a motion served upon the alleged victim (line 39, page 7, HB 2030) might be a means for abuse of the victim. Professor Kirkpatrick suggests that might be made through the district attorney's office.

There might be cases where the victim's address might not otherwise be known and that would be a means by which the defense attorney might ask for it.

320 CHAIRPERSON MASON stated that he had no objection to the deletion of that langauge.

343 CHAIRPERSON MASON adjourned the meeting at 5:30 p.m.

Submitted,

Pearl Bare
Committee Assistant

Exhibits

Exhibit A, HB 2030 - Proposed Evidence Code
Exhibit B, HB 2030 - Federal Rules
Exhibit C, HB 2030 - Oregon Law Review
Exhibit K, HB 2030 - Proposed Amendments presented by Elliott Lynn
Exhibit L, HB 2030 - Proposed Amendments presented by Allison Smith
Exhibit M, HB 2030 - Proposed Amendments presented by Jim McCandlish

For Exhibits A, B and C: See Over-Sized Exhibits

Tape 101
Side B

014 MOTION: REP. SPRINGER moved HB 2061 to the full committee with a Do Pas recommendation.

018 CHAIRPERSON MASON stated that the proposed amendments would be reserved for the full committee.

027 MOTION PASSED: Voting aye - Cohen, Courtney, Springer, Mason. Voting no - Lombard, Rutherford.

030 PUBLIC HEARING

031 HB 2030 - Relating to evidence (Article III)

032 MR. GRIFFITH stated that the article begins with Rule 305 to be consistent with the Federal Rules. There are only three federal rules, two of which were adopted. They do not correspond to any of the Oregon rules. The numbering could be changed to begin with Rule 301. Professor Kirkpatrick did suggest that there be a Rule 301 which would provide definitions of terms used.

The existing Oregon statutes provide defintions of "inference", "presumption" and "burden of proof". "Burden of proof" is not used in the proposed code although several of the witnesses will propose that "burden of persuasion" be changed to "burden of proof".

081 CHAIRPERSON MASON stated that the renumbering would be considered editorial.

084 Rule 305

098 BRUCE SMITH, representing the Oregon State Bar, stated that his association's suggestion was that "burden of proof" be retained. In the uniform jury instructions there is no definition of burden of proof.

111 FRANK LENSER, representing the Oregon District Attorneys' Association, stated that he did not believe this rule has an impact on criminal cases because the burden of proof or persuasion is not shifted to criminal.

The ODAA does not take a position as to the wording used.

124 REP. RUTHERFORD stated that the burden of persuasion shifts from time to time during a trial, but the burden of proof may remain with one party. He thought that "burden of persuasion" was more accurate.

149 MR. SMITH stated that he thought "burden of persuasion" was being used as the same thing as "burden of proof". The California section

referred to in this used "burden of proof". There is no federal rule on this.

160 MR. GRIFFITH stated that Article III does not use the words "burden of proof". It gets by with two concepts: burden of persuasion and burden of producing evidence. The burden of producing evidence may shift. Rule 307 indicates where the burden initially lies. Burden of persuasion is used in the same way burden of proof is normally used.

This issue affects Rules 305, 306 and 307.

190 Rule 306

193 MR. SMITH stated that the Bar suggests changing this to "burden of proof'.

195 Rule 307

201 MR. SMITH suggested changing burden of persuasion.

209 Rule 306

210 REP. SPRINGER stated that some judges like to give some instructions before receiving evidence. They may want to retain some discretion. Some judges feel it is helpful to the jury.

225 MR. GRIFFITH presented the committee with a letter from Professor Lansing (Exhibit N, HB 2030).

237 Rule 308

240 CHAIRPERSON MASON stated that the controversy here seems to be between the Morgan and the Thayer approach. The Morgan approach has been adopted by the committee.

255 MR. SMITH stated that the Bar's proposal was somewhat of a modification between those two. It is the Alaskan modification. Professor Kirkpatrick has also recommended this.

The Bar would like less weight to be given to presumptions than under the proposed rule. The proposed rule would change Oregon law substantially and give a great deal of weight to presumptions. Professor Younger made the comment that Federal 308 is incredibly complex in application and will lead to extensive litigation. Professor Younger suggested that Oregon not adopt it.

One of the most recent presumptions is that a letter duly addressed and mailed is presumed to have been received. If the burden of proof is shifted on that presumption and the person testified that he did not receive the letter, he would fail. The burden should continue

to be on the party who has that burden of proof. It would be up to the jury to decide which of the parties it believed.

296 MR. GRIFFITH stated that Professor Younger's comments were on Oregon's proposed Rule 308.

Judge Jones indicated that he had personally had no particular loyalty to one view or the other.

336 CHAIRPERSON MASON stated that he thought of presumptions as logical constructs. A lot of the presumptions are just common sense.

375 REP. RUTHERFORD stated that in the Thayer approach, the burden does not shift. The mere introduction of the presumption does not change the burden of persuasion.

386 Rule 309

393 MR. SMITH presented the committee with proposed amendments (Exhibit O, HB 2030).

412 MR. LENSER called the committee's attention to the proposed amendments presented by Allison Smith (Exhibit P, HB 2030).

428 MR. GRIFFITH called the committee's attention to the proposals from Mr. McCandlish (Exhibit Q, HB 2030).

447 MR. LENSER stated that the proposed changes (Exhibit P, HB 2030) are because they are the current standard for submitting a question to the jury. The court has to make that determination and in making that determination, it has to view the evidence in the light most favorable to the state.

The second issue, which is not addressed by the amendments, is with (2)(b). It is the ODAA's position that the presumed facts following from the basic facts is not constitutionally required. That is a higher standard than is imposed at this time. That is making all presumptions permissive inferences. The judge cannot direct the jury in a criminal case to find against the defendant on any issue. He can only instruct the jury that it may infer. There is no such thing as a conclusive presumption.

Tape 102
Side B

026 MR. LENSER continued that the higher standards talked about in Supreme Court decisions do not apply here. At this point, no Oregon case has reached the point of which test to adopt. The less stringent test is called the rational connection test or the more likely than not test.

The state in criminal prosecutions is going to lose some of the presumptions with this proposed rule.

047 MR. GRIFFITH stated that at the time the proposed code (Exhibit A, HB 2030) was prepared, it was unclear what the interpretation of the Constitution was as to the standard of proof between the foundational facts and the inference. That is reflected in the commentary.

The Supreme Court has since ruled in Ulster County Court v. Allen that the inference need only follow from the foundational facts as a matter of probability, although the foundational facts must be proved beyond a reasonable doubt.

069 CHAIRPERSON MASON stated that it seemed to him that the jury would have to decide that the letter duly mailed probably arrived. The jury would have to question the presumption itself. The presumption has to make sense to the jury.

071 MR. GRIFFITH stated that in a criminal case, it would have to be established beyond a reasonable doubt that the letter was written, mailed and not returned. Under the most recent decision, it is not constitutionally required that the inference of delivery also be beyond a reasonable doubt from those foundational facts.

086 JIM McCANDLISH, representing the Oregon Criminal Defense Lawyers Association, stated that the case referred to was in existence at the time this was heard by the interim committee. It was brought to the attention of the committee by Judge Jones and Judge Unis. It was the judges' position that this was good policy anyway.

There is a question of whether Article I of the Oregon Constitution might require something different than the confrontation clause of the U.S. Constitution.

It is his association's basic position that this is only adding a jury instruction. It goes contrary to the development of the law which is to cut back on comments on the evidence.

Nothing is said in the rule about presumptions in criminal trials where the presumption is in favor of the defendant. He suggested adding to the commentary that this does not change the present law with respect to a defendant having the benefit of a presumption.

132 MR. GRIFFITH agreed with that. That is the effect of the rule. It says that there can be presumptions in all civil cases going in both directions but that in a criminal action against the accused something cannot be relied upon as a presumption. The commentary could reflect the fact that the accused could avail himself of a presumption against the prosecution.

141 MR. LENSER stated that the presumption of innocence is not a valid presumption as the commentary does point out. It is a policy

statement which the society has accepted. That policy statement shifts the burden to the state. The defendant has nothing to prove.

163 MR. GRIFFITH stated that this issue comes in under Rule 311.

170 Rule 311

171 MR. LENSER stated that the preceeding was his only comment on 311.

172 MR. GRIFFITH stated that the only controversy he was aware of in the text of Rule 311 is the inclusion of 311(1).

Professor Kirkpatrick raises the same point that properly speaking this is not a presumption. Professor Kirkpatrick recommends that the policy be continued but not be listed as a presumption. In order to preserve this as an instruction to the jury, Professor Kirkpatrick recommends that it be placed in ORS 17.250.

The committee might also want to consider the suggestion of adding to the commentary an indication of the Legislature's intent as to the other presumptions that are throughout the statutes. It could note for purposes of clarification an indication that something that is prima facie evidence of another proposition is a disputable presumption under the evidence code.

240 CHAIRPERSON MASON stated that there were a couple of presumptions that concerned him.

245 In response to CHAIRPERSON MASON, MS. LaMAR stated that she would urge that the committee not do away with the presumption of legitimacy. That would be a difficult nonpresumption to prove in cases where that was in issue.

261 CHAIRPERSON MASON stated that 22 was obviously not written with 1981 in mind.

263 REP. LOMBARD used an example of ownership of real property where the man and woman living together are entitled to property as husband and wife, both are deceased and someone raises the question of the lawfulness of the marriage. If they were not legally married, Oregon law would say that the property was held as tenancy in common. That would have a definite effect on the distribution of the property.

296 CHAIRPERSON MASON adjourned the meeting at 3:45 p.m.

Submitted,

Pearl Bare

Pearl Bare
Committee Assistant

EXHIBITS

Exhibit B, HB 2061 - Testimony of Rep. Jane Cease
Exhibit C, HB 2061 - Opinion of Legislative Counsel presented by Rep. Cease
Exhibit D, HB 2061 - Proposed amendments presented by Rep. Cease
Exhibit E, HB 2061 - Testimony of Yvonne Addington
Exhibit F, HB 2061 - Testimony of Denise Kliem
Exhibit A, HB 2030 - Proposed Oregon evidence code (See over-sized exhibits)
Exhibit N, HB 2030 - Letter from Professor Lansing presented by staff
Exhibit O, HB 2030 - Proposals from Bruce Smith
Exhibit P, HB 2030 - Proposals from Allison Smith
Exhibit Q, HB 2030 - Proposals from Jim McCandlish

HOUSE COMMITTEE ON JUDICIARY

Subcommittee 1

March 5, 1981 1:30 p.m. 350 State Capitol

Members Present:	Representative Tom Mason, Chairperson Representative Joyce Cohen Representative Peter Courtney Representative Kip Lombard Representative Bill Rutherford Representative Dick Springer
Staff:	Stephen L. Giffith, Legal Counsel Christena LaMar, Legal Counsel, Senate Justice Pearl Bare, Committee Assistant
Measure:	HB 2030 - Relating to evidence
Witnesses:	Allison Smith, Oregon District Attorneys Association Elliott Lynn, Oregon Trial Lawyers Association Mark Nelson, National Association of Social Workers Marie Evans, Executive Director, Oregon Chapter, National Association of Social Workers Jim McCandlish, Oregon Criminal Defense Lawyers Association Robert Keating, Attorney
Tapes:	H-81-JUD-118 H-81-JUD-119

Tape 118
Side A

008 CHAIRPERSON MASON opened the public hearing at 1:30 p.m.

010 HB 2030 - Relating to evidence

033 Article V - Privileges

038 ALLISON SMITH, representing the Oregon District Attorneys' Association, presented the committee with a memo from John L. Collins (Exhibit R, HB 2030). He summarized the memo.

ODAA would not oppose the changes in Rule 504 proposed by the Oregon State Bar Ad Hoc Committee, but it would oppose the changes proposed by the Public Defender's Association.

153 ELLIOTT LYNN, representing the Oregon Trial Lawyers' Association, presented the committe with a proposal for Rule 503 (Exhibit S, HB 2030).

The Interim Committee adopted a "control group" test because it does not afford the large organization a right to shield anyone involved in a products liability case or anything where there would be extensive discovery requested of the organization.

He suggested that the committee adopt the Interim Committee commentary.

A recent US Supreme Court case said there should be no difference bewteen a corporation and a private individual with respect to privilege. He had not been able to find the case.

187 CHRISTENA LaMAR, Senate Justice Legal Counsel, state that case was Upjohn v. U.S., 49 Law Week 4093, decided on January 13, 1981. The court considered the control group test, but the decision was not based on any constitutional grounds. It was merely an interpretation of the federal rule dealing with the attorney client privilege. The case is not binding on any interpretation adopted for state rules.

205 MARK NELSON, representing the National Association of Social Workers, spoke in support of the clinical social worker privilege.

Over 55% of the psychotherapy conduct in Oregon is being conducted by clinical social workers. The privilege which now exists is a good one and should be extended to the clincial social worker.

224 MARIE EVANS, Executive Director, Oregon Chapter, National Association of Social Workers, spoke in support of Section 33d, Rule 504 (Exhibit T, HB 2030).

359 JIM McCANDLISH, representing the Oregon Criminal Defense Lawyers' Association, spoke in support of Rule 504 and the Interim Committee's change making the privilege applicable to criminal proceedings (Exhibit U, HB 2030).

Professor Kirkpatrick (Exhibit C, HB 2030) criticized the lack of privilege in criminal proceedings.

His association would oppose the ODAA's proposal to remove the criminal application. Removal of this would be a block to a person's treatment.

On the involuntary civil commitment proceeding, the Advisory Committee's suggestion was to do away with the privilege entirely. The Governor's Task Force on Mental Health offered a compromise to do away with that privilege during the pre-detention period. OCDLA's position is that there is no evidence that people who should be

committed are not being committed and there is no evidence that the existing facilities to treat people are being under-utilized.

Tape 119
Side A

045 STEPHEN GRIFFITH, Legal Counsel, presented the committee with a memo from Dr. Treleaven (Exhibit V, HB 2030) concerning Rule 504.

059 No testimony was presented on Rules 506, 507, 508 and 509.

076 MS. LaMAR pointed out that Professor Kirkpatrick (Exhibit C, HB 2030) suggested that Rule 510 be expanded to include "or city sister state or federal governmental unit or agency thereof". At present this privilege only extends to Oregon and its subdivisions.

100 ROBERT KEATING, attorney, stated that the bulk of his practice consists of the defense of professional liability claims for physicians and hospitals. He spoke in opposition to Rule 511 and the commentary of the Advisory Committee.

The Advisory Committee's commentary indicates that the existing law will be changed. The first issue is that the privilege is not waived by the mere commencement of litigation. A good case can be made that when a party puts his physical condition in issue, the principle of preserving from public scrutiny the physical condition of the patient no longer applies. In practice, it becomes a strategic opportunity for one party to prevent another party in litigation from obtaining access to highly relevant evidence in the preparation of the case.

In malpractice cases it is even more important because the communications between a patient and a subsequent treating physician do not simply go to the question of damages. Frequently, they go to the liability side of the case. This proposes the single biggest obstacle in doing a good job in finding out the nature of the claim against the client and in preparing a defense.

In the current statute, Rule 44(e) of the Oregon Rules of Civil Prcoedure allows the defense to obtain from any subsequent treating physician a written report of his examinations. Frequently, references to facts or answers to questions are not made which have bearing on a liability question. Generally when the physician prepares this type of document, the physician relates the things he found and the opinions he formed bearing on the future treatment of the patient. Often, there are pertinent questions that only that physician could answer. Facts may be pertinent to the liability issue that have nothing to do with the decision that physician needs to make with regard to how to treat the patient in the future.

These facts will not be in the report and there is no mechanism whereby that can be discovered. The purpose of the privilege is not

served. The purpose of protecting the confidential information is no longer relevant.

The second point is the language which says that voluntary disclosure does not occur with the mere commencement of litigation but rather at the holder's offering of himself as a witness and testifying on direct examination as to the subject matter of the confidential matter or communication. That is a change in the way the rules have been applied. The rule has always been that once the person takes the stand to testify with regard to his physical condition, the privilege is waived as to every physician who has treated the patient. Calley v. Olsen specifically holds that.

The Advisory Committee commentary states that there is some inconsistency in the Oregon cases as to whether testimony in general on the same subject will waive the privilege or whether it is necessary for the holder of the privilege to testify on direct examination on a particular communication. Footnote #12 in the Stark Street Property cases referred to by the Advisory Committee states clearly the inconsistency discussed. The Advisory Committee by adopting this section expresses its intention that a resticted view of waiver will be taken. There is some inconsistency in the Oregon cases as to this.

If this statute is passed without this question being addressed, he feels that it is a possibility that a plaintiff can go to many doctors until the plaintiff finds one that says the physical problem was caused by the accident. The deposition will tell every physician the person went to see, but the privilege will not be waived by case law and the defense cannot compel the other physicians to testify. If the plaintiff does not testify on direct examination that he went to those other physicians, those physicians cannot be called as witnesses.

The practice in personal injury cases has been that once the plaintiff testifies as to the injury at trial and has voluntarily offered himself as a witness on the subject matter, the whole thing is opened.

He was testifying in support of the present Oregon practice. The language of the Advisory Committee commentary is narrower than the rule. The rule could be enacted with every intention of maintaining the existing practice. The Advisory Committee commentary could be used as legislative intent that it be construed more narrowly.

260 CHAIRPERSON MASON stated that the Interim Committee commentary added language to make it clear that the Advisory Committee's commentary was adopted.

286 MR. KEATING stated that in the present law, what the person testifies about is ambiguous. The commentary says the person has to testify about the communication, not the subject matter.

He was opposed to the rule because of the statement that mere commencement of litigation does not waiver the privilege and that the rule specifically states on testifying on direct examination.

The other thing he is concerned about is the language in the rule being narrowly construed by the commentary as to what it is the witness testifies to. No reference in the Advisory Committee commentary is made to State ex rel Calley v. Olsen. That case held that when a deposition is taken in preparation for litigation at the holder of the privilege request, privilege is waived as to that physician and every other physician who has ever treated the patient for the same or similar condition. He suggested that the issue be specifically addressed in the statute by clarifying or codifying that language with regard to deposition because it is being interpreted differently in different counties.

The language is a little ambiguous. It is subject to the interpretation that the holder offering the other party to the communication as a witness does not wavie the privilege. He suggested that the language "or any party to the communication" be added so that it is clear that the second sentence is consistent with the first sentence and is consistent with the existing law. He was asking that the Calley case and the present law be preserved.

382 REP. COHEN asked what type of cases this would apply to other than medical malpractice.

384 MR. KEATING stated that he thought it applied in all personal injury cases.

Tape 118
Side B

017 MR. LYNN stated that what Mr. Keating is asking for is a special interest group interest in products liability cases and medical malpractice cases. The defense of those cases is now very adequate. At present, the defendant has the right to medical reports. Any doctor with which the person has treated can be subpenaed to the trial. The defense can also get the medical reports from any hospital that the person has been treated at for any reason. A great deal of discovery is now available.

Mr. Keating is asking for a sweeping waiver that would do away with the physician patient privilege. MR. LYNN feels it would also do the same to any other professional person, such as a psychotherapist, that the plaintiff has been treated by for any reason.

Present law in Oregon is that the privilege is not waived simply by filing a lawsuit. That has worked very well. There are few arguments against that except for the moneyed defense groups defending particular types of expensive lawsuits.

050 REP. LOMBARD stated he wanted to raise the public policy issue of what is being served by being able to not reveal everything that each side has. From a public policy standpoint, everyone ought to be able to find out well in advance of trial what these various opinions are.

070 MR. LYNN stated that a trial is designed to bring out facts. Each side selects the persons they are going to bring to the stand. Is there any public policy served by having either party take depositions of all doctors the person has ever treated with? This opens the door to everything and causes a great deal of expense to both sides. The expense can be borne a lot better by large organizations than by a person who has come to an attorney on a contigency fee.

It is a public policy decision that the legislature can make.

111 REP. LOMBARD stated that once a case puts in issue the medical treatment of a person, what are the reasons for allowing both sides to hold back certain information.

120 MR. LYNN stated that the present practice is very satisfactory to all but the small minority of special interest groups.

134 MR. GRIFFITH asked whether Mr. Lynn agreed with Mr. Keating that it was existing law that the waiver applies once any party to the privileged communication testifies.

139 MR. LYNN replied that he could not answer that question specifically. The privilege is waived only when the person offers his testimony. The Calley case is completely different. It is perpetuation of trial when a doctor's deposition is taken. He disagreed with the interpretation of the case.

163 MS. LaMAR stated that this rule only applies to privileges created within the proposed code. There are many other privileges which exist. This does not apply to the waiver of those other privileges. Professor Kirkpatrick suggests that the waiver of privileges apply to privileges across the board.

168 CHAIRPERSON MASON asked to have appropriate language prepared for that.

172 No testimony was presented on Rule 512.

177 MS. LaMAR presented the committee with a chart from Professor Kirkpatrick (Exhibit W, HB 2030). He suggests that in Rule 513,

there be an exception to the comment by the judge or counsel where a witness attempts to claim the fifth amendment privilege in civil cases since technically the fifth amendment privilege applies only to criminal cases.

In Rule 514, Professor Kirkpatrick suggests that those privileges created under the constitution of the state be added after "the statutes". The only two privileges that Professor Kirkpatrick identified were privilege against self-incrimination and privilege for words spoken in legislative debates.

200 CHAIRPERSON MASON adjourned the meeting at 3:00 p.m.

Submitted,

Pearl Bare

Pearl Bare
Committee Assistant

EXHIBITS

Exhibit C, HB 2030 - Oregon Law Review (Over-sized exhibit)
Exhibit R, HB 2030 - Proposals presented by Allison Smith
Exhibit S, HB 2030 - Proposals presented by Elliott Lynn
Exhibit T, HB 2030 - Memo presented by Marie Evans
Exhibit U, HB 2030 - Proposals presented by Jim McCandlish
Exhibit V, HB 2030 - Memo from Dr. Treleaven presented by staff
Exhibit W, HB 2030 - Chart presented by staff

HOUSE COMMITTEE ON JUDICIARY

Subcommittee 1

March 12, 1981 1:30 p.m. 350 State Capitol

Members Present:	Representative Tom Mason, Chairperson Representative Joyce Cohen Representative Peter Courtney Representative Kip Lombard Representative Bill Rutherford Representative Dick Springer
Staff:	Stephen L. Griffith, Legal Counsel Kristena LaMar, Legal Counsel, Senate Justice Pearl Bare, Committee Assistant
Measure:	HB 2030 - Relating to evidence
Witnesses:	Chief Justice Denecke, Law Revision Commission Professor Ron Lansing The Honorable Robert E. Jones, Circuit Court Judge, 4th Judicial District Allison Smith, Oregon District Attorneys' Association Jim McCandlish, Oregon Criminal Defense Lawyers Association David Ledzoe, Oregon Criminal Defense Lawyers Association Clayton Patrick, Oregon Trial Lawyers Association
Tapes:	H-81-JUD-140 H-81-JUD-141 H-81-JUD-142 H-81-JUD-143

Tape 140
Side A

002 REP. COHEN, acting chairperson, called the subcommittee to order at 1:30 p.m.

006 Article III

007 Rule 308

012 CHIEF JUSTICE DENECKE, representing the Law Revision Commission, stated that he would be speaking in opposition to Professor Lansing.

This matter was considered very thoroughly by the Law Revision Commission. The commission was influenced by Professor Strong and came to the conclusion that the Morgan theory that the presumption shifts the burden of proof was the most preferable.

He preferred this because it seems to be the most simple to explain to the jury. The uniform instruction now given to the jury is that the law recognizes certain generalizations concerning human contact called disputable presumptions and these are to be considered by the jury as evidence. The presumptions are set out.

The faulty thing about the present law is that it is almost impossible to weigh a presumption against concrete or even indirect evidence that the witness has given. The present law definitely should be changed. The Commission felt that its proposal was preferable to any of the other theories.

083 PROFESSOR RON LANSING referenced his letter (Exhibit N, HB 2030, February 26, 1981) concerning Rule 308, Professor Strong's reply (Exhibit X, HB 2030) and his own response to that (Exhibit Y, HB 2030).

He summarized his response (Exhibit Y, HB 2030).

The Thayer view is simpler. The Morgan view creates a splintering effect of a single issue area which is the major thing wrong with it. He gave an example concerning a letter duly mailed. The trial judge has to make a judgment whether the rebuttal that the plaintiff did not receive the letter saying the product was defective is sufficient. If the judge finds that the rebuttal is sufficient, the Thayer view would say that ends the presumption, but there is still the inference. The instruction to the jury would be that it had to decide whether the plaintiff assumed the risk of the defective product. The burden is on the defendant in case the jury is in equipose. Under the Morgan view, the judge must instruct the jury that the assumption of risk is still a defense and that the burden to persuade by the greater preponderance of the evidence as to whether the letter was received is on the plaintiff.

Sometimes in a civil case, the burden to persuade is not a mere preponderance. It is a burden to persuade by clear and convincing evidence such as in fraud, liable and slander cases. Under the Thayer view, it is too easy to rebut this. However, it is easy for the proponent to invoke the presumption in the first place. What happened to the initial assumption that put the burden on the proponent? That has vanished.

The Morgan or the Thayer view only creates a problem when the evidence is in equipose. That is the only place where it makes any difference which view is adopted. Why break away from the federal rule and that which has been the majority view in the United States traditionally and go to a view that creates complications in trial court instructions?

344 THE HONORABLE ROBERT E. JONES, Circuit Court Judge, Fourth Judicial District, representing the Advisory Committee, stated that in the

field of the burden of proof of presumptions both Professor Lansing and Professor Strong have well-reasoned views. He did not serve on the subcommittee of the Law Revision Commission which adopted its rule. Justice Denecke, Judge Unis and Professor Strong did.

375 REP. COURTNEY pointed out that both Justice Denecke and Professor Lansing say that their view is simpler.

Page 29 (Exhibit A, HB 2030) states that the jury should never hear the word "presumption". He asked if that were a standard or if it were just because of the example given in the code?

393 JUDGE JONES stated that could have come from speeches made by Professor Irving Younger.

JUDGE JONES has not personally defined what a presumption is to a jury in 15 years.

The term "presumption" is rarely used.

He did not have an advocacy position to take on either view.

Tape 141
Side A

014 Rule 305

016 MR. GRIFFITH stated that last time the committee met on Article III, it discussed whether some definitions such as "inference", "presumption", "burden of persuasion" and "burden of production" should be included.

"Inference" and "presumption" are now defined by statute.

Professor Kirkpatrick in the Oregon Law Review (Exhibit C, HB 2030) indicated that definitions might be useful for practitioners.

051 PROFESSOR LANSING stated that he did not think it was necessary to define these terms in the code because the terms are well defined in other texts and secondary references. The use of the terms should receive no different definition than that which exists in all the evidence books. A possible difference might confuse the courts.

060 MR. GRIFFITH stated that the evidence code would repeal the definitions now in the statutes and not insert them into the code.

062 PROFESSOR LANSING stated that the line between inference and presumption is well drawn because they have received a lot of common law, judicial and commentary definitions.

074 Rules 305, 306 and 307

076 MR. GRIFFITH stated that in Rules 305, 306 and 307, the code uses the term "burden of persuasion". The suggestion by some witnesses was that the term be changed to "burden of proof" on the ground that it would be more understandable to the general public.

088 PROFESSOR LANSING stated that the way Rule 306 is worded is correct. "Burden of proof" is the umbrella term. Beneath that there are two kinds of burden: the burden to produce and the burden to persuade. The burden to produce is simply to satisfy the court that evidence is sufficient to go forward. The burden to persuade is to convince the jury. It is correct for the judge to instruct the jury as to which party should persuade.

Rule 305 is true of a burden to persuade and a burden to produce. A more generic term would be to change that to "burden of proof". The party has both the burden to persuade and to produce evidence as to each item of fact that is essential to the claim.

The burden of producing would be correct for Rule 307. It would compel a directed verdict or a dismissal if no evidence were produced. This rule is saying that if a party has the burden to persuade, it follows that he initially has the burden to produce. There are, however, jurisdictions where this is not true such as payment in a contract case.

178 REP. COHEN asked if Professor Lansing would recommend a change to allocation of the burden of proof in Rule 305.

180 PROFESSOR LANSING replied that would be reasonable to him.

187 REP. COHEN stated that burden of persuasion is appropriate in Rule 306 according to Professor Lansing.

201 REP. COURTNEY stated that there was never an instruction on the burden to produce.

202 PROFESSOR LANSING replied that there was not.

218 Rule 309

220 MR. GRIFFITH stated that the next suggestions were on Rule 309 concerning presumptions in criminal proceedings. There was a suggestion that rather than refer to "basic facts", the phrase "facts giving rise to the presumed facts" be substituted. It was pointed out that "presumed facts" in the context of criminal actions was not correct because the presumption has the effect of nothing more than a permissible inference when used against the defendant.

252 ALLISON SMITH, representing the Oregon District Attorneys' Association, presented the committee with a proposal from Fred Lenzser (Exhibit Z, HB 2030).

When the Rule was first drafted, the U.S. Supreme Court had not yet decided what the quantum of proof necessary was in a criminal case. Since then, it has been decided.

ODAA would like to have this rule reworded so that it does not have the beyond a reasonable doubt requirement. It should be the more likely than not test. This is also suggested by Professor Kirkpatrick.

305 MR. GRIFFITH suggested the language discussed at the last meeting. The proposal would read "(1) In criminal actions and proceedings, the judge is not authorized to direct the jury to find a presumed fact against the accused; but in accordance with subsection (2) of this rule, the judge may instruct the jury that it may find an inferred fact against the accused. (2) When a fact to be inferred establishes guilt or is an element of the offense or negates a defense, the judge may submit the question of guilt or the existence of the fact to the jury only if a reasonable jury could find that: (a) Viewing the evidence in the light most favorable to the prosecution, the facts giving rise to the inference have been established beyond a reasonable doubt; and (b) the fact to be inferred follows from the facts giving rise to the inference."

This would mean that there would be an inference in a criminal case that the basic facts would have to be established beyond a reasonable doubt, but the flowing of the inferred fact from the basic facts would only have to be reasonable by a preponderance of the evidence.

384 REP. COHEN asked if this was a proper response to Ulster County v. Allen.

388 JIM McCANDLISH, representing the Oregon Criminal Defense Lawyers Association, stated that during the interim, Professor Lansing testified in favor of the standard that now exists. Ulster County v. Allen was brought to the attention of the committee by Judge Jones. Mr. Lenzser testified at that hearing.

Judge Unis and Professor Lansing preferred the view of flowing beyond a reasonable doubt as having more symmetry in a criminal proceeding.

The constitutional standard set out by the U.S. Supreme Court does not require that the presumed fact flow from the base facts established beyong a reasonable doubt. This was not known when the Advisory Committee opposed it, but it was known when the Interim Committee discussed it.

424 REP. COURTNEY asked if Mr. McCandlish has any problem with deleting "beyond a reasonable doubt".

426 MR. McCANDLISH replied that he definitely did. His association opposed "rationale connection" or "more likely than not" during the interim.

435 REP. COURTNEY stated that Professor Kirkpatrick believes that a "more probable than not" standard is sufficient and would meet the constitutional standards.

438 MR. McCANLDISH stated that he had no problems with that meeting the constitutional requirements of the U.S. Constitution, however the members of the Oregon Supreme Court have not decided if that meets the requirements of the Oregon constitution.

443 REP. COURTNEY stated that to him the "more likely than not" language is much easier to understand.

448 MR. McCANDLISH stated that this was not a jury question. It is a question that the court has to decide.

Tape 140
Side B

018 MR. GRIFFITH stated that there is no substantial difference between Mr. McCandlish's suggestion and his suggestion up to the point of subsection (2)(b). The issue is what shall be the relationship between the base facts and the fact to be inferred in a criminal case.

One point made is that it is not constitutionally required by the federal constitution. Another point is that the Oregon Supreme Court has not reached the issue.

The language that MR. GRIFFITH stated for Rule 309 was the synthesis of suggestions made.

067 JUDGE JONES stated that he has heard the debate before as to whether Oregon is going to have a more stringent rule than what the U.S. Supreme Court requires. The opinion of the Law Revision Commission is that the wording of established beyond a reasonable doubt is alright.

He feels that the existing language should be adhered to.

He has no problem with changing the terminology from basic facts to facts giving rise to presumed facts. It clarifies what "basic facts" means.

103 Rule 310

No testimony or discussion.

104 Rule 311

105 MR. GRIFFITH stated there was discussion whether or not 311(1) should properly be listed. The argument was made that it was not a true presumption in the sense of the others listed. On the other hand, it is a phrase enshrined in the law. Those favoring deleting the presumption would still favor and accept its conclusion in ORS 17.250.

No other presumptions have been questioned.

137 Article IV

148 Rule 412

150 MR. McCANDLISH stated that his association was simply trying to incorporate the language of the present statute in the proposal. He did not believe this substantively change anything. It better defines what is constitutionally required with respect to the admission of prior sexual acts.

155 Article V

156 Rule 503

183 JUDGE JONES stated that in the Collin Hawkins quadruple murder case, the defense lawyer had the defendant examined by a psychologist and by a psychiatrist as agents of the lawyer. The psychologist has a privilege under the existing law, the psychiatrist does not. The statements made to those physicians were sequestered because they were under an umbrella of the attorney-client privilege.

This are was thoroughly discussed by the Commission and the Interim Committee and the decision was to allow the privilege to extend to agents of the lawyer.

212 Rule 504

220 DAVID LEDZOE, representing the Oregon Criminal Defense Lawyers' Association, stated that he spoke with John Clausen at the Oregon State Hospital. Mr. Clausen said that the average daily population was 643.1 persons. The capacity at OHS is 676. The preferred population is in the 640's.

At Damasch, MR. LEDZOE spoke with Dr. Holmes, the Director. Dr. Holmes stated that the average daily population in 1980 was 380. The present population is 401. Damasch is staffed and budgeted for 409 patients. Population overcrowding is not normally a major factor in release dates, but there are distribution problems between wards.

267 REP. COHEN stated that she did not understand the relevance of this to Rule 504.

273 MR. McCANDLISH stated that this rule was talking about trying to commit more people. The rule will do away with the psychotherapist privilege for the five-day prehearing detention period. He was suggesting deleting that exception so that the present law that there is a privilege preventing the psychotherapist from testifying in a civil commitment hearing would apply.

319 Rule 504(1)

There was no discussion or testimony.

324 Rule 505

There was no testimony or discussion.

328 Rule 506

There was no testimony or discussion.

334 Rule 508

338 In response to REP. RUTHERFORD, JUDGE JONES replied that with respect to the lawyer-secretary privilege, that goes in the lawyer-client privilege because the secretary is acting as an agent for the lawyer.

Rule 508 was deleted. Under the Brink v. Multnomah County theory, if the secretary is to do something specifically as an agent of the lawyer, the commentary should make it clear that the confidentiality is not eliminated.

370 REP. RUTHERFORD stated that if Rule 508 is not included in the bill, he would like that clear in the commentary under lawyer-client privilege.

378 KRISTENA LaMAR asked about the stenographers of all the other privileged professionals.

380 REP. RUTHERFORD stated that he thought Rule 508 would probably be voted on again.

396 JUDGE JONES stated that if the stenographer is acting as an agent, it would not be restricted just to attorney-client; it would be restricted to anyone who had a privilege.

405 Rule 510

There was no discussion or testimony.

411 Rule 511

413 MR. SMITH stated that the memo from John Collins (Exhibit R, HB 2030, March 5, 1981) addressed this section.

ODAA feels it would be appropriate to change this rule to Mr. Collins suggestion (page 11, Exhibit R). The first sentence semms to be inconsistent with the second.

459 REP. RUTHERFORD asked if the privilege, to the extent of the person put on the stand, would be waived. If a person called his clergyman to testify, wouldn't he waive his privilege as to what he told his clergyman.

466 MR. SMITH replied that he thought that was what the first sentence meant. That is what the Advisory Committee intended. There was language--the last sentence--added by the Interim Judiciary Committee that throws doubt on that.

Tape 141
Side B

024 REP. RUTHERFORD stated the he thought that was saying that if a person has a privilege and files a lawsuit, he does not waive the privilege by the act of filing the lawsuit, but that if he testifies, he waives the privilege and that is the first point at which he waives the privilege.

027 MR. SMITH stated that is what he thought the last sentence did say.

As an example, a defendant in a criminal case puts forward a mental disease or defect defense. He has a psychiatrist who has examined him. The defendant chooses not to take the stand, but has the psychiatrist take the stand to testify as to the psychiatrist's opinion. Then on either direct or cross-examination, the basis for the psychiatrist's opinon would be inquired into. That would include, in most cases, what the defendant had told the psychiatrist. That is privileged information. This section would bar the psychiatrist from telling the rest of the story.

059 JUDGE JONES stated that the Advisory Committee and the Interim Committee had a terrible time determining the right language for waiver of the privilege. Oregon and Ohio have the widest waiver statutes of any state. Under existing law, anytime the holder of the privilege offers himself as a witness on the subject matter, everything that the lawyer, etc., has been told is admissible.

The thought was to restrict it to when the defendant offers himself as a witness on the confidential communication. The language from ORS 44.040 was changed to work out a more restrictive language.

He thought that when the psychiatrist takes the stand, the privilege is waived.

086 REP. RUTHERFORD stated that he thought so too. That is why he was puzzled by Mr. Smith's concern.

094 JUDGE JONES stated that the Advisory Committee wanted to make sure that there is no waiver of the physician-patient privilege merely by filing a lawsuit. That is why the language was used.

101 REP. LOMBARD asked if it was intended to back off of and restrict State ex rel Calley v. Olsen.

111 JUDGE JONES replied that he was not sure it was.

113 CLAYTON PATRICK, representing the Oregon Trial Lawyers' Association, stated that it was a technical concern. The first sentence describes in general terms how the privilege may be waived. The concern was that by adding the last sentence, the last clause of the last sentence might be construed, in a technical sense, to be a more restrictive interpretation and to apply to the overall privilege situation as a whole and that it might be read with no reference to the first part of the sentence. That is not what was intended. The intent was to say that mere commencement of litigation is not a waiver. He felt that the intent could be taken care of with adequate commentary.

143 JUDGE JONES stated that he felt Calley is still what the law would be.

146 REP. LOMBARD stated that this case included prior medical history which had a relevancy to the injury.

154 JUDGE JONES stated that this would not prevent another physician consulted for the same relevant condition from being called to testify. Once that is voluntarily put in issue, the privilege is waived as to other phsyicians.

161 REP. RUTHERFORD asked if the words "the holder's offering of the holder as witness" limited the waiver to the holder.

175 JUDGE JONES stated that his interpretation was that that did not mean it couldn't be waived otherwise.

181 REP. RUTHERFORD stated that the waiver could be done under either sentence 1 or sentence 2 and sentence 2 does not limit sentence 2.

182 JUDGE JONES replied in the affirmative.

189 MR. GRIFFITH asked what would happen if the last sentence were stopped after "litigation" if that were the intent.

191 JUDGE JONES replied that he thought that would make it clearer.

192 REP. RUTHERFORD stated it probably would.

193 MR. SMITH had no objection to that.

195 JUDGE JONES asked if the Calley v. Olson case could be picked up in the commentary as another method of waiver.

208 REP. COHEN stated that if the last sentence is dropped, she would like to see the commentary changed. She thought that this would make a change in the intent of the Interim Committee.

240 REP. RUTHERFORD asked legal counsel to ask Professor Kirkpatrick if he were concerned with the suggested amendment to the sentence.

243 MR. PATRICK stated that he was troubled with deleting any of that sentence. He could see making it more clear that it was not intended to be a restriction on the first sentence, but it seems that deleting part of that last sentence might cause it to be open to interpretation that waiver might commence with the deposition of the plaintiff or the filing of some other motion.

264 REP. LOMBARD stated that the protection would be in the first sentence.

276 MR. PATRICK stated that he would like an opportunity to present a response to any change in this.

293 WORK SESSION

305 Article III

307 Rule 305

308 REP. LOMBARD stated that he was persuaded by Professor Lansing that it could be changed back to "proof" and still be consistent with the existing language in Rule 306 and Rule 307, except possibly in 307(2).

314 REP. RUTHERFORD stated that Professor Lansing indicated that change could be made, but REP. RUTHERFORD did not feel that Professor Lansing gave any good reason for doing it. REP. RUTHERFORD was not persuaded. He felt "persuasion" more clearly set forth what the burden was.

322 MOTION: REP. COHEN moved that in line 3, page 4, of the printed bill, the word "persuasion" be deleted and "proof" be inserted.

343 MOTION PASSED: Aye - Cohen, Lombard, Springer, Mason. No - Courtney, Rutherford.

362 MOTION: CHAIRPERSON MASON moved adoption of Rule 305 as amended.

364 MOTION PASSED: There were no objections.

366 Rule 306

396 MR. GRIFFITH stated that if "burden of proof" means both "burden of persuasion" and "burden of production", there might be some conflict between 305, 306 and 307. Rule 307(2) has the burden of production initially with the the burden of persuasion, but the burden of production might switch back and forth. Rule 305 now says that there is a burden of production as to each fact.

To use "burden of proof" in Rule 305 to mean both might wrongly imply that burden of production always stays with a single party.

437 REP. LOMBARD stated that is why he felt that Rule 307(2) should probably be changed to "burden of proof".

448 MR. GRIFFITH stated that suggestion would make 307(2) say that the burden of producing evidence was initially on the party with the burden of producing evidence.

463 MOTION: REP. SPRINGER moved to delete on line 6, page 4, the word "only".

Tape 142
Side A

020 REP. SPRINGER continued that in the commentary on page 27 (Exhibit A, HB 2030) the intent seems to be to not preclude trial judges from making preliminary statements as to the burden of proof and not to prevent attorneys from commenting on the burden of persuasion during voir dire or during their opening or closing remarks. If that is the intent, that discretion should be recognized by removing the word "only".

030 JUDGE JONES said there was no problem with that.

035 MOTION PASSED: There were no objections.

038 MR. GRIFFITH pointed out that the commentary on page 26 (Exhibit A, HB 2030) indicates that Rule 306 is a necessary by-product of the adoption of the Morgan approach to presumptions. He was unclear why that was.

043 JUDGE JONES stated that he did not think this was necessary. It is really a gratuitous statement.

054 MR. GRIFFITH stated that he was questioning whether if the committee adopted Rule 308, it would have to adopt Rule 306.

068 Rule 308

076 MOTION: CHAIRPERSON MASON moved Rule 308 as written.

082 MOTION PASSED: Aye - Cohen, Courtney, Lombard, Mason, Springer. No - Rutherford.

083 Rule 306

084 MOTION: CHAIRPERSON MASON moved Rule 306 as amended.

085 MOTION PASSED: There were no objections.

085 Rule 307

086 MOTION: REP. RUTHERFORD moved adoption of Rule 307.

091 MOTION PASSED: There were no objections.

093 Rule 309

097 CHAIRPERSON MASON stated that he had a reference to a tentative amendment that would make subparagraph (2)(a) read "A reasonable juror on the evidence as a whole could find that the facts giving rise to the presumed facts have been established beyond a reasonable doubt, and" (Exhibit O, HB 2030, February 26, 1981). That language was suggested as being clearer.

103 JUDGE JONES stated that the Bar Association suggested that.

JUDGE JONES felt that language helped define more clearly what a basic fact is.

116 CHAIRPERSON MASON stated that the further suggestion was for (2)(b) to read "The presumed facts follow from the facts giving rise to the presumed facts beyond a reasonable doubt.".

130 MR. GRIFFITH stated that the committee might want to decide if it wants a "beyond a reasonable doubt" standard or a "rationale connection" standard as to the creation of an inference in a criminal case. The exact language could be left until later.

134 REP. SPRINGER stated that he would like to discuss that in the form of an amendment. There has been a lot of discussion about this rule and several amendments proposed.

145 MOTION: REP. SPRINGER moved conceptually to delete the language "beyond a reasonable doubt" in (2)(b) and insert the language "more probable than not" as suggested by Professor Kirkpatrick (Exhibit C, HB 2030) as being consistent with the most recent decisions of the Supreme Court.

172 REP. RUTHERFORD stated that Judge Jones did not feel that change was necessary.

174 JUDGE JONES stated that as long as there was a standard, it did not make any difference. With either one, the judge will know what to do. There would be no factual trouble dealing with "beyond a reasonable doubt".

178 REP. COURTNEY asked if adopting this amendment would lower the standard.

182 JUDGE JONES replied that the Oregon Supreme Court has not spoken on the subject. He thought that the amendment was raising the standard in anticipation of what the Oregon Supreme Court might do.

194 MOTION FAILED: Aye - Courtney, Springer, Mason. No - Lombard, Rutherford. Excused - Cohen.

198 MOTION: CHAIRPERSON MASON moved the amendments he stated before on 2(a) and 2(b).

202 MOTION WITHDRAWN.

205 REP. SPRINGER stated that one of the issues raised was whether the committee was going to use the phrase "presumed fact". It was his impression that changing that to "fact or facts generally inferred" was felt to be generally preferable to "presumed facts".

210 MOTION: REP. SPRINGER moved conceptually that the term "presumed fact" be deleted and "fact or facts to be inferred" be inserted.

233 MR. GRIFFITH stated that he felt that in subsection 1 the word "presumed" was correct because it says that the judge cannot direct the jury to find a presumed fact against the accused. In subsection (2), the judge may instruct the jury that it would find an inferred fact against the accused. It is in subsection (2) that the word "presumed" is no longer appropriate.

244 MOTION AMENDED: REP. SPRINGER amended his motion to just be concerning subsection (2).

262 MOTION FAILED: Aye - Courtney, Lombard, Springer. No - Rutherford, Mason. Excused - Cohen.

266 CHAIRPERSON MASON stated that he felt introducing "fact to be inferred" did not track right.

271 MOTION: REP. SPRINGER moved conceptually the language "A reasonable jury on the evidence viewed in a light most favorable to the plaintiff could find that the basic facts have been established beyond a reasonable doubt" in (2)(a).

282 CHAIRPERSON MASON stated that he thought that "in the light most favorable to the plaintiff" was only directed verdict language.

286 REP. SPRINGER stated the language was looking at a sufficiency issue. He did not think it was appropriate at that point to remove those facts from the trier of fact unless those facts are looked at favorably as it relates to the party upon which that burden is placed.

310 MOTION FAILED: Aye - Springer, Mason. No - Courtney, Lombard, Mason. Excused - Cohen.

321 MOTION: CHAIRPERSON MASON moved the amendments he stated previously (Exhibit O, HB 2030, February 26, 1981).

322 MOTION PASSED: There were no objections.

323 MOTION: CHAIRPERSON MASON moved adoption of Rule 309 as amended.

328 MOTION PASSED: Aye - Courtney, Lombard, Rutherford, Mason. No - Springer. Excused - Cohen.

333 Rule 310

346 MOTION: CHAIRPERSON MASON moved adoption of Rule 310.

347 MOTION PASSED: There were no objections.

348 Rule 311

353 MOTION: REP. RUTHERFORD moved that 311(1) be deleted and be placed in ORS 17.250.

364 MOTION PASSED: There were no objections.

365 MOTION: REP. RUTHERFORD moved adoption of Rule 311 as amended.

366 MS. LaMAR noted that there was one other amendment suggested by Professor Kirkpatrick. The way the presumptions are set out in the rule, they appear to be all-inclusive. There are other presumptions created throughout the code. Professor Kirkpatrick suggested that the Legislature might want to add one more section saying that a statute providing that a fact or group of facts prima facie evidence of another fact establishes a presumption within the meaning of this rule.

387 MR. GRIFFITH stated that could either be covered in the commentary or in the rule.

400 CHAIRPERSON MASON stated the point was well taken that something is needed stating that these are not the only presumptions.

403 REP. RUTHERFORD stated under current conditions, presumption (22) could create more problems than it could solve. He did not really understand the purpose of the presumption in the evidence paragraph.

411 MS. LaMAR stated that Rep. Lombard pointed out one situation where it might be dangerous. That would be after the death of one person purporting to be a spouse and involving the title held as husband and wife on a deed.

438 MOTION: CHAIRPERSON MASON moved conceptually to add a paragraph as outlined previously by counsel that there are other presumptions in the statutes and they shall apply if the facts giving rise to the presumed facts are established.

452 MOTION PASSED: There were no objections.

453 MOTION: CHAIRPERSON MASON moved adoption of Rule 311 as amended.

455 MOTION PASSED: There were no objections.

466 Article IV

467 Rule 412

Tape 143
Side A

023 MR. McCANDLISH stated that he had submitted amendments (Exhibit M, HB 2030, February 19, 1981). The first amendment suggested is irrelevant because the committee already made its decision with respect to opinion evidence.

049 MOTION: CHAIRPERSON MASON moved the second amendment (Exhibit M, HB 2030, February 19, 1981) to delete, on page 7, starting on line 24 the words "and is" and delete lines 25-31 and insert the language suggested (Exhibit M, HB 2030, February 19, 1981).

061 MR. McCANDLISH explained that the proposed rule would only allow scientific evidence to explain injury or source of semen. If other scientific evidence were in, a witness could not be cross-examined as to a person whom the witness had sex with who might be the source of the evidence, such as hair.

The present law is not being changed because it is constitutionally necessary to allow that kind of cross-examination of a prosecutrix with respect to sexual conduct with some other person. All this suggestion is doing is using the language of the existing statute. That is what (a), (b) and (c) are about.

The proposal is narrow in concept, but uses the catch-all that it is to be admitted it if is constitutionally required. The suggestion gives more direction to the trial court.

084 CHAIRPERSON MASON noted that there was one further amendment suggested on line 39 to delete the period and insert ", through the office of the prosecutor." That is an amendment of convenience so that the defense attorney and defendant do not have to contact the victim.

088 MR. McCANDLISH stated that Professor Kirkpatrick suggested that amendment.

The amendment to insert the language of the existing statute is also Professor Kirkpatrick's suggestion.

097 MR. SMITH stated that the last amendment talked about is the service on the victim through the office of the prosecutor. There will be criminal defense attorneys raising the issue that the victim never got it because the prosecutor did not pass it on.

103 CHAIRPERSON MASON stated, for the record, that he felt the prosecutor receiving it was all that was necessary.

110 MR. SMITH stated that he did not object to the amendment concerning scientific evidence. There was some concern at the time of the original hearing that it would perhaps inadvertently eliminate some of the procedures. It has been pointed out that it does not. ODAA would not object to that amendment.

115 MOTION PASSED: There were no objections.

116 MOTION: CHAIRPERSON MASON moved adoption of Rule 412 as amended.

117 MOTION PASSED: There were no objections.

118 Article V

119 Rule 508

124 MOTION: REP. RUTHERFORD moved the reinstatement of Rule 508.

133 MS. LaMAR stated that one objection to this rule and potential area of abuse is that a stenographer would not be allowed to testify regarding communications made to him by his employer where he had some type of civil rights claims against his employer if those communications were made in the course of professional employment.

140 REP. RUTHERFORD stated that type of case was taken care of in abuse cases such as the husband-wife privilege not applying. He would accept that as an amendment to this rule.

MR. GRIFFITH stated that point holds true with all these privileges.

MS. LaMAR stated that Professor Kirkpatrick (Exhibit C, HB 2030) indicates that this rule could be a significant impediment to investigations of fraudulent or unlawful business activities.

CHAIRPERSON MASON stated that he felt the only situation where this rule should not apply is when the stenographer is the plaintiff.

REP. RUTHERFORD agreed with Mr. Griffith that the same comment could be made about all of the privileges.

MOTION PASSED: There were no objections.

Rule 503

MOTION: REP. RUTHERFORD moved adoption of Rule 503.

MOTION PASSED: There were no objections.

Rule 504

MOTION: REP. RUTHERFORD moved adoption of Rule 504.

MOTION PASSED: There were no objections.

Rule 504-1

MOTION: REP. RUTHERFORD moved adoption of Rule 504-1.

MOTION PASSED: There were no objections.

Rule 505

MOTION: REP. RUTHERFORD moved adoption of Rule 505.

MOTION PASSED: There were no objections.

Rule 506

MOTION: REP. RUTHERFORD moved adoption of Rule 506.

MOTION PASSED: There were no objections.

Rule 509

MOTION: REP. RUTHERFORD moved adoption of Rule 509.

MOTION PASSED: There were no objections.

Rule 510

217 MOTION: REP. RUTHERFORD moved adoption of Rule 510.

218 MS. LaMAR stated that Professor Kirkpatrick suggested adding ", or sister state or federal governmental unit or agency thereof" after "subdivision in the first sentence.

230 MOTION AMENDED: REP. RUTHERFORD accepted that amendment as his motion.

231 MOTION PASSED: There were no objections.

232 MOTION: REP. RUTHERFORD moved adoption of Rule 510 as amended.

233 MOTION PASSED: There were no objections.

234 Rule 512

235 MOTION: REP. RUTHERFORD moved adoption of Rule 512.

238 MOTION PASSED: There were no objections.

240 Rule 513

241 MOTION: REP. RUTHERFORD moved adoption of Rule 513.

246 MOTION PASSED: There were no objections.

248 Rule 514

254 MOTION: REP. RUTHERFORD moved adoption of Rule 514.

260 MS. LaMAR stated that it had been suggested that "or constitution" be added with the two privileges that are created by the constitution for legislators' discussions and criminal privileges.

271 MOTION: REP. LOMBARD moved that the phrase "statutes of the state" be deleted and the phrase "laws" be inserted in Rule 514.

284 MS. LaMAR asked if in that case "developed by the courts of Oregon" should also be deleted.

304 MOTION: REP. RUTHERFORD moved adoption of Rule 514 as amended.

305 MOTION PASSED: There were no objections.

328 CHAIRPERSON MASON adjourned the meeting at 4:40 p.m.

Submitted,

Pearl Bare

Pearl Bare
Committee Assistant

EXHIBITS

Exhibit X, HB 2030 - Letter from Professor Strong submitted by staff
Exhibit Y, HB 2030 - Letter from Professor Lansing
Exhibit Z, HB 2030 - Memo from Frederick Lenzser presented by Allison Smith

HOUSE COMMITTEE ON JUDICIARY

Subcommittee 1

March 19, 1981 3:10 p.m. 350 State Capitol

Members Present:	Representative Tom Mason, Chairperson Representative Joyce Cohen Representative Peter Courtney Representative Kip Lombard Representative Bill Rutherford Representative Dick Springer
Staff:	Stephen L. Griffith, Legal Counsel Kristena LaMar, Legal Counsel, Senate Justice Pearl Bare, Committee Assistant
Measure:	HB 2030 - Relating to evidence
Witnesses:	The Honorable Robert E. Jones, Circuit Court, 4th Judicial District Jim Hennings, Metroplitan Public Defender The Honorable Richard L. Unis, Circuit Court, 4th Judicial District William Gary, Oregon District Attorneys' Association Marks Acker, Oregon State Bar Ad Hoc Committee Phillip Margolin, attorney Mike Bailey, Metropolitan Public Defender Professor Ron Lansing Jim McCandlish, Oregon Criminal Defense Lawyers Association
Tapes:	H-81-JUD-168 H-81-JUD-169

Tape 168
Side A

001 CHAIRPERSON MASON called the subcommittee to order at 3:10 p.m.

003 HB 2030 - Relating to evidence

004 Rule 609

010 THE HONORABLE ROBERT E. JONES, Circuit Court, Fourth Judicial District, state that Rule 609 is a pivotal decision for the committee to make because the entire evidence code could go down depending on the committee's decision. It has been suggested to him that if this

passes in its present form, some people will be seeking a governor's veto.

Federal Rule 609 had more testimony and controversy in Congress than any other measure. Congress came up with a compromise (Exhibit B, HB 2030). The federal rule allows in any felony crime. The federal judge would, within his discretion, determine if the prejudical effect outweighed the probative value of the impeachable crime. Congress put in a nondiscretion section for any crimes involving dishonesty or false statement irrespective of the penalty. That would include misdemeanors. The decisions on what is an impeachable crime in one judge's mind is different than that in another's. The Law Revision Commission felt that discretion should by removed from the trial judge and if there is a rule, it should be one where the lawyers can have predictability. The commission voted for any felony crime plus any other crime that involved dishonesty or false statement.

The academics in the law review articles on the subject of the impeachment of a witness for conviction of a crime are virutally unanimous. They should be restricted to crimes that are relevant to truth-telling.

Oregon has had impeachment with a conviction of any crime. Until the law changed to eliminate traffic infractions, a person could be impeached by conviction for failure to yield the right-of-way.

The Oregon Supreme Court has said, by inference, that this is a bad law but that it has to be changed by the legislature.

The decision that needs to be made is whether it is going to be restricted to crimes involving false statement or is any felony crime as well as other crimes involving false statement going to be allowed in.

077 JIM HENNINGS, Multnomah and Washington Counties Public Defender, stated that he was representing the Metropolitan Public Defender.

The idea of impeachment for prior crimes should be done away with completely. It is highly prejudicial at any point to bring in a prior crime. The question is how relevant is a prior crime to whether or not the defendant or the witness is lying at that particular time.

This prohibition to people testifying is a major one and involves tactics which should not be looked at. It prohibits defendants and victims and witnesses of defendants and victims from taking the witness stand.

105 REP. RUTHERFORD stated that the person who puts on the witness cannot ask the person if he has ever been convicted of a crime.

107 JUDGE JONES stated that the Supreme Court now allows that.

112 THE HONORABLE RICHARD L. UNIS, Circuit Court, Fourth Judicial District, stated that is not changed because the Supreme Court in State v. Gilbert said it wasn't impeachable.

115 JUDGE JONES stated that Justice Linde changed that restriction. It is on page 127 of the proposed code (Exhibit A, HB 2030).

119 MR. HENNINGS stated that in a fair number of cases the defendant did not take the witness stand for tactical reasons. It is his association's position that in seeking the facts, it is much better for the trier of fact to have all those witnesses testifying without bringing in the tactical question of whether someone should testify. Whether a person is lying under oath is more likely to be brought out by the examination of counsel.

His position is that prior crime for impeachment should be done away with, but not prior crime for other purposes.

136 JUDGE JONES stated that is the law in Hawaii under State v. Santiago. It has been the law there since 1971, but it is restricted to criminal cases. It is restricted to impeaching the credibility of the defendant.

He asked if Mr. Hennings wanted to abolish it for all witnesses or to restrict it to the Santiago scope.

141 MR. HENNINGS replied that doing away with it for all witnesses is the appropriate procedure.

149 WILLIAM GARY, representing the Oregon District Attorneys' Association, stated that this is a pivotal decision for the committee.

There is concern among district attorneys about what will be the outcome of this. There is a significant portion of the ODAA which is convinced that the best rule is the current rule.

ODAA's proposal is the Advisory Committee's proposal with two minor amendments and is a substantial compromise.

One amendment would make it clear that the introduction of impeachment by public record need not happen on cross-examination. The suggested language is "if elicited from the witness during cross-examination or established by public record".

The other change suggested is under subsection (1)(b) and is to insert "or dishonesty" after "false statement". That is designed to reach crimes such as misdemeanor theft.

186 JUDGE JONES stated that the federal rule uses "dishonesty and false statement", but the interpretation in 8 circuits has been that dishonesty really means crimes involving false statement. In the 9th Circuit, the crime of shoplifting was not considered a crime of dishonesty.

198 MR. GARY stated that he did not think his association was aware of this when they adopted the amendment. The intent of the ODAA is to reach crimes that are in the ordinary sense of the term crimes of dishonesty. Through some change in the language of the Advisory Committee proposal or through the commentary, it could be made clear that the intent is not to incorporate the federal courts interpretation of "dishonesty".

The trial is supposed to be a search for truth. When the evidence that a jury can hear is limited, the jury's ability to determine the credibility of the witnesses is limited. Mr. McCandlish's proposal (Exhibit AA, HB 2030) suggests that the witness has to put his credibility in issue when he takes the witness stand. The only question is whether the kinds of convictions that are talked about being allowed in as impeachment are the kinds of things that people in their ordinary conduct of business affairs would want to know about someone when they determine whether they are going to believe what that person has to say.

Under the proposal as it is convictions for murder, rape or armed robbery could be used for impeachment purposes.

234 CHAIRPERSON MASON asked if that wasn't contrary to Mr. Hennings' argument about allowing only crimes involving false statement or dishonesty.

237 MR. GARY replied that he did not think it was because the Advisory Committee proposal (Exhibit A, HB 2030) in subsection (a) permits any felony.

240 CHAIRPERSON MASON asked what the purpose was of the artifical distinction between felonies and misdemeanors involving truth or dishonesty.

243 MR. GARY replied that he was not sure it was an artificial distinction. There are a good many misdemeanors whose probative value in terms of the credibility of the witness is clearly outweighed by the prejudicial impact.

250 CHAIRPERSON MASON asked about criminal mischief in the first degree, a felony.

251 MR. GARY stated that it was his association's position that the jury is entitled to hear about anything deemed by the legislature to be so serious that it should be punished by a felony.

253 CHAIRPERSON MASON asked for the rationale for that.

253 MR. GARY replied that it was a basic difference in philosophy. The district attorneys believe that a person's past conduct has probative value in terms of his credibility. The basic philosophy of members of the defense bar is that prior convictions have no weight against whether the person is to be believed or not.

A jury is instructed that the convictions are introduced to be evaluated in terms of the witness' credibility. The assumption that underlies all of the proposals to do away with or to cut back on impeachment is that the jury is going to disregard that instruction and use it as evidence of the witness' tendency to commit bad acts.

The basic philosophy underlying the ODAA's proposal is that these things are relevant to credibility and that the jury is entitled to hear them.

278 CHAIRPERSON MASON asked if Mr. Gary felt that the jury would only confine the knowledge of a prior crime to its consideration on credibility or would it come to the conclusion that the defendant is a bad person.

285 MR. GARY replied that he could not predict what a jury was going to do once it was enclosed in the jury room.

287 Mr. Gary's reply indicated to CHAIRPERSON MASON that the jury does take that information into consideration in regard to the person's character.

288 MR. GARY stated that he could not say that the jury did not, but the principle of limited admissibility is well-founded in the law. If legislation is going to be passed based on the assumption that the jury is going to disregard its assumptions, a lot of other things should be looked at.

The principle of limited admissibility is a cornerstone to the law of evidence in both criminal and civil law.

298 CHAIRPERSON MASON asked if Mr. Gary felt the impeachment privileges as they are now discourage some defendants from testifying.

300 MR. GARY replied that he did not think there was any doubt that it did.

301 CHAIRPERSON MASON asked if Mr. Gary thought that was a good thing. Mr. Gary had said the trial was a search for the truth.

302 MR. GARY replied that it is a tactical decision that the defendant makes. This is not the only thing the a defense lawyer looks at when deciding whether to put his client on the stand.

320 REP. SPRINGER asked if it were fair to assume that a defendant who had a prior conviction might allow that to affect his testimony because he might think his sentence might be enhanced by that prior conviction.

343 MR. GARY replied that it probably did. A person who is facing conviction for a crime, regardless of whether he his going to be impeached for prior convictions, is going to be motivated to change his testimony accordingly.

360 CHAIRPERSON MASON asked about upgrading the impeachment to Class A felonies only and any other crime involving truth or dishonesty.

369 MR. GARY stated that he was hesitant to speak for the district attorneys on that point. He thought that would certainly make progress in the right direction.

The primary concern that the D.A.'s have is that they not be prevented from impeaching with criminal acts, notwithstanding the fact that they do not necessarily relate to honesty or truth and voracity.

A juror might want to know about the entire criminal history of the defendant in order to determine whether it is likely that the defendant committed the crime he is charged with. He felt that if the distinction were drawn clearly enough, most reasonable people would be able to see that there are differences within the felony classification. He is not quite sure that Class A felony would draw that line.

414 MARTS ACKER, representing the Ad Hoc Committee of the Oregon State Bar, presented the committee with a written comment (Exhibit BB, HB 2030).

The members of his committee deal more with the civil than the criminal. The considerations are different.

Tape 169
Side A

019 In response to REP. LOMBARD, JUDGE JONES stated that he felt the ODAA and others were prepared to live with the proposal of the Advisory Committee. It improved the law.

The Interim Committee took a very intellectual and academic approach. It is an honest approach as to what the law should be and what is right.

Montana abolished impeachment by prior crime, but it does allow impeachment with prior bad acts involving credibility.

046 REP. SPRINGER stated that the commentary (Exhibit A, HB 2030) indicates that no attempt was made to list every crime which would be inlcuded in the category of crime involving dishonesty or false statement. He asked if that was an invitation to appeal and if litigation will result if that is refined.

049 JUDGE JONES stated that he felt the commentary could be expanded to say that the federal reasoning of what dishonesty means is adopted or the term "dishonesty" could be eliminated. It is Judge Unis' position that he would prefer to leave "dishonesty" in and follow the federal interpretation. JUDGE JONES' feeling is that people should not be duped into thinking they can impeach with a crime that is patently dishonest but has to be interpreted as honest or not applicable.

059 JUDGE UNIS stated that he wanted to make sure the legislative history was correct. Where the language "dishonesty or false statement" is used in the Advisory Committee's proposal and the Interim Committee's commentary, it was the intent that the legislative history preceding the adoption of Federal Rule 609 be incorporated.

The legislative history to Federal Rule 609 clearly said that the words "dishonesty and false statements" shall include the following: embezzlement, false swearing and so forth. It was for that reason that the various federal circuits said that dishonesty would not involve a crime showing that a person had a propensity to steal versus a propensity to tell the truth.

He is not married to the term "dishonesty". The intent was to limit it to crimes that would bear upon the propensity to tell the truth, but those are words of art with legislative history.

If there is modification, the legislative history should indicate any amendment to that policy.

083 REP. COURTNEY stated that Professor Kirkpatrick (Exhibit C, HB 2030) indicates that 609 is inconsistent with 607 and 806 unless "during cross-examination" is deleted from subsection (1) of 609. He asked if the judges agreed with that.

089 JUDGE UNIS stated that the reasons for it being included during cross-examination were well stated. If the witness is there, he can explain it. That was the reason the federal rule of evidence adopted it. Under current practice, there can be extrinsic or intrinsic impeachment. He had no view on whether the record should be allowed in later. It is not a significant point.

097 PHILLIP MARGOLIN, attorney, stated that he has had a deep interest in this particular rule for many years. His now practicing in Portland with an exclusively criminal trial practice.

He feels that this proposal is sufficient to deprive a criminal defendant of a fair trial.

He is opposed to any rule that permits a defendant to be impeached by prior crimes. If such a rule has to exist, it should be limited to crimes that have a bearing on whether an individual is truthful or not.

Having a defendant get on the stand and explain the situation to the jury can surmount any amount of evidence against the defendant. There is a percentage of defendants who are innocent and that is where the concern is, especially if they have prior convictions. This is especially true with certain kinds of prior crimes like murder or moral convictions.

Most D.A.'s will say that impeachment by prior crimes is to smear the defendant. Most D.A.'s do not believe that the prior crime has anything to do with credibility.

This type of highly prejudicial evidence can tilt the scales against the truly innocent individual.

243 REP. SPRINGER stated that this might be a denial of an individual's right to a jury trials.

247 MR. MARGOLIN agreed that it could be.

252 MIKE BAILEY, representing the Metropolitan Public Defender, stated that he supported the comments of Mr. Hennings. Except for the moral turpitude crimes, he also agreed with what Mr. Margolin has said.

267 PROFESSOR RON LANSING stated that he supported the proposal from the Interim Committee (Exhibit CC, HB 2030).

276 JIM McCANDLISH, representing the Oregon Criminal Defense Lawyers Association, stated that he had just spoken with Clay Patrick, representative of the Oregon Trial Lawyers Association. OTLA does not support the the OCDL suugestion for a separate rule for criminal defendants (Exhibit AA, HB 2030) but OTLA does support the Interim Committee's proposal.

MR. McCANDLISH stated that the commentary should make it clear that it has to be counseled prior conviction. Many people are not aware of this.

299 JUDGE JONES replied that the counseled convictions were required under the criminal law under Locar v. Fedo, but he had a civil case go up on appeal and the decision was that it did not apply to civil cases. That makes no sense to him whatsoever.

319 CHAIRPERSON MASON adjourned the meeting at 4:00 p.m.

Submitted,

Pearl Bare
Committee Assistant

EXHIBITS

Exhibit A, HB 2030 - Proposed Evidence Code (Over-Sized Exhibit)
Exhibit B, HB 2030 - Federal Rules (Over-Sized Exhibit)
Exhibit C, HB 2030 - Oregon Law Review (Over-Sized Exhibit)

Exhibit AA, HB 2030 - Oregon Criminal Defense Lawyers's Association proposal
Exhibit BB, HB 2030 - Oregon State Bar Ad Hoc Committee proposal
Exhibit CC, HB 2030 - Letter from Professor Ron Lansing

HOUSE COMMITTEE ON JUDICIARY

Subcommittee 1

March 26, 1981 2:30 p.m. 354 State Capitol

MEMBERS PRESENT:	Rep. Joyce Cohen Rep. Peter Courtney Rep. Bill Rutherford Rep. Dick Springer Rep. Kip Lombard
EXCUSED:	Rep Tom Mason, Chairperson
STAFF:	Stephen Griffith, Legal Counsel Pearl Bare, Committee Assistant
MEASURES:	HB 2030 - Relating to evidence
WITNESSES:	Bill Gary, Oregon District Attorneys Association Elliott Lynn, Oregon Trial Lawyers Association Michael Mahoney
TAPES: H-81-JUD-191	H-81-JUD-190

Tape 190
Side A

002 REP. RUTHERFORD, acting chairperson, opened the public hearing at 2:30 p.m.

003 Article VI

004 Rule 601

No testimony

005 Rule 602

No testimony

006 Rule 603

007 BILL GARY, representing the Oregon District Attorneys Association (ODAA), stated that his concern about this section relates to the form of oath required of young children who would be testifying. ODAA advocates adoption of the Advisory Committee proposal for section 45 but no adoption of section 46. There is no reason for including the form of oath in the code.

The Interim Committee incorporated the Advisory Committee proposal for Rules 603 and 603-1. ODAA would prefer to delete the portion that specifies an oath because giving an oath in any other form could be subject to challenge.

070 REP. SPRINGER asked if Mr. Gary felt that the commentary's intent is that the child must be administered some form of oath.

073 MR. GARY replied in the affirmative.

074 REP. SPRINGER stated that the question raised by Mr. Gary had merit.

078 MR. GARY presented the committee with proposals (Exhibit DD, HB 2030). ODAA feels that subsections 2 and 3 should not be part of the evidence code. They basically track the provisions in the administrative procedures act.

101 REP. LOMBARD stated that the commentary states that this is identical to Federal Rule 604.

107 MR. GRIFFITH stated that the only part identical to the federal rule is 604 sub 1. The Judiciary Committee Commentary (Exhibit A, HB 2030) on page 112 indicates that the committee decided to add the provisions of certain statutes. That was subsections 2-4.

115 Rule 606

116 MR. GARY stated that ODAA advocates incorporation of the Advisory Committee's proposed section 2. The Interim Committee deleted this because it believed that the case law adequately stated the rule. District attorneys with recent experience in the area were not completely satisfied that the case law was that clear. Section 2 does accurately state the common law rule, but there are a sufficient number of confusing cases in the area. The prosecution of Gary Gortmaker is an exaple.

141 Rule 606-1

142 MR. GARY stated that ODAA's proposal was to insert "private law" between "attorneys" and "firm" because there is a substantial battle within the Bar between private sector lawyers and public sector lawyers as to whether the lawyers in the public sector are subject to the same unit rule applied to private, profit-making law firms. The reason one would not be allowed to testify as a witness in a trial where a member of his firm was acting as the attorney was because of the profit interest in the outcome of the case. That rule does not carry over to the public sector.

There are certain cases which require the testimony of a member of the district attorney's office. Prosecution for failure to appear is an example.

177 REP. COURTNEY asked if a contested case situation would also be a trial.

178 MR. GARY replied that he did not think so becasue of the definitions early in the code regarding to what proceedings the code would apply.

186 MR. GRIFFITH asked if it were Mr. Gary's position that pecuniary interest was the only interest which could tend to bias a witness.

187 MR. GARY responded in the negative, but it is the only reason for application of the unit rule. Rule 606-1 is an application within the evidence code of the unit rule to all attorneys. The unit rule being applied in the public sector causes public sector law firms to come to a screeching halt because frequently two opposing state agencies are being advised by assistants of the attorney general. If the unit rule is applied, there is a conflict of interest and all of it must be referred to outside counsel.

201 REP. LOMBARD stated that he had a problem with saying that in all public interest cases there is not a commonality of interest and that the unit rule should not be applied. There are a few nonprofit public-interest law firms which frequently get involved in causes with result-motive not profit-motive.

221 MR. GARY stated that one of the things discussed by the ODAA Evidence Committee was whether the ODAA's proposed amendment would mean that a public-interest law firm would be excluded from the requirements of this provision. The ODAA satisfied itself that private law firm would include public-interest law firm and the distinction would be between the public sector and private sector. Legal Aid, for example, falls within the public sector.

Whether the unit rule is applied to the public sector at all is an issue that is much too complex to be resolved in the evidence code. The Attorney General's position and the position of the ODAA is that there are other protections against conflict of interest within the public sector and application of the unit rule is much too crippling.

Ethics Opinion 451, which arises out of Coos County, applies the unit rule and says that no one in the district attorney's office can prosecute any defendant who was a client of the public defender while the district attorney was in the public defender's office.

The district attorney of Multnomah County has two ethics opinions pending. The AG's office has recently begun the process of forming an internal ethics committee to deal with the problem.

274 MR. GRIFFITH presented the committee with the proposal of the Oregon Crinimal Defense Lawyers' Association (OCDLA) (Exhibit EE, HB 2030). It would rather limit the rule to subsections 1-4.

318 Rule 607

322 MR. GARY stated that ODAA does not oppose the section as written but there is concern regarding a statement in the commentary that the section is intended to overrule the Court of Appeals decision in State v. Bruce, 31 Or App 1189. Bruce held that the statement "I don't remember" by a witness in response to questions about prior inconsistent statements was sufficient to allow introduction of prior inconsistent statements. The commentary indicates that the proposed rule is designed to change that. The ODAA does not think that it does and would like the commentary changed to make it clear that it is not intended to change the Bruce rule.

347 MR. GRIFFITH presented the committee with the positions and proposals of the Bar (Exhibit FF, HB 2030) and the OCDLA (Exhibit GG, HB 2030).

386 Rule 608

389 MR. GARY presented the committee with the proposed amendment (Exhibit DD, HB 2030) from the ODAA. There is general distrust of character evidence. Opinion evidence makes it that much easier for this kind of evidence to come in.

430 In repsonse to REP. COURTNEY, MR. GRIFFITH stated that the committee, in Rule 405, approved the rule as written which allowed evidence of character in the form of testimony as to reputation and by testimony in the form of an opinion.

436 MR. GARY stated that the ODAA opposed opinion evidence in that rule also.

Tape 191
Side A

008 ELLIOTT LYNN, representing the Oregon Trial Lawyers Association (OTLA) presented the committee with proposals (Exhibit HH, HB 2030).

056 MR. GRIFFITH presented the committee with the position of OCDLA (Exhibit II, HB 2030).

062 In response to REP. COURTNEY, MR. LYNN stated that taking out the prohibition of cross examination would not change OTLA's position. Taking that out would open up all the dangers of trials within trials.

It would be consistent with Rule 405.

074 Rule 609

075 MR. LYNN presented the position of OTLA (Exhibit HH, HB 2030).

079 MR. GRIFFITH stated that at the last hearing, someone mentioned that that kind of information can be brought out, under some recent rulings, on direct on the grounds that it is simply background.

094 MICHAEL MAHONEY, Portland, stated that at the time the code was proposed he was a member of the ODAA committee studying it.

The precise language describing the circumstances under which impeachment by a prior conviction may be made is going to be so vague it is going to take four or five years of legal interpretations to straighten it out. The language of the proposed rule says that the crime talked about shall be a crime of dishonesty or false statement. The question is what constitutes a crime of dishonesty or false statement. The Judiciary Committee commentary says a crime involving dishonesty or false statement includes crimes such as perjury, criminal fraud, false prestense, embezzlement, etc. There are no crimes in the Oregon Criminal Code called criminal fraud, embezzlement or false pretenses. These are, for the most part, under the crime of theft. That raises the question of whether theft is a crime of dishonesty within the meaning of the rule.

There was some discussion last week to the effect that the federal rules had been restrictively interpreted and the word "dishonesty" was out. He sees no reason to leave in the word "dishonesty" if nothing is meant by it.

The commentary to the Advisory Committee rule lists every conceivable misdemeanor from the criminal code that they included in crimes of dishonesty and false statement. Very few of these offenses are ever prosecuted, let alone any very frequently. If it is limited to crimes of false statement, it has probably, as a practical matter, abolished impeachment for prior conviction. If it goes that far, why not throw the whole thing out.

He recommended that it be impeachment by any felony and not to try to decide if it is a crime of dishonesty or false statement. If that is not done, the Court of Appeals is going to make those decisions. That will cause every conviction by means of an impeachment by any crime that does not clearly fall within the categories to be in peril and a lot of cases will have to be retried.

193 Rule 609-1

No testimony

194 Rule 610

No testimony

195 Rule 611

196 MR. GRIFFITH presented the committee with the position of OCDLA (Exhibit JJ, HB 2030).

222 Rule 612

223 MR. LYNN presented the committee with OTLA's position (Exhibit HH, HB 2030).

He suggested that the commentary be limited to expert witnesses. As an example, a doctor's file used to refresh memory, should not be introduced in evidence. Currently portions would only be admissible under some exception to the hearsay rule.

307 REP. SPRINGER asked if OTLA's objection was that reviewing the document as to what portions ought to be introduced and given to the jury was a burden on the court and the parties.

311 MR. LYNN replied in the negative. That does follow though. An expert has gone through quite a bit of information to refresh his memory and may have brought a lot of it to the trial. If the expert is asked if he relied on that information to refresh his memory and replies that he has and then offers everything into evidence, the whole legal system comes to a halt to go through what information is admissible and relevant. It is a sorting out process. This happens at present with the introduction of hospital records. Those have to be excised regularly for reference to insurance and other irrelevant information.

He was talking about admission in mass of whatever material the person has relied upon in refreshing his memory prior to the time of coming to trial or at the time of trial. Something in the rule or the commentary that would limit this in mass introduction so that experts were not subject to the introduction of all the material they have reviewed is the best that can be done under this rule.

346 REP. SPRINGER asked if it were Mr. Lynn's position that such evidence is also cumulative in nature.

351 MR. LYNN replied that this rule does not address itself to that.

369 REP. RUTHERFORD asked if Mr. Lynn wanted the evidence to be read or used to refresh memory, but not given to the jury.

379 MR. LYNN replied in the affirmative.

389 MR. MAHONEY stated that not only is the implication that all of the material in front of the witness goes into the jury, but also the information back in the office. That would cause the trial to be adjourned while someone goes to get the evidence. That is the point that concerns him.

In criminal prosecution, there are at present two situations under which the defense may inspect documentary material in the possession of the prosecution: 1) the discovery statue (not subject to amendment by this bill), and 2) the rule of refreshing recollection (document used to refresh memory must be supplied to opposing counsel.

The proposed rule changes Oregon law by inserting "or before testifying". Anything in the history of the case that was used to refresh memory must be brought into court and made available to opposing counsel. The prosecutor must have available at the trial every document prepared in the history of the case which might have any bearing on the case that any of the witnesses might look at. The report must either be presented at once or the witness' testimony is stricken. No alternative is offered.

The phrase "when the prosecution elects not to comply" means that the sanction of striking the witness' testimony only applies when the prosecutor says that he has the document but that he will not show it. It does not apply when the prosecutor says that he would show it, but it is back at the police station. This loophole seems to escape the penalty the rule seems to apply, but it also seems to swallow up the rule.

As a practical matter, this rule will put a substantial financial burden on the prosecution. It also will divert the cross examination of the witness from asking what happened to asking how the witness reconstructed his memory of what happened in hopes of turning up some document that the witness has looked at but has not supplied to defense counsel.

Tape 190
Side B

024 MR. MAHONEY recommended that "or before testifying" be stricken. This would pretty much put the law back into congruence with existing Oregon statute.

028 MR. GRIFFITH presented the committee with the OCDLA position (Exhibit KK, HB 2030) which is in response to the ODAA's position (Exhibit DD, HB 2030).

041 Rule 614

042 MR. LYNN presented the committe with OTLA's position (Exhibit HH, HB 2030) which is basically the same as the Bar's position (Exhibit LL, HB 2030). The both oppose Rule 614.

105 REP. COURTNEY asked about the situation where a witness has been called and leaves the stand and then the judge calls the witness back.

107 MR. LYNN stated that in view of Frangos, if the judge believes that it is necessary in the furtherance of impartial justice, the judge should have the authority to do that.

115 Rule 615

MR. GRIFFITH presented the committee with the position of the OCLDA (Exhibit MM, HB 2030).

REP. RUTHERFORD adjourned the meeting at 3:40 p.m.

Submitted,

Pearl Bare
Committee Assistant

EXHIBITS

Exhibit A, HB 2030 - Proposed Code (Over-Sized Exhibit)
Exhibit DD, HB 2030 - Presented by Bill Gary
Exhibit EE, HB 2030 - Presented by staff
Exhibit FF, HB 2030 - Presented by staff
Exhibit GG, HB 2030 - Presented by staff
Exhibit HH, HB 2030 - Presented by Elliott Lynn
Exhibit II, HB 2030 - Presented by staff
Exhibit JJ, HB 2030 - Presented by staff
Exhibit KK, HB 2030 - Presented by staff
Exhibit LL, HB 2030 - Presented by staff
Exhibit MM, HB 2030 - Presented by staff

HOUSE COMMITTEE ON JUDICIARY

Subcommittee 1

April 2, 1981 2:15 p.m. 350 State Capitol

MEMBERS PRESENT:	Rep. Tom Mason, Chairman Rep. Joyce Cohen Rep. Peter Courtney Rep. Kip Lombard Rep. Bill Rutherford Rep. Dick Springer
STAFF:	Stephen Griffith, Legal Counsel Kristena LaMar, Legal Counsel, Senate Justice Pearl Bare, Committee Assistant
MEASURE:	HB 2030 - Relating to evidence
WITNESSES:	The Honorable Robert E. Jones, Circuit Court, Fourth Judicial District Allison Smith, Oregon District Attorneys Association (ODAA) Bruce Smith, Oregon State Bar Ad Hoc Committee on Evidence Bob Keating Jim McCandlish, Oregon Criminal Defense Lawyers Association (OCDLA)
TAPES:	H-81-JUD-213 H-81-JUD 214

Tape 213
Side A

003 CHAIRPERSON MASON opened the work session at 2:15 p.m.

010 Article VI

012 Rule 601

015 MR. GRIFFITH stated that there were no proposed amendments.

The agenda from March 19 (Exhibit NN, HB 2030) shows most of the proposals.

025 Hearing no objections, Rule 601 was adopted as written.

027 MS. LaMAR stated that ORS 41.010 is not repealed in the bill. It provides that a witness is a person whose declaration is received as

evidence for any purpose whether it is made on oral examination by deposition or by affidavit.

032 THE HONORABLE ROBERT E. JONES, Circuit Court, Fourth Judicial District, stated that would be superfuluous and should be repealed.

033 Rule 602

035 MOTION: CHAIRPERSON MASON moved adoption of Rule 602.

044 MOTION PASSED.

046 Rule 603

050 MR. GRIFFITH went over the proposals and objections of the ODAA (See minutes - March 26, 1981- 2:30 p.m.).

065 CHAIRPERSON MASON stated that the exact purpose of the oath was to impress the witness.

068 JUDGE JONES stated that the Advisory Committee went to great lengths to find an oath that would apply over-all and consistently.

Sometimes children are declared competent, yet are not sworn. There is no obligation for an oath. It might be well to point out in the commentary that the oath need not be rendered if the child otherwise demonstrates his competency.

090 REP. SPRINGER stated that the language in (2) and (3) is permissive, but it is not in (1). Would a statement in the commentary such as suggested by Judge Jones be adequate?

100 ALLISON SMITH, representing the ODAA, stated that a formal oath would be contrary to the intent to getting truth from the child because the child is frequently too scared. The language is too strong.

120 REP. SPRINGER agreed.

137 REP. LOMBARD suggested a sub (4) allowing the court to decide the form.

143 JUDGE JONES suggested changing it to an adult witness having to take the oath. The commentary could say that child witness being given the oath is left to the discretion of the judge.

150 MR. GRIFFITH asked if the intent of subs (2) and (3) was that one or the other would be administered to every adult witness.

153 JUDGE JONES replied in the affirmative. They are permissive though. It is to standardize it.

155 MR. GRIFFITH stated that if those are not exclusive even to adult witnesses, the language in sub (1) covers the case of a child.

164 REP. LOMBARD stated that the simplest thing might be to make it clear in the commentary that these are permissive and that children may be treated differently by the court.

171 Rule 603 was adopted as written.

172 Rule 604

177 MR. GRIFFITH stated that the ODAA favors deletion of subs (2) - (4) as not being rules of evidence.

178 JUDGE JONES stated that there were things that the Advisory Committee felt should be in the evidence code so that a lawyer could pick them up. This was one of them.

183 MOTION: REP. RUTHERFORD moved adoption of Rule 604 as written.

184 MOTION PASSED.

185 Rule 605

187 MR. GRIFFITH stated that there were no objections to this rule.

196 MOTION: CHAIRPERSON MASON moved adoption of Rule 605.

197 MOTION PASSED.

198 Rule 606

199 MR. GRIFFITH stated that the ODAA favors adoption of the Advisory Committee proposal. That is basically adding a sub (2).

215 JUDGE JONES stated that Judge Unis had ask him to comment on this. The Interim Committee believed that case law adequately states circumstances under which there may be an inquiry into the validity of a jury verdict. Blanton v. Union Pacific is a recent case.

Judge Unis' and JUDGE JONES' feelings are that the federal rule is much superior to the interpretation the Oregon Supreme Court has given to inquiries of jury verdicts and that the jury verdict should be kept intact except for extraneous prejudicial information being brought to the attention of the jury. The line of cases that will develop under the federal rule should be followed. That would be going back to the Advisory Committee proposal.

238 MOTION: REP. SPRINGER moved adoption of the Advisory Committee's Rule 606.

240 MOTION PASSED.

242 Rule 606-1

244 MR. GRIFFITH stated that the ODAA proposed to limit the unit rule to private law firms and wished to insert in the third line before "firm", "private law".

253 JUDGE JONES stated that the D.A.'s office gets into situations often where someone from the office has to be called to testify. That office is under the same ethical obligations as any other law firm. The A.G. or another D.A. is brought in to prosecute the case. Although that is an inconvenience, JUDGE JONES feels that it would violate the canons of ethics to do otherwise. It is the same as with any other law firm.

270 In response to REP. RUTHERFORD, JUDGE JONES stated that if the A.G.'s office is compromised, that office brings in someone else, such as a D.A.

277 MOTION: REP. RUTHERFORD moved adoption of Rule 606-1 as written.

285 REP. SPRINGER stated that he agreed with Judge Jones. He did not want to create an exception at this time.

293 CHAIRPERSON MASON stated that the greater use of this would be with the public defender.

301 MOTION PASSED.

302 Rule 607

306 MR. GRIFFITH stated that the Oregon State Bar and the ODAA object to one requirement (See Exhibit NN, HB 2030).

322 CHAIRPERSON MASON stated that the proposal would delete the last phrase of 607--"and must be actually injurious to the calling party's case".

328 BRUCE SMITH, representing the Oregon State Bar Ad Hoc Committee on Evidence, stated that would be the proposal. The federal rule says the credibility of a party may be attacked by any party including the party calling him. The proposed rule could say "the credibility of a witness may be impeached by any party, including any party calling the witness."

334 JUDGE JONES stated that it was strictly a policy decision. Justice Tongue in Rhodes v. Harwood expressed the preferred rule as far as the Supreme Court was concerned would be to go for injury with dictus, even requiring surprise. The Interim Committee compromised by taking out "surprise" and then putting in "actually injurious".

It wouldn't be very serious in civil litigation; it would be very helpful to the prosecution in criminal litigation; it would be devestating to the defense in a criminal case.

He gave the example of State v. Derryberry (See Exhibit A, HB 2030, commentary to Rule 607),

He would be happy to follow the recommendation of the Bar and the ODAA. There are enough safeguards.

410 REP. SPRINGER asked if the "actually injurious to the calling party's case" didn't raise a collateral issue that would get the main trial off track.

415 JUDGE JONES stated that what is injurious is another question. What is inconsistent is fairly clear.

420 MOTION: REP. SPRINGER moved to delete the language "and must be actually injurious to the calling party's case".

423 JUDGE JONES stated if this were deleted, the rule would still not be as progressive as the federal rule.

448 CHAIRPERSON MASON stated that this deletion would put it back to the federal rule.

467 JUDGE JONES stated that he thought the federal rule would be broader and more controversial. He suggested deleting the rest of the sentence after the second "witness". That would mean the credibility of a person's own witness could be impeached with a prior inconsistent statement.

Tape 214
Side A

024 MOTION AMENDED: REP. SPRINGER amended his motion to allow the credibility of a person's own witness to be impeached by a prior inconsistent statement itself.

026 MR. BRUCE SMITH stated that as he read the rule, he thought the only limitation on impeachment related to inconsistent statement by itself.

046 REP. RUTHERFORD stated that he liked Judge Jones' proposal to put the period after witness.

048 JUDGE JONES stated that he did not think that would work because it left a nonsequiter.

063 MOTION AMENDED: REP. SPRINGER amended his motion to reflect that position and statement of Mr. Bruce Smith.

068 MR. BRUCE SMITH stated that the rule should read "The credibility of a witness may be impeached by any party including the party calling the witness."

070 REP. RUTHERFORD stated that Judge Jones said that was not enough.

071 JUDGE JONES stated that was the federal rule. He assumed that the federal rule would be reflected in the commentary.

076 MOTION PASSED: Springer, Lombard, Courtney, Rutherford and Mason agreed. Cohen noted an objection.

080 Article V - Rule 511

118 BOB KEATING, attorney, presented the committee with proposed language for Rule 511 (Exhibit OO, HB 2030). He deleted the language which created the amibuity and added two sentences that state the holding in State ex rel Calley v. Olsen that whenever the other party to the communication is called as a witness, total waiver occurs. He believes this is the state of the law now. Elliott Lynn, representing the Oregon Trial Lawyers Association, does not agree with this proposal.

142 Rule 608

145 REP. RUTHERFORD stated that ODAA, OTLA and OCDLA oppose this.

158 MR. GRIFFITH explained the objections (See minutes and exhibits - March 26, 2:30 p.m.).

He did not think those objections could be recognized in this rule without revising Rule 405.

167 MOTION: REP. COURTNEY moved adoption of Rule 608 as written.

174 MOTION PASSED: Aye - Cohen, Courtney, Lombard, Rutherford, Mason. No - Springer.

175 MS. LaMAR stated that ORS 45.620 was inadvertently omitted from the repealer.

179 MOTION: CHAIRPERSON MASON moved to add the repeal of ORS 45.620.

180 MOTION PASSED: There were no objections.

184 Rule 609

191 MR. GRIFFITH explained the positions of the ODAA, OSB, OCDLA (Exhibit NN, HB 2030).

210 JUDGE JONES stated that if the committee did not adopt the federal rule, he and Judge Unis recommended adopting the Advisory Committee

proposal (Exhibit A, HB 2030). The existing Oregon rule is ridiculous. He wanted to remove the word "dishonesty".

The Advisory Committee proposal prevents having to interpret "dishonesty".

269 REP. LOMBARD stated that court decisions have said that "false statement" and "dishonesty" are the same thing. The Advisory Committee proposal removes the word "dishonesty". Otherwise, the Advisory Committee proposal does retain the dichotomy between felony and misdemeanor.

285 JUDGE JONES agreed.

If the committee is going to limit it to crimes involving dishonesty or false statement, the word "dishonesty" should be removed.

The federal rule says any federal crime and any crime involving dishonesty or false statement. The Advisory Committee adopted any felony crime but restricted the misdemeanant crime to false statement. The Interim Committee dropped any felony crime and restricted it to any crime involving dishonesty or false statement.

His suggestion is that if the committee is going to go that route, it should also drop "dishonesty".

324 CHAIRPERSON MASON stated that deleting the word "dishonesty" would reduce the policy question to the automatic inclusion of felonies.

329 MOTION: REP. LOMBARD moved to adopt the Advisory Committee proposal (See Exhibit A, HB 2030) for Rule 609.

341 REP. RUTHERFORD asked if the motion passed, would the crime of embezzlement not be admissible under the case law.

343 JUDGE JONES stated that it would be. So would shoplifting and filing false income tax returns.

376 REP. RUTHERFORD stated that he was looking for misdemeanors that do not involve false statement, but still indicate dishonesty.

380 JUDGE JONES stated that unlawful possession of a stolen vehicle would fit in this.

383 MS. LaMAR stated that criminal similation would be an example.

406 REP. RUTHERFORD stated that he did not feel comfortable with just "false statement". There might be crimes left out.

425 JUDGE JONES stated that using the term "dishonest" would disclaim the work of eight federal cirucits.

438 JIM McCANDLISH, representing the Oregon Criminal Defense Lawyers Association (OCDLA), stated that the federal rule contains an out each time a conviction is proposed to be introduced into evidence. That is if its probative value is outweighed by the prejudicial value with respect to a felony. The Luck rule is in the federal rule. The Advisory Committee is a retreat from the federal rule in this.

457 JUDGE JONES stated that the Luck doctrine has created havoc because rulings differ in different courts. It was overruled by Congress because what is prejudicial to one judge might not be to another.

465 CHAIRPERSON MASON stated that he would like to stick with the Interim Committee proposal.

Tape 213
Side B

020 REP. SPRINGER stated that unless the committee was prepared to list the crimes that fall within dishonesty or false statement, it will create a tangle. The Advisory Committee proposal clarifies that as best it can. There is a policy decision implicit in there that a felony is significant enough to impeach and a misdemeanor is not. He would support the Advisory Committee proposal.

029 REP. LOMBARD stated that he would rather leave it to argument at a trial whether or not a particular conviction really reflects upon the credibility of the witness.

The interim committee proposal severely restricts those felonies which can be brought in. It is so restricted that there might be some type of felonies that do reflect upon the credibility of the witness but will be excluded.

The protection under the Advisory Committee proposal is that the party can argue that the type of crime does not bear upon the credibility of a witness.

057 CHAIRPERSON MASON stated that under an automatic impeachment rule, the prior conviction would come in. Although it can be argued that it does not bear on false statement or dishonesty, it is still brought in to make the witness look like a bad person. That is what bothers him about automatic felony impeachment. It is a tremendously unfair tactical advantage.

102 MOTION FAILED: Aye - Cohen, Courtney, Lombard, Mason, Rutherford. No - Springer.

110 JUDGE JONES asked if the commentary would indicate that the federal interpretation of dishonesty was being rejected.

111 CHAIRPERSON MASON replied in the affirmative.

114 REP. RUTHERFORD also agreed.

117 MR. GRIFFITH stated that he needed some guidance from the committee on what it wanted the commentary to say about dishonesty and false statement. Did the committee wish the commentary to indicate an exclusive or a sample list or no list of what crimes are crimes of dishonesty or false statement.

124 REP. LOMBARD stated that he beleived all felonies were.

125 REP. COURTNEY and REP. SPRINGER agreed.

130 JUDGE JONES stated that he felt case law would make those distinctions as long as the federal interpretation is rejected.

134 REP. RUTHERFORD stated that was his notion. The commentary would say that Oregon was going to develop its own pattern.

139 CHAIRPERSON MASON stated that he thought the record and the commentary should reflect rejection of Judge Hoffsetter's approach.

145 REP. RUTHERFORD suggested putting some "such as's" in the commentary and leaving the rest to be worked out. In response to MR. GRIFFITH's question about whether to develop a list of crimes which in all cases involve either dishonesty or false statement, REP. RUTHERFORD agreed.

155 CHAIRPERSON MASON stated that a constitutent of his had received a pardon years ago on a felony conviction. There was an attempted impeachment in a civil trial. Case law is that a person cannot be impeached for a pardoned crime.

163 MOTION: CHAIRPERSON MASON moved on page 15, line 53, after "if", to insert of ": (a)" and delete the paragraph in line 35 and insert "(b) The witness has been granted a pardon by the jurisdiction in which the witness was convicted."

174 JUDGE JONES stated that Federal Rule 609(c) (Exhibit B, HB 2030) had language which might be helpful.

180 CHAIRPERSON MASON read the federal language of Rule 609(c) (Exhibit B, HB 2030).

188 JUDGE JONES stated that the Oregon expungement should be included.

192 REP. SPRINGER agreed.

194 MOTION AMENDED: CHAIRPERSON MASON amended his motion to be a conceptual motion.

204 JUDGE JONES stated that it could be limited just to those which had been pardoned or expunged

205 MOTION AMENDED: CHAIRPERSON MASON amended his motion to add "or the conviction has been expunged".

211 MOTION PASSED: There were no objections.

213 JUDGE JONES stated that the parole classification of crimes has them all listed.

226 MR. ALLISON SMITH stated that ODAA had also suggested that the words "during cross-examination" be deleted from subsection 1.

227 CHAIRPERSON MASON stated that Professor Kirkpatrick also suggested that.

231 REP. COURTNEY stated that Professor Kirkpatrick's other concern was that something be put in about the ability to impeach the witness after a guilty verdict but prior to sentencing. The federal rule did not make that clear.

232 JUDGE JONES replied that Oregon law in State v. Bakkalear says that it is not a conviction until the person is sentenced. That is existing law.

239 CHAIRPERSON MASON indicated that OCDLA also agrees with the deletion of "during cross-examination."

241 MOTION: CHAIRPERSON MASON moved deletion of "during cross-examination."

243 JUDGE JONES stated that he had no problem with that.

244 MOTION PASSED: There were no objections.

254 JUDGE JONES stated that there were a lot a lot of people who could be impeached if impeachment were allowed before sentencing.

265 CHAIRPERSON MASON stated that he had no problem with impeachment once the jury comes back.

266 REP. SPRINGER asked if it could be accomplished in the commentary.

270 REP. COURTNEY stated that according to Kirkpatrick, this would overrule State v. Bakkalear.

282 JUDGE JONES did not agree. Bakkalear says that it is not a conviction until there is sentencing.

290 MR. GRIFFITH stated that "evidence that the witness has been found guilty of a crime" rather than "convicted" would do it.

297 JUDGE JONES stated that the language would have to be changed or "conviction" would have to be defined.

299 JUDGE JONES and MR. GRIFFITH said that they would recommend the language of the rule be changed rather than that of the commentary.

300 MOTION: REP. COURTNEY moved conceptually that language "has been found guilty" be inserted in line 3, page 124, and "convicted" be deleted.

312 REP. SPRINGER stated that the same language change should follow throughout where "conviction" or "convicted" appeared. He asked to have language in the commentary reflecting the reasons.

320 MOTION PASSED: There were no objections.

323 Rule 609-1

332 MR. GRIFFITH stated that there were no objections to Rule 609-1.

333 Being no objections, Rule 609-1 was adopted.

335 Rule 610

336 MR. GRIFFITH stated that there were no objections to Rule 610.

337 MOTION: CHAIRPERSON MASON moved adoption of Rule 610.

338 MOTION PASSED: There were no objections.

340 Rule 611

343 MR. GRIFFITH stated that OCDLA had proposed amendments (Exhibit JJ, HB 2030, March 26, 1981, 2:30 p.m.). He read the first proposal.

369 MR. ALLISON SMITH stated that ODAA would like the rule left as it is.

370 JUDGE JONES stated that taking it out by legislative enactment would raise the inference that it can't be done.

377 CHAIRPERSON MASON agreed.

378 MR. McCANDLISH stated that it wasn't a strong point with him.

396 MR. McCANDLISH, concerning the second proposal of OCDLA (Exhibit JJ, HB 2030, March 26, 1981) stated that it was a technical amendment. It was the feeling the OCDLA that the definition should be in the rule.

402 CHAIRPERSON MASON stated that he agreed wtih Judge Jones that everybody knows that. It is existing law and if nobody objected, he had no objection to inclusion.

409 JUDGE JONES suggested putting it in the commentary.

411 MR. GRIFFITH stated that it might not be a bad idea because that provision in being repealed.

418 REPS. SPRINGER, LOMBARD, RUTHERFORD AND MASON agreed that they would want it in the commentary.

422 MOTION: CHAIRPERSON MASON moved adoption of Rule 611 as written.

424 MOTION PASSED: There were no objections.

425 Rule 612

429 MR. GRIFFITH read the ODAA's suggested amendment (Exhibit DD, HB 2030, March 26, 1981)

445 MR. ALLISON SMITH stated that it is already covered in the discovery statutes. This is superfluous.

454 JUDGE JONES stated that the Janx act was essentially adopted in State v. Slatster. It has to be produced whether it is used to refresh memory or not. He saw no mischief in the rule as written. It doesn't hurt anything and it follows the federal rule.

Tape 214
Side B

019 REPS. SPRINGER, LOMBARD and COURTNEY stated they wanted to leave the rule as is.

021 REP. SPRINGER stated that another issue is to when the reference is made to the document. The language in question is "or before testifying".

035 JUDGE JONES stated that all the trial lawyers (on the Advisory Committee) felt strongly that this was a good addition. It is within the court's discretion to send people back to get their reports.

045 REP. SPRINGER asked if that wasn't available through discovery anyway.

046 JUDGE JONES that it was not always.

052 CHAIRPERSON MASON stated that the record will reflect that it is within the court's discretion.

056 MR. GRIFFITH stated that could be emphasized in the commentary.

Another suggestion coming from Professor Kirkpatrick is that there are things besides writings which can be used to refresh memory.

068 JUDGE JONES stated that other things can, but it is the writings that need to be used for cross-examination purposes.

075 REP. SPRINGER suggested that the commentary reflect that "writing" be given a liberal interpretation.

083 MOTION: CHAIRPERSON MASON moved adoption of Rule 612 as written.

084 MOTION PASSED: There were no objections.

085 Amendment to ORS 45.610

090 MR. GRIFFITH stated that this amendment was for sex nuetral language.

094 Hearing no objection, it was adopted.

096 REP. LOMBARD asked if it would be better to put this in rule form.

103 JUDGE JONES stated that it was meant to go with the foundation that is required under Rule 609-1. He suggested labelling it Rule 609-2.

111 Hearing no objection to this suggestion, it was adopted.

112 Rule 614

114 MR. GRIFFITH stated that the Bar opposes adoption of this rule because judges should not be encouraged to interrogate witnesses.

117 MR. BRUCE SMITH stated that it was the State Bar Ad Hoc Committee on Evidence that opposed this, not the State Bar.

131 JUDGE JONES stated that the judges' position was that they did not care.

132 REP. SPRINGER agreed with the position of the Ad Hoc Committee.

133 MOTION: REP. SPRINGER moved deletion of Rule 614.

135 MOTION PASSED: There were no objections.

139 JUDGE JONES asked if it could be left in the commentary that judges have inherent power.

143 REP. RUTHERFORD stated that is the basis on which it was deleted. They already have that authority.

146 Rule 615

148 MOTION: CHAIRPERSON MASON moved to adopt Rule 615.

150 MR. GRIFFITH stated that OCDLA preferred the Advisory Committee proposal because it sets out the procedure more clearly.

MR. McCANDLISH stated that the Advisory Committee proposal set out that the court shall exclude upon motion. If there is good cause not to, it is the court's discretion not to. The existing proposal makes it discretionary from the beginning.

MOTION PASSED: There were no objections.

CHAIRPERSON MASON adjourned the meeting at 4:00 p.m.

Submitted,

Pearl Bare
Committee Assistant

EXHIBITS
Exhibit NN, HB 2030 - Agenda submitted by staff
Exhibit OO, HB 2030 - Proposed amendment submitted by Bruce Smith

For the following exhibits, see over-sized exhibits:
Exhibit A, HB 2030 - Proposed Evidence Code
Exhibit B, HB 2030 - Federal Rules of Evidence

HOUSE COMMITTEE ON JUDICIARY

Subcommittee 1

April 9, 1981 1:30 p.m. 350 State Capitol

MEMBERS PRESENT:	Rep. Bill Rutherford, Acting Chairperson Rep. Joyce Cohen Rep. Peter Courtney Rep. Kip Lombard Rep. Dick Springer
EXCUSED:	Rep. Tom Mason
STAFF:	Stephen Griffith, Legal Counsel Kristena LaMar, Senate Justice, Legal Counsel Pearl Bare, Committee Assistant
MEASURE:	HB 2030 - Relating to evidence
WITNESSES:	The Honorable Richard L. Unis, Circuit Court, Fourth Judicial District Allison Smith, Oregon District Attorneys' Association Jim McCandlish, Oregon Criminal Defense Lawyers' Association Elliott Lynn, Oregon Trial Lawyers' Association Bruce Smith, Oregon State Bar Ad Hoc Committee on Evidence Roger Harris, Oregon District Attorneys' Association
TAPES:	H-81-JUD-240 H-81-JUD-241 H-81-JUD-242

Tape 240
Side A

004 CHAIRPERSON RUTHERFORD opened the public hearing at 1:30 p.m.

005 Artice VII

007 Rules 701 and 702

No one to testify

008 Rule 703 - Section 59.

013 MR. GRIFFITH stated that there is no guidance in these rules as to what facts an expert may rely on in stating an opinion. That is because of the deletion of Rule 703.

032 THE HONORABLE RICHARD L. UNIS, Circuit Court, Fourth Judicial District, stated that the Advisory Committee favored the adoption of Federal Rule 703. The interim committee deleted it.

Under existing Oregon law, a qualified expert can give an opinion that has to be based upon facts in evidence, subject to certain exceptions. Federal Rule 703 permits an expert to give an opinion based upon the types of things he would rely upon in his lab or office.

The controversy is because under existing law, if the opinion has to be based on evidence, the opponent has a basis for cross-examination. Under the federal rule, it is another hearsay exception for all practical purposes.

Last session under the Oregon Rules of Civil Procedure 36(4)(b), there was a proposal to permit discovery of experts' names. The Legislature eliminated that provision. This means that if Rule 703 is adopted, the committee should consider a provision which would allow discovery of the experts of the opponent or there is no way there can be effective cross-examination. The scholars in this area say that if there is going to be such a rule, there has to be discovery to the opponents.

Under present Oregon law, there is some uncertainty to the extent that the opponent's experts and their opinions can be discovered.

He saw no problem with Rule 703, providing the party can do it. There should be some expression in the rules as to what an expert can base his opinion on.

By being silent on this, the Supreme Court is going to make the decision. It has already carved out three basic exceptions to the facts in evidence rule.

The difficulty in codifying the existing Oregon law is because of the exceptions that have been made. The courts have been saying that there may be other exceptions. If it is put in writing, it might freeze something that should be developing. It is difficult to determine which exceptions the Court of Appeals is going to allow. The Court of Appeals has gone much further than the Supreme Court. Both are going in the direction of Rule 703.

There are parts of Rule 703 which are not controversial, such as an expert basing his opinion on the matters of personal opinion or matters related in a hypothetical situation.

187 Rule 704

No one testified

188 Rule 705

192 CHAIRPERSON RUTHERFORD called the committee's attention to Professor Kirkpatrick's suggestion (Exhibit PP, HB 2030).

204 JUDGE UNIS stated that the existing Oregon law is working well. He felt that the interim committee's proposal to adopt the federal rule should be retained.

231 ALLISON SMITH, representing the Oregon District Attorneys' Association (ODAA), stated that ODAA would prefer the Advisory Committee proposal.

237 Rule 706

238 JIM McCANDLISH, representing the Oregon Criminal Defense Lawyers Association (OCDLA), stated that OCDLA would like it made clear that the rule does not apply in the criminal context. There are numerous statutes which deal with court-appointed experts.

258 BRUCE SMITH, representing the Oregon State Bar Ad Hoc Committee on Evidence, stated that his committee opposes Rule 706 (Exhibit QQ, HB 2030).

272 MR. McCANDLISH stated that unless this is gratuitously made available to the D.A., there is an absolute right of confidentiality in criminal cases for any assisting expert appointed by the court. This statute would give up that right, if it applies to criminal proceedings.

288 JUDGE UNIS stated that the Advisory Committee has been deeply concerned about judges, on their own motion particularly, appointing experts. They do have the inherent power, although it is not exercised much. The law will be available to municipal court judges, J.P.'s and such, and this authority may be utilized more.

He likes Rule 706, but since the committee has deleted Rule 614, Mr. Bruce Smith's proposal would be consistent.

No member of the Bar has ever challenged the inherent power of the judge.

347 MR. LaMAR called the committee's attention to SB 433.

381 Work Session

383 Rule 701

386 Hearing no objection, Rule 701 was adopted.

387 Rule 702

389 Hearing no objection, Rule 702 was adopted.

390 Rule 703 - Section 59

401 CHAIRPERSON RUTHERFORD stated that this was the deletion of Rule 703.

409 MR. GRIFFITH suggested a redrafting of the rule which would give the court discretion in allowing in facts or data which are not in themselves admissible. The last sentence could be changed to read "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data which would otherwise not be admissible in evidence may be the basis of an expert opinion in the discretion of the court."

427 CHAIRPERSON RUTHERFORD stated that the testimony was that it would be very difficult to codify a rule in this area.

442 JUDGE UNIS stated that Judge Jones indicated that the committee should adopt Rule 703. This would eventually force some recognition by decisional law or statutory enactment of the counterpart--the discovery aspect.

JUDGE UNIS was not opposed to Rule 703, but it does go hand in hand with the discovery aspect. In effect, it is another exception to the hearsay rule.

482 MOTION: REP. SPRINGER moved that the committee adopt the Advisory Committee proposal for Rule 703.

Tape 241
Side A

020 MOTION PASSED: Aye - Courtney, Lombard, Rutherford, Springer. Excused - Mason, Cohen.

036 MR. GRIFFITH stated that the committee might want to consider Professor Kirkpatrick's suggestion (Exhibit PP, HB 2030).

047 MR. ALLISON SMITH stated that ODAA would not object to that. He was not sure it was necessary.

055 JUDGE JONES stated that there is a recent law review article that says no matter what is said, it will be used for substantive purposes. These limiting instructions are very ineffective. He did not think this suggestion did anything except confuse it.

063 Rule 704

064 Hearing no objections, Rule 704 was adopted.

065 Rule 705

077 Hearing no objections, Rule 705 was adopted.

078 CHAIRPERSON RUTHERFORD read the suggested amendment from Professor Kirkpatrick (Exhibit PP, HB 2030).

088 JUDGE UNIS thought that Professor Kirkpatrick's concern was that if an expert's opinion was not supported by facts in the record and if it is based upon matters that the expert reasonably relied upon, there would be no opportunity for cross-examination if there is no disclosure.

100 MR. GRIFFITH stated that the purpose of sub (b) (Exhibit PP, HB 2030) is that if the adverse party knows that an expert is going to testify about a certain subject, the adverse party can ask for separate determination before proceeding to be satisfied that the outside evidence is the kind reasonably relied upon.

106 JUDGE UNIS stated that was now required by Rule 703 under the interpretations of the Federal Rule 703. The court has to make a determination of that as a preliminary fact.

Under existing law, if an expert is called and it turns out that his opinion is not based on facts in record, there is a potential mistrial.

One problem is that experts are called out of order with the assurance that the opinions are going to be tied in by facts in record.

He wondered if the amendments were necessary and if they would defeat the purposes of Rule 703 and Rule 705.

162 MR. GRIFFITH stated that Professor Kirkpatrick raises two concerns: The danger of mistrial, and allowing the adverse party to conduct this type of examination prior to or as part of the direct examination of the expert witness would allow better preparation later in the cross-examination of that expert.

174 JUDGE UNIS stated that it is still discretionary under the rules as adopted and present law that a judge can require a hypothetical question rather than just stating the conclusion.

198 Rule 706

202 ELLIOTT LYNN, representing the Oregon Trial Lawyers Association (OTLA), stated that OTLA opposed Rule 706.

208 MOTION: CHAIRPERSON RUTHERFORD moved deletion of Rule 706.

210 REP. SPRINGER stated that was consistent with the committe's action on Rule 614.

224 CHAIRPERSON RUTHERFORD stated that the deletion of this rule was not depriving the court of the authority to call witnesses on its own motion or the motion of a party.

226 JUDGE UNIS stated that by deleting this rule, it was not going to change the authority of the judge. This is consistent with the committee's action on both rules.

There is no controversy over the court's power to appoint on a request of a party.

237 REP. COURTNEY stated that his concern was whether the whole rule needed to be taken out. He had no probelm with taking out the court's authority.

245 JUDGE UNIS stated that the court has the inherent power in both instances.

246 CHAIRPERSON RUTHERFORD stated that was his view in making the motion. It is not going to prevent a person from having experts appointed. There will be commentary on that.

255 MOTION PASSED: Aye - Courtney, Lombard, Rutherford, Springer. Excused - Cohen, Mason.

262 Article VIII - Hearing

263 Rule 801

265 MR. McCANLDISH stated that OCDLA would like any ratification of the interim comittee's work on 804(a)(C) to be a reassertation of the fact that this has nothing to do with a question of the sufficiency of the evidence to convict somebody. The concern is over the police officer's statement of what a witness has said, when the witness is available. The classic case is State v. Fennell. That case points out the desirability of the police officer's information in that situation, but it leaves it at the mercy of the police unless there are other facts corroborating the guilt of the defendant. The interim committee deleted that portion but not for the purpose of altering the standard of the burden of the state to produce sufficient evidence. He asked that it be made clear that the interim committee's commentary is being adopted.

338 MR. BRUCE SMITH presented the committee with the Bar's Evidence Committee concerns (Exhibit RR, HB 2030).

Tape 240
Side B

023 Rule 802

No one testified.

024 Rule 803

025 JUDGE UNIS stated that the proposed evidence code (Exhibit A, HB 2030) does not recommend the adoption of present sense impression. That was the intent of the Advisory Committee, however in connection with 803(2) the Advisory Committee did recommend excited utterance. There is an existing Oregon law relative to criminal cases. The Advisory Committee recommended (Exhibit SS, HB 2030) a confirmation of existing Oregon law of the excited utterance where it is a complaint of sexual misconduct made by the prosecution witness after the commission of an alleged offense.

The codification of this raises an interesting question. If the person tells someone a while after the incident, under the complaint of sexual misconduct exception in Oregon, the person is only permitted to testify as to the fact that a complaint of rape is made.

This was the decision in the recent case State v. Baker, 46 Or App 79. An Oregon Trial judge was reversed for holding that. The puzzling thing is that the same author of that opinion wrote State v. Fennell. He believes there sould be a new rule recognizing a complaint of sexual misconduct made by the prosecuting witness after the commission of the alleged offense. (See Exhibit SS, HB 2030).

104 MR. McCANDLISH stated that on page 164 (Exhibit A, HB 2030), the interim committee commentary indicates that the Judiciary Committee was not intending to overrule State v. Waites.

109 JUDGE UNIS stated that it might not be the intent, but there is no rule.

113 MR. ALLISON SMITH stated that ODAA would agree. It would be much better to have it in the rule.

116 JUDGE UNIS stated that there is an omission in 803(22). There is no reference to misdemeanors.

140 MS. LaMAR stated that the fifth paragraph on page 159 (Exhibit A, HB 2030) does not have the corroboration requirement.

146 JUDGE UNIS stated that was written when there was a proposal for a corrobation requirement. That should be deleted.

147 Hearing no objections, it was deleted.

169 Rule 804

170 JUDGE UNIS stated that was a reference to ORS 41.860 on page 193 (Exhibit A, HB 2030). That statute is repealed by this bill. There is a hearsay exception that the commentary doesn't explain, but the exception does exist under ORS 41.860(2). In Oregon, it appears that if a statement is made out of court but in writing by a declarant

based on firsthand knowledge at or near the time of the transaction and the declarant is unavailable due to death or being out of state, the writing can come in. The repeal of ORS 41.860 also repeals this second portion.

ORS 41.860 was deleted, but there was never any discussion of that aspect of the rule. The statute is not used very often.

It may be that the writing would qualify under the great hearsay exception or the residual hearsay exception in 803(24) or 804(b)(5) if the procedures are complied with.

He is not opposed to the deletion of this ORS; he just wanted to bring it out because no discussion has occurred in the past.

284 MR. ALLISON SMITH stated that 804(3)(3) duplicates 803(24). 804(3)(e) is not necessary and should be deleted because it will cause confusion.

316 JUDGE UNIS stated that it is possible that something may be lacking one element to fit in the hearsay exceptions to Rule 803, yet might come in under Rule 804.

354 MR. McCANDLISH stated that he personally agreed with Mr. Allison Smith.

Rule 804(3)(c) would change present law and allow a hearsay statement against penal interest to be admitted into evidence. If this section is read to allow the prosecution to bring that in, there will be a serious confrontation clause problem when it deals with co-defendants. The commentary notes that this takes no position with respect to the confrontation clause.

OCDLA believes that there is a confrontation clause problem and an inherent reliability problem. In U.S. V. Sarmiento-Perez, the court came to the general conclusion that Federal Rule 804(3)(c) could not include custodial interrogation situations of co-defendants because it is inherently reliable. The commentary suggests that each of these custodial situations should be judged by its own facts. The federal circuit that has interpreted the federal rule says this cannot be done.

He also felt that allowing this would undermine the limitation in Rule 801.

He suggested that the committee adopt language in the commentary that says it disapproves of the use of statements made by co-defendants in a custodial setting.

Tape 241
Side B

030 JUDGE UNIS stated that there was no attempt in these rules to define constitutional issues. Mr. McCandlish's concern is of a constitutional dimension.

060 Rules 805 and 806

No one testified.

062 Work Session

063 Rule 801

070 ROGER HARRS, representing the ODAA, stated that the recent Court of Appeals case State v. Howard, 49 Or App 391 (1980) addresses the issue of 801(4)(a)(A). He suggested that the commentary incorporate a reference to that. He explained the case.

131 CHAIRPERSON RUTHERFORD asked if the proposals on page 2 from the Bar's Evidence Committee (Exhibit RR, HB 2030) would cure the problem addressed in Howard.

136 JUDGE UNIS stated that Howard dealt with the former testimony exception and is consistent with 804(3). It was not intended to be under the definition of nonhearsay in 801.

152 MR. HARRIS stated that he was suggesting that there should be consistency in the definition.

160 JUDGE UNIS stated that the cases have interpreted the federal rule dealing with former testimony to require substantial identity of the parties and issues.

167 MR. HARRIS stated that cases were saying that the identity of parties did not necessarily mean the exact same parties, but whether or not they had the same motive and opportunity to cross-examine the adverse witness.

The proposal on page 2 (Exhibit RR, HB 2030) would solve the problem. It leaves case law intact.

179 JUDGE UNIS stated that before Howard, testimony of an unavailable witness could be offered. Under the definition in 801, the witness has to be subject to cross examination. In Howard, the witness was unavailable. That is not covered by 801. Had the witness been available, the testimony would have come in under prior inconsistent statement under oath.

210 MR. McCANDLISH stated that the basic concern with this rule, and especially the proposal of the Bar Evidence Committee, is that a person is going to be convicted on evidence which would have been hearsay before or only available for impeachment.

241 MOTION: CHAIRPERSON RUTHERFORD moved adoption of the amendments on page 2 (Exihbit RR, HB 2030) subject to editorially removing the sex bias language.

271 MOTION PASSED. There were no objections.

274 Rule 804

277 MR. HARRIS called the committee's attention to the recent Court of Appeals case Stae v. Tcheverria Court of Appeals #18846, that cites the proposed evidence code as authority for a hearsay exception, exception (e). A list prepared by a victim, who died prior to catching the burglars, was allowed in by the trial court as being inherently reliable. The Court of Appeals upheld that admissibility.

He suggested that the commentary refer to Tcheverria.

351 JUDGE UNIS stated that referring to the case of Williams v. Lawrence David and ORS 41.860 in the commentary would take care of the medical records problem he referred to earlier.

364 MOTION: CHAIRPERSON RUTHERFORD moved reinsertion of ORS 41.860 in Rule 804.

397 MOTION PASSED: There were no objections.

428 Rule 803

429 JUDGE UNIS stated that he had a concern over the omission of the word "misdemeanor" in Rule 803(22).

446 MOTION: REP. LOMBARD moved conceptually to add "misdemeanor" to paragraph 22 on page 163 (Exhibit A, HB 2030).

460 MOTION PASSED: There were no objections.

473 MOTION: CHAIRPERSON MASON moved the language in section 3(2) (Exhibit SS, HB 2030).

481 MOTION PASSED: There were no objections.

Tape 242
Side A

021 JUDGE UNIS asked if the commentary could point out that this inclusion would not limit some other aspect of a victim's statement to come under some other exception.

038 Hearing no objection, CHAIRPESON RUTHERFORD stated that the commentary would so reflect.

040 MR. GRIFFITH stated that sub (1) on page 161 and sub (18) on page 163 (Exhibit A, HB 2030) have a disclaimer adopt the federal rules. He suggested putting that in the commentary.

046 There were no objections to that change.

072 MR. GRIFFITH stated that it was suggested by Professor Kirkpatrick that sub (18), learned treatise, be retained.

080 JUDGE UNIS stated that sub 18 was left out because it was felt that this would just get into a battle of reading.

Rule 803(8), public records exception, would greatly enlarge the existing law in Oregon. The committee may want to consider this in more detail.

110 MS. LaMAR stated that chapter 43 deals with public reocrds. All of that chapter has not been repealed. It might be appropriate to deal with this all together when it comes up in Articles IX and X.

116 MR. GRIFFITH stated that on page 161 (Exhibit A, HB 2030), Professor Kirkpatrick criticizes sub (6) because it fails to require that the entrant and his informant have a business duty to report the information in the business record. The requirement has been imposed by case law and is necessary to insure the trustworthiness of the hearsay. Professor Kirpatrick's points out that it could be added by deleting in line 4, the words "if kept" and inserting the word "acting".

143 JUDGE UNIS stated that case law does say what Professor Kirkpatrick is suggesting.

158 MR. GRIFFITH stated that inserting the word "acting" would make it clear that the informant has to be acting in the course of regularly conducted business acitivity.

164 JUDGE UNIS stated that the words "if kept" referred to the keeping of the record. He felt that was another foundational requirement.

170 MR. GRIFFITH asked if that foundational requirement wasn't satisfied by the balance of the sentence.

174 JUDGE UNIS stated that they were two different things. One is a duty to record; the other is a duty to report.

Another foundation requirement is to keep the record.

181 Rule 801

182 Hearing no objections, Rule 801 as amended was adopted.

183 Rule 802

186 Hearing no objections, Rule 802 was adopted.

186 Rule 803

187 Hearing no objections, Rule 803 as amended was adopted.

189 Rule 804

199 CHAIRPERSON RUTHERFORD stated that Rule 804 would be considered at the next meeting.

201 Rule 805

202 Hearing no objections, Rule 805 was adopted.

203 Rule 806

204 Hearing no objections, Rule 806 was adopted.

220 CHAIRPERSON RUTHERFORD adjourned the meeting at 3:50 p.m.

Submitted,

Pearl Bare
Committee Assistant

EXHIBITS

Exhibit PP, HB 2030 - Agenda presented by staff
Exhibit QQ, HB 2030 - Proposals of the Bar Evidence Committee presented by Bruce Smith
Exhibit RR, HB 2030 - Proposals of the Bar Evidence Committee presented by Bruce Smith
Exhibit SS, HB 2030 - Memo to the Advisory Committee presented by staff

For Exhibit A, HB 2030 (Proposed Evidence Code) -- See Over-Sized Exhibits

HOUSE COMMITTEE ON JUDICIARY

Subcommittee 1

April 16, 1981 1:55 p.m. 350 State Capitol

MEMBERS PRESENT: Rep. Tom Mason, Chairperson
Rep. Peter Courtney
Rep. Kip Lombard
Rep. Bill Rutherford
Rep. Dick Springer

EXCUSED: Rep. Joyce Coehn

STAFF: Stephen Griffith, Legal Counsel
Kristena LaMar, Senate Justice, Legal Counsel
Pearl Bare, Committee Assistant

MEASURES: HB 2030 - Relating to evidence

WITNESSES: Allison Smith
Jerry Cooper, Washington County District Attorney

TAPE: H-81-JUD-271

Tape 271
Side A

007 CHAIRPERSON MASON opened the public hearing and work session.

008 MOTION: CHAIRPERSON MASON moved to take HB 2030 from the table.

009 MOTION PASSED: There were no objections.

010 Article IX

No one testified

012 MOTION: REP. LOMBARD moved adoption of Article IX.

014 MOTION PASSED: There were no objections.

021 Article X

023 MOTION: REP. LOMBARD moved adoption of Article X.

026 MOTION PASSED: There were no objections.

027 Article XI

028 MR. GRIFFITH stated that Joan Robinson suggested that a section 97(b) be included to provide that the Act apply to causes of action arising after its effective date.

There does need to be some provision indicating what actions the evidence code will be used in.

038 REP. RUTHERFORD asked if the theory of the code was that it did not affect substantive rights and was procedural in nature.

041 REP. LOMBARD stated that some rather significant procedural changes have been made.

050 ALLISON SMITH suggested that a special effective date be added. If it goes into effective about September or October, the Bar is not going to have time to really learn it. He suggested July 1982. He thought there would be CLE programs on this.

060 REP. RUTHERFORD stated that he was thinking of January 1982. His question was whether it should say "causes of action arising after" or should it be "trials" only.

062 MR. GRIFFITH suggested "actions commenced". The concept of a cause of action arising as a result of a certain injury gets into whether the cause of action arises before any legal proceeding has begun.

070 MOTION: REP. RUTHERFORD moved insertion of section 97(b) to make the code effective for cases filed after January 1, 1982.

087 MR. ALLISON stated that the case commences in a criminal suit when any accusatory instrument is filed. That is the time that has to be met for the statute of limitation.

090 REP. RUTHERFORD asked if it said "cases filed" would it cover criminal actions.

091 MR. SMITH replied in the affirmative. He would use "upon the filing of an accusatory instrument".

095 JERRY COOPER, Washington County District Attorney, stated that it is in statutory form under definitions under the criminal procedure code that a complaint commences a misdemeanor and a complainant's information commences a felony. An indictment or D.A.'s information would commence the criminal proceedings. An accusatory instrument would be the rule by statute.

105 MR. GRIFFITH stated that if those commence an action, a reference to the commencement of an action would apply to both criminal and civil proceedings.

108 CHAIRPERSON MASON stated that apparently the committee was talking abut the Act applying to any civil action filed after January 1982

and any criminal action commenced after January 1982. The definition of "commenced" is as described by Mr. Cooper.

112 MR. COOPER stated that is under the definition of complaints, complainant's information and district attorney's information.

117 REP. LOMBARD stated that the intent could be reflected in the commentary.

132 MOTION PASSED: There were no objections.

135 MOTION: REP. LOMBARD moved adoption of Article XI.

138 MOTION PASSED: There were no objections.

153 CHAIRPERSON MASON adjourned the meeting at 2:05 p.m.

Submitted,

Pearl Bare
Committee Assistant

HOUSE COMMITTEE ON JUDICIARY

Subcommittee 1

April 23, 1981 1:30 p.m. 350 State Capitol

MEMBERS PRESENT:	Rep. Tom Mason, Chairperson Rep. Peter Courtney Rep. Kip Lombard Rep. Bill Rutherford Rep. Dick Springer
Excused:	Rep. Joyce Cohen
STAFF:	Stephen Griffith, Legal Counsel Kristena LaMar, Senate Justice, Legal Counsel Pearl Bare, Committee Assistant
MEASURES:	HB 2030 - Relating to Evidence
WITNESSES:	Elliott Lynn, Oregon Trial Lawyers Association Allison Smith, Oregon District Attorneys Association
TAPES:	H-81-JUD-305 H-81-JUD-306

Tape 305
Side A

003 CHAIRPERSON MASON called the work session to order at 1:30 pm.

004 Rule 511

005 MR. GRIFFITH presented the committee with proposed amendments to Rule 511 (Exhibit OO, HB 2030, April 2, 1981) prepared by Mr. Keating. The other proposed amendments were presented by the ODAA (Exhibit R, HB 2030, March 5, 1981).

The rule has to do with when the privilege is raised. One issue is who might waive the privilege. Is it when the holder voluntarily discloses the subject matter of the privileged communication or when the other party does? Another issue is will the waiver only occur at trial or could it occur in a deposition taken in advance of trial.

An issue on which no conflicting testimony has been given is what sort of information would amount to a disclosure. Is it simply the same general subject or would it be the subject matter of the privileged communication?

The fourth issue relates to "on direct examination". ODAA is concerned about that language because with the rule as now written

for expert opinions, the privileged information may come up on cross-examination and there will be no waiver.

The final issue is raised by the last sentence in Mr. Keating's proposal (Exhibit OO, HB 2030, April 2, 1981) which deals with the extent of the waiver. Does it waive other consultations with other doctors?

Page 97 (Exhibit A, HB 2030) says that there is some inconsistency in the Oregon cases as to whether testimony in general on the same subject will waive the privilege or whether it is necessary for the holder to testify on a particular privileged communication. The Advisory Committee wants a restricted view of waiver. That is what is in the rule.

118 CHAIRPERSON MASON stated that on one hand is the concern of the civil defense bar and on the other hand is the concern of the district attorneys.

His inclination was to adopt the Advisory Committee position on the restrictive view.

136 REP. SPRINGER stated that he would rather see the inquiry opened up.

149 In response to CHAIRPERSON MASON, MR. ELLIOTT LYNN, representing the Oregon Trial Lawyers Association (OTLA), stated that the plaintiff's bar would endorse the restrictive, existing language.

154 REP. LOMBARD stated that all of the proposals have the portion relating to the waiver of the person or the person's predecessor while holder voluntarily discloses or consents to disclosure of any significant part of the matter or communication. There is not an issue there.

174 ALLISON SMITH, representing the Oregon District Attorney's Association, stated that there was no problem with that first sentence. It is the last sentence that ODAA has a problem with.

194 MOTION: REP. RUTHERFORD moved Rule 511 as written.

211 MR. GRIFFITH stated that the last sentence of that says "the holder's offering of the holder". The issue is whether the waiver only occurs when the holder discloses the contents or can it occur when the other party to the communication testifies as to the privileged communication.

225 REP. RUTHERFORD stated that if a person calls his doctor to testify, he feels that person has waived the privilege.

226 MR. GRIFFITH stated that the rule did not say that. That is contrary to the statements in Calley.

ODAA feels that the rule should be amended (Exhibit R, HB 2030, March 5, 1981, page 9). Its suggestion is to insert "or other person" after "the holder's offering of the holder". Mr. Keating suggests that voluntary disclosure also occurs when the holder intentionally offers the testimony of another party (Exhibit OO, HB 2030, April 2, 1981).

266 MOTION WITHDRAWN: REP. RUTHERFORD withdrew his motion.

271 MR. LYNN stated that OTLA's objection to Mr. Keating's proposal was that the party would waive the privilege as to any attending physician even if the defendant is forced to take the deposition of his doctor in perpetuation of testimony.

290 MR. GRIFFITH stated that the extent of waiver is a separate issue from whether there is a waiver at that point.

296 MR. LYNN stated that his position was that there was no voluntary waiver at the point of a perpetuation deposition taken prior to trial.

301 MR. GRIFFITH stated that Mr. Keating's proposal did not distinguish between kinds of depositions.

304 MR. LYNN stated that OTLA is opposed to an involuntary waiver of privilege occurring at all. That is what would happen in this situation.

314 REP. RUTHERFORD asked what the policy reason was for excluding access to that information once it has been placed as part of the evidence of the case.

321 MR. LYNN stated that the reason for the waiver was the same as for the privilege. The policy reason for the privilege is to encourage a person to get treatment.

355 REP. RUTHERFORD stated that if the waiver is not allowed, one party is privileged to ask questions and the other party cannot.

366 MR. LYNN had no problem if voluntary waiver. His problem was with an involuntary waiver prior to trial. Mr. Keating's proposal would result in an involuntary waiver at the time the person must, of necessity, take a perpetuation deposition.

391 REP. RUTHERFORD stated that the waiver would only be involuntary in the sense that the doctor has said he could not be there at trial.

403 MR. LYNN stated that is not a voluntary waiver. A perpetuation deposition is not a voluntary waiver. Doctors often cannot appear at trial.

424 REP. LOMBARD stated that it did not appear to him that the court, in Calley, distinguished between voluntarily producing the doctor for deposition versus involuntarily producing the doctor for deposition.

435 MR. LYNN stated that Calley was a special case where the person was dead and not able to waive anything. He did not agree with Mr. Keating's interpretation of the case.

459 MR. GRIFFITH stated that it was never argued in the Supreme Court case that this was or was not a perpetuation deposition. In Calley, the court did find that there was a holder of the privilege -- the personal representative.

Tape 306
Side A

029 REP. LOMBARD stated that the decision said that any doctor who had previously treated the person for the same injury or illness or for any related injury or illness could be called upon to testify.

It seems to him that the Keating proposal conforms closely to the Calley case. That is the law now and he would be reluctant to change it.

040 MR. LYNN stated that Calley has not been used to any extent.

He did not think that the Calley case said that a voluntary waiver occurs when someone must take a perpetuation deposition of a doctor.

The holder of the privilege should not be forced to waive that privilege as to all doctors he has ever treated with just because one doctor has to be deposed for trial.

A waiver from a perpetuation deposition allows the defense bar to go around to every other doctor who has treated that person. This puts the defense bar in a very good position. It is an abuse of the judicial system and is unfair to the plaintiff who is not in a good position to fight that.

088 REP. RUTHERFORD stated that the policy is to encourage settlements of law suits. Why would it not be appropriate that this information be disclosed before the time of trial?

101 MR. LYNN asked why, if the privilege can be waived involuntarily, should there be a privilege at all. Mr. Keating's proposal will make involuntary waivers, voluntary waivers.

109 CHAIRPERSON MASON stated that the ODAA proposal (Exhibit R, HB 2030) did not have the same problem. It does not refer to depositions.

113 MR. GRIFFITH stated that a compromise allowing waiver for some depositions could be a commentary which indicated that it is not

voluntary disclosure until the time of trial if it is a perpetuation deposition.

127 MR. LYNN stated that he had no problem with a voluntary waiver in a perpetuation deposition. As it is now written, it will not be a voluntary waiver.

141 REP. SPRINGER stated that he thought Mr. Lynn was saying that the waiver, in a perpetuation deposition, should be limited to the individual who is being deposed. He would be willing to go along with an amendment that would do that as long as it is opened up at the time of trial.

148 REP. LOMBARD stated that the time element is a fiction. Mr. Lynn is saying that because the deposition is taken in advance of trial, the defense should not be allowed to dig up the information, but the defense can dig up the information once the trial starts.

172 MR. LYNN stated that he was not concerned about the timing. He was concerned about the voluntariness.

188 REP. LOMBARD stated that the voluntariness existed when the person says that he wants the doctor to testify and takes the deposition in perpetuation of testimony.

237 MR. LYNN stated that the plaintiff does not want to take a deposition of his doctor. He wants his doctor at trial.

279 MOTION: REP. RUTHERFORD moved adoption of the amendments presented by Mr. Keating (Exhibit OO, HB 2030, April 2, 1981).

289 MOTION FAILED: Aye - Lombard, Rutherford. No - Springer, Mason. Excused - Cohen, Courtney.

290 MR. GRIFFITH stated that if the committee wanted to work on perpetuation of testimony, it could amend the proposal by inserting after "deposition", "or by deposition which is not taken to perpetuate testimony".

299 MOTION: REP. SPRINGER moved the proposed amendments to Rule 511 from the ODAA (Exhibit R, HB 2030, March 5, 1981).

315 MR. GRIFFITH stated this would have nothing to do with depositions.

318 MS. LaMAR stated that the phrase "or other person" would expand this to any person who was called by the holder of the privilege, not just the person subject to the privileged communication.

The other suggestion was that it be the calling of the holder or the other party to that confidential communication.

330 REP. LOMBARD asked if there were any reason why the privilege should not be waived even if the subject matter is raised through lay testimony.

346 MS LaMAR stated that what witnesses say cannot be controlled. The other person may not be called for the purpose of testifying about the confidential communication but may gratutitously throw in a comment that the holder of the privilege did not want to be inserted into the controversy.

360 CHAIRPERSON MASON stated that the holder offers the person's testimony as to the subject matter. If the person goes onto another topic, the privilege would not be waived.

370 MS. LaMAR suggested the language "the offering of the holder or other person to testify as to the subject matter of the confidential communication".

374 REP. SPRINGER stated that he did not think there was anyway to statutorily control a gratutitous blundering.

He did not think the practical effect would be that serious.

398 MOTION PASSED: Aye - Courtney, Lombard, Mason, Springer. No - Rutherford. Excused - Cohen.

401 Rule 804

402 MR. GRIFFITH stated that Rule 804 was not adopted before because the Oregon Criminal Defense Lawyers Association (OCDLA) said they wanted to come in to testify at further length.

Judge Jones and Mr. McCandlish would be satisfied with one sentence in the commentary that is verbatim to the federal commentary indicating that this rule does not affect the Bruton principal where a co-defendant takes the stand and is subject to cross-examination.

The federal rules committee added to the federal rule a sentence that was designed to codify the doctrine of Bruton v. United States. That committee also indicated that the sentence was not intended to affect the existing exception to the Bruton principal where a co-defendant takes the stand and is subject to cross-examination.

OCDLA had no problem with the text of Rule 804. It would like the commentary to indicate that there is a case law interpretation of the Bruton principal.

Tape 305
Side B

025 MR. SMITH stated that is in the last full paragraph on page 190 (Exhibit A, HB 2030).

041 MR. GRIFFITH stated that the specific exception was 804(3)(c).

074 REP. RUTHERFORD stated that OCDLA was saying that the statement against interest would be admissible if the declarant were unavailable. Bruton says that it was inadmissible against the accused. The commentary to the federal rule says that the exception carved out by Bruton was that 65(c) does not apply because the person was not unavailable. It is not admissible as hearsay because the person is available.

089 CHAIRPERSON MASON stated that the situation where a confession is against the confessor's penal interest and the confessor is unavailable but the confession is incriminating to the accused would violate the confrontation clause.

097 REP. RUTHERFORD stated that the exception was that it was admissible because it was a statement against interests.

100 CHAIRPERSON MASON stated that it is still incriminating to the accused and the accused does not get to confront the witness.

103 REP. RUTHERFORD stated that the commentary to the federal rule says that it cannot come in because the witness is not unavailable.

107 MR. SMITH stated that ODAA liked the commentary the way it was. Bruton is a U.S. Supreme Court case.

111 MOTION: CHAIRPERSON MASON moved to include the sentence.

116 MOTION PASSED: There were no objections.

120 Rule 305, 306 and 307

122 MR. GRIFFITH stated that the committee has adopted these rules.

Rule 305 was changed to allocation of the burden of proof. Mr. Griffith suggested adding "the party is asserting" at the end of the sentence. If that language is not added, it is not clear whose claim for relief or whose defense it pertains to.

144 MOTION: REP. RUTHERFORD so moved.

145 MOTION PASSED: There were no objections.

149 MR. GRIFFITH stated that if it is going to be "burden of proof" in Rule 305, it has to be "burden of proof" in 306 and 307.

"Burden of proof" was chosen because it is more commonly understood. There was some thought that "persuade" was not as forceful as "prove".

The commentary will make it clear that there are only two burdens: the burden of producing evidence and the burden of persuasion or the burden of proof.

170 REP. RUTHERFORD stated that it could also be changed back to "burden of persuasion" in Rule 305. He thought that was the more accurate and intellectually sound approach.

171 MOTION: REP. RUTHERFORD moved to change Rule 305 to "burden of persuasion".

176 MOTION FAILED: Aye - Courtney, Rutherford. No - Lombard, Mason, Springer. Excused - Cohen.

178 MOTION: CHAIRPERSON MASON moved to change Rules 306 and 307 to "burden of proof".

182 MOTION FAILED: Aye - Lombard, Mason. No - Courtney, Rutherford, Springer. Excused - Cohen.

190 MR. GRIFFITH stated that the rules had to be consistent because there are only two burdens.

215 MOTION: REP. SPRINGER moved reconsideration of the prior vote.

217 MOTION PASSED: There were no objections.

222 MOTION: REP. RUTHERFORD moved to change Rule 305 to "burden of persuasion".

225 MOTION PASSED: Aye - Courtney, Lombard, Rutherford, Springer. No - Mason. Excused - Cohen.

242 CHAIRPERSON MASON adjourned the meeting at 3:00 p.m.

Submitted,

Pearl Bare

Pearl Bare
Committee Assistant

For Exhibit A, HB 2030 - See over-sized exhibits

HOUSE COMMITTEE ON JUDICIARY

Subcommittee 1

July 2, 1981 1:30 p.m. 354 State Capitol

MEMBERS PRESENT:	Rep. Tom Mason, Chairman Rep. Joyce Cohen Rep. Peter Courtney Rep. Lombard Rep. Bill Rutherford Rep. Dick Springer
STAFF:	Stephen Griffith, Legal Counsel Kristena LaMar, Legal Counsel, Senate Justice Pearl Bare, Committee Assistant
MEASURE:	HB 2030 - Relating to evidence HB 2656 - Relating to certain records HB 2678 - Relating to evidence SB 230A - Relating to welfare fraud SB 600A - Relating to taxation
WITNESSES:	The Honorable Robert E. Jones, Circuit Court, 4th Judicial District The Honorable Richard L. Unis, Circuit Court, 4th Judicial District Jim McCandlish, Metropolitan Public Defenders Charles Lee, Oregon District Attorneys Association Allison Smith, Oregon District Attorneys Association Roger Harris, Linn County District Attorneys Office Senator Ed Fadeley Don Barnes, Metropolitan Public Defenders Jim Nass, Governor's Task Force on Mental Health John Collins, Yamhill County District Attorney Jack Follier Nan Dewey, Oregon Dental Association Pete Fleissner, Oregon Association of Hospitals George Weber, Administrator, Audit Division, Department of Revenue
TAPES:	H-81-JUD-515, Sides A and B H-81-JUD-516, Sides A and B H-81-JUD-517, Side A

Tape 515
Side A

003 CHAIRPERSON MASON opened the work session at 1:50 p.m.

004 <u>HB 2030 - Relating to evidence</u>

016 Rule 309

017 STEPHEN L. GRIFFITH, Legal Counsel, stated that the only issue remaining in Article III was Rule 309(2)(b) (Exhibit TT, HB 2030).

Rule 309(2)(b) says that in a criminal case not only must the basic facts be proved beyond a reasonable doubt but the fact which is inferred from the basic fact must follow beyond a reasonable doubt from the basic facts for the presumption to be admitted or commented on as an inference in the instruction of the court.

030 THE HONORABLE ROBERT E. JONES, Circuit Court, Fourth Judicial District, stated that it does make a difference in a criminal case whether the "more likely than not" test or the "beyond a reasonable doubt" test is adopted. He had stated otherwise at previous meetings.

He has since received a letter from Fred Lenzer, Senior Deputy District Attorney, Multnomah County, stating that it can make a difference and citing some examples, particularly State v. Vance dealing with the presumption that a gun is loaded.

040 THE HONORABLE RICHARD L. UNIS, Circuit Court, Fourth Judicial District, stated that in State v. Vance, 285 Or 383 (1979), the Oregon Supreme Court held that where a person points a gun at a person within firing range in the course of a robbery, the jury may infer that the gun was loaded, and that did not unconstitutionally shift the burden of proof to the defendant to prove the contrary.

The constitutional question concerns the relationship between the basic fact and the presumed fact.

There really cannot be a true presumption against a defendant in a criminal case; there can only be an inference. A presumption is that with fact "A", the jury must find fact "B". In a criminal case, the jury can only be told it may find fact "B" from the basic fact.

The Advisory Committee considered three tests: the rational connection test, the more likely than not test, and the beyond a reasonable doubt test. It adopted the most stringent test--the beyond a reasonable doubt test--to avoid a constitutional problem.

Since that time the U.S. Supreme Court came down with the Ulser case (see Exhibit TT, HB 2030) saying that the more stringent test is not required.

He recommended that the intermediate test--the more likely than not test--be adopted and that Rule 309(2)(b) be amended to read "The presumed fact follows more likely than not from the facts giving rise to the basic fact." This will have a great impact on the trial of cases. For example, the Vance case could never get to the jury without the inference that the gun was loaded.

Under Oregon Rules of Civil Procedure 59(e), it is improper for a judge to comment on matters in evidence. That has a relationship to the difference between presumptions and inferences. A judge can comment on inferences in a criminal case.

097 MR. GRIFFITH stated that page 4, Exhibit TT, refers to the points raised by the judges. Ulser indicates that what the committee has adopted now is not constitutionally required.

113 JUDGE UNIS stated the way the rule is now, robbery in the first degree is being done away with unless there is actual evidence of the loaded gun.

114 JIM McCANDLISH, representing the Multnomah County Defense Lawyers Assocation, asked if this merited different treatment than other presumptions?

If the jury has sufficient circumstantial evidence, this would help. If the jury doesn't have it, the presumption is not going to help.

143 MOTION: REP. SPRINGER moved adoption of the amendment outlined by Judge Unis of inserting "more likely than not" and deleting "beyond a reasonable doubt" in Rule 309(2)(b).

150 MOTION PASSED: There were no objections.

152 Article I

154 MR. GRIFFITH presented the committee with the rules and commentary for Article I (Exhibit UU, HB 2030).

164 Rule 101

168 MR. GRIFFITH stated that the bracketed language on lines 2 and 3 (Exhibit UU, HB 2030, Rule 101) is a staff proposal. Subsection (1) refers to courts. Subsection (2) makes it clear that the Evidence Code applies generally to all suits, actions and proceedings. The bracketed language is duplicative.

184 MOTION: REP. LOMBARD moved deletion in Rule 101(1) of "in all actions, suits and proceedings,".

187 MOTION PASSED: There were no objections.

188 MR. GRIFFITH stated that subsection (4) has "except as required by ORS 132.320." ORS 132.320 states that in grand jury proceedings, the evidence code shall apply with several exceptions. There is case law that the statute is only admonitory (Exhibit UU, HB 2030). The question is whether the committee wants to adopt the case law or the literal terms of ORS 132.320. The commentary to Rule 104 indicates this and has on page 5 of Rule 101 the words "disavows" and "adopts". The committee should determine which it wants.

219 MR. McCANDLISH stated that his association's position was "disavows".

Since State v. McDonald, the Oregon Legislative has amended the grand jury statute twice: once allowing in documentary evidence and another allowing in affidavits when witnesses unavailable.

The Legislature has twice expressed an opinion different than McDonald.

244 MOTION: CHAIRPERSON MASON moved adoption of the "disavows" position.

253 MR. GRIFFITH stated that Rule 101(4)(d) does cover hearsay.

255 CHARLES LEE, representing the Oregon District Attorneys Association, stated that there is no way of deciding what evidence goes into the grand jury.

He did not believe "disavows" would encourage D.A.'s to go to preliminary hearings.

286 MOTION FAILED: Aye - Cohen, Mason. Nay - Courtney, Lombard, Springer. Excused - Rutherford.

295 MOTION: REP. LOMBARD moved to adopt State v. McDonald. He did not like the word "gloss" in the commentary.

300 MOTION PASSED: Aye - Courtney, Lombard, Springer. No - Cohen, Mason. Excused - Rutherford.

305 MR. GRIFFITH stated that the issue in the commentary to Rule 101(4)(d) is whether when a party does insist, and the witness is before the court, the rules of evidence should be applied to that witness as to whether that witness can convey hearsay to the judge.

340 MR. McCANDLISH stated that the case law is unclear whether a police officer can get up and give live testimony without putting on testimony as to the particulars. There is a large loophole now where it can come in through the presentence investigation. His association can live with that because they get a copy of the report and know exactly what the issues are.

He suggested that there be commentary to clarify that ORS 137.090 means what a live witness can talk about.

364 MR. LEE stated this was an issue involving quite a bit of money and third-party hardship if a police officer who has covered a string of robberies has to bring in all the witnesses and victims to those robberies.

A judge should have access to as much information as possible in his sentencing and should not be limited in that by the technicalities of

the Evidence Code. The judge at the hearing on sentencing is making a decision on what is necessary to rehabilitate the defendant.

429 MOTION: CHAIRPERSON MASON moved that the requirements of the code be applied to the live witnesses in the sentencing procedure.

442 MOTION PASSED: Aye - Cohen, Courtney, Mason. No - Lombard, Springer. Excused: Rutherford.

453 JUDGE JONES asked if this would mean that in a child molestation case, all children that were victims would have to be brought in.

466 MOTION: REP. COURTNEY moved to reconsider the vote by which the previous motion passed.

470 MOTION PASSED: Aye - Cohen, Courtney, Lombard, Springer. No - Mason. Excused - Rutherford.

478 MOTION: REP. COURTNEY moved that hearsay be allowed from live witnesses in proceedings.

Tape 516
Side A

002 MOTION PASSED: Aye- Courtney, Lombard, Springer. No - Cohen, Mason. Excused - Bugas.

029 MR. GRIFFITH stated that Rule 101(4)(e) has not been adopted (Exhibit UU, HB 2030). He noted it should read ". . . except as required by ORS 137.090." The wording was suggested by the Metropolitan Public Defender as a compromise position.

The commentary says that the revocation proceedings have an adjudicatorial and a dispositional phase. The adjudicatory phase would have constitutional considerations. Constitutional law should define what may be presented as evidence at the adjudicatory phase.

054 MR. McCANDLISH stated this was a compromise position with the ODAA.

056 MOTION: CHAIRPERSON MASON moved Rule 101(4)(e) as outlined by staff.

060 MOTION PASSED: There were no objections.

061 MR. GRIFFITH stated Rule 103(1) has "in a civil case". Judge Unis and Judge Jones were concerned about criminal cases.

074 JUDGE JONES stated that he thought it could be resolved by putting in the commentary that criminal error will be covered by Supreme Court decision and citing State v. Naylor, a Supreme Court decision of June 1981, and the two statutes.

"In a civil or criminal case" would cause no problem. That would make it subject to the constitution.

102 ALLISON SMITH, representing the Oregon District Attorneys Association (ODAA), stated that would be alright.

105 ROGER HARRIS, District Attorney's office, Linn County, stated that there is a civil case pending before the Supreme Court which will probably decide the issue.

110 JUDGE UNIS stated that the distinction was between criminal and civil.

118 MR. GRIFFITH stated that the commentary to Rule 103 (Exhibit UU, HB 2030) indicates that the Supreme Court wondered whether the conception of presumption really applied at the appeal level.

123 JUDGE UNIS suggested putting a period after "prejudicial" and deleting "in a civil case".

126 MOTION: REP. LOMBARD moved to put a period after "prejudicial" and delete the rest of the sentence and to delete "in any case" after error in the next sentence in Rule 103(1).

127 MOTION PASSED: There were no objections.

131 CHAIRPERSON MASON stated that the commentary could include reference to Naylor.

138 SB 600A - Relating to taxation

142 SEN. ED FADELEY stated that he was in support of SB 600.

146 HB 2030 - Relating to evidence

153 MR. GRIFFITH presented the committee with Rule 504 (Exhibit VV, HB 2030). The psychotherapist privilege does not now apply once a person has been assigned in a pre-hearing detention period. HB 2400, which failed, was to the opposite effect.

188 DON BARNES, representing the Metropolitan Public Defender, stated that Rule 504(4)(a) would have a tremendous fiscal impact on the courts. He recommended that it be deleted and that the privilege be continued. If there is no privilege, the form in which this information comes into court is medical records. The alleged mentally ill person has a right to continue the hearing and to bring all the medical persons in who contributed information to the record.

240 MR. GRIFFITH stated that the Governor's Task Force on Mental Health recommended this particular waiver.

251 JIM NASS, representing the Governor's Task Force on Mental Health, stated that whoever represents the state would have to make the judgment whether it was worth risking medical personnel being cited into court to testify in a hearing.

316 MOTION: REP. COHEN moved to delete Rule 404(4)(a).

327 MOTION PASSED: Aye - Cohen, Lombard, Mason. No - Springer. Excused - Courtney, Rutherford.

331 MR. GRIFFITH presented the committee with a memo from the Mental Health Division asking to insert drug or alcohol dependence into Rule 504(1)(c) (Exhibit WW, HB 2030). This was in the federal rule.

He carried this over in the commentary saying that the Legislative Assembly intends that mental or emotional condition include drug addiction.

361 JUDGE JONES stated that the federally funded drug programs were claiming that they could not give the courts status reports on the drug addicted persons because they said it was privileged information. This was counterproductive to the drug addicted person who wanted parole.

387 CHAIRPERSON MASON stated that he would be opposed to the inclusion of alcohol and drug dependence.

401 MR. NASS stated that there are three recognized groups in mental health in this state: mentally and emotionally disturbed; mentally retarded; and alcohol and drugs.

The feeling was that to use "emotionally or mentally disturbed" excluded mentally retarded. A conscious choice was made to exclude the drug and alcohol.

There are separate commitment statutes for mentally and emotionally disturbed and for mentally retarded.

447 MR. McCANDLISH stated that the problem raised by Judge Jones was a probation problem. A judge can make as a condition of probation the release of any confidential information.

The problem is that this information can be used as substantive evidence in trial.

474 JUDGE JONES stated that the federal rule was never adopted.

This is not a critical item.

Tape 515
Side B

024 MR. GRIFFITH stated that he would delete from page 4 of the commentary (Exhibit VV, HB 2030) that drug dependency was included within mental or emotional condition.

In Rule 504-1, "physician" includes "Christian Science Practitioners". Christian Science organizations have indicated that they would prefer such a practitioner to be designated under the clergyman-penitent privilege.

043 MOTION: CHAIRPERSON MASON moved to delete "Christian Science Practitioners" from Rule 504-1 and to insert it in Rule 506.

044 MOTION PASSED: There were no objections.

055 SB 230A - Relating to welfare

056 MOTION: REP. SPRINGER moved to reconsider the vote by which SB 230 failed.

062 MOTION PASSED: Aye - Lombard, Mason, Springer. No - Cohen. Excused - Bugas, Rutherford.

063 MOTION: REP. SPRINGER moved SB 230A to the full committee with a do pass as amended recommendation.

065 MOTION PASSED: Aye - Lombard, Mason, Springer. No - Cohen. Excused - Bugas, Rutherford.

066 SB 600A - Relating to taxation

072 MOTION: CHAIRPERSON MASON moved to reconsider the vote by which SB 600 failed.

074 MOTION PASSED: Aye - Lombard, Mason, Springer. No - Cohen. Excused - Bugas, Rutherford.

076 MOTION: REP. SPRINGER moved SB 600A to the full committee.

078 MOTION PASSED: Aye - Lombard, Mason, Springer. No - Cohen. Excused - Bugas, Rutherford.

087 HB 2030 - Relating to evidence

100 MR. GRIFFITH stated that Rule 510 needed a form and style change to change "federal government, state or political subdivision" to "unit of government".

113 MOTION: REP. COHEN moved the suggestion by counsel.

117 MOTION PASSED: There were no objections.

122 MR. GRIFFITH stated that Rule 511 is a substantive matter. The proposed rule (Exhibit XX, HB 2030) is not what the committee approved.

Conceptually there are two ways a privilege of a communication can be waived: reveal a substantial part of the communication itself (there is no controversy over this); present testimony about a topic as to which there has been privileged communication (this is the issue).

The committee adopted language from the ODAA. That language is over-broad.

The language proposed by Mr. Griffith (Exhibit XX, HB 2030) limits waiver to the medical people and does not waive the attorney-client privilege. It also limits the waiver for psychotherapists upon testimony as to a mental or emotional condition and for physicians as to a physical condition.

Language has also been drafted for taking deposition for the purpose of perpetuating testimony.

207 MR. SMITH stated that the ODAA had some problems with the narrowness of this language.

208 JOHN COLLINS, Yamhill County District Attorney, representing the ODAA, stated that the proposed language is too narrow because it limits it to two types of expert witnesses. The same issue can arise with any kind of expert witness. This would allow the defense to prevent the state from calling its other experts as expert witnesses.

238 JUDGE JONES stated that experts could be protected by the attorney-client privilege as representatives of the attorney.

257 MR. COLLINS stated that the state would be prohibited from calling in a ballistics expert because the expert would fall under the attorney-client privilege. This would be the case even if the lawyer had contacted five experts before finding one that agreed with him.

267 JUDGE JONES stated that the present ORS 44.040 is restricted to waiver in actions, suits and proceedings. It does not cover criminal trials so the defense lawyer could not be put on.

282 JUDGE UNIS questioned how a ballistic expert would become a representative of the lawyer. A ballistic expert is for the purpose of testifying, not to help the lawyer prepare. Therefore, there is no privilege.

JUDGE JONES stated this is why the Public Defenders always have experts appointed to aid and assist, not to testify.

He thought Mr. Griffith suggestion was good. The theory of Calley is captured and the unfairness of perpetuating testimony is taken care of. JUDGE JONES did not think it could be written any better.

314 JACK FOLLIER, attorney, Portland, stated that he thought the perpetuating testimony portion could be inconsistent with the holding of Calley.

342 MR. GRIFFITH explained that it is not clear from Calley if it was a perpetuation deposition. The committee, as a matter of policy, decided that when a deposition is taken for perpetuating testimony or purports to be taken for the purpose of perpetuating testimony, it does not constitute a waiver until such time as the deposition is offered as evidence at trial.

He felt it would be appropriate to include in the commentary a sentence directed to the professional responsibility of the Bar that it not abuse this.

387 MR. COLLINS recommended that the last sentence suggested in Rule 511 (Exhibit XX, HB 2030) be changed to any expert witness.

395 MOTION: REP. COHEN moved adoption of the language as proposed by staff (Exhibit XX, HB 2030), with the sentence in the commentary suggested by staff.

408 JUDGE UNIS suggested that the sentence in the commentary make reference to Rule 606-1.

452 MOTION PASSED: Aye - Cohen, Courtney, Lombard, Springer. No - Rutherford. Excused - Mason.

Tape 516
Side B

014 MR. GRIFFITH stated that Rule 514 (Exhibit YY, HB 2030) indicates that there are other existing privileges created by statute. HB 2656 and HB 2768 relate to these.

030 HB 2656 - Relating to certain records

044 NAN DEWEY, representing the Oregon Dental Association (ODA), stated that the reason for the bill is that all members of the ODA are required to serve on peer review if requested. ODA is asking that the records of the peer review case be privileged information. This is the law in California.

076 REP. RUTHERFORD stated that any records of the Oregon State Bar are open to the public. Why should ODA's records be different?

088 REP. COHEN stated that a bill was just passed that opened up judicial fitness.

090 MR. GRIFFITH stated that under that bill as soon as there is a hearing, it becomes a matter of public record. Until the first hearing, it is not public unless the judge requests it.

102 REP. SPRINGER asked if the candor existing in the peer review would cease to exist if disclosure were required and if it would effect the integrity of the process.

112 In response to REP. RUTHERFORD, MS. DEWEY stated that if a crime is suspected, the case goes to the Board of Dental Examiners. Peer review deals with insurance matters, excess treatment, etc. The majority of cases do go to the Board of Dental Examiners.

142 REP. LOMBARD stated it was like the Bar's grievance committees. He did not think those records were subject to the public records law. Data presented to those grievance committees do become evidence in proceedings.

He thought HB 2656 was overly broad because the records could not be used in further disciplinary proceedings.

174 MS. DEWEY stated that amendments have been drafted by Legislative Counsel to make it less broad.

214 REP. RUTHERFORD posed the situation of welfare fraud where the evidence is uncovered in peer review. There is no evidence admissible in court. The D.A. cannot subpena those records.

242 MS. DEWEY stated that the records of what the dentist charged welfare would be open.

248 REP. RUTHERFORD stated that language looked as though the Dental Board would have to resist a D.A.'s subpena for records.

250 MS. DEWEY stated that the original records would be open. Just the discussion at the peer review would be closed.

There are records kept and those are turned over to the Dental Association.

262 MR. COLLINS stated that this bill makes specific reference to committees in connection with the discipline of dentists. This would be analogous to the Bar's Discipline committee.

If a dentist admitted to sexual abuse of a patient in front of the Dental Review Committee those records could not be introduced into court under this bill.

This bill covers both peer review and disciplinary committees.

309 HB 2678 - Relating to evidence

311 PETE FLEISSNER, representing the Oregon Association of Hospitals, stated this bill is an amendment to existing law. It is designed to protect the individual who offers information about the level of quality of practice of his peers. It does include tissue committees, quality assurance committees, utilization review committees and professional standards review organizations.

Access to this data for prosecuting a case is provided for in section 5, line 21.

House Judiciary Committee has passed this bill the last two sessions.

367 MR. GRIFFITH stated that the word "privilege" applied to this is a misnomer. There is no holder who can waive it. This is a flat prohibition.

386 MR. COLLINS stated that he saw a policy reason for the evidence not being used. The doctors should be able to discuss the situation candidly without the discussion being used in court.

He did have concern about the records of disciplinary committees. That evidence should not be excluded from court.

409 MR. FLEISNNER stated he did not believe this bill went to records of the Board of Medical Examiners.

411 MR. COLLINS stated that it made references to committees or professional societies.

415 MR. FOLLIER stated that would not include the Board of Medical Examiners. The Board of Medical Examiners is an agency as opposed to a committee.

417 MR. FLEISSNER stated there is a difference between the Oregon Medical Association and the Board of Medical Examiners. It is not like the Bar Association.

433 HB 2656 - Relating to certain records

439 MOTION: REP. RUTHERFORD moved HB 2656 to the full committee without recommendation.

445 MOTION PASSED. Aye - Courtney, Lombard, Rutherford, Springer. Excused - Cohen, Mason.

446 HB 2678 - Relating to evidence

447 MOTION: REP. RUTHERFORD moved HB 2678 to the full committee without recommendation.

449 MOTION PASSED: Aye - Courtney, Lombard, Rutherford, Springer. Excused - Cohen, Mason.

455 HB 2030 - Relating to evidence

456 MR. GRIFFITH stated that Rule 602 (Exhibit ZZ, HB 2030) is a staff proposal.

The printed bill makes no reference to the fact that experts may testify using evidence which would not be admissible at trial because it is hearsay. Rule 703 should be referenced in Rule 602. It should include at the beginning "Subject to section 59 (Rule 703) of this Act,".

Tape 517
Side A

026 MR. GRIFFITH continued that the Advisory Committee included this language.

037 JUDGE UNIS stated that there is some duplication between 601 and 602. He saw no harm in it.

045 MOTION: REP. SPRINGER moved adoption of the language recommended by counsel.

061 MOTION PASSED: Aye - Cohen, Lombard, Rutherford, Springer. Excused - Courtney, Mason.

063 SB 600 - Relating to taxation

066 REP. RUTHERFORD noted that SB 600 was voted out of subcommittee without the amendments (Exhibit B, SB 600).

067 MOTION: REP. LOMBARD moved reconsideration of the vote by which SB 600 passed.

068 MOTION PASSED: Aye - Cohen, Lombard, Rutherford, Springer. Excused - Courtney, Mason.

089 GEORGE WEBER, Administrator, Audit Division, Department of Revenue, stated that the amendments (Exhibit B, SB 600) are to conform the inheritance and gift tax as well as the income tax.

The more significant provisions are on page 4, line 11. A civil penalty would be assessed if there was intentional failure to file a report or return with intent to evade the tax. The purpose is to reach flagrant cases.

The amendment on page 4, line 16, is to avoid unduly harsh penalties.

172 MOTION: REP. RUTHERFORD moved the amendments (Exhibit B, SB 600).

173 MOTION PASSED: There were no objections.

HOUSE COMMITTEE ON JUDICIARY

Subcommittee 1

July 6, 1981 1:30 p.m. 350 State Capitol

MEMBERS PRESENT: Rep. Tom Mason, Chairman
Rep. Joyce Cohen
Rep. Peter Courtney
Rep. Kip Lombard
Rep. Bill Rutherford
Rep. Dick Springer

STAFF: Stephen Griffith, Legal Counsel
Kristena LaMar, Legal Counsel, Senate Justice
Pearl Bare, Committee Assistant

MEASURE: HB 2030 - Relating to evidence

WITNESSES: The Honorable Richard L. Unis, Fourth Circuit
Jim McCandlish, Oregon Criminal Defense Lawyers Association
The Honorable Robert E. Jones, Fourth Circuit
Allison Smith, Oregon District Attorneys Association

TAPES: H-81-JUD-524, Sides A and B
H-81-JUD-525, Sides A and B
H-81-JUD-526, Side A

Tape 524
Side A

003 CHAIRPERSON MASON opened the work session.

004 HB 2030 - Relating to evidence

010 THE HONORABLE RICHARD L. UNIS, Circuit Court, Fourth Judicial District, presented the committee with his recommendations and explanations (Exhibit AAA, HB 2030) on the proposed code.

049 MOTION: CHAIRPERSON MASON moved adoption of the amendment to Rule 201(a) (Exhibit AAA, HB 2030) as suggested by Judge Unis.

054 MOTION PASSED: There were no objections.

075 MOTION: CHAIRPERSON MASON moved adoption of the amendment outlined by Judge Unis on pages 4 and 5 (Exhibit AAA, HB 2030).

076 MOTION PASSED: There were no objections.

082 MOTION: CHAIRPERSON MASON moved adoption of the amendment outlined by Judge Unis on page 6 (Exhibit AAA, HB 2030).

083 MOTION PASSED: There were no objections.

087 MOTION: CHAIRPERSON MASON moved adoption of the amendment outlined by Judge Unis on page 7 (Exhibit AAA, HB 2030).

088 MOTION PASSED: There were no objections.

093 MOTION: CHAIRPERSON MASON moved adoption of the amendment outlined by Judge Unis on page 8 (Exhibit AAA, HB 2030).

096 MOTION PASSED: There were no objections.

102 MOTION: CHAIRPERSON MASON moved adoption of the amendment outlined by Judge Unis on page 9 (Exhibit AAA, HB 2030).

103 MOTION PASSED: There were no objections.

118 MOTION: CHAIRPERSON MASON moved adoption of the amendment outlined by Judge Unis on pages 10 and 11 (Exhibit AAA, HB 2030).

120 MOTION PASSED: There were no objections.

137 MOTION: CHAIRPERSON MASON moved adoption of the proposed amendment on page 12 (Exhibit AAA, HB 2030).

140 MOTION PASSED: There were no objections.

145 JUDGE UNIS noted that page 13 (Exhibit AAA, HB 2030) should be omitted.

152 STEPHEN L. GRIFFITH, Legal Counsel, presented the committee with the rewrite of Article VI (Exhibit BBB, HB 2030).

162 MOTION: CHAIRPERSON MASON moved adoption of the proposed amendment on page 14 (Exhibit AAA, HB 2030).

162 MOTION PASSED: There were no objections.

180 MOTION: CHAIRPERSON MASON moved adoption of the amendment on pages 15 and 16 (Exhibit AAA, HB 2030).

182 MOTION PASSED: There were no objections.

203 MOTION: CHAIRPERSON MASON moved adoption of the amendment on page 18 (Exhibit AAA, HB 2030).

204 MOTION PASSED: There were no objections.

241 MOTION: CHAIRPERSON MASON moved adoption of the amendment on page 21 (Exhibit AAA, HB 2030).

243 MOTION PASSED: There were no objections.

260 MR. GRIFFITH presented the committee with proposed changes to ORE 702 commentary from the Oregon Criminal Defense Lawyer's Association (Exhibit CCC, HB 2030).

261 JIM McCANDLISH, representing the Oregon Criminal Defense Lawyer's Association (OCDLA), stated that he deferred to Judge Unis' proposal (Exhibit AAA, HB 2030, page 22).

268 MOTION: CHAIRPERSON MASON moved adoption of the amendment on page 22 (Exhibit AAA, HB 2030).

271 MOTION PASSED: There were no objections.

281 MOTION: CHAIRPERSON MASON moved adoption of the suggestion on page 23 (Exhibit AAA, HB 2030).

282 MOTION PASSED: There were no objections.

297 MOTION: CHAIRPERSON MASON moved adoption of the amendment on page 24 (Exhibit AAA, HB 2030).

298 MOTION PASSED: There were no objections.

320 MOTION: CHAIRPERSON MASON moved adoption of the amendment on page 25 (Exhibit AAA, HB 2030).

321 MOTION PASSED: There were no objections.

337 MOTION: CHAIRPERSON MASON moved adoption of the amendment on page 27 (Exhibit AAA, HB 2030).

339 MOTION PASSED: There were no objections.

348 MOTION: CHAIRPERSON MASON moved adoption of the amendment on page 28 (Exhibit AAA, HB 2030).

349 MOTION PASSED: There were no objections.

414 THE HONORABLE ROBERT E. JONES, Circuit Court, Fourth Judicial District, stated that he reviewed all the cases under the federal rules interpreting 803(8). All deal with evaluative reports. He did not think this would be relevant if the restricted view (Exhibit AAA, HB 2030, page 29) is taken.

416 MOTION: CHAIRPERSON MASON moved adoption of page 29 (Exhibit AAA, HB 2030).

423 MOTION PASSED: There were no objections.

431 MR. McCANDLISH stated that he saw some inconsistencies. The last sentence in Rule 104 is redundant. It is covered by Rule 101.

Tape 525
Side A

014 MR. GRIFFITH stated that it is redundant as to the rules of privilege. It is not rebundant when it says the rules of privilege do not apply otherwise.

035 MR. McCANDLISH stated that the example of heroin in Rule 309 is a bad example. It is a federal crime. He suggested using an example from Oregon case law.

He was concerned about the presumption situation in Vance.

121 MR. GRIFFITH stated that the committee could either take a position on the comment on a presumption as it becomes an inference in a criminal case or it could remain silent on the issue. If the committee takes a position, it can either authorize the comment upon a presumption as it becomes an inference in a criminal case or it can state that the substance of a presumption cannot be commented on because it is an inference.

131 JUDGE UNIS stated that it cannot be held unconstitutional under Oregon law because the courts have already held that the presumed fact (in Vance, the gun was loaded) was more likely than not related to the basic fact (the gun was within close range and pointed at the person). It would be allowed in Oregon since Oregon is a no comment state.

205 MR. GRIFFITH stated that the commentary does take a position on page 13 (Exhibit DDD, HB 2030).

216 MR. McCANDLISH asked that the commentary be redrafted to take no position and that it be left up to judicial determination.

224 JUDGE UNIS suggested that the language be left as it is. It is based upon U.S. Supreme Court decisions.

230 MR. McCANDLISH stated that practitioners would not understand that there is an issue that has not been resolved.

270 The committee decided to leave this as it was.

271 MR. McCANDLISH stated that page 18 of the commentary to Rule 504 (Exhibit EEE, HB 2030) says that there is no change in the law with respect to the psychiatrist privilege. It does not apply to criminal proceedings and he felt that should be reflected on that page of the commentary.

298 The committee agreed to that change.

308 MR. McCANDLISH suggested that Rule 504(4)(a) be deleted. The committee has deleted the rule that allows a judge to call his own experts. This does not add anything to that.

329 MR. GRIFFITH replied that no express authority was given for a judge to call his own experts, but there is inherent authority. Under Rule 504(4)(a) there is no privilege if the judge does call that kind of witness.

410 JUDGE JONES stated that the committee changed the interim recommendation on Rule 801 and the recommendation of the Advisory Committee. The committee adopted the recommendation of the Bar Association.

If the committee keeps this change, Rule 613 is not needed.

He suggested that committee either adopt Federal Rule 613 or delete Rule 613.

465 MOTION: REP. RUTHERFORD moved to delete Rule 613.

Tape 524
Side V

028 MOTION PASSED: There were no objections.

030 JUDGE JONES stated that on Rule 609, the committee should either go with the federal rule allowing any felony or to crimes involving false statements. It should stay away from dishonesty and false statements.

He stated that the other statutes that need to be picked up in the code can be taken care of on the Senate side.

155 The committee agreed to picking up the statutes on the Senate side.

198 ALLISON SMITH, representing the Oregon District Attorneys Association (ODAA), stated that Rule 802 commentary states that hearsay might be allowed by specific sections of ORS outside the Evidence Code. That does not allow for specific exception by case law. He suggested adding "or by case law."

He presented proposed amendments to Article XI (Exhibit FFF, HB 2030).

237 JUDGE JONES suggested adding a sentence in Rule 802 commentary saying that hearsay not objected to is admissible as subsequent evidence.

242 The committee agreed with Judge Jones' suggestion.

268 MR. GRIFFITH presented the committee with lists (Exhibit GGG, HB 2030) for Rule 609.

He reiterated the committee's decision on Rule 609 and went over the proposed commentary (Exhibit BBB, HB 2030).

The proposed lists (Exhibit GGG, HB 2030) or parts of them will be inserted on page 38 (Exhibit BBB, HB 2030).

The first two pages of the lists are crimes that involve deception or falsity.

Tape 525
Side B

He noted that the "f" and "m" meant "felony" and "misdemeanor".

The supplemental list is pages 3-6 (Exhibit GGG, HB 2030). The commentary for the supplemental list starts on page 39 (Exhibit BBB, HB 2030).

The rationale for supplemental list A is that the victim is incapable of consent. The rationale for supplemental list B is that the party communicating the information is deceived as to the privacy of the communications. Supplemental list C is there because in a high percentage of cases there is deception in the method of entering. The reason for supplemental list D is that a large percentage of the cases are committed by deception. He noted that the crimes underlined were just crimes of dishonesty.

The committee can either go with a list or with a category. A list should include either false statement or dishonesty and false statement, with any or all of the lists included.

The principal crimes left out are assaults and mal-and-prohibited crimes, such as consenting adults.

190 REP. SPRINGER stated the only thing he could see left out was misuse of a driver's license.

197 JUDGE UNIS stated that one consideration was the cost of trial no matter which rule the committee adopts. The effect of what the committee does might cause a very extensive hearing outside of the jury's hearing. It might also cause a lot more appeals.

215 MR. GRIFFITH stated that was a different issue. The committee could have an absolute rule by saying that things on the list are the only impeachable offenses and that the offerer of a witness cannot challenge them.

Convictions from other jurisdictions are addressed in the commentary on page 40 (Exhibit BBB, HB 2030).

253 REP. LOMBARD stated that he had no problem with the Advisory Committee proposal, which is based on the federal rule.

266 REP. SPRINGER agreed with Rep. Lombard.

285 REP. MASON stated that the federal rule had loopholes under felonies.

The proposed list is very inclusive.

334 MR. SMITH stated that there are still some things missing from the lists. One is transporting livestock without a certificate. There are also some cases where perjury is committed, that is not included, such as when Woodfield testified that he did not commit murder and the jury found that he did.

384 MR. GRIFFITH pointed out that the commentary addressed this by saying that crimes not on the list may be used for impeachment. It is a policy decision for the committee to make.

426 JUDGE UNIS stated that the problem would be much less if it were reduced to false statement misdemeanors and all felonies.

473 MOTION: CHAIRPERSON MASON moved to adopt the commentary and the lists presented, including adding misuse of a driver's license.

The list is not all inclusive and the commentary makes that evident.

Tape 526
Side A

This list is a coherent rationale behind impeachment and gets rid of some of the blatant injustices of impeachment.

038 REP. LOMBARD stated this was going to create a lot of testing and litigation for a while.

077 MOTION PASSED: Aye - Cohen, Courtney, Lombard, Rutherford, Springer, Mason.

080 CHAIRPERSON MASON adjourned the meeting at 3:40 p.m.

Submitted,

Pearl Bare

Pearl Bare
Committee Assistant

EXHIBITS

Exhibit AAA, HB 2030 - Proposals submitted by Judge Unis
Exhibit BBB, HB 2030 - Commentary submitted by staff
Exhibit CCC, HB 2030 - Proposed amendments from OCDLA presented by staff
Exhibit DDD, HB 2030 - Commentary submitted by staff
Exhibit EEE, HB 2030 - Commentary submitted by staff
Exhibit FFF, HB 2030 - Proposed amendments from ODAA submitted by Mr. Smith
Exhibit GGG, HB 2030 - Proposed lists to Rule 609 submitted by staff

HOUSE JUDICIARY COMMITTEE
HB 2030 - Exhibit A
January 22, 1981 - 3:15 p.m.
242-page exhibit
presented by staff

OREGON STATE ARCHIVES

Proposed –

OREGON EVIDENCE CODE

Report of the Legislative Interim Committee on the JUDICIARY

December, 1980 State Capitol – Salem

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December 1980

To: The Presiding Officers and Members of the Sixty-First Legislative Assembly

It is with pleasure that I forward for your consideration the Report of the Interim Joint Committee on the Judiciary entitled "Proposed Oregon Evidence Code." The proposed code reflects years of work by the Advisory Committee on Evidence Law Revision and months of work by the Judiciary Committee's Subcommittee on Evidence.

On behalf of the committee, I want to thank Judges Robert E. Jones and Richard L. Unis of the Multnomah County Circuit Court. The judges, both members of the Advisory Committee, spent many hours patiently explaining the provisions of the Advisory Committee's proposal.

I would also like to thank the staff in the Legislative Counsel office for their valuable assistance in producing this report; all those members of the public who helped the committee develop its proposed rules of evidence; and, of course, I want to thank the members of the committee for their diligent, patient and competent work.

Sincerely,

Vern Cook

Vern Cook
Chairperson

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TABLE SHOWING DISPOSITION

OF EXISTING STATUTES

Column (1) lists each section of the Oregon Revised Statutes which is either amended or repealed by the proposed Oregon Evidence Code. Column (2) shows whether the section is amended (A) or repealed (R). Column (3) shows, if the ORS section is amended, the proposed section which accomplishes the amendment; and if the ORS section is repealed, the proposed section which contains comparable provisions. An asterisk (*) in column (3) indicates that the repealed ORS section is not replaced.

(1)	(2)	(3)
41.020	R	3
41.030	R	*
41.040	R	*
41.050	R	71
41.060	R	71
41.070	R	*
41.080	R	*
41.090	R	*
41.100	R	*
41.120	R	*
41.130	R	*
41.140	R	*
41.150	R	*
41.210	R	14,16
41.220	R	21
41.230	R	21,22
41.240	R	14
41.250	R	*
41.260	R	*
41.270	A	86
41.280	R	*
41.310	R	*
41.320	R	*
41.330	R	*
41.340	R	17
41.350	R	*
41.360	R	20,69
41.410	R	7,8,13
41.420	R	13
41.430	R	13
41.440	R	13
41.450	R	13
41.460	R	13
41.470	R	13
41.480	R	13
41.610	R	72
41.640	R	72,73,74,75,76
41.650	R	*
41.670	R	64
41.680	R	64
41.690	R	64
41.700	R	64
41.710	R	64
41.720	R	73
41.730	R	73
41.810	R	28
41.820	R	*
41.830	R	65
41.840	R	64
41.850	R	65
41.860	R	65
41.870	R	65
41.880	A	6a
41.890	R	65
41.900	R	62,63,64,65,68
41.905	A	87
44.020	R	43
44.030	R	43
44.040	R	32,33,33a,33b, 33c,33d,34,35 37,39
44.050	R	48,49
44.060	R	44
44.070	R	*
44.095	R	47
44.310	R	45
44.330	R	45
44.340	R	45
44.350	R	45
44.360	R	45

Table Showing Disposition of Existing Statutes - cont.

(1)	(2)	(3)	(1)	(2)	(3)
45.510	R	55b	107.600	A	88
45.520	R	47	136.655	A	89
45.530	R	54b	162.055	A	90
45.540	R	54b	163.475	R	31
45.550	R	54b	165.845	A	91
45.560	R	54b	192.500	A	92
45.570	R	54b	336.185	A	93
45.580	R	55	418.750	A	94
45.590	R	51,52,53	418.775	A	95
45.600	R	51,52,53,64	675.010	A	96
45.610	A	55a	722.422	A	97
45.630	R	55	ORCP 59C	A	97a

INTRODUCTION

In 1974 an Advisory Committee on Evidence Law Revision was appointed to undertake a comprehensive study of Oregon's evidence law. The result of its work, a proposed Oregon Evidence Code, was presented to the Interim Judiciary Committee in September, 1979. The Judiciary Committee's Subcommittee on Evidence then began its review of the Advisory Committee's proposal. This report presents the proposed Evidence Code as adopted by the Interim Judiciary Committee to be presented to the Sixty-first Legislative Assembly.

The Advisory Committee's proposed rules and the commentary to them form the basis of this report and they are reprinted in their entirety. In those cases in which the Judiciary Committee amended, deleted or added rules, there is a section entitled "Judiciary Committee Commentary". That section is usually followed by the original Advisory Committee proposal. When the Judiciary Committee adopted an Advisory Committee proposal without change, it also adopted the commentary. When the Judiciary Committee changed an Advisory Committee proposal, it nevertheless adopted those parts of the Advisory Committee commentary still relevant.

The numbering of the proposed rules is designed to parallel the numbering of the Federal Rules of Evidence if the rules deal with the same subject. Thus, proposed rule 401 (Section 21) is a definition of "relevant evidence", as is Federal Rule 401. The internal numbering, however, differs from that of the Federal Rules. It was changed to conform to the style used in the Oregon Revised Statutes. The proposed rule that corresponds to Federal Rule 801 (d)(1)(A), for example, is 801 (4)(a)(A).

In recommending the proposed Oregon Evidence Code to the Legislature, the Judiciary Committee would like to acknowledge the invaluable assistance of the Advisory Committee. Its work product was the Judiciary Committee's starting point; its members were the Judiciary Committee's guides.

The proposed Oregon Evidence Code is contained in HB 2030, 1981 Session.

ARTICLE I. GENERAL PROVISIONS

SECTION 1. Rule 100. Short title. Sections 1 to 78 (Rules 100 to 1008) of this Act shall be known and may be cited as the Oregon Evidence Code.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on Rule 1103 of the Federal Rules of Evidence.

SECTION 2. Rule 101. Applicability of Oregon Evidence Code. (1) Courts. The Oregon Evidence Code applies to all courts in this state in all actions, suits and proceedings, except for:

(a) The small claims division of the Oregon Tax Court as provided by ORS 305.545;

(b) The small claims division of a district court as provided by ORS 46.415; and

(c) The small claims department of a justice's court as provided by ORS 55.080.

(2) Proceedings generally. The Oregon Evidence Code applies generally to civil actions, suits and proceedings, criminal actions and proceedings and to contempt proceedings except those in which the court may act summarily.

(3) Rules of privilege. Sections 32 to 41 (Rules 503 to 513) of this Act relating to privileges apply at all stages of all actions, suits and proceedings.

(4) Rules inapplicable. Sections 1 to 31 (Rules 100 to 412) and sections 42 to 78 (Rules 514 to 1008) of this Act do not apply in the following situations:

(a) The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under section 5 (Rule 104) of this Act.

(b) Proceedings before grand juries, except as required by ORS 132.320.

(c) Proceedings for extradition.

(d) Sentencing.

(e) Granting or revoking probation.

(f) Issuance of warrants of arrest, bench warrants or search warrants.

(g) Proceedings under ORS chapter 135 relating to conditional release, security release or release on personal recognizance.

(h) Proceedings to determine proper disposition of a child in accordance with ORS 419.500 (2).

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee deleted the Advisory Committee's blanket exemption of juvenile courts from courts to which the Oregon Evidence Code applies. The committee believes the Code should apply in the adjudication phase of a juvenile court proceeding, whether for delinquency or dependency. However, the committee added paragraph (h) to subsection (4) of section 2 (Rule 101) to make it clear that during the dispositional phase of a juvenile court proceeding, evidence may be admitted in accordance with subsection (2) of ORS 419.500.

The committee also intends that paragraph (d) of subsection (4) of section 2 (Rule 101), which exempts sentencing proceedings from most of the rules of evidence, not be construed to change the holding of State v. Collins 43 Or App 265 (1979). See also. State v. Brown 44 Or App 597 (1980).

ADVISORY COMMITTEE PROPOSAL

SECTION 2. Rule 101. Applicability of Oregon Evidence Code. (1) Courts. The Oregon Evidence Code applies to all courts in this state in all actions, suits and proceedings, except for:

(a) The small claims division of the Tax Court as provided by ORS 305.545;

(b) The small claims division of a district court as provided by ORS 46.415;

(c) The small claims department of a justice's court as provided by ORS 55.080; and

(d) The juvenile departments of county and circuit courts as provided by ORS 419.500.

(2) Proceedings generally. The Oregon Evidence Code applies generally to civil actions, suits and proceedings, criminal actions and proceedings and to contempt proceedings except those in which the court may act summarily.

(3) Rules of privilege. Sections 32 to 41 (Rules 503 to 513) of this Act relating to privileges apply at all stages of all actions, suits and proceedings.

(4) Rules inapplicable. Sections 1 to 31 (Rules 100 to 412) and sections 42 to 78 (Rules 514 to 1008) of this Act do not apply in the following situations:

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(b) Proceedings before grand juries, except as required by ORS 132.320.

(c) Proceedings for extradition.

(d) Sentencing.

(e) Granting or revoking probation.

(f) Issuance of warrants of arrest, bench warrants or search warrants.

(g) Proceedings under ORS chapter 135 relating to conditional release, security release or release on personal recognizance.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on Rule 101 and Rule 1101 of the Federal Rules of Evidence. Federal Rule 101 declares that the Federal Rules of Evidence apply in federal courts and before federal magistrates. Similarly, this section provides that the rules of evidence created by this Act apply in all courts in the State of Oregon unless there is an exception stated in this Act. Federal Rule 1101 is a separate rule providing for the application of exceptions to the scope of the Federal Rules of Evidence. The exceptions to the applicability of the Oregon Evidence Code are less complex and have been placed in this section to provide clearer organization and easier understanding.

B. Summary

This section describes the courts and the types of proceedings therein to which the Oregon Evidence Code applies.

C. Relationship to Existing Law

Subsection (1). The rules of evidence proposed by this Act generally apply to all the courts of Oregon. Indeed, it would be correct to assert that the courts over which the Supreme Court has general administrative and supervisory authority under ORS 1.002 are those courts to which these rules of evidence apply.

However, it is not intended that current statutes providing for certain divisions or departments of those courts to conduct proceedings without regard to the technical rules of evidence be repealed, or even limited in their effect.

Thus, the small claims division of a district court under ORS 46.415, the small claims division of the Tax Court under ORS 305.545 and the small claims department of a justice's court under ORS 55.080 may continue to conduct the informal hearings and disposition of actions provided for by those statutes.

Similarly, the juvenile departments of county and circuit courts under ORS 419.500 may continue to receive as evidence certain materials relating to the child's mental, physical and social history and prognosis without regard to their competency or relevancy under the rules of evidence.

Currently, the rules of evidence, except for the rules of privilege, do not apply to administrative agencies in contested cases. ORS 183.450. Nothing in this Act should be construed to alter the present Oregon practice under the administrative procedure statutes.

Subsection (2). This subsection restates the general principle that, except as otherwise provided, the rules of evidence apply to all actions, suits and proceedings conducted in a court of justice. Contempt is punishable summarily when committed in the immediate view and presence of the court. ORS 33.030. The circumstances which preclude application of the rules of evidence in this situation are not present, however, in other cases of criminal contempt. This provision is subject to the qualifications expressed in the subsections which follow.

Subsection (3). This subsection is made necessary by the limited applicability of the remaining sections of this Act. Because sections 32 to 41 (Rules 503 to 513) relating to privileges, contain internal exceptions to particular privileges, and recognize other exceptions created under current statutes, it is recognized that a particular privilege may not apply in a given proceeding.

Subsection (4). This subsection is not intended as an expression of when due process or other constitutional provisions may require an evidentiary hearing.

Paragraph (a) restates, for convenience, the provisions of the second sentence of subsection (1) of section 5 (Rule 104) of this Act.

Paragraph (b). Although ORS 132.320 declares that a grand jury shall not receive evidence other than such as might be given on the trial of the person charged with the crime in question, State v. McDonald, 231 Or 24, 361 P2d 1001 (1961), held that the section was admonitory only, and the fact that a grand jury may have been prejudiced by hearsay evidence was not grounds for dismissing or quashing an indictment. The paragraph does not deal with the evidence required to support an indictment.

Paragraph (c). Extradition proceedings are governed in detail by statute. ORS 133.743 to 133.857. Since they are essentially administrative in character, and since the question of the guilt or innocence of the accused is not at issue, application of the formal rules of evidence would be inappropriate and impracticable.

Paragraphs (d) and (e). The rules of evidence have not been regarded as applicable to sentencing or probation proceedings, where great reliance is placed upon the presentence investigation and report. Under ORS chapter 137, a judge has broad discretion as to the sources and types of information relied upon when sentencing or passing on probation. Coffman v. Gladden, 229 Or 99, 366 P2d 171 (1961), holds that unsworn statements may be received by the trial court in considering sentence. State v. Scott, 237 Or 390, 390 P2d 328 (1964), holds that hearsay evidence is admissible in the sentencing procedure, at least insofar as it may be included in a presentence report. The Court of Appeals, however, in State v. McKinney, 7 Or App 248, 489 P2d 976 (1971), declared that the question whether witnesses called at a sentence hearing are restricted to giving testimony subject to the rules of evidence is still open. Since an investigator can put the hearsay evidence in a presentence report, it seems pointless to prevent a witness under oath from saying the same thing to the court. However, it can be argued that a trained probation officer may be able to eliminate untrustworthy hearsay and bring to the court's attention only that part of hearsay which has reliability and value for its legitimate uses. The Advisory Committee considers judges capable of determining the reliability of hearsay evidence, and agrees that it is pointless to assign different values to the same hearsay depending upon the manner in which it's presented to the court.

Paragraph (f). Warrants of arrest and search warrants are issued upon complaint or affidavit showing probable cause. ORS 133.110, 133.545 and 133.555. The nature of the proceedings makes application of the rules of evidence inappropriate and impracticable.

Paragraph (g). Proceedings under ORS chapter 135 relating to conditional release, security release or release on personal recognizance do not call for application of the rules of evidence.

Unlike Federal Rule 1101, subsection (4) of this section does not except preliminary examinations in criminal cases. Although a preliminary examination before a magistrate is not a criminal prosecution or judicial trial of the accused, but only a judicial inquiry to determine whether there is probable cause to believe that a crime has been committed and that the defendant committed it, it is a formal judicial proceeding that must be held in accordance with the procedures established by law. ORS 135.070 to 135.225 are silent as to the applicability of the rules of evidence in a prelimianry hearing, but grant the accused an array of procedural protections, including the right to counsel, the right to subpoena witnesses, the right to cross-examine witnesses and the right to make or waive the making of a statement. The Advisory Committee believes that making the rules of evidence proposed by this Act applicable to preliminary hearings is in agreement with the spirit and intent of those statutes. If, for example, hearsay testimony is admitted at a preliminary hearing, the accused's right under ORS 135.090 to cross-examine adverse witnesses is denied. In addition, the Advisory Committee believes that application of the rules of evidence in preliminary hearings is the general Oregon practice currently, and the Advisory Committee desires to continue that practice.

SECTION 3. Rule 102. Purpose and construction. The Oregon Evidence Code shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 102 of the Federal Rules of Evidence except for the substitution of "The Oregon Evidence Code" for the words "These rules". For similar provisions, see the California Evidence Code, section 2, and New Jersey Evidence Rule 5.

B. Summary

This section declares the purpose and the proper approach to the construction of sections 1 to 78 (Rules 100 to 1008) of this Act.

C. Relationship to Existing Law

This section replaces ORS 41.020 (1979 Replacement Part), a more general description of the law of evidence.

SECTION 4. Rule 103. Rulings on evidence. (1) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

(a) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(b) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(2) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon. It may direct the making of an offer in question and answer form.

(3) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(4) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 103 of the Federal Rules of Evidence.

B. Summary

Under subsection (1), rulings on evidence cannot be assigned as error unless a substantial right is affected, and the nature of the error was called to the attention of the trial judge so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures. The objection and offer of proof are the techniques for accomplishing these objectives.

Under subsection (2), a true and complete record of what occurred in the trial court must be reproduced for the appellate court. The second sentence is designed to resolve doubts as to what testimony the witness would have in fact given, and, in nonjury cases, to provide the appellate court with material for a possible final disposition of the case in the event of a reversal of a ruling which excluded evidence. The subsection is couched in discretionary language because of the practical impossibility of formulating a satisfactory rule in mandatory terms.

Under subsection (3), excluded evidence in a jury case must, to the extent practicable, be prevented from coming to the attention of the jury. For example, questions on which an offer of proof is based should not be asked in the presence of the jury.

Under subsection (4), the Advisory Committee reaffirms the plain error principle that courts should not be bound by breakdowns of the adversary system. Subsection (4) is an exception to subsection (1) of this section, particularly with regard to a ruling admitting evidence when no timely objection or motion to strike appears in the record.

C. Relationship to Existing Law

The Advisory Committee, by its adoption of this section, does not intend to change current Oregon practice with regard to rulings on evidence. By necessary

implication from the language used, subsection (1) does not change the law in Oregon with respect to harmless error. Section 3, Article VII (Amended), Oregon Constitution, allows the appellate courts of this state to affirm the judgment of a lower court, notwithstanding any error committed by the trial court, if the error is either so technical in nature or so unsubstantial that as a practical matter there is little, if any, likelihood that the erroneous evidence affected the verdict. State v. Van Hooser, 11 Or App 146, 501 P2d 78 (1972).

Subsection (1) of the section is also in accord with current Oregon statutes ORS 19.125 and 131.035. Under these statutes, a ruling of a trial court, in order to warrant reversal, must be not only erroneous, but also prejudicial. Edwards, Guardian v. Hovet, 185 Or 284, 200 P2d 955 (1949); Kuffel v. Reiser, 268 Or 152, 519 P2d 365 (1974).

However, the Oregon Supreme Court has enunciated the rule that in appeals in civil cases erroneously admitted evidence is deemed prejudicial unless the contrary is affirmatively shown. Meyer v. Harvey Aluminum, 263 Or 487, 495, 501 P2d 795 (1972); Elam v. Soares, 282 Or 93, 193, 577 P2d 1336 (1978). The Advisory Committee believes that subsection (1) of this section does not affect that rule or the authority of the appellate courts in this state to determine whether error in the trial of a civil case is prejudicial or not. Paragraph (a) of the subsection restates the rule in Oregon that if counsel would avail himself on appeal of an error of the trial court, he must advise the judge of his position by some offer, objection, motion or other appropriate action, in order that the trial court may avoid the error. Frangos v. Edmunds, 179 Or 577, 173 P2d 596 (1946). Similarly, paragraph (b) of the subsection maintains the requirement that an offer of proof must ordinarily follow a ruling excluding evidence before a ground for reversal is presented. O'Brien v. Dunigan, 187 Or 227, 210 P2d 567 (1949). Paragraph (b) is also consistent with the current requirement that in making an offer of proof, it is requisite that counsel should be distinct and clear; that the tender should embody the specific fact or facts in such connection and in such terms as to be apprehended and ruled upon in the intended sense by the trial judge, and be examined and applied by the reviewing court in proper light to test the accuracy of the ruling if adverse. Downey v. Traveler's Inn, 243 Or 206, 412 P2d 359 (1966).

Subsection (3) of the section is not inconsistent with the holding in State v. Jordan, 146 Or 504, 26 P2d 558 (1933), affirmed 146 Or 504, 30 P2d 751, that doubtful questions of evidence or procedure should not be proposed or discussed in the jury's presence, and that the court should exclude the jury while hearing preliminary testimony in the question of admissibility of evidence generally or documentary evidence.

Subsection (4) does not change the Oregon rule that a question not raised and preserved in the trial court will not be considered upon appeal unless, upon examination of the entire record, the reviewing court finds that the error is manifest and that the ends of justice will not otherwise be satisfied. State v. Hickmann, 21 Or App 303, 540 P2d 1406 (1975).

SECTION 5. Rule 104. Preliminary questions. (1) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (2) of this section. In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(2) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(3) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.

(4) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(5) Weight and credibility. This section does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 104 of the Federal Rules of Evidence except that "subsection (2) of this section" is substituted for "subdivision (b)" to comply with Oregon's statutory drafting style.

B. Summary

Since the applicability of a particular rule of evidence often depends upon the existence of a condition, under subsection (1) of this section, the trial judge is given the responsibility for making certain preliminary determinations. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? In each instance, the admissibility of evidence will turn upon the answer to the question.

To the extent that these inquiries are factual, the judge acts as a trier of fact. Often, however, rulings on evidence call for an evaluation in terms of a legally set standard. Thus, when a hearsay statement is offered as a declaration against interest, a decision must be made whether it possesses the required against-interest characteristics. These decisions, too, are made by the judge.

Subsection (1) is of general application. It must, however, be read as subject to subsections (2) and (3) of this section.

If a preliminary question is factual in nature, the judge will of necessity receive evidence on the issue. The subsection provides that the rules of evidence in general do not apply to this process.

Subsection (2) recognizes that in some situations, the relevancy of an item of evidence depends upon the existence of a particular preliminary fact. Thus, when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. If a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labeled "conditional relevancy." Morgan, Basic Problems of Evidence 45-46 (1962). Problems arising in

connection with it are to be distinguished from problems of logical relevancy treated under section 21 (Rule 401) of this Act.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subsection (1), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that treatment generally given questions of fact. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for the jury. If the evidence is not such as to allow a finding, the judge withdraws the matter from the jury's consideration.

Under subsection (3), preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. Otherwise, detailed treatment of when preliminary matters should be heard outside the hearing of the jury must be left to the discretion of trial judges who will act as the interests of justice require. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect.

When an accused is a witness as to a preliminary matter, he has the right, upon his request, to be heard outside the jury's presence. The Advisory Committee agreed that a proper regard for the right of an accused not to testify generally in the case dictates that he be given an option to testify out of the presence of the jury on preliminary matters.

Under subsection (4), a limitation upon cross-examination is imposed to encourage participation by the accused in the determination of preliminary matters. He may testify concerning them without exposing himself to cross-examination generally. This subsection is necessary because of the scope of cross-examination possible under ORS 45.570. The subsection does not address itself to questions of the subsequent use of testimony given by an accused at hearing on a preliminary matter.

Subsection (5) declares that nothing contained in the first four subsections of this section should be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

C. Relationship to Existing Law

The Advisory Committee believes that adoption of section 5 (Rule 104) of this Act will not change prevailing Oregon law relating to preliminary questions of admissibility. Subsection (1) is consistent with ORCP 59B and ORS 136.310 which provide that the court shall decide "all questions of law, including the admissibility of testimony, [and] the facts preliminary to such admission. . ." Subsection (2) is consistent with the holding of Menefee v. Blitz, 181 Or 100, 179 P2d 550 (1947), which declared that when admissibility of an item of evidence is dependent upon the submission of preliminary proof in the form of a foundation or condition precedent, the party who offers the dependent testimony must submit the preliminary proof or establish the condition precedent before the dependent fact can be deemed admissible. Subsection (3) is in accord with State v. Jordan,

146 Or 504, 26 P2d 558 (1934) and State v. Brewton, 238 Or 590, 395 P2d 874 (1964). Under those cases, preliminary inquiries as to the admissibility of a confession should be held out of the presence of the jury. Subsection (5) is consistent with section 6, Article I, Oregon Constitution, subsection (16) of ORS 41.900 (1979 Replacement Part) and the holding in State v. Estabrook, 162 Or 476, 91 P2d 838 (1939). Although the Advisory Committee proposes the repeal of ORS 41.900, it retains the substantive legal principles of the section in the several proposed sections of this Act.

SECTION 6. Rule 105. Limited admissibility. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 105 of the Federal Rules of Evidence.

B. Summary

This section permits the admission of evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under section 23 (Rule 403) of this Act. The Advisory Committee does not intend to imply that limiting or curative instructions are sufficient in all situations, or that it limits the authority of a court to order a severance in a multidefendant case.

C. Relationship to Existing Law

This section is consistent with current Oregon Practice. See State v. Moore, 180 Or 502, 176 P2d 631 (1947); Brooks v. Bergholm, 265 Or 1, 470 P2d 154 (1970); Cramer v. Mengerhausen, 275 Or 223, 550 P2d 740 (1976).

Section 6a. ORS 41.880 is amended to read:

41.880. Rule 106. When part of transaction proved, whole admissible. When part of an act, declaration, conversation or writing is given in evidence by one party, the whole, on the same subject, may at that time be inquired into by the other; when a letter is read, the answer may at that time be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation[,] or writing which is necessary to make it understood may at that time also be given in evidence.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee amended ORS 41.880 to make it clear that when part of a transaction is admitted into evidence, the rest of it may be admitted either contemporaneously or later. This does not affect the judge's control over the order of presenting evidence. See, section 54b (Rule 611).

A. Derivation

This section is ORS 41.880.

Rule 106 of the Federal Rules of Evidence is deleted from the proposal adopted by the Advisory Committee on Evidence Law Revision.

Federal Rule 106, when a writing or recorded statement is introduced by a party, allows the other party to demand the introduction of any part or any other writing which ought in fairness to be considered contemporaneously with it.

In the absence of a clear need for change in this area of the law, the Advisory Committee retains ORS 41.880 (1979 Replacement Part) as Rule 106 of the Oregon Evidence Code, relating to the same general subject matter, but somewhat broader in scope.

Federal Rule 106 reads as follows:

Rule 106.
REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

ARTICLE II. JUDICIAL NOTICE

SECTION 7. Rule 201(a). Scope. Sections 7 to 13 (Rules 201 and 202) of this Act govern judicial notice of adjudicative facts and law.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is similar to Rule 201(a) of the Federal Rules of Evidence. However, Federal Rule 201(a) declares that Federal Rule 201 governs only judicial notice of adjudicative facts, while this section makes it clear that Article II of this Act governs both judicial notice of adjudicative facts and judicial notice of law.

The subdivisions of Federal Rule 201 are separated into several sections in this Act to provide for easier understanding and clearer organization.

B. Summary

This section provides that this Article shall include judicial notice of both facts and law. Although this Article broadly recognizes that judicial notice may be taken of all types of law, the kinds of facts governed by this Article are limited to adjudicative, rather than legislative facts. The limitation to adjudicative facts is in conformity with Rule 201(a) of the Federal Rules of Evidence. With regard to the reasons for limiting judicial notice of facts to adjudicative facts, the Advisory Committee adopts the commentary following Rule 201 of the Federal Rules of Evidence. Fed. Rules of Evid. Pamph., 11-13 (West Publishing Co. 1975).

The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. The terminology was coined by Professor Kenneth Davis in his article An Approach to Problems of Evidence in the Administrative Process, 55 Harv L Rev 364, 404-407 (1942). The following discussion draws extensively upon his writings. In addition, see the same author's Judicial Notice, 55 Colum L Rev 945 (1955); Administrative Law Treatise, ch. 15 (1958); A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69 (1964).

The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside the area of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite.

Legislative facts are quite different. As Professor Davis says:

"My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are 'Clearly . . . within the domain of the indisputable.' Facts most needed in thinking about difficult

problems of law and policy have a way of being outside the domain of the clearly indisputable." A System of Judicial Notice Based on Fairness and Convenience, supra, at 82.

An illustration is Hawkins v. United States, 358 US 74, 79 SCt 136, 3 LEd 2d 125 (1958), in which the Court refused to discard the common law rule that one spouse could not testify against the other, saying, "Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage." This conclusion has a large intermixture of fact, but the factual aspect is scarcely "indisputable." See Hutchins and Slesinger, Some Observations on the Law of Evidence--Family Relations, 13 Minn L Rev 675 (1929). If the destructive effect of the giving of adverse testimony by a spouse is not indisputable, should the Court have refrained from considering it in the absence of supporting evidence?

"If the Model Code or the Uniform Rules had been applicable, the Court would have been barred from thinking about the essential factual ingredient of the problems before it, and such a result would be obviously intolerable. What the law needs at its growing points is more, not less, judicial thinking about the factual ingredients of problems of what the law ought to be, and the needed facts are seldom 'clearly' indisputable." Davis, supra, at 83.

Professor Morgan gave the following description of the methodology of determining domestic law:

"In determining the content of applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. . . [T]he parties do no more than to assist; they control no part of the process." Morgan, Judicial Notice, 47 Harv L Rev 269, 270-271 (1944).

This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations. See Borden's Farm Products Co. v. Baldwin, 293 US 194, 55 SCt 187, 79 LEd 281 (1934), where the cause was remanded for the taking of evidence as to the economic conditions and trade practices underlying the New York Milk Control Law.

Similar considerations govern the judicial use of nonadjudicative facts in ways other than formulating laws and rules. Thayer described them as a part of the judicial reasoning process.

"In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit." Thayer, Preliminary Treatise on Evidence 279-280 (1898).

As Professor Davis points out, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 73 (1964), every case involves the use of hundreds or thousands of nonevidence facts. When a witness in an automobile accident case says "car," everyone, judge and jury included,

furnishes, from nonevidence sources within himself, the supplementing information that the "car" is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate Cogito, ergo sum. These items could not possibly be introduced into evidence, and no one suggests that they be. Nor are they appropriate subjects for any formalized treatment of judicial notice of facts. See Levin and Levy, Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum, 105 U Pa L Rev 139 (1956).

Another aspect of what Thayer had in mind is the use of nonevidence facts to appraise or assess the adjudicative facts of the case. Pairs of cases from two jurisdictions illustrate this use and also the difference between non-evidence facts thus used and adjudicative facts. In People v. Strook, 347 Ill 460, 179 NE 821 (1932), venue in Cook County had been held not established by testimony that the crime was committed at 7956 South Chicago Avenue, since judicial notice would not be taken that the address was in Chicago. However, the same court subsequently ruled that venue in Cook County was established by testimony that a crime occurred at 8900 South Anthony Avenue, since notice would be taken of the common practice of omitting the name of the city when speaking of local addresses, and the witness was testifying in Chicago. People v. Pride, 16 Ill 2d 82, 156 NE 2d 551 (1951). And in Hughes v. Vestal, 264 NC 500, 142 SE 2d 361 (1965), the Supreme Court of North Carolina disapproved the trial judge's admission in evidence of a state-published table of automobile stopping distances on the basis of judicial notice, though the court itself had referred to the same table in an earlier case in a "rhetorical and illustrative" way in determining that the defendant could not have stopped her car in time to avoid striking a child who suddenly appeared in the highway and that a nonsuit was properly granted. Ennis v. Dupree, 262 NC 224, 136 SE 2d 702 (1964). See also Brown v. Hale, 263 NC 176, 139 SE 2d 210 (1964); Clayton v. Rimmer, 262 NC 302, 136 SE 2d 562 (1964). It is apparent that this use of nonevidence facts in evaluating the adjudicative facts of the case is not an appropriate subject for a formalized judicial notice treatment.

In view of these considerations, the regulation of judicial notice of facts by the present rule extends only to adjudicative facts.

What, then, are "adjudicative" facts? Davis refers to them as those "which relate to the parties," or more fully:

> *When a court or an agency finds facts concerning the immediate parties--who did what, where, when how, and with what motive or intent--the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. . . .*
>
> *Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses. 2 Administrative Law Treatise 353.*

C. Relationship to Existing Law

This section, by itself, works no change in Oregon law because Oregon statutes currently provide for both judicial notice of facts, ORS 41.410 (1979 Replacement Part), and judicial notice of law, ORS 41.420 to 41.480 (1979 Replacement Part) and ORS 221.710.

SECTION 8. Rule 201(b). Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

(1) Generally known within the territorial jurisdiction of the trial court; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 201 (b) of the Federal Rules of Evidence.

B. Summary

This section provides that a court may only take judicial notice of facts which are not subject to reasonable dispute. The rule is identical to the Federal Rules of Evidence, Rule 201 (b). The Advisory Committee adopted a standard of indisputability because judicial proceedings are adversary in nature; traditional methods of proof, including rebuttal evidence, cross-examination and argument, should only be dispensed with in clear cases.

As Professor Davis says:

> *The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention. A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69,93 (1964).*

Section 8 [Rule 201(b)] of this Act is consistent with the Uniform Rules of Evidence and the California Evidence Code. However, this section eliminates the phrase "propositions of generalized knowledge" which is found in the Uniform Rules [9 (1) and 9 (2)] and in the California Evidence Code [sec. 451 (f)]. Believing that the phrase in the Uniform Rules was designed to give judges more leeway in judicially noticing legislative facts, the Advisory Committee concluded that it was inapplicable given the limitation of this Article to adjudicative facts. Furthermore, based on the assumption that in modern practice judges do not instruct the jury on propositions of generalized knowledge, the phrase was deleted from this section.

C. Relationship to Existing Law

This section differs from Oregon's present statutory scheme in its attempt to provide broad guidelines for the court in judicially noticing facts, rather than

enumerating specific categories of facts subject to judicial notice, as in ORS 41.410 (1979 Replacement Part). Because Oregon courts have not in the past bound themselves by noticing only those matters set out in ORS 41.410 (1979 Replacement Part), the new guidelines, although broad, do not change Oregon law. E.g. Oregon v. Miles 8 Or App 189, 492 P2d 497 (1972); Smith v. Portland Traction Co., 226 Or 221, 359 P2d 899 (1961); Croft v. Lambert, 228 Or 76, 357 P2d 513 (1961); Brown v. Gessler, 191 Or 503, 230 P2d 541 (1951).

SECTION 9. Rules 201(c) and 201(d). When mandatory or discretionary. (1) A court may take judicial notice, whether requested or not.

(2) A court shall take judicial notice if requested by a party and supplied with the necessary information.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

Subsections (1) and (2) of this section are identical to Rules 201 (c) and 201 (d) of the Federal Rules of Evidence, respectively.

B. Summary

Under this section, the judge has discretionary authority to take judicial notice of the matters described, regardless of whether he is so requested by a party. The taking of judicial notice is mandatory under this section only when a party requests it and the necessary information is supplied. The drafters of the Federal Rules of Evidence recommended the rule because it is simple, workable and avoids troublesome distinctions in the many situations in which the process of taking judicial notice is not recognized as such.

The Advisory Committee recognized the value of including provisions for the mandatory taking of judicial notice. First, a party who is planning to use judicial notice as a substitute for proof on a matter may better plan his case if he is assured that judicial notice will be taken when requested and when the necessary information is supplied. Second, the mandatory requirement provides a basis for appeal if these two prerequisites are met and the court fails to take judicial notice of a matter.

C. Relationship to Existing Law

Although former Oregon statutes do not provide any procedural requirements for the taking of judicial notice, Oregon case law has established that the duty is upon the counsel requesting judicial notice to bring the knowledge of the established fact before the courts. Unless this is done, a court may refuse to take judicial notice of a fact. Stites v. Morgan, 229 Or 116, 366 P2d 324 (1961). The present rule extends this requirement by providing that judicial notice of a matter shall be mandatory only if a party requests that notice be taken and supplies the necessary information to the court. Unless these requirements are satisfied, judicial notice of a matter is merely discretionary.

SECTION 10. Rule 201(e). Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 201 (e) of the Federal Rules of Evidence.

B. Summary

Under this section, an opportunity to be heard as to the propriety of taking judicial notice will be granted upon request. No formal scheme of giving notice is provided.

The Advisory Committee on the Federal Rules of Evidence noted in their comment to Rule 201 (e) that:

Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. . . An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subsection (d) [subsection (2) of section 9 of this Act] that judicial notice be taken, or through an advance indication by the judge. Or he may have no advance notice at all. The likelihood of the latter is enhanced by the frequent failure to recognize judicial notice as such. And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely.

C. Relationship to Existing Law

There is no comparable rule in Oregon law, statutory or judicial.

SECTION 11. Rule 201(f). Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 201 (f) of the Federal Rules of Evidence.

B. Summary

In accord with Rule 201(f) of the Federal Rules of Evidence, Uniform Rule 12 and California Evidence Code section 459, this section provides that judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal.

However, it should be noted that at least one federal appellate court, in an appeal involving a conviction for illegal interception of telephone

conversations, refused to take judicial notice of the fact that South Central Bell Telephone Company was a common carrier as defined in a federal criminal statute. Evidence at the trial showed only that the tapped telephone was furnished by South Central Bell. Other than that fact, the government offered no evidence to show that the telephone company was a "person engaged as a common carrier."

In refusing to take judicial notice, the court reasoned that "as enacted by Congress, Rule 201(g) of the Federal Rules of Evidence plainly contemplates that the jury in a criminal case shall pass upon facts which are judicially noticed. This it could not do if this notice were taken for the first time after it had been discharged and the case was on appeal. We, therefore, hold that Rule 201(f), authorizing judicial notice at the appellate level, must yield in the face of the express congressional intent manifested in [Rule] 201(g) for criminal jury trials." United States v. Jones, 580 F2d 219, 221 (6th Cir., 1978).

C. Relationship to Existing Law

This section clarifies existing case law, which is in conflict as to whether an appellate court may assume the existence of a fact not brought to the attention of the trial court. See State v. Jacobs, 11 Or App 218, 501 P2d 353 (1972); Kepl v. Manzanita Corp., 246 Or 170, 424 P2d 674 (1967); State v. Jones, 240 Or 129, 400 P2d 524 (1965); Stites v. Morgan, 229 Or 116, 366 P2d 324 (1961); Board of Medical Examiners v. Buch, 192 Or 66, 232 P2d 791 (1951); Webb v. Clatsop County School District No. 3, 188 Or 324, 215 P2d 368 (1950).

SECTION 12. Rule 201(g) Instructing the jury. (1) In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact or law judically noticed.

(2) In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 201 (g) of the Federal Rules of Evidence.

B. Summary

Subsection (1) of this section provides that in civil cases the judge shall instruct the jury to regard judicially noticed facts and laws as established; there is to be no contradictory evidence before the jury. The rule is consistent with the standard of indisputability required by section 9 (Rule 201(b)) of this Act. Any standard of disputability, whereby the jury is permitted to hear evidence contradicting the judicially noticed fact, would defeat the function of judicial notice as a means of expediting proof of certain matters. Furthermore, ample procedural protections and flexibility are afforded by the broad provision for opportunity to be heard upon request. See section 10 (Rule 201(e)) of this Act.

In criminal cases, on the other hand, the jury is not required to accept as conclusive any fact judicially noticed. Here constitutional considerations

outweigh the need to expedite proof of certain matters, and thus the jury should be permitted to hear evidence in disproof of the fact judicially noticed. A mandatory instruction to a jury on a fact judicially noticed effectively removes the issue from the jury's consideration. Therefore, judicial notice of an element of the prosecution's prima facie case would be contrary to the spirit of the Sixth Amendment providing for the right to a jury trial. For example, in State v. Lawrence, 120 Utah 323, 234 P2d 600 (1951), the lower court took judicial notice of the fact that the value of the automobile allegedly stolen by the defendant was worth in excess of $50.00, the amount required for a larceny conviction. The case was reversed on appeal, the court holding that the defendant was denied jury consideration of the value of the stolen car.

As the court notes in State v. Lawrence, 234 P2d at 603, no matter how clear and convincing the evidence might be in a criminal case, it is not the prerogative of the court to tell the jury that they have to believe it and so find. For example, a defendant is charged with violation of the Sunday closing laws and concedes every element of the crime, including the date on which the business was allegedly open. May the court judicially notice the fact that the particular date fell on a Sunday? Although the court may judicially notice the fact, it may not direct a verdict against the accused and thus remove the case from the jury's consideration.

C. Relationship to Existing Law

This section represents a change in Oregon law. The view that a judicially noticed fact is indisputable appears to have been adopted by statute in Oregon. ORS 136.310 provides that "whenever the knowledge of the court is by statute made evidence of a fact, the court shall declare such knowledge to the jury, which is bound to accept it as conclusive." For identical provisions relating to civil actions, see ORS 17.425 (1977 Replacement Part) and ORCP 59B.

However, the Oregon courts have never clearly addressed the potential constitutional problems created when a court instructs a jury in a criminal case to accept as conclusive any fact judicially noticed.

In State v. Kinkaid, 133 Or 95, 103-104, 285 P2d 1015, 1018 (1930), a case involving a prosecution for operating a dance hall in a town of less than 500 people, the Supreme Court did not allow the trial judge to rely on judicial notice to supply a missing element of the prosecutor's case, the population of the town. Recognizing that, as a general rule, judicial notice could be taken of the population of a town as declared by the latest census, the Supreme Court declared that, when the alleged offense occurred nine years after the last census, a conviction could not be based upon judicially noticed nine-year old census figures. The state was required to prove the population of the town at the time of the alleged commission of the offense.

Thus, subsection (2) of this section removes any ambiguities in existing Oregon law relating to the conclusiveness of judicially noticed facts in criminal cases by providing that a jury is not required to accept facts judicially noticed by the court.

This section should be compared with section 18 (Rule 309) of this Act relating to the effect of presumptions in criminal cases.

SECTION 13. Rule 202. Kinds of law. Law judicially noticed is defined as:

(1) The decisional, constitutional and public statutory law of Oregon, the United States and any state, territory or other jurisdiction of the United States.

(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, and any other state, territory or other jurisdiction of the United States.

(3) Rules of professional conduct for members of the Oregon State Bar.

(4) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States or any public entity of the United States.

(5) Records and rules of court of any court of this state or any court of record of the United States or of any state, territory or other jurisdiction of the United States.

(6) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom, when pleaded and referred to by its title, if any, or by its commonly accepted name, and the date of its passage or the date of its approval when approval is necessary to render it effective. As used in this subsection, "comprehensive plan" has the meaning given that term by ORS 197.015.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

Subsection (1) and subsections (3) to (6) of this section represent a consolidated version of California Evidence Code sections 451 and 452.

Subsection (2) of this section is based upon subsection (3) of ORS 41.410 (1979 Replacement Part). Subsection (2) of this section, however, is broader in scope than subsection (3) of ORS 41.410 in that it provides for judicial notice of official acts of the branches of government of other states and of territories and possessions of the United States.

Subsection (7) of this section is based on subsection (2) of ORS 16.510 (1977 Replacement Part) and ORCP 20D.(2).

B. Summary

This section was adopted because the Federal Rules of Evidence do not include provisions on judicial notice of law, and the Oregon statutes relating to the subject limit judicial notice of law to a few areas. The Advisory Committee believes a broader approach is more in keeping with the goals of judicial notice: promoting convenience and expediting the administration of justice.

Under subsection (1) of this section, the decisional, constitutional and public statutory law of Oregon, the United States and any state, territory or other jurisdiction of the United States must be noticed. In addition, relevant decisions of all sister-state courts, including those of the intermediate-

appellate level, may be noticed under the rule. As the Comment to section 452 of the California Evidence Code notes, the courts of sister states generally can be considered as responsive to the need for properly determining the law as are equivalent courts in this state.

Subsection (2) of this section provides for judicial notice of all official acts of the legislative, executive and judicial departments of this state, the United States and any other state, territory or other jurisdiction of the United States. Under the similar California provision, the California courts have taken judicial notice of a wide variety of administrative and executive acts, such as proceedings and reports of Congressional committees, records of the California State Board of Education and the records of a county planning commission.

While the provisions of this subsection are broad enough to include court records, specific mention of those records in subsection (5) of this section is made in order to eliminate any uncertainty in the law on this point.

Subsection (3) of this section provides for judicial notice of the Rules of Professional Conduct of the Oregon State Bar. These rules are, in effect, rules of the Supreme Court because they must be adopted by that court under ORS 9.490. Therefore, a court may take judicial notice of the rules to the same extent that it takes notice of other rules of the Supreme Court.

Subsection (4) of this section provides for judicial notice of regulations and legislative enactments adopted by or under the authority of the United States or any state, territory or possession of the United States, including public entities therein. Consonant with the California Evidence Code (Comment to section 452), the phrase "regulations and legislative enactments" includes such matters as ordinances and other similar legislative enactments, since not all public entities legislate by ordinance. This subdivision also provides for judicial notice of documents published in the Federal Register, such as presidential proclamations and executive orders having general applicability and legal effect and orders, regulations, rules, certificates, codes of fair competition, licenses, notices and similar instruments having general applicability and legal effect, which are issued by, prescribed or promulgated by federal agencies.

Subsection (5) provides that judicial notice may be taken of the records and rules of: (1) any court in this state; (2) any court of record in the United States; or (3) any state, territory or possession of the United States.

Subsection (6) of this section provides for judicial notice of the law of organization of nations, foreign nations and public entities in foreign nations. This rule makes all law, in whatever form, subject to judicial notice.

Subsection (7) of this section retains the current Oregon requirement that a court may take judicial notice of an ordinance, comprehensive plan or enactment of a county or city, or a right derived therefrom, only when the pleadings refer to the document by its title and the date of its enactment or approval, if such approval is necessary to render it effective. It should be noted that these local government enactments are the only laws that must be pleaded under this section in order for a court to take judicial notice of them.

C. Relationship to Existing Law

This section changes current Oregon law by greatly expanding the scope of judicial notice of law in this state.

Currently, Oregon has enacted the Uniform Judicial Notice of Foreign Laws Act, ORS 41.420 to 41.480 (1979 Replacement Part), which enables Oregon courts to take judicial notice of the constitutions, common law, civil law and statutes of every other jurisdiction of the United States. Oregon courts may continue to do so under subsection (1) of this section and this subsection, therefore, does not change Oregon law.

Subsection (2) of this section changes Oregon law in that it allows a court to take judicial notice of the official acts of the legislative, executive and judicial departments of sister states and territories and possessions of the United States.

Currently, under subsection (3) of ORS 41.410 (1979 Replacement Part), a court may take judicial notice only of the official acts of the various departments of this state and the United States. That this marks a considerable expansion in the scope of judicial notice in Oregon is best indicated by a consideration of the types of acts and enactments that a court may judicially notice under this subsection. Under subsection (3) of ORS 41.410, for example, a court may judicially notice civil service commission rules, Beistel v. Public Employe Relations Board, 6 Or App 115, 486 P2d 1305 (1971), regulations and official acts of the Department of Higher Education, Vandever v. State Bd. of Higher Education, 8 Or App 50, 491 P2d 1198 (1971), and statutes and regulations of the State Board of Forestry, Eugene Stud and Veneer, Inc. v. State Bd. of Forestry, 3 Or App 20, 469 P2d 635 (1970). The statutory authority of the Superintendent of the Oregon Fairview Home and the rules and regulations of the Board of Control as to the release of an inmate were held to be proper subjects for judicial notice in Jarrett v. Wells, 235 Or 51, 53, 383 P2d 995 (1963). Likewise, rules of a state agency filed with the Secretary of State pursuant to ORS 183.020 and compiled and published by the Secretary of State, such as a rule prescribed by the Public Utility Commission, are subject to judicial notice. Fulton Insurance Company v. White Motor Company, 261 Or 206, 222-223, 493 P2d 138, 146 (1972).

Subsection (3) of this section may represent a change in Oregon law since it is not certain that courts in this state, under subsection (3) of ORS 41.410, may judicially notice the rules of professional conduct for members of the Oregon State Bar.

Subsection (4) of this section clarifies existing Oregon law by providing for judicial notice of documents published in the Federal Register. Although not bound by 44 U.S.C. 1507, which declares that "the contents of the Federal Register shall be judicially noticed," Oregon courts have indicated a willingness to notice material published in the Federal Register if properly brought to a court's attention. Mogul Transportation Co. v. Larison, 181 Or 252, 181 P2d 139 (1947).

Subsection (5) of this section represents a change in Oregon law. A long line of cases, the most recent being State ex rel. Juvenile Dept. v. Martin, 271 Or 603, 533 P2d 780, rev'g 19 Or App 28, 526 P2d 647, and Hood v. Hatfield, 235 Or 38, 383 P2d 1021 (1963), have held that a court cannot take judicial notice of the records in a case different from the case before it. Therefore, to the extent that records of any court of record of any state or the United States can be judicially noticed, this is a change in the law.

Similarly, the rule in Oregon appears to be that local court rules will not be judicially noticed. Stivers v. Byrkett, 56 Or 565, 108 P 1014, 109 P 386 (1910). However, the Advisory Committee believes that to adequately cover a rule

on judicial notice of law this area should be included. There is little reason for not changing the rule as the Supreme Court is promulgating rules of court and local court rules are available in any county courthouse.

Subsection (6) of this section changes current Oregon law by allowing judicial notice of the laws of foreign nations. Currently, under ORS 41.460 (1979 Replacement Part), the laws of foreign countries must be proved. The court determines the foreign law, which is not subject to the provisions concerning judicial notice. See also State of Oregon v. Moy Looke, 7 Or 54 (1879).

Subsection (7) of this section is taken from subsection (2) of ORS 16.510 (1977 Replacement Part) and ORCP 20D.(2) and therefore no change occurs as a result of its adoption.

This section does not affect ORS 221.710 which requires all incorporated cities to file with the Librarian of the Supreme Court Library a duly certified copy of the city charter and all amendments thereto. When so filed, a court shall take judicial notice of the charter and its provisions.

This Act repeals ORS 41.410 to 41.480 (1979 Replacement Part), the existing statutes which relate to judicial notice.

ARTICLE III. BURDEN OF PERSUASION; BURDEN OF PRODUCING EVIDENCE; PRESUMPTIONS

SECTION 14. Rule 305. Allocation of the burden of persuasion. A party has the burden of persuasion as to each fact the existence or nonexistence of which the law declares essential to the claim for relief or defense.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is a modified version of California Evidence Code section 500 which reads:

> *Sec. 500. Party who has the burden of proof. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.*

B. Summary

As used in this section, the burden of persuasion means the obligation of a party to produce a particular state of conviction in the mind of the trier of fact as to the existence or nonexistence of a fact. If the requisite degree of conviction is not achieved, the trier of fact must assume that the fact does not exist. Morgan, Basic Problems of Evidence, 19 (1957); 9 Wigmore, Evidence, section 2485 (3d ed 1940). Cal. Evid. Code, section 500, Comment at 1079 (West 1965). In civil cases, the usual burden of persuasion requires a party to convince the trier of fact that the existence of a particular fact is more probable than its nonexistence. This degree of proof is described as proof by a preponderance of the evidence. However, in some instances the burden of persuasion requires a party to produce a substantially greater degree of belief in the mind of the trier of fact concerning the existence of the fact. For example, in actions based on fraud or the allegation of a gift, the trier of fact must be persuaded by "clear and convincing evidence," which means that the truth of the facts asserted must be highly probable, Cook v. Michael, 214 Or 513, 330 P2d 1026 (1958). Finally, in criminal cases, the prosecution must persuade the trier of fact beyond a reasonable doubt.

Under this section, the burden of persuasion as to a particular fact is normally on the party to whose case the fact is essential. However, the rule does not attempt to indicate what facts may be essential to a particular party's claim for relief or defense because the elements of a prima facie case or defense are determined by the substantive law, not the law of evidence.

If the substantive law does not dictate which party is to have the burden of persuasion on an issue, the courts should consider the following factors in making the allocation: (1) access to the evidence; (2) special policy considerations, such as those disfavoring certain defenses; (3) fairness to the litigants; and (4) the probability of the existence or nonexistence of the fact. 9 Wigmore, Evidence, section 2486 at 275 (3d ed 1940); McCormick, Evidence, section 337 at 785-88 (2d ed 1972).

C. Relationship to Existing Law

This section is a departure from the rigid rules of ORS 41.210 and 41.240 (1979 Replacement Part), which allocate the burden of persuasion strictly on the basis of whether the allegations in the pleadings are in affirmative or negative form. However, to the extent that Oregon courts have refused to follow the strict language of the statutes and have allocated the burden of persuasion on the basis of access to proof, probabilities and policy considerations, this section does not depart substantially from existing law. See Secretary of State v. Hanover Ins. Co., 242 Or 541, 411 P2d 89 (1966); Carpenter v. Carpenter, 153 Or 584, 57 P2d 1098 (1936); Hauns v. Hauns, 246 Or 282, 423 P2d 499 (1967).

ORS 41.210 provides that the party having the affirmative of the issue must produce the evidence to prove it and that the burden of proof rests on the party who would be defeated if no evidence were given on either side. This section has been criticized as establishing a meaningless standard:

> *That the burden is on the party having the affirmative (or) that a party is not required to prove a negative . . . is no more than a play on words since practically any proposition may be stated in either affirmative or negative form. Thus, a plaintiff's exercise of ordinary care equals absence of contributory negligence in the minority of jurisdictions which place this element in plaintiff's case. In any event, the proposition seems simply not to be so. Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan L Rev 5, 11 (1959).*

A recent Oregon case illustrates the unfairness that may result when a court allocates the burden of persuasion solely on the basis of the pleadings. In First Nat'l Bank v. Malady, 242 Or 353, 408 P2d 724 (1965), an insurance company brought a declaratory judgment action to test coverage of a liability policy that it had issued to plaintiff. The issue on appeal was whether the lower court had erred in ruling that the plaintiff had the burden of proving coverage. Although the court recognized that in some cases the issues involved would require a reversal of the usual allocation of the burden of proof, the court held that in most declaratory judgment actions the plaintiff who initiates the action and makes affirmative allegations must bear the burden of proving what he alleges. The Advisory Committee believes that this is an unduly mechanical means of allocating the burden of persuasion.

For the reasons just discussed, the Advisory Committee recommends the adoption of this section and the repeal of ORS 41.210 and 41.240.

SECTION 15. Rule 306. Instructions on the burden of persuasion. The court shall instruct the jury as to which party bears the applicable burden of persuasion on each issue only after all of the evidence in the case has been received.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is original and is a necessary by-product of the Advisory Committee's adoption of the Morgan approach to presumptions.

B. Summary

This section recognizes that the burden of persuasion is not immutably fixed at the commencement of the action. In most cases the burden of persuasion will ultimately rest on the party to whose claim for relief or defense the fact is essential, but the operation of a presumption may shift the burden to the opposing party. Because the basic facts giving rise to the presumption must be established by the evidence in the cases the burden of persuasion should not be ultimately asigned until the case is ready to go the the jury. McCormick, Evidence, section 345 at 827 (2d ed 1972). This section is not intended to prevent attorneys from commenting on the burden of persuasion during voir dire or during their opening or closing remarks or to preclude trial judges from making preliminary statements as to the burden of proof.

After the burden of persuasion is assigned, the court shall instruct the jury as to the degree of proof necessary to satisfy the burden: Proof by preponderance of the evidence, proof by clear and convincing evidence or proof beyond a reasonable doubt.

C. Relationship to Existing Law

Although not reflected in Oregon case or statutory law, this section accords with present practice of instructing the jury on the burden of persuasion only after all the evidence in the case has been received. The degrees of proof necessary to satisfy the burden of persuasion also find support in Oregon law: Proof by a preponderance of the evidence, proof by clear and convincing evidence and proof beyond a reasonable doubt. See Cook v. Michael, 214 Or 513, 330 P2d 1026 (1958).

SECTION 16. Rule 307. Allocation of the burden of producing evidence. (1) The burden of producing evidence as to a particular issue is on the party against whom a finding on the issue would be required in the absence of further evidence.

(2) The burden of producing evidence as to a particular issue is initially on the party with the burden of persuasion as to that issue.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is a slightly modified version of California Evidence Code, section 550, which reads as follows:

> *Sec. 550. Party who has the burden of producing evidence. (a) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence. (b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact.*

B. Summary

This section defines and allocates the burden of producing evidence. The burden of producing evidence on an issue means the liability to an adverse ruling (generally a finding or directed verdict) if evidence on the issue has not been produced. McCormick, Evidence, section 336 at 784 (2d ed 1972). At the outset of the case, this burden will coincide with the burden of persuasion. However, once

a party has produced evidence sufficient for a reasonable man to infer the existence of the fact sought to be proved, the burden of producing evidence has been satisfied and the party will survive a motion for a nonsuit or directed verdict. See McCormick, Evidence, section 338 at 789-93 (2d ed 1972); Cal. Evid. Code, section 550, Comment at 1083.

C. Relationship to Existing Law

This section is in accord with existing Oregon law. ORS 41.210 (1979 Replacement Part) provides that the "burden of proof" lies on the party who would be defeated if no evidence were given on either side. Similarly, Oregon courts have held that the party having the burden of producing evidence must produce substantial evidence to avoid a nonsuit or directed verdict, Larson v. Hansen, 223 Or 533,355 P2d 235 (1960); Fish v. Southern Pacific Co., 173 Or 294, 143 P2d 917 (1943). In addition, Oregon statutes provide that the burden of producing evidence as to an issue is on the party having the burden of persuasion, that is, the party having the "affirmative of the issue." ORS 41.210 and 41.240 (1979 Replacement Part).

SECTION 17. Rule 308. Presumptions in civil proceedings. In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based upon the version of Federal Rule 301 prescribed by the Supreme Court of the United States in October of 1972, which reads as follows:

Rule 301 Presumptions in General.

> *In all cases not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.*

B. Summary

Under this section, once the party invoking the presumption establishes the basic facts giving rise to it, the burden of establishing the nonexistence of the presumed fact shifts to the opposing party. In other words, once the trial judge determines that there is sufficient evidence to support a finding of the basic facts, the burden of persuasion on this issue is transferred to the opposing party as part of his burden of proof. The same considerations of fairness, policy and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions, Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan L Rev 4 (1959).

Any doubt about the constitutional permissibility of imposing the burden of persuasion on the party against whom the presumption is invoked is satisfied by

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Dick v. New York Life Ins. Co., 359 US 437, 79 SCt 921, 3 LEd 2d 935 (1959). Without reservation, the Supreme Court applied the North Dakota rule that the presumption against suicide imposed on defendant the burden of proving that the death of the insured, under an accidental death clause, was due to suicide.

The Advisory Committee rejected the so-called "bursting bubble" theory advocated by Thayer, because it accords presumptions too slight and evanescent an effect. Under this theory a presumption vanishes upon the introduction of evidence contrary to the presumed fact, although the evidence may not be credible. Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv L Rev 909 (1937).

For reasons discussed below, the Advisory Committee also rejected the current Oregon practice in dealing with presumptions, which is to instruct jurors that they are to weigh the evidence, including any presumptions, and, if their minds are equally divided on the issue, to decide against the party upon whom the burden of persuasion rests. U.S. National Bank v. Underwriters at Lloyds, 239 Or 298, 396 P2d 765 (1964).

The Advisory Committee has adopted instead the approach set forth in this section. That approach is simple and workable, and it gives due consideration to the policies behind the creation of presumptions. All presumptions, whether legislatively or judicially created, must be treated in the manner prescribed by this section.

To illustrate the operation of this section, suppose the plaintiff raises the presumption that a letter duly addressed and mailed was received in the regular course of the mail (subsection (18) of section 20 (Rule 311) of this Act). The judge must then determine whether plaintiff has established the basic facts that the letter was properly addressed, mailed and not returned. If so, the judge simply instructs the jury that if they find the base facts to be true, then the burden is on the defendant to prove by a preponderance of the evidence that the letter was not received. The jury should never hear the word "presumption."

C. Relationship to Existing Law

This section represents a major change in current Oregon law relating to the effect of presumptions in civil proceedings.

Oregon courts have taken a middle ground in their approach to presumptions. The presumption does not disappear from the case when contradictory evidence is introduced, nor does it shift the burden of persuasion to the adversary. Under the pure Thayer approach, when the opponent has introduced evidence contrary to the existence of the presumption, the presumption disappears. However, Oregon courts have held that the policies behind the creation of presumptions necessitate an instruction that in some way calls the existence of the presumption to the attention of the jury, despite the Thayerian proscription against the practice.

For example, in U.S. National Bank v. Underwriters at Lloyds, 239 Or 298, 396 P2d 765 (1964), the Oregon Supreme Court held that the jury should be told that a presumption is to be treated like any other evidentiary fact and that the existence of a presumption does not endow the fact upon which it is based with any special value for evidentiary purposes. The jury should also be informed of the basis for the presumption. Finally, the jury should be instructed to weigh the evidence as a whole, including the presumption, and if their minds are

equally divided on the issue, then their decision must be against the party upon whom the burden of persuasion rests.

The Advisory Committee rejected this approach for several reasons. First, it is extremely difficult to phrase a jury instruction without conveying the impression that the presumption itself is evidence. The doctrine that a presumption is evidence has long been discredited by scholarly writers and by Oregon courts. See e.g., McCormick, Evidence, section 345 at 825, n 60. (2d ed 1972); Wycoff v. Mut. Life Ins. Co., 173 Or 592, 147 P2d 227 (1944).

Second, under the approach to presumptions taken by Oregon courts the jury is confronted with a difficult or impossible task. They must weigh the force of the legal conclusions mandated by the presumption against the testimony of witnesses and other direct evidence.

Therefore, under this section the existence of a presumption relating to an issue in the case merely requires that the burden of persuasion on that issue shift to the party against whom the presumption operates.

SECTION 18. Rule 309. Presumptions in criminal proceedings. (1) The judge is not authorized to direct the jury to find a presumed fact against the accused.

(2) When the presumed fact establishes guilt or is an element of the offense or negates a defense, the judge may submit the question of guilt or the existence of the presumed fact to the jury only if:

(a) A reasonable juror on the evidence as a whole could find that the basic facts have been established beyond a reasonable doubt; and

(b) The presumed facts follow from the basic facts beyond a reasonable doubt.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is a modification of Federal Rule 303 which was recommended by the Supreme Court of the United States (October, 1972) but deleted by Congress in their enactment of the Federal Rules of Evidence. Rule 303 was based upon A.L.I. Model Penal Code section 1.12(5), P.U.D. (1962) and United States v. Gainey, 380 US 63 (1965), and read as follows:

Rule 303 Presumptions in Criminal Cases.

(a) Scope. Except as otherwise provided by Act of Congress, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(b) Submission to jury. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a

whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

(c) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

B. Summary

This section makes no use of presumptions to remove any matters in a criminal proceeding from final determination by the jury.

Such use of presumptions could violate the axiom that a verdict cannot be directed against the accused in a criminal case, 9 Wigmore, Evidence, section 2495 at 312 (3d ed 1940), or its corollary that a judge is without authority to direct the jury to find against the accused as to any element of the crime, A.L.I. Model Penal Code, section 1.12(1) P.U.D. (1962).

Furthermore, the existence of a presumption as to a particular element of a crime may compel a defendant to introduce proof in rebuttal, including his own testimony, and thus force him to waive his constitutional right to remain silent. McCormick, Evidence, section 344 at 819 (2d ed 1972).

Because the operation of presumptions may infringe upon the rights of the accused, the United States Supreme Court in a series of recent decisions has limited the operation of presumptions in criminal cases. In an early case, Tot v. United States, 319 US 463, 63 SCt 1241, 87 LEd 1519 (1943), the Supreme Court formulated the "rational connection" test under which a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed.

The rational connection test was refined in two 1965 cases dealing with presumptions enacted to aid the government in prosecuting violations of federal liquor laws. In United States v. Gainey, 380 US 63, 85 SCt 754, 13 LEd 2d 658 (1965), the Supreme Court held that there was a sufficiently rational connection between the fact of unexplained presence at a still site and the presumption of carrying on an illegal distilling business. However, in United States v. Romano, 382 US 136, 86 SCt 279, 15 LEd 2d 210 (1965), the Court struck down a presumption of possession of an illegal still based on unexplained presence, holding that presence itself tells nothing about what the defendant's specific function was and thus carried no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession.

The Supreme Court employed a more rigid test in Leary v. United States, 395 US 6, 89 SCt 1532, 23 LEd 2d 57 (1969). In order for a presumption establishing an element of the offense to be constitutional in a criminal trial, one must be able to say with substantial assurance that the presumed fact is more likely than not to flow from the base facts. There the court declared unconstitutional a presumption providing that possession of marijuana was sufficient to infer guilty knowledge of its illegal importation. Although most marijuana is imported,

the court concluded that it would be pure speculation to say that a majority of possessors knew the source of their marijuana. In Turner v. United States, 396 US 298, 90 SCt 642, 24 LEd 2d 610, reh. den. 397 US 958, 90 SCt 929, 25 LEd 2d 144 (1970), the court dealt with a presumption identical to the one struck down in Leary, except that the drugs involved were heroin and cocaine rather than marijuana. After an extensive review of the evidence, the court upheld the presumption as to heroin, because all heroin consumed in the United States is illegally imported. In contrast, the presumption as to the importation of cocaine was struck down because there was a reasonable possibility that the purchase had been legally made.

The United States Supreme Court has most recently expounded on presumptions in criminal cases in Barnes v. United States, 412 US 837, 93 SCt 2357, 37 LEd 2d 380 (1973). Mr. Justice Powell, writing the 6-3 majority opinion, noted that the teaching of the Turner, Leary, Romano and Gainey cases relating to the validity of criminal law presumptions and inferences under the Due Process Clause was not altogether clear. The opinion summarized: "What has been established by the cases, however, is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process." 412 US at 843. The court held that because the inference under consideration satisfied the reasonable doubt standard, the most stringent standard applied by the court in judging permissive criminal law inferences, it therefore comported with due process.

Although the Supreme Court did not announce in Barnes that the reasonable doubt standard is the standard to be applied in judging presumptions and inferences in all criminal case, the Advisory Committee sought to avoid any possible conflict with the defendant's constitutional rights. Therefore, section 18 (Rule 309) of this Act specifically provides that the presumed facts must follow from the basic facts beyond a reasonable doubt. It also provides that the judge may not submit the existence of the presumed fact to the jury unless a reasonable juror on the evidence as a whole could find that the basic facts have been established beyond a reasonable doubt.

Therefore, the net effect of this section is to reduce presumptions in criminal cases to nothing more than permissible inferences. For example, consider the presumption of knowledge of illegal importation of heroin based on the fact of possession. The judge must first determine as a matter of law that guilty knowledge follows from possession beyond a reasonable doubt. If so, the judge then instructs the jury that if they find beyond a reasonable doubt that defendant was in possession of the heroin, then they are permitted but not required to find that defendant knew of the illegal importation of the drug.

C. Relationship to Existing Law

Perhaps due to the failure of the United States Supreme Court to articulate clear constitutional principles governing the effect of presumptions in criminal cases, Oregon law is currently in the formative stages in this area. However, section 18 (Rule 309) of this Act is intended to be a logical culmination of this process of development at both the state and federal levels. Following the reasoning used in Tot v. U.S., 395 US 463, 63 SCt 1241, 87 LEd 1519 (1943), the Oregon Court of Appeals has recently held that a jury may permissively infer an element establishing a prima facie case if there is rational connection between the presumption and the fact upon which it is based, State v. Offord, 14 Or App

195, 512 P2d 1375 (1973). The court cited the cases of Leary v. United States, 395 US 6, 89 SCt 1532, 23 LEd 2d 57 (1969), in which the United States Supreme Court held that the existence of a presumed fact must more likely than not be able to be inferred from the basic facts, and Turner v. United States, 396 US 398, 90 SCt 642, 24 LEd 2d 610 (1970) in which the Court stated that it was not necessary to hold that a presumed fact must flow from the basic facts beyond a reasonable doubt. However, the Court of Appeals applied neither the "more likely than not" nor the "reasonable doubt" standard. See also State v. Bartolon, 8 Or App 538, 495 P2d 772 (1972).

SECTION 19. Rule 310. Conflicting presumptions. If presumptions are conflicting, the presumption applies that is founded upon weightier considerations of policy and logic. If considerations of policy and logic are of equal weight, neither presumption applies.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is patterned after Uniform Rule 301(b) (Final Draft, August, 1974), which reads as follows:

> *Rule 301 (b). Inconsistent Presumptions. If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies.*

B. Summary

This section anticipates the possibility that one issue in a case may generate two or more presumptions which conflict with each other. Thayer's solution to this problem would be to disregard the presumptions, and give them no effect. The facts upon which the presumptions are based would then have to be considered as evidence, together with all the other facts that may be relevant. Perhaps when the conflicting presumptions involved are based upon probability or upon procedural convenience, this solution is a fairly practical one. However, a presumption may have a strong basis in logic or social policy, McCormick, Evidence, section 345 at 823 (2d ed 1972). Under Thayer's solution, in a case of two conflicting presumptions, with one based on procedural convenience and the other based on social policy factors, both presumptions would be disregarded. Therefore, not only would the procedural convenience created by one presumption be eliminated, but strong social policy considerations giving rise to the other presumption would likewise lack a vehicle for expression. "A weighing of the reasons underlying the particular presumptions in question will lead to a rational solution of any conflict; an inflexible rule that every presumption vanishes upon the introduction of evidence of a fixed kind and quantity will often produce an irrational solution," Morgan, Some Observations Concerning Presumption, 44 Harv L Rev 906, 932, n 41 (1931).

C. Relationship to Existing Law

The effect of conflicting presumptions under Oregon law is not altogether clear. Early cases have held that conflicting presumptions balance and cancel each other. State ex rel. Olcott, 67 Or 214, 135 P 95 (1913); McVay v. Byars, 171

Or 449, 138 P2d 210 (1943). However, there is support for the rule that the judge should apply the presumption based on the weightier considerations of policy and logic, State v. Wakefield, 11 Or 615, 218 P 115 (1924); Smith v. Smith, 169 Or 650, 131 P2d 447 (1942). More recently, the Oregon Supreme Court considered a conflict between two presumptions based on probabilities, Dicillo v. Osborn, 204 Or 171, 282 P2d 611 (1955). The court noted that unlike presumptions of marriage and legitimacy, probability-based presumptions are not concerned with any social policy of the state. Therefore, the court held that as a matter of law, there was no way to tell which presumption was stronger than the other. Application of this section in the Osborn case would not have changed the result.

SECTION 20. Rule 311. Presumptions. The following are presumptions:

(1) A person is innocent of a crime or wrong.

(2) A person intends the ordinary consequences of a voluntary act.

(3) A person takes ordinary care of the person's own concerns.

(4) Evidence wilfully suppressed would be adverse to the party suppressing it.

(5) Money paid by one to another was due to the latter.

(6) A thing delivered by one to another belonged to the latter.

(7) An obligation delivered to the debtor has been paid.

(8) A person is the owner of property from exercising acts of ownership over it or from common reputation of the ownership of the person.

(9) A person in possession of an order on that person, for the payment of money or the delivery of a thing, has paid the money or delivered the thing accordingly.

(10) A person acting in a public office was regularly appointed to it.

(11) Official duty has been regularly performed.

(12) A court, or judge acting as such, whether in this state or any other state or country, was acting in the lawful exercise of the jurisdiction of the court.

(13) Private transactions have been fair and regular.

(14) The ordinary course of business has been followed.

(15) A promissory note or bill of exchange was given or indorsed for a sufficient consideration.

(16) An indorsement of a negotiable promissory note, or bill of exchange, was made at the time and place of making the note or bill.

(17) A writing is truly dated.

(18) A letter duly directed and mailed was received in the regular course of the mail.

(19) Identity of person from identity of name.

(20) A person not heard from in seven years is dead.

(21) Persons acting as copartners have entered into a contract of copartnership.

(22) A man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.

(23) A child born in lawful wedlock is legitimate.

(24) A thing once proved to exist continues as long as is usual with things of that nature.

(25) The law has been obeyed.

(26) An uninterrupted adverse possession of real property for 20 years or more has been held pursuant to a written conveyance.

(27) A trustee or other person whose duty it was to convey real property to a particular person has actually conveyed it to the person, when such presumption is necessary to perfect the title of the person or the person's successor in interest.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on ORS 41.360 (1979 Replacement Part) and incorporates the majority of presumptions which were codified under that section. The presumptions repealed and recodifed and the reasons therefor are listed below.

B. Summary

The effect of the operation of the presumptions listed in this section will be different in civil and criminal cases. However, by the inclusion of these presumptions in this section, the Advisory Committee makes no judgment as to whether any of the presumptions will pass constitutional muster in criminal cases. In other words, the Advisory Committee has made no determination that the presumed facts flow from the basic facts beyond a reasonable doubt.

This section includes certain presumptions that are not presumptions in the technical sense of the word because there are no base facts which give rise to a presumed fact. These are the presumptions found in subsection (1), (2), (3), (13) and (24) of this section. However, the Advisory Committee believes them to be of sufficient importance to include them in the evidence code.

The enumeration of presumptions in this section does not impair the integrity of judicially created presumptions, nor does it affect the courts' power to create new presumptions in the future.

C. Relationship to Existing Law

This section retains all of the presumptions currently existing in Oregon law under ORS 41.360 (1979 Replacement Part) except for those presumptions created by subsection (2), (6), (10), (11), (17), (18), (27), (28), (34), (35), (36) and (39) of that section.

The presumption that an unlawful act was done with an unlawful intent (subsection (2) of ORS 41.360) was deleted because it was held unconstitutional as applied against a defendant in a criminal case, State v. Bartolon, 8 Or App 538, 495 P2d 772 (1972). The Advisory Committee also believed that it should not be applied in civil cases. A party could invoke the presumption of unlawful intent merely by establishing the fact that an unlawful act had occurred. The occurrence of an unlawful act should not have the effect under section 17 (Rule 308) of this Act of shifting the burden of persuasion to the opposing party on the issue of intent.

The Advisory Committee was of the opinion that subsection (6) of ORS 41.360, creating the presumption that higher evidence would be adverse from inferior being produced, is unnecessary in view of subsection (7) of ORS 17.250. It was therefore deleted.

There were several reasons for the deletion of subsection (10) of ORS 41.360, which created the presumption that former rent or instalments of a debt have been paid when a receipt for the latter is produced. First, the presumption is ambiguous and unintelligible. Second, the presumption could be misapplied. For example, production of one rent receipt or instalment payment of a debt could be used to give rise to the presumption that all prior payments had been made. Third, if a person has a receipt for a rent payment or an instalment of a debt, there is no need for the presumption.

Under subsection (11) of ORS 41.360, it is presumed that things in the possession of a person are owned by him. This presumption was deleted because the inference of ownership based upon possession is not sufficiently strong to warrant treatment as a presumption. In addition, the burden of persuasion is usually allocated to the party disputing the claim that the person possessing things also owns them.

Because it may be an inaccurate statement of existing law, particularly in criminal cases, subsection (17) of ORS 41.360 was deleted. It created the presumption that a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties.

Also deleted was subsection (18) of ORS 41.360, the presumption that all matters within an issue were submitted to the jury and passed upon by them. It is unnecessary because res judicata and collateral estoppel operate to conclusively establish the issues on which the judgment rests.

The Advisory Committee agrees with the revisers of the California Evidence Code in their repeal of the presumption that acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact (subsection (27) of ORS 41.360). "Although it may be appropriate under some circumstances to infer from the lack of protest that a person believes in the truth of a statement made in his presence, it is undesirable to require such a conclusion. The surrounding circumstances may vary greatly from case to case, and the trier of fact should be free to decide whether acquiescence resulted from belief or some other cause," 6 California Law Revision Commission, Reports, Recommendations and Studies, Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence, pp 1042-3 (June, 1964).

Finally, subsection (28) of ORS 41.360 was deleted because it is overly broad and may be misapplied. It creates the presumption that things have happened according to the ordinary course of nature and the ordinary habits of life. Any benefits derived from relying on this presumption may be obtained by requesting the court to judicially notice facts describing the ordinary course of nature or the ordinary habits of life, which are matters of common knowledge.

Subsections (34), (35) and (36) of ORS 41.360 have been recodified in the Oregon Evidence Code under Article IX of this Act, relating to authentication and identification.

Subsection (39) of ORS 41.360 has been rewritten and placed in the Uniform Commercial Code.

The Advisory Committee has not recodified ORS 41.350 (1979 Replacement Part), relating to conclusive presumptions, in the Oregon Evidence Code. Conclusive presumptions are not true presumptions. When the base fact giving rise to a conclusive presumption is established, the presumed fact must be taken as true, and the adversary is not allowed to dispute the presumed fact. As McCormick points out, ". . . the courts are not stating a presumption at all, but are simply expressing a rule of law . . ." McCormick, Evidence, section 342 at 802 (2d ed 1972). Therefore, the Advisory Committee recommended recodification of subsection (3) of ORS 41.350 under ORS chapter 42, Execution, Formalities and Interpretation of Writings, and subsection (5) of ORS 41.350 under ORS chapter 91, Landlord and Tenant. The remainder were deleted for the reasons stated below.

Under subsection (1) of ORS 41.350 an intent to murder is conclusively presumed from the deliberate use of a deadly weapon which causes death within a year. Subsection (2) of ORS 41.350 creates a conclusive presumption of a malicious and guilty intent, from the deliberate commission of an unlawful act for the purpose of injuring another. These rules were repealed because the Oregon Supreme Court has held that they cannot be constitutionally applied against a defendant in criminal cases, State v. Elliott, 235 Or 522, 383 P2d 382 (1963).

Subsection (4) of ORS 41.350 states that whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he shall not, in any litigation arising out of such declaration, act or omission, be permitted to falsify it. It was repealed because it is merely a statement of the judicially established principle of estoppel in pais, or equitable estoppel, Second Northwestern Finance Corp, v. Mansfield, 121 Or 236, 252 P 400 (1927). In recommending the repeal of this subsection, the Advisory Committee does not intend to affect the law of estoppel as expressed in Earls v. Clarke, 223 Or 527, 530-31, 355 P2d 213 (1960) and Bennett v. City of Salem, 192 Or 531, 541, 235 P2d 772 (1951).

Under subsection (6) of ORS 41.350, it is conclusively presumed that the issue of a wife cohabiting with her husband who was not impotent or sterile at the time of conception of the child is legitimate. This subsection is an unnecessary duplication of subsection (1) of ORS 109.070.

Subsection (7) of ORS 41.350 conclusively presumes the judgment, decree or order of a court when declared by statute to be conclusive. That subsection also provides, however, that the judgment, decree or order shall be pleaded if there is an opportunity to do so, but if there is no such opportunity, then it may be used as evidence with like effect. The first sentence states the meaningless truism that judgments are conclusive when declared by law to be conclusive. The

remainder, dealing with pleading and effect of judgments, is covered by ORCP 20B. and ORS 43.110 to 43.220.

Subsection (8) of ORS 41.350 conclusively presumes any other presumption which by statute is expressly made conclusive. This statement is meaningless and unnecessary.

ARTICLE IV. RELEVANCY

SECTION 21. Rule 401. Definition of "relevant evidence." "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 401 of the Federal Rules of Evidence.

B. Summary

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning.

The variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof. An enormous number of cases fall into no set pattern, and this section is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Section 24 (Rule 404) of this Act and those sections following it are of that variety; they also serve as illustrations of the applications of the present rule as limited by the exclusionary principles of section 23 (Rule 403) of this Act.

Passing mention should be made of so-called "conditional" relevancy. Morgan, Basic Problems of Evidence, 45-46 (1962). In this situation, probative value depends not only upon satisfying the basic requirements of relevancy as described above but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See subsection (2) of section 5 (Rule 104) and section 68 (Rule 901) of this Act. The discussion which follows under this section is concerned with relevancy generally, not with any particular problem of conditional relevancy.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. James, Relevancy, Probability and the Law, 20 Calif L Rev 689, 696, n 15 (1941), in Selected Writings on Evidence and Trial 610, 615, n 15 (Fryer ed. 1957). For example, in appraising the probative worth of the offered evidence, courts consider the distance in time between the facts offered and the matter sought to be proved. This factor is often termed "remoteness," McCormick, Evidence, section 185 at 439, n 30 (2d ed. 1972). The rule summarizes this relationship between an item of evidence and a matter properly provable in a case as a "tendency to make the existence" of the fact to be proved "more probable or less probable."

Compare Uniform Rule 1 (2) which states the crux of relevancy as a "tendency in reason," thus perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle upon which relevancy in a particular situation depends.

The standard of probability under the rule is "more . . . probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As McCormick, Evidence, section 185, p 436 (2d ed 1972) says, "A brick is not a wall," or, as Falknor, "Extrinsic Policies Affecting Admissibility," 10 Rutgers L Rev 574, 576 (1956), quotes Professor McBaine, ". . . [I]t is not to be supposed that every witness can make a home run." Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence. See State v. Sack, 210 Or 552, 300 P2d 427 (1956).

The rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code, section 210; it has the advantage of avoiding the loosely used and ambiguous word "material." "Tentative Recommendation and Study Relating to the Uniform Rules of Evidence" (Art. I General Provisions), Cal Law Revision Comm'n Rep., Rec. & Studies, pp 10-11 (1964). The fact to be proved may be ultimate, intermediate or evidentiary; it matters not, so long as it is of consequence in the determination of the action. See Uniform Rule 1 (2) which requires that the evidence relate to a "material" fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice, rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission. See California Evidence Code, section 210, defining relevant evidence in terms of tendency to prove a disputed fact.

C. Relationship to Existing Law

This section changes existing Oregon law concerning the definition of relevant evidence only to the extent that it eliminates the distinction currently maintained in this state between materiality and relevance. The Advisory Committee believes that the elimination of the distinction will have little, if any, practical effect.

While relevancy concerns the relationship between the facts in evidence and the conclusions to be drawn from them, materiality is the "relation between the proposition for which the evidence is offered and the issues in the case." McCormick, Evidence, section 185 at 434 (2d ed 1972).

Under ORS 41.220 and 41.230 (1979 Replacement Part), a distinction between materiality and relevance is maintained because the sections provide that only material allegations need be proved at trial and that evidence admitted at trial must be pertinent to the substance of the material allegations.

This article, on the other hand, abandons a separate concept of "materiality" and merges the concepts of materiality and relevancy. Thus, this section requires relevant evidence to involve a fact that "is of consequence to the determination of the action." Therefore, although avoiding the loosely used and ambiguous word "material," this section maintains the current Oregon requirement that evidence admitted at trial must relate to issues that have been pleaded or that are dictated by the substantive law on which the pleadings are based. Mills v. Dunn Bros, Inc., 264 Or 156, 503 P2d 1250 (1972); Arrien v. Levanger, Or, 502 P2d 573 (1972).

With regard to "relevance," this section restates existing Oregon law that "any evidence which tends to render the fact probable or improbable is relevant." Klingback v. Mediola, 138 Or 234, 239, 6 P2d 237 (1931). In this state, if a fact "will advance the search for the truth, it is relevant" and "if it throws some light upon the issue" it may be admitted. Trook v. Sagert, 171 Or 680, 688, 690, 138 P2d 900 (1943). Similarly, evidence is relevant and "is admitted if it logically tends to prove the essential fact." Tanner v. Farmer, 243 Or 431, 436, 414 P2d 340 (1966).

The standard for determining relevance under this section is that the evidence must tend to make a fact more probable or less probable than it would be without the evidence.

A recent Oregon case, Byrd v. Lord Brothers Contractors, Inc., 256 Or 421, 473 P2d 1018 (1970), illustrates the application of this standard of probability. The case involved an action to recover damages for personal injuries suffered when the plaintiff was hit by a piece of concrete as he drove beneath an overpass under construction. Evidence that some young boys were seen running away from the overpass at about the time of the accident, and in close proximity to the site of the accident, was admitted.

Admittedly, the boys could come from numerous other places than the overpass and could have been running for any one of the various reasons that boys run. The relation between the boys and the overpass is an attenuated one, but we believe that, after the introduction of the evidence in question, there was a greater possibility that the concrete was thrown from the overpass than would have appeared in the absence of such evidence. (256 Or 421, 424-425)

SECTION 22. Rule 402. Relevant evidence generally admissible. All relevant evidence is admissible, except as otherwise provided by the Oregon Evidence Code, by the Constitutions of the United States and Oregon, or by Oregon statutory and decisional law. Evidence which is not relevant is not admissible.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on Rule 402 of the Federal Rules of Evidence. Federal Rule 402 declares that all relevant evidence is admissible in federal courts, except as otherwise provided by the Constitution of the United States, by Act of Congress, by the Federal Rules of Evidence or by other rules prescribed by the Supreme Court pursuant to statutory authority. Federal Rule 402 is modified in this section to provide that the exceptions to admissibility are set forth in the

Oregon Evidence Code, the Constitutions of the United States and Oregon and in Oregon's statutory and decisional law.

B. Summary

The provision that all relevant evidence is admissible, with certain exceptions, is "a presupposition involved in the very conception of a rational system of evidence." Thayer, Preliminary Treatise on Evidence, 264 (1898). It constitutes the foundation upon which the structure of admission and exclusion rests. For similar provisions see California Evidence Code, sections 350, 351. Provisions that all relevant evidence is admissible are found in Uniform Rule 7(f); Kansas Code of Civil Procedure, section 60-407(f); and New Jersey Evidence Rule 7(f).

Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by Oregon statutory and decisional law consistent with these rules, or by constitutional considerations.

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, Article V recognizes a number of privileges; Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

In addition, rules outside the proposed evidence code require the exclusion of relevant evidence. For example, ORS 45.250, by imposing requirements of notice and unavailability of the deponent, places limits on the use of relevant depositions. Similarly, ORS 133.683 excludes evidence of the fruits of unlawful searches or seizures, and ORS 133.703 excludes the testimony of an unidentified informant under certain circumstances.

The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, Weeks v. United States, 232 US 383 (1914); Katz v. United States, 389 US 347 (1967); incriminating statement elicited from an accused in violation of his right to counsel, Massiah v. United States, 377 US 201 (1964).

C. Relationship to Existing Law

This section restates the rule of evidence that all relevant facts are admissible unless they violate specific exclusionary rules, and is in accord with existing Oregon law. Trook v. Sagert, 171 Or 680, 688 138 P2d 900 (1943); ORS 41.230 (1979 Replacement Part).

SECTION 23. Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion or undue delay. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence.

A. Derivation

This section is based on Rule 403 of the Federal Rules of Evidence. The federal rule includes "waste of time" as a reason for excluding relevant evidence. That reason for exclusion is not found in this section.

B. Summary

The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan L Rev 1, 12-15 (1956); Trautmann, Logical or Legal Relevancy - A Conflict in Theory, 5 Van L Rev 385, 392 (1952); McCormick, Evidence, section 185, pp 438-441 (2d ed 1972). The rules which follow this rule in this article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Unfair prejudice within its context means an undue tendency to suggest decisions on an improper basis, commonly, though not necessarily an emotional one. In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See ORS 41.880 (Rule 106) and the Advisory Committee's Commentary thereunder. The availability of other means of proof may also be an appropriate factor.

Although Federal Rule 403 contains "waste of time" as a basis for exclusion of relevant evidence, the Advisory Committee deleted the language. The committee believes that relevant evidence is never a "waste of time" unless it is "cumulative." Since the rule provides for exclusion on the grounds of "needless presentation of cumulative evidence," the "waste of time" language was deleted as vague and unnecessary.

The rule does not enumerate surprise as a separate ground for exclusion simply because surprise is usually coupled with the danger of prejudice and confusion of the issues. Cf. McCormick, Evidence, section 185, p 440, n 34 (2d ed 1972). Rather than exclude the evidence solely on the basis of unfair surprise, the granting of a continuance would seem to be a more appropriate remedy. While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure, section 60-445, surprise is not included in California Evidence Code, section 352 or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45.

C. Relationship to Existing Law

This section is in accord with current Oregon law, except for the elimination of surprise as a basis for excluding relevant evidence.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury or cumulative evidence all find ample support in Oregon decisional law. See the following Oregon cases. Unfair prejudice: State v. Joseph, 10 Or App 367, 499

P2d 30 (1972); State v. Freeman, 232 Or 267, 374 P2d 453 (1963); State v. Flett, 134 Or 300, 380 P2d 643 (1963). Confusion of issues and misleading the jury: Jackeland v. Miles and Sons Trucking Service, 254 Or 514, 462 P2d 668 (1973), Carter v. Moberly, 263 Or 193, 501 P2d 1276 (1972), State v. Harns, 241 Or 224, 405 P2d 492 (1965), Loibl v. Nienie, 214 Or 172, 327 P2d 786 (1958). Cumulative evidence: Kraus v. Eugene Dodge, Inc., 265 Or 486 409 P2d 1199 (1973).

In Carter v. Moberly, 263 Or 193, 501 P2d 1276 (1972) and Krause v. Eugene Dodge, Inc., 265 Or 486, 509 P2d 1199 (1973), surprise was adopted by the Supreme Court as a separate basis for excluding otherwise relevant evidence.

SECTION 24. Rule 404. Character evidence: Admissibility. (1) Admissibility generally. Evidence of a person's character or trait of character is admissible when it is an essential element of a charge, claim or defense.

(2) Admissibility for certain purpose prohibited; exceptions. Evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(b) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor;

(c) Character of witness. Evidence of the character of a witness, as provided in sections 51 to 53 (Rules 607 to 609) of this Act; or

(d) Reputation for violent behavior. Evidence of the reputation of a party for violent behavior offered in a civil assault and battery case when self-defense is pleaded and there is evidence to support such defense.

(3) Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on Rule 404 of the Federal Rules of Evidence.

The federal rule was modified and reorganized by the members of the Advisory Committee to better reflect their intent. Thus, subsection (1) of this section does not appear in Federal Rule 404, but was added in order to codify in one section all situations where evidence of character is admissible. Subsection (1) of this section is derived from Rule 405(b) of the Federal Rules of Evidence. See section 25 (Rule 405) of this Act and the commentary accompanying it.

In paragraph (b) of subsection (2) of this section, the federal rule's restriction of admission of evidence of a victim's character trait of peacefulness to homicide cases has been abandoned by deleting the words "in a homicide case."

Paragraph (d) of subsection (2) of this section does not appear in Federal Rule 404, but was added to codify the present Oregon law regarding evidence of character pertaining to the pugnaciousness of civil parties as set forth in Brooks v. Bergholm, 256 Or 1, 470 P2d (1970).

The remainder of this section is identical to Rule 404 of the Federal Rules of Evidence.

B. Summary

This section describes the conditions under which evidence of a person's character may be considered by the trier of fact in a civil or criminal case.

Questions concerning a person's character may arise in two fundamentally different ways. The first way, commonly referred to as "character in issue," is when character itself is an element of a crime, claim or defense. If a person's possession of a particular trait is an operative fact which, under the substantive law, determines the legal rights and liabilities of the parties, and if that character trait has been placed at issue by the pleadings, the fact of character must be open to proof. McCormick, Evidence, section 187 (2d ed 1972). Examples of "character in issue" are the chastity of a victim under a statute specifying the victim's chastity as an element of the crime of seduction, the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver or, in an action for defamation, the character of the plaintiff when the slander charged bad character. It is quite clear in these situations that character evidence is generally relevant, and that the only problem relates to allowable methods of proof. Therefore, subsection (1) of this section allows the admission of character evidence in such situations. For allowable methods of proof, see section 25 (Rule 405) of this Act.

The second way in which questions of character may arise is when a party attempts to persuade the trier of fact to draw an inference that a person acted consistently with the person's character. This use of character evidence is often described as "circumstantial." Examples of circumstantial use of character evidence are presenting evidence of a person's violent disposition in order to suggest that the person was the aggressor in a melee or presenting evidence of honesty to counter a charge of theft.

Unlike situations involving "character in issue," the circumstantial use of character evidence raises questions of relevancy. Subsection (2) of this section deals with the basic question of whether circumstantial character evidence should be admitted. If admissible under subsection (2) of this section, then section 25 (Rule 405) of this Act determines the appropriate method of proof. If the character evidence relates to a witness, then sections 52 and 53 (Rules 608 and 609) of this Act apply with regard to methods of proof.

Subsection (2) of this section is in accord with the rule in most jurisdictions that rejects use of circumstantial character evidence, but provides several important exceptions. McCormick, Evidence, sections 188 to 194 (2d ed 1972).

Under paragraph (a) of subsection (2) of this section, an accused in a criminal trial may introduce evidence of a pertinent trait of his character (often misleadingly described as "putting his character in issue"), and the prosecution may then rebut with contradictory evidence.

Under paragraph (b) of subsection (2) of this section, an accused in a criminal trial may introduce evidence of a pertinent trait of character of the victim to support, for example, a claim of self-defense to a charge of homicide or assault. The prosecution may then rebut with contradictory evidence.

This paragraph also permits the prosecution to introduce evidence of a victim's character trait of peacefulness to rebut evidence that the victim was the first aggressor. The prosecution can produce such evidence when the defendant pleads self-defense and offers evidence that the victim was the first aggressor. The prosecution need not wait until the defense has produced evidence of the victim's reputation for violence or aggressiveness before it produces evidence of the victim's reputation for peacefulness. The rationale for this approach is that the character trait of the victim for peace or violence has a revealing significance which may well outweigh the possibility of prejudice. See McCormick, section 193 (2d ed 1972).

Paragraph (b) of subsection (2) of this section differs from Rule 404 of the Federal Rules of Evidence and from the rule in most jurisdictions in that it does not limit introduction of evidence of a victim's character trait of peacefulness to homicide cases, but permits introduction of such evidence in any criminal trial at which the accused produces evidence that the victim was the first aggressor. A majority of the members of the Advisory Committee believed that the reasons for adopting this exception for homicide cases have equal force in other criminal prosecutions, such as a prosecution for assault. Similarly, there is no reason to believe that the dangers of prejudice, distraction from the issues and time consumption will be greater when such evidence is introduced in nonhomicide criminal cases. Indeed, the appeal to pity and vengeance implicit in the praise of the character of the victim may be less effective when the victim still lives.

It should be noted that in a prosecution for rape, sodomy or sexual abuse, reputation or opinion evidence of the past sexual behavior of the victim is barred under section 31 (Rule 412) of this Act. That section, based on the Privacy Protection for Rape Victims Act of 1978, P.L. 95-540 (92 Stat 2046), supersedes paragraph (b) of subsection (2) of this section to prevent admission of evidence of the character of the victim, otherwise admissible under such paragraph, to support a claim of consent.

Paragraph (c) of subsection (2) of this section allows admission of evidence concerning the character of a witness for truthfulness or untruthfulness for the purpose of attacking or supporting the credibility of the witness.

Paragraph (d) of subsection (2) of this section allows admission of evidence of the reputation of either party for violent behavior in civil actions for assault and battery when the issue is who committed the first act of aggression.

Although the exceptions set forth in subsection (2) of this section have their reasons for existence based more in history and experience than in logic, an underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L Rev 574, 584 (1956); McCormick, Evidence, section 190 (2d ed 1972). In any event, the exceptions for criminal trials allowed under paragraphs (a) and (b) of this subsection are so deeply imbedded in

our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

It should be stressed that the exceptions to inadmissibility set forth in subsection (2) of this section involve specific character traits, rather than character generally. Thus, paragraphs (a) and (b) of subsection (2) of this section allow admission of evidence relating to a "pertinent trait of character" or the "character trait of peacefulness." Similarly, in section 52 (Rule 608) of this Act, to which reference is made in paragraph (c) of subsection (2) of this section, character evidence relating to witnesses is limited to evidence bearing upon credibility and a character for truthfulness or untruthfulness. Finally, paragraph (d) of subsection (2) of this section is limited to evidence of reputation for violent behavior. This limitation to pertinent traits of character, rather than character generally, is in accord with the prevailing view in the United States. McCormick, Evidence, section 191 (2d ed 1972).

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e. evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L Rev 574, 581-583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence, Art. V, Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, pp 657-658 (1964). The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission in its ultimate rejection of Uniform Rule 47, id., p 615:

> *Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their reflective characters despite what the evidence in the case shows actually happened.*

The Advisory Committee chose not to expand the use of circumstantial character evidence in civil cases. The members merely retained in paragraphs (c) and (d) of subsection (2) of this section those uses of such evidence already sanctioned under existing law. Subsection (2) of this section should not be construed to allow admission of character evidence under circumstances in which it would not be currently admitted, such as character evidence with respect to care, negligence or "accident proneness" in negligence cases.

Subsection (3) of this section deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistent with that rule, evidence of other crimes, wrongs or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered in either civil or criminal cases for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. The list of purposes set forth in the subsection for which evidence of other crimes, wrongs or acts may be admitted is not meant to be exclusive.

When evidence of other crimes, wrongs or acts is sought to be admitted under subsection (3) of this section, the subsection does not require that the evidence be admitted. No mechanical solution is offered to the problem of determining whether the evidence ought to be admitted or excluded. The determination must be made whether the danger of undue prejudice outweighs the probative value of the

evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under section 23 (Rule 403) of this Act. Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L Rev 325 (1956).

C. Relationship to Existing Law

The only change made in current Oregon law under this section is made by paragraph (b) of subsection (2) of this section which allows the prosecution, in any criminal trial at which the defendant produces evidence that the victim was the first aggressor, to present evidence of the victim's character trait of peacefulness. Under current Oregon law, the prosecution can present such evidence only in homicide cases. State v. Holbrook, 98 Or 43, 188 P 947 (1920).

Subsection (1) of this section maintains current Oregon law that the fact of character is open to proof when a particular character trait under the substantive law determines legal rights and liabilities of the parties and when that character trait has been put in issue by the pleadings. Guedon v. Rooney, 160 Or 621, 87 P2d 209 (1939) (competency of driver in action for negligently entrusting a motor vehicle to an incompetent driver); State v. Heinster, 60 Or 467, 120 P 406 (1912) (chastity of victim in prosecution for seduction).

Subsection (2) of this section is in accord with current Oregon law that generally rejects circumstantial use of character evidence. Rich v. Cooper, 234 Or 300, 380 P2d 613 (1963). The exceptions to nonadmissibility set forth in subsection (2) of this section are those recognized under current Oregon law.

In Oregon, an accused may introduce evidence of a pertinent trait of his character, and the prosecution may rebut such evidence. State v. Miles, 8 Or App 189, 492 P2d 497 (1972); State v. Rowley, 6 Or App 13, 485 P2d 1120 (1971). This is not changed by paragraph (a) of subsection (2) of this section.

Paragraph (b) of subsection (2) of this section changes Oregon law in the manner already discussed. Except for that change, it restates the existing law in this state. An accused may introduce evidence of a pertinent character trait of the victim, in order to support a claim of self-defense, for example, and the prosecution may rebut the evidence. The prosecution may introduce evidence of the victim's character trait of peacefulness when the defendant pleads self-defense and offers evidence that the victim was the first aggressor. State v. Holbrook, 98 Or 43, 188 P 947 (1920); State v. Wilkins, 72 Or 77, 142 P 589 (1914); State v. Thompson, 49 Or 46, 88 P 583 (1907).

Under current Oregon law, as under paragraph (c) of subsection (2) of this section, a witness may be impeached by evidence that the witness' reputation for truthfulness or untruthfulness is bad. Lucas v. Kaylor, 136 Or 541, 299 P2d 197 (1931); McIntosh v. McNair, 53 Or 87, 99 P 74 (1909).

Paragraph (d) of subsection (2) of this section was added to this section to expressly retain existing Oregon law. Brooks v. Bergholm, 256 Or 1, 470 P2d 154 (1970); Linkhart v. Savely, 190 Or 484, 227 P2d 187 (1950).

The limitation of the exceptions listed in subsection (2) of this section to specific character traits, rather than character generally, is in agreement with the exceptions currently recognized in this state. State v. Selby, 73 Or 378, 144 P 657 (1914).

In agreement with current Oregon law, subsection (3) of this section does not permit admission of evidence of other crimes, wrongs or bad acts to prove the

character of a person to show that the person acted in conformity therewith, but does allow admission of such evidence for other purposes. State v. Brown, 231 Or 297, 372 P2d 779 (1962) (Evidence of stealing cars admitted to show intent to avoid punishment for present crime); State v. Long, 195 Or 81, 244 P2d 1033 (1952) (Evidence of murder of owner of truck admitted to establish motive: defendant shortly afterward used truck to commit a robbery); State v. Pace, 187 Or 498, 212 P2d 755 (1949) (In prosecution for statutory rape, evidence of prior sexual relations with victim was admitted to show a propensity for illicit sexual relations with the particular person concerned in the crime on trial).

Evidence may be admitted under subsection (3) of this section in either civil or criminal trials. This is currently the rule in Oregon. Karsun v. Kelley, 258 Or 155, 482 P2d 533 (1971).

SECTION 25. Rule 405. Methods of proving character. (1) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(2) (a) Specific instances of conduct. In cases in which character or a trait of character of a person is admissible under subsection (1) of section 24 (Rule 404) of this Act, proof may also be made of specific instances of the conduct of the person.

(b) When evidence is admissible under subsection (3) of section 24 (Rule 404) of this Act, proof may be made of specific instances of the conduct of the person.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee deleted the reference in subsection (2) of section 25 (Rule 405) to subsection (3) of section 24 (Rule 404) and broke subsection (2) of Rule 405 into two paragraphs. The committee felt that the proposed subsection dealt with methods of providing character and that that is not relevant to subsection (3) of Rule 404.

Subsection (3) of Rule 404 deals with purposes for which evidence of other crimes, wrongs or acts is admissible. Acting in conformity with character or a character trait is a specifically excluded purpose. The committee felt that neither the included purposes nor other acts deal with character. Rather, character and traits of character are not admissible under paragraph (3) of Rule 404. Therefore, the committee felt that given the wording of the proposed subsection (2) of section 25 (Rule 405) it was inappropriate to refer to subsection (3) of section 24 (Rule 404).

Thus paragraph (a) of subsection (2) of section 25 deals with the method of proving character when it is admissible under subsection (1) of section 24 (Rule 404). Paragraph (b) of subsection (2) of section 25 deals with methods of proving other crimes, wrongs or acts when they are admissible under subsection (3) of section 24 (Rule 404).

ADVISORY COMMITTEE PROPOSAL

SECTION 25. Rule 405. Methods of proving character.

(1) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(2) Specific instances of conduct. In cases in which character or a trait of character of a person is admissible under subsection (1) or (3) of section 24 (Rule 404) of this Act, proof may also be made of specific instances of the conduct of the person.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on Rule 405 of the Federal Rules of Evidence. Subsection (2) of this section is a slightly modified version of Federal Rule 405 (b), in which the words "an essential element of a charge, claim, or defense" have been replaced with "admissible under subsection (1) or (3) of section 24 (Rule 404) of this Act," a more specific reference to the cases in which proof of specific instances of conduct may be used.

Subsection (1) of this section is identical to Federal Rule 405(a).

B. Summary

This section deals only with the methods which may be used to prove character evidence. Section 24 (Rule 404) of this Act deals with the admissibility of character evidence and is the only section under which character evidence may be admitted. When character evidence is admissible, it is to be proven by methods specified by this section.

Of the three methods of proving character provided by this section, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently, this section confines the use of evidence of this kind to two situations: (1) when character is, in the strict sense, in issue and hence deserving of a searching inquiry; and (2) when character is not admitted for the purpose of proving that the person acted in conformity with that character. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine. McCormick, Evidence, section 186 (2d ed 1972).

In recognizing opinion as a means of proving character, the section departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore, Evidence, section 1986 (3d ed 1940) pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with "the second-hand, irresponsible produce

of multiplied guesses and gossip which we term 'reputation.'" It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion.

According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question, but the witness may not be asked whether he knew of particular instances of conduct. Michelson v. United States, 355 US 469, 69 SCt. 213, 93 L Ed 168 (1948); Annot., 47 A.L.R.2d 1258. The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. However, questions about knowledge of specific acts of conduct would elicit opinion evidence and are therefore improper. The Advisory Committee believes that these distinctions are of slight, if any, practical significance, and adopted the second sentence of subsection (1) of this section which eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony.

Under this rule testimony of relating specific instances of conduct is not generally permissible on direct examination of an ordinary opinion witness to prove character. This is also true of witnesses to the character of witnesses under subsection (2) of section 52 (Rule 608) of this Act. Opinion testimony on direct examination in these situations should be confined to the nature and extent of observations and acquaintance upon which the opinion is based.

C. Relationship to Existing Law

Existing Oregon law has generally allowed evidence of character to be proved by reputation. State v. Holbrook, 98 Or 43, 192 P 640 (1920); Rich v. Cooper, 234 Or 300, 380 P2d 613 (1963). Therefore, insofar as reputation evidence is concerned, Oregon law is in accord with subsection (1) of this section.

No Oregon case has been found in which opinion evidence has been used to prove character. Subsection (1) of this section, which allows opinion evidence to prove character, may therefore expand existing Oregon law to encompass this method of proof.

The final sentence of subsection (1), which provides that inquiry is allowable into relevant specific instances of conduct on cross-examination, is consistent with current Oregon law. State v. Shull, 131 Or 224, 282 P 237 (1929). That case also provides authority for the position taken under subsection (1) of this section that during cross-examination of a character witness, one may inquire into relevant specific instances of conduct without making distinctions in the form of questions between "hearing" of specific instances of conduct and "knowing" of such instances.

Subsection (2) of this section does not alter existing Oregon law. Karsun v. Kelley, 258 Or 155, 482 P2d 533 (1971); State v. Brown, 231 Or 297, 372 P2d 779

(1962); State v. Pace, 187 Or 498, 212 P2d 755 (1949); State v. Heinster, 60 Or 467, 120 P 406 (1912).

SECTION 26. Rule 406. Habit; routine practice. (1) Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(2) As used in this section "habit" means a person's regular practice of meeting a particular kind of situation with a specific type of conduct.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee decided to make a definition of "habit" part of Rule 406. It was felt that defining "habit" in the rule would forestall use as habit evidence of evidence of conduct which in fact shows a character trait rather than a habit. The definition is a paraphrase of language in the Advisory Committee's "Note" to Rule 406 of the Federal Rules of Evidence.

ADVISORY COMMITTEE PROPOSAL

SECTION 26. Rule 406. Habit; routine practice. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 406 of the Federal Rules of Evidence.

B. Summary

McCormick effectively describes habit by contrasting it with character:

> *Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. McCormick, Evidence, section 195 at 462 (2d ed 1972).*

Equivalent behavior on the part of a group is designated "routine practice of an organization" in this section.

Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion. Again, quoting McCormick:

Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistence with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it. McCormick, Evidence, section 195 at 463 (2d ed 1972).

When disagreement has appeared, its focus has been upon the question of what constitutes habit, and there are two readily apparent reasons for this. First, there has been confusion between a person's habits and his traits of character. In fact, much character evidence has been smuggled into court under the guise of habit. To paraphrase McCormick, a trait of character, such as character for care, is a person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular situation with a specific, distinctive type of conduct, such as the habit of going down a particular stairway two stairs at a time. Conduct is "distinctive" if there is some aspect of the activity which would set it apart from the ordinary response to the same situation. For example, an individual who always stops his motor vehicle at a particular "stop" sign cannot be said to be in the "habit" of stopping at that sign. The individual's behavior is not distinctive. It is a response that is required by law and that is typical of most drivers at the same intersection. However, if the individual never stops at that particular sign, then that distinctive and specific conduct may be termed "habit."

Second, there is disagreement on the extent to which instances of conduct must be multiplied and consistency of behavior maintained in order for the conduct to rise to the status of habit. Lewan, Rationale of Habit Evidence, 16 Syracuse L Rev 39, 49 (1964). While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidentiary purposes cannot be formulated.

The above comments on habit evidence apply equally as well to routine practices of an organization.

This section specifically rejects the "no-eyewitness" limitation on the admissibility of evidence of a person's habits. Under this limitation, habit evidence is inadmissible if an eyewitness to the event was present. It was rejected by the Advisory Committee because it operates unfairly. First, the eyewitness present is usually the opposing party, and, in many cases, this would operate to exclude evidence of habit. Second, the presence or absence of eyewitnesses is a mere fortuity and evidence of habit should not be admitted or excluded on the basis of circumstance. Obviously, if a party can produce an eyewitness, he is in a better position than if none were available. But under the "no-eyewitness" rule, the production of a witness on one side reinforces the opposing party's disadvantage, because he is prevented from rebutting the statements of the witness with evidence of habit.

McCormick comments that courts have adopted the "no-eyewitness" limitation because of their failure to draw a clear line between character and habit, McCormick, Evidence, section 195 at 463 and 464 (2d ed 1972). He noted, "This is contributed to by the popular custom of describing character in terms of 'habits,' such as 'habits of care' or 'habits of intemperance.'" McCormick concludes that, as a consequence, these courts mistakenly apply to evidence of

habit the restrictions developed for the far less probative and more prejudicial evidence of character. In rejecting the "no-eyewitness" rule, the Advisory Committee does not contemplate a great influx of habit evidence into the court for the simple reason that the committee has adopted a very restrictive definition of habit. To be admissible, the habit must constitute a specific, distinctive response to a particular situation.

With respect to the routine practice of an organization, a position similar to the eyewitness limitation is the requirement that evidence of the practice be corroborated as a condition precedent to its admission in evidence. A considerable body of authority, perhaps a majority, require corroboration. McCormick Evidence, section 195 at 464, n 18 (2d ed 1972); Slough, Relevancy Unraveled, 5 Kan. L. Rev. 404, 449 (1957). This requirement of corroboration is specifically rejected by this section on the ground that it relates to the sufficiency of the evidence rather than admissibility.

In order to illustrate the intended application of the section, the Advisory Committee on Evidence Law Revision suggests the following examples of habit or routine practice:

> *Where evidence has been admitted in a homicide prosecution to the effect that the deceased was in the habit of arming himself whenever he became involved in a quarrel, rebuttal evidence is allowed that it is the habit of the deceased to never carry arms. State v. Mims, 36 Or 315, 61 P 888 (1900).*
>
> *Evidence of a bank's custom or practice of giving a notice of dishonor is admissible. McMillan v. Montgomery, 121 Or 28, 253 P 879 (1927).*
>
> *Evidence of a person repeatedly riding a horse rapidly and carelessly about the streets of a certain city is not habit evidence. Blue v. City of Union, 159 Or 5, 75 P2d 977 (1938).*
>
> *Evidence that an employer customarily instructed his stenographer to enclose materials with dictated letters and that the stenographer always followed the instructions is admissible as a habit, custom or practice. Start v. Shell Oil Co. and Arnston, 202 Or 99, 260 P2d 468 (1954).*
>
> *Evidence that a child always uses a particular cross-walk is admissible as habit. Fenton v. Aleshire, 238 Or 24, 393 P2d 217 (1964).*
>
> *Evidence that it is an auto dealer's 'inflexible rule, habit and custom' to require that all buyer's orders be completely filled out before being signed by the buyer is admissible. Krause v. Eugene Dodge, Inc., 265 Or 486, 509 P2d 1199 (1973).*

C. Relationship to Existing Law

This section changes Oregon law by eliminating the requirement that there be no eyewitnesses to conduct on a particular occasion before evidence will be admitted to prove that the conduct on that occasion was in conformity with habit or routine practice. This "no-eyewitness" rule was recently adhered to by the Supreme Court in Fenton v. Aleshire, 238 Or 24, 393 P2d 219 (1964).

The requirement that evidence of the routine practice of an organization be corroborated before being admitted has been impliedly rejected in Oregon. Start v. Shell Oil Co., 202 Or 99, 273 P2d 225 (1954). Therefore, the explicit

rejection of such a requirement under this section is not considered by the Advisory Committee to be a substantive change in existing law.

Current Oregon law, in accord with this section, allows admission of evidence of the routine practices of organizations as well as the habits of individuals. Krause v. Eugene Dodge, Inc., 265 Or 468, 509 P2d 1199 (1973), Robbins v. Steve Wilson, 255 Or 4, 463 P2d 585 (1970); Start v. Shell Oil Co., 202 Or 99, 260 P2d 468 (1954); Shaver v. Eagle Star Ins. Co., 172 Or 91, 139 P2d 769 (1943).

SECTION 27. Rule 407. Subsequent remedial measures. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 407 of the Federal Rules of Evidence.

B. Summary

The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. The first is that a subsequent remedial measure is not in fact an admission, since such conduct is equally consistent with injury by mere accident or through contributory negligence. Under a liberal theory of relevancy, however, this ground alone would not support exclusion as the inference of culpable conduct is still a possible one. The second, and more impressive ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules and discharge of employes, and the language of the present rule is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L Rev 574, 590 (1956). See also McCormick, Evidence, section 275 at 666 (2d ed 1972).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. However, the evidence may be allowable for other purposes, including impeachment and, if controverted, ownership or control, existence of duty or feasibility of precautionary measures. 2 Wigmore, Evidence, section 283 (3d ed 1940); Annot., 64 A.L.R.2d 1296. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue is present and allows the opposing party to lay the groundwork for exclusion by taking an admission. Otherwise, the factors of undue prejudice, confusion of issues and misleading the jury remain for consideration under section 23 (Rule 403) of this Act. It should be noted that if the feasibility of precautionary measures or ownership or control is not proven by

evidence of subsequent remedial measures but by some other means, this section does not apply and, therefore, there is no requirement that the other purpose be controverted.

For comparable rules, see Uniform Rule 51; California Evidence Code, section 1151; Kansas Code of Civil Procedure, section 60-451; New Jersey Evidence Rule 51.

C. Relationship to Existing Law

This section reflects existing Oregon law. Currently, evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct. Rich v. Tite-Knot Pine Mill, 245 Or 185, 421 P2d 370 (1960); Phipps v. Air King Manufacturing Corp., 263 Or 141, 501 P2d 790 (1972). However, as under this section, evidence of subsequent remedial measures may be offered for other purposes, as indicated by two Oregon cases.

In Parsons v. Leavitt, 249 Or 283, 437 P2d 843 (1968), an action against the resident supervisor of a state park for negligent failure to warn plaintiff of a sudden drop-off or to authorize safety measures, the court upheld the admission of evidence of subsequent safety measures offered to prove the defendant's control or authority.

In Fields v. Fields, 213 Or 522, 307 P2d 528, 326 P2d 451 (1958), an action against a ranch owner for negligent failure to provide an adequate safety guard on a piece of machinery, the court sustained the admission of evidence of the addition of a guard after the accident to show the feasibility of precautionary measures.

SECTION 28. Rule 408. Compromise and offers to compromise. (1) (a) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

(b) Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

(2) (a) Subsection (1) of this section does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

(b) Subsection (1) of this section also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on Rule 408 of the Federal Rules of Evidence. The language of the federal rule has been divided into subsections and paragraphs to provide clearer organization and easier understanding.

B. Summary

As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of either the validity or invalidity of the claim. McCormick, Evidence, section 274 (2d ed 1972). As with evidence of subsequent remedial measures, dealt with in section 27 (Rule 407) of this Act, exclusion may be based on either lack of relevancy or policy considerations. The evidence can be considered irrelevant since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim, with a very small offer to settle a large claim being much more readily construed as a desire for peace rather than an admission of culpability or liability. The second and more consistently impressive ground for exclusion is promotion of the public policy favoring the compromise and settlement of disputes. McCormick, Evidence, sections 74 and 274 (2d ed 1972). While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.

Under the common law rule and generally accepted doctrine, an admission of fact made in the course of compromise negotiations is not protected unless it is hypothetical or it is expressly stated to be "without prejudice" or it is so inseparably connected with the offer that it cannot be correctly understood without reading the two together. McCormick, Evidence, section 274 pp 663 and 664 (2d ed 1972). An inevitable effect of that rule is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the Advisory Committee's rejection of the common law rule. Thus, evidence of conduct or any statements made in compromise negotiations, as well as the offer or completed compromise itself, is not admissible under this section.

The policy considerations which underlie this section do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. McCormick, Evidence, section 274 at 663 (2d ed 1972). Therefore, paragraph (a) of subsection (1) of this section requires that the claim be disputed as to either validity or amount.

Subsection (2) of this section imposes some limitations on the applicability of this section. The broad purpose of this section is to insure that frank and open negotiations will take place without fear that what is said during the negotiations will be used against the parties during the trial. Paragraph (a) of subsection (2) of this section is meant to prevent the abuse of the policy behind that purpose, which policy is to favor compromises and settlements of disputes. Therefore, in order to prevent a party from trying to immunize evidence from being admissible by presenting it during negotiations, the other party may otherwise discover the evidence and present it so long as no reference is made to the compromise negotiations.

Paragraph (b) of subsection (2) allows admission of evidence of compromise when that evidence is offered for some purpose other than to prove the validity or invalidity of a claim or its amount. The illustrative situations mentioned in paragraph (b) of subsection (2) of this section are supported by the authorities. As to proving bias or prejudice of a witness, see Annot., 161 A.L.R. 995, contra, Fenberg v. Rosenthal, 348 Ill App 510, 109 NE 2d 402 (1952); and as to negativing

a contention of lack of due diligence in presenting a claim, see McCormick, Evidence, section 274 at 664 (2d ed 1972). An effort to "buy off" the prosecution or a prosecuting witness in a criminal case is also not within the policy of the rule of exclusion. McCormick, Evidence, section 274 at 665 (2d ed 1972).

For other rules of similar import, see Uniform Rules 52 and 53; California Evidence Code, sections 1152 and 1154; Kansas Code of Civil Procedure, sections 60-452 and 60-453; New Jersey Evidence Rules 52 and 53.

C. Relationship to Existing Law

Paragraph (b) of subsection (a) of this section changes existing Oregon law by making evidence of conduct or statements made in compromise negotiations inadmissible at trial. This paragraph overrules the common law doctrine of allowing admissions of liability made during negotiations to be admissible while still excluding evidence of any offers of compromise. The common law doctrine is currently followed in Oregon. ORS 41.810 (1979 Replacement Part); Broadway Finance, Inc. v. Tadorovich, 216 Or 475, 339 P2d 436 (1939); Sims v. Sowle, 238 Or 329, 395 P2d 133 (1964).

In other respects, existing Oregon law is generally consistent with this section. In accord with this section, Oregon's common law rule excludes evidence of offers of compromise for the purpose of proving that anything is due. ORS 41.810; Dalk v. Lachmund, 157 Or 152, 70 P2d 558 (1939).

This section does not alter the existing Oregon interpretation of its common law rule under which the rule applies to prohibit admission of evidence of completed compromises when offered against a party thereto. Zahumensky v. Fandrich, 200 Or 588, 267 P2d 664 (1954).

The policy of favoring compromises and settling disputes that this section is intended to promote finds expression, in a different context, in paragraph (c) of subsection (1) of ORS 135.435 which provides that admissions made by a criminal defendant during plea negotiations are not admissible.

SECTION 29. Rule 409. Payment of medical and similar expenses. Evidence of furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an injury is not admissible to prove liability for the injury. Evidence of payment for damages arising from injury or destruction of property is not admissible to prove liability for the injury or destruction.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee amended section 29 (Rule 409) to include payments for property damage so as to be consistent with ORS 41.970.

ADVISORY COMMITTEE PROPOSAL

SECTION 29. Rule 409. Payment of medical and similar expenses. Evidence of furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 409 of the Federal Rules of Evidence.

B. Summary

The considerations underlying this rule parallel those underlying sections 27 and 28 (Rules 407 and 408) of this Act, which deal respectively with subsequent remedial measures and offers of compromise. As stated in Annot., 20 A.L.R. 2d 291, 293:

> *[G]enerally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.*

Contrary to section 28 (Rule 408) of this Act, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature.

For rules on the same subject, but phrased in terms of "humanitarian motives," see Uniform Rule 52; California Evidence Code, section 1152; Kansas Code of Civil Procedure, section 60-452; New Jersey Evidence Rule 52.

C. Relationship to Existing Law

This section does not alter existing Oregon law. In Oregon, evidence of payment of the expenses of an injured party by the opposing party is not admissible to prove liability. ORS 41.950 to 41.980 (1979 Replacement Part); Briggs v. J. Yeon Co., 168 Or 239, 122 P2d 444 (1942).

As under this section, existing Oregon law does not exclude statements made in conjunction with the payment of an injured party's expenses. Briggs v. J. Yeon Co., supra; Dunning v. Northwestern Electric Co., 186 Or 379, 199 P2d 648 (1949); Sims v. Sowle, 238 Or 329, 395 P2d 133 (1964).

The Advisory Committee does not recommend repeal of the existing Oregon statutes relating to advance payments for death, injury or property damage (ORS 41.950 to 41.980), but proposes renumbering those statutes so that they will appear in ORS chapter 18 with ORS 18.510, relating to the effect of advance payments on the amount of a judgment.

SECTION 29a. Rule 410. Withdrawn plea or statement not admissible. (1) A plea of guilty or no contest which is not accepted or has been withdrawn shall not be received against the defendant in any criminal proceeding.

(2) No statement or admission made by a defendant or a defendant's attorney during any proceeding relating to a plea of guilty or no contest which is not accepted or has been withdrawn shall be received against the defendant in any criminal proceeding.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee adopted section 29a in order to insure that the language would appear in the evidence code. Except for deletion of the word "his," the rule is a restatement of ORS 135.445.

ADVISORY COMMITTEE COMMENTARY

Rule 410 of the Federal Rules of Evidence is deleted from the proposals adopted by the Advisory Committee on Evidence Law Revision.

Believing that the current Oregon statute relating to the admissibility of withdrawn or rejected pleas of guilty or no contest is satisfactory, the Advisory Committee retains ORS 135.445 and does not adopt Federal Rule 410. The members of the Advisory Committee recognized that the last sentence of Federal Rule 410 would change current Oregon law by allowing a defendant's statement made in connection with a plea of guilty or no contest to be admitted as evidence under certain conditions in a subsequent criminal proceeding for perjury or false statement. This was a change not favored by the members of the Advisory Committee.

Federal Rule 410, as amended by Congress in section 1 of the Act of December 12, 1975, PL 94-149 (89 Stat 805), reads as follows:

Inadmissibility of Pleas, Offers of Pleas, and Related Statements

Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

SECTION 30. Rule 411. Liability insurance. (1) Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.

(2) Subsection (1) of this section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

A. Derivation

This section is identical to Rule 411 of the Federal Rules of Evidence. The language of the federal rule has been divided into subsections to provide clearer organization and easier understanding.

B. Summary

The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. McCormick, Evidence, section 201 (2d ed 1972). At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds. McCormick, Evidence, supra, at 481; Annot., 4 A.L.R. 2d 761. This section is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

Subsection (2) illustrates the limitation of applicability of this section, using well established examples. Thus, evidence of insurance is admissible for purposes other than proving fault, such as proof of control and bias or prejudice of a witness.

The procedure which a court must follow once the issue of insurance has been injected into the proceedings varies according to whether the disclosure is advertent or inadvertent. In the case of inadvertent disclosures, the trial judge may at his discretion grant a mistrial or instruct the jury to disregard the evidence of insurance. NOTE, DeSpain v. Bohlke and Exclusion of Evidence of Insurance in Oregon, 8 Will LJ 294 (1972). When the reference to insurance is advertent, the judge must automatically grant a mistrial. Id. There is, however, an increasing trend to minimize the effect of the rule that any reference to insurance is necessarily prejudicial to the litigants. McCormick, Evidence, section 201 at 482 (2d ed 1972).

For similar rules see Uniform Rule 54; California Evidence Code, section 1155; Kansas Code of Civil Procedure, section 60-454; New Jersey Evidence Rule 54.

C. Relationship to Existing Law

This section is consistent with existing Oregon law. Oregon courts do not allow admission of evidence of liability insurance for the purpose of proving fault. Sherrick v. Landstrom, 229 Or 415, 267 P2d 452 (1961).

Under current Oregon law, evidence of insurance is admissible for purposes other than proving fault. Blake v. Roy Webster Orchards, 249 Or 348, 437 P2d 757 (1968) (proof of control); Rigelman v. Gilligan, 265 Or 109, 506 P2d 710 (1973) (bias or prejudice of witness); Fairbrother v. Rinker, 274 Or 525, 547 P2d 605 (1976) (evidence of insurance coverage offered to show bias was excluded when there was sufficient other evidence available which could be offered without prejudice).

This section does nothing to change current Oregon practice followed by courts when the issue of insurance has been injected into the proceedings. Blake

v. Roy Webster Orchards, 249 Or 348, 437 P2d 757 (1968); DeSpain v. Bohlke, 259 Or 320, 486 P2d 545 (1971).

SECTION 31. Rule 412. Rape cases; relevance of victim's past behavior. (1) Notwithstanding any other provision of law, in a prosecution for a crime described in ORS 163.355 to 163.425, or in a prosecution for an attempt to commit such a crime, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(2) Notwithstanding any other provision of law, in a prosecution for a crime described in ORS 163.355 to 163.425, or in a prosecution for an attempt to commit such a crime, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:

(a) Admitted in accordance with paragraphs (a) and (b) of subsection (3) of this section and is constitutionally required to be admitted; or

(b) Admitted in accordance with subsection (3) of this section and is evidence of:

(A) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape, sodomy or sexual abuse or attempted rape, sodomy or sexual abuse is alleged.

(3) (a) If the person accused of committing rape, sodomy or sexual abuse or attempted rape, sodomy or sexual abuse intends to offer under subsection (2) of this section evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(b) The motion described in paragraph (a) of this subsection shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subsection (2) of this section, the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subsection (2) of section 5 (Rule 104) of this Act, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(c) If the court determines on the basis of the hearing described in paragraph (b) of this subsection that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(4) For purposes of this section, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape, sodomy or sexual abuse or attempted rape, sodomy or sexual abuse is alleged.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee amended Rule 412 to make it clear that the rule also applies to prosecutions for attempted rape, sodomy or sexual abuse.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on Rule 412 of the Federal Rules of Evidence, which was enacted by Congress as the Privacy Protection for Rape Victims Act of 1978, PL 95-540 (92 Stat 2046). However, in order to broaden the scope of application of this section so that it is coextensive with the applicability of ORS 163.475 (1979 Replacement Part), and to have this section correctly refer to crimes defined in the Oregon Criminal Code of 1971, the following changes have been made: In subsections (1) and (2) of this section, "criminal case in which a person is accused of rape or of assault with intent to commit rape" is deleted in favor of the phrase, taken from ORS 163.475, "prosecution under ORS 163.355 to 163.425"; in subparagraph (B) of paragraph (b) of subsection (2) of this section, ", sodomy or sexual abuse" is substituted for the federal phrase "or assault"; and in subsections (3) and (4) of this section, ", sodomy or sexual abuse" is substituted for the federal phrase "or assault with intent to commit rape."

Changes in the form of internal references to sections, subsections and paragraphs have also been made throughout this section.

B. Summary

The principal purpose of this section is to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives. It does so by narrowly circumscribing when such evidence may be admitted. It does not do so, however, by sacrificing any constitutional right possessed by the defendant. The section balances the interests involved: The rape victim's interest in protecting her private life from unwarranted public exposure; and the defendant's interest in being able to adequately present a defense by offering relevant and probative evidence.

This section, applicable only in criminal cases, spells out when, and under what conditions, evidence of a rape victim's prior sexual behavior can be admitted. This section provides that reputation or opinion evidence about a rape victim's prior sexual behavior is not admissible. This section also provides that a court cannot admit evidence of specific instances of a rape victim's prior sexual conduct except in three circumstances.

The first circumstance is where the Constitution requires that the evidence be admitted. This exception is intended to cover those infrequent instances where, because of an unusual chain of circumstances, the general rule of inadmissibility, if followed, would result in denying the defendant a constitutional right.

The second circumstance in which the defendant can offer evidence of specific instances of a rape victim's prior sexual behavior is where the defendant raises the issue of consent and the evidence is of sexual behavior with the defendant. To admit such evidence, however, the court must find that the evidence is relevant and that its probative value outweighs the danger of unfair prejudice.

The third circumstance in which a court can admit evidence of specific instances of a rape victim's prior sexual behavior is where the evidence is of behavior with someone other than the defendant and is offered by the defendant on the issue of whether or not he was the source of semen or injury. Again, such evidence will be admitted only if the court finds that the evidence is relevant and that its probative value outweighs the danger of unfair prejudice.

This section further provides that before evidence is admitted under any of these exceptions, there must be an in camera hearing--that is, a proceeding that takes place in the judge's chambers out of the presence of the jury and the general public. At this hearing, the defendant will present the evidence he intends to offer and be able to argue why it should be admitted. The prosecution, of course, will be able to argue against that evidence being admitted.

The purpose of the in camera hearing is twofold. It gives the defendant an opportunity to demonstrate to the court why certain evidence is admissible and ought to be presented to the jury. At the same time, it protects the privacy of the rape victim in those instances when the court finds that evidence is inadmissible. Of course, if the court finds the evidence to be admissible, the evidence will be presented to the jury in open court.

The effect of this section therefore, is to preclude the routine use of evidence of specific instances of a rape victim's prior sexual behavior. Such evidence will be admitted only in clearly and narrowly defined circumstances and only after an in camera hearing. In determining the admissibility of such evidence, the court will consider all of the facts and circumstances surrounding the evidence, such as the amount of time that lapsed between the alleged prior act and the rape charged in the prosecution. The greater the lapse of time, of course, the less likely it is that such evidence will be admitted.

C. Relationship to Existing Law

This section replaces ORS 163.475 (1979 Replacement Part), Oregon's current statute relating to the admissibility of evidence of sexual character in prosecutions for certain criminal offenses.

The Advisory Committee adopted this section in lieu of retaining ORS 163.475 for three reasons:

(1) The members believe that this section better balances the interests of defendants and victims in prosecutions for sexual offenses. See State v. Jalo, 27 Or App 845, 557 P2d 1359 (1976), in which the court held that ORS 163.475, prior to 1977 amendments, was applied in a manner that violated the defendant's constitutional right to confront the witnesses against him.

(2) The members wish to avoid the potential problems caused by invoking, in a criminal case, a presumption that relates to an element of the offense or negates a defense. See the commentary to section 18 (Rule 309) of this Act.

(3) The members determined that subsections (5) and (6) of ORS 163.475, relating to relevancy of a complainant's previous sexual conduct and to impeachment of a witness' credibility by proof of a prior criminal conviction will be unnecessary after the adoption of Articles IV and VI of this Act.

SECTION 32. Rule 503. Lawyer-client privilege. (1) Definitions. As used in this section, unless the context requires otherwise:

(a) "Client" means a person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(b) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(d) "Representative of the client" means a person who has authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client.

(e) "Representative of the lawyer" means one employed to assist the lawyer in the rendition of professional legal services, but does not include a physician making a physical or mental examination under ORCP 44.

(2) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;

(b) Between the client's lawyer and the lawyer's representative;

(c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;

(d) Between representatives of the client or between the client and a representative of the client; or

(e) Between lawyers representing the client.

(3) Who may claim the privilege. The privilege created by this section may be claimed by the client, a guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(4) Exceptions. There is no privilege under this section:

(a) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(b) As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(c) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee rejected the Advisory Committee's definition of "representative of the client" in favor of the more restrictive "control group test." The committee adopts the following commentary from the comment to Rule 503(a)(2), Alaska Rules of Evidence, Alaska Bar Association, 115 (May 1979).

"The Proposed Federal Rules of Evidence as submitted to Congress by the United States Supreme Court did not contain a definition of 'representative of the client.' Because of uncertainty about the extent of the privilege to be granted to corporate clients, the Advisory Committee came out in favor of a case-by-case analysis. This approach is rejected here. 'An ad hoc approach to privilege pursuant to a vague standard achieves the worst of possible worlds: harm in the particular case because information may be concealed; and a lack of compensating long-range benefit because persisting uncertainty about the availabiltiy of the privilege will discourage some communications.' Note, Attorney-Client Privilege for Corporate Clients: The Control Group Text, 84 Harv. L. Rev. 424, 426 (1970). No definition of "representative of the client" will be perfect, but the best approach to corporate privilege developed to date is the 'control group' text as adopted in Alaska Rule 503(a)(2). See City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp 483, 485 (E.D. Pa. 1962). The 'control group' test is admittedly restrictive and has been criticized by some courts. See, e.g., Harper & Row Publishers, Inc., v. Decker, 423 F.2d 487, 491-492 (7th Cir. 1970), aff'd by an equally divided court per curiam, 400 U.S. 348, 27 L.Ed. 2d 433 (1971). However, the restrictive view brings the corporate privilege more in line with the privilege available to unincorporated business concerns. Business organizations should not receive different treatment on evidence questions in courts of law merely because of differences in financial structure.

If, for example, A runs a taxi service as a sole proprietorship with several employees, and one employee driver is involved in an accident for which A is sued, the employee's statements to A's attorney are not within the attorney-client privilege, even though A may order his employee to talk with the lawyer. If A incorporates, the ruling should not change. It should be sufficient that A and other corporate officers having the capacity to seek legal advice and to act on it can claim the benefits of the privilege for private communications with counsel. A more permissive privilege would result

in suppression of information conveyed to attorneys by employees who are more like witnesses than clients and who have no personal desire for confidentiality."

In what follows, the Advisory Committee proposal is not reprinted in its entirely because the only change made by the Judiciary Committee was in the definition of "representative of a client."

ADVISORY COMMITTEE PROPOSAL

(d) "Representative of the client" means a person who may be charged with liability for the alleged acts, omissions or transactions for which the person's employer may be charged or whose duty or job is to report to the client's lawyer concerning a matter of interest to the client.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on proposed Rule 503 of the Federal Rules of Evidence, which was prescribed by the Supreme Court of the United States and submitted to Congress, but which was not enacted. Aside from minor changes made to conform this section to the form and style of Oregon statutes, there are two major differences between this section and proposed Federal Rule 503. This section contains a definition of "representative of the client," which the federal rule does not, and this section specifically excludes a physician making a physical or mental examination under ORS 44.610 to 44.640 from the definition of "representative of the lawyer."

B. Summary

Subsection (1). (a) The definition of "client" includes governmental bodies. The definition also extends the status of client to one consulting a lawyer preliminarily with a view to retaining him, even though actual employment does not result. McCormick, Evidence, section 88 (2d ed 1972). The client need not be involved in litigation; the rendition of legal service or advice under any circumstances suffices. 8 Wigmore, section 2294 (McNaughton Rev 1961). The services must be professional legal services; purely business or personal matters do not qualify. McCormick, Evidence, section 88 (2d ed 1972).

(b) The requisite confidentiality of communication is defined in terms of intent. A communication made in public or meant to be relayed to outsiders or which is divulged by the client to third persons can scarcely be considered confidential. McCormick, Evidence, section 91 (2d ed 1972). The intent is inferable from the circumstances. Unless intent to disclose is apparent, the attorney-client communication is confidential. Taking or failing to take precautions may be considered as bearing on intent.

Practicality requires that some disclosure be allowed beyond the immediate circle of lawyer-client and their representatives without impairing confidentiality. Hence the definition allows disclosure to persons "to whom disclosure is in furtherance of the rendition of professional legal services to the client," contemplating those in such relation to the client as "spouse, parent, business associate, or joint client." Comment, California Evidence Code, section 952.

Disclosure may also be made to persons "reasonably necessary for the transmission of the communication," without loss of confidentiality.

(c) A "lawyer" is a person licensed to practice law in any state or nation. There is no requirement that the licensing state or nation recognize the attorney-client privilege, thus avoiding excursions into conflict of laws questions. "Lawyer" also includes a person reasonably believed to be a lawyer. For similar provisions, see California Evidence Code, section 950.

(d) Unlike proposed Federal Rule 503, this section contains a definition of "representative of the client." In determining whether an individual, in the context of applying the lawyer-client privilege to corporations, is a representative of the client, the Advisory Committee specifically rejects the "control group" test, the most restrictive test, which limits the category to persons with authority to seek out and act upon legal advice for the client. See, e.g. City of Philadelphia v. Westinghouse Electric Corp., 210 F Supp 483 (ED Pa 1962), mandamus and prohibition denied sub nom; General Electric Co. v. Kirkpatrick, 312 F2d 742 (3d Cir), cert denied 372 US 943; Garrison v. General Motors Corp., 213 F Supp 515 (SD Cal 1963).

Under the control group test, the attorney-client privilege attaches only when the corporate employe is in a position to control or have substantial effect on a decision about any action which the corporation may take upon the advice of an attorney. Thus, the test limits the attorney-client privilege to statements made by members of the corporate control group, a group loosely defined as those individuals having authority to seek out and act on legal advice for the corporation. This group includes, and may be limited to, the director and executive officers of the corporation. Under the "control group" test, a bus driver's accident report to his company's legal counsel would not be protected by the attorney-client privilege, but a report made by the company president, even though based upon information from the driver, would be privileged.

In rejecting the "control group" test, the Advisory Committee intends to focus on the communication when determining the applicability of the attorney-client privilege. It's more realistic to extend the privilege to all communications about a matter of interest to the corporation made by a person whose job requires a report be made to counsel. If a corporate employe may render the corporation liable for damages or other penalties, he should also have the power to make a confidential communication to counsel concerning that possible liability.

Therefore, the Advisory Committee intends that any corporate employe who, in the course of his corporate duties, transmits required information to the corporation's counsel be considered a "representative of the client" for the purposes of this section. See D. I. Chadbourne, Inc. v. Superior Court, 60 Cal 2d 723, 36 Cal Rptr 468, 388 P2d 700 (1964).

(e) The definition of "representative of the lawyer" recognizes that the lawyer may, in rendering legal services, utilize the services of assistants in addition to those employed in the process of communicating. Thus the definition includes an expert employed to assist in rendering legal advice. It also includes an expert employed to assist in the planning and conduct of litigation, though not one employed to testify as a witness. The definition does not, however, limit "representative of the lawyer" to experts. Whether his compensation is derived immediately from the lawyer or the client is not material. A physician making a physical or mental examination under ORS 44.610 to 44.640 is expressly excluded from the scope of the defined term.

Subsection (2) of this section sets forth the privilege, using the previously defined terms.

Substantial authority has in the past allowed the eavesdropper to testify to overheard privileged conversations and has admitted intercepted privileged letters. Today, the evolution of more sophisticated techniques of eavesdropping and interception calls for abandonment of this position. This section accordingly adopts a policy of protection against these kinds of invasion of the privilege.

The privilege extends to communications (a) between client or his representative and lawyer or his representative, (b) between lawyer and lawyer's representative, (c) by client or his lawyer to a lawyer representing another in a matter of common interest, (d) between representatives of the client or the client and a representative of the client, and (e) between lawyers representing the client. All these communications must be specifically for the purpose of obtaining legal services for the client; otherwise the privilege does not attach.

In cases in which different lawyers represent clients who have some interests in common, this section allows each client a privilege as to his own statements. Thus, in such "joint defense" or "pooled information" situations, if all the clients resist disclosure, none will occur. However, if for reasons of his own, a client wishes to disclose his own statements made at a joint conference, he should be permitted to do so, and this section is to that effect. This section does not apply to situations where there is no common interest to be promoted by a joint consultation, and the parties meet on a purely adversary basis.

Subsection (3). The privilege is, of course, that of the client, to be claimed by him or by his personal representative. The successor of a dissolved corporate client may claim the privilege. California Evidence Code, section 953; New Jersey Evidence Rule 26(1).

The lawyer may not claim the privilege on his own behalf. However, he may claim it on behalf of the client. It is assumed that the ethics of the profession will require him to do so except under most unusual circumstances. American Bar Association, Canons of Professional Ethics, Canon 37.

Subsection (4) of this section in general incorporates well established exceptions. (a) The privilege does not extend to advice in aid of future wrongdoing. 8 Wigmore, section 2298 (McNaughton Rev 1961). The wrongdoing need not be that of the client. The provision that the client knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is erroneously advised that a proposed action is within the law. No preliminary finding that sufficient evidence aside from the communication has been introduced to warrant a finding that the services were sought to enable the commission of a wrong is required. Cf Clark v. United States, 289 US 1, 15-16, 53 SCt 465, 77 LEd 993 (1933). While any general exploration of what transpired between attorney and client would, of course, be inappropriate, it is wholly feasible, either at the discovery stage or during trial, so to focus the inquiry by specific questions as to avoid any broad inquiry into attorney-client communications. Numerous cases reflect this approach.

(b) Normally the privilege survives the death of the client and may be asserted by his representative under subsection (3) of this section. When, however, the identity of the person who steps into the client's shoes is in issue, as in a will contest, the identity of the person entitled to claim the privilege remains undetermined until the conclusion of the litigation. The choice

is thus between allowing both sides or neither to assert the privilege, with authority and reason favoring the latter view. McCormick, Evidence, section 94 (2d ed 1972); California Evidence Code, section 957; Kansas Code of Civil Procedure, section 60-426(b)(2); New Jersey Evidence Rule 26(2)(b).

(c) The exception is required by considerations of fairness and policy when questions arise out of dealings between attorney and client, as in cases of controversy over attorney's fees, claims of inadequacy of representation, or charges of professional misconduct. McCormick, Evidence, section 91 (2d ed 1972); California Evidence Code, section 958; New Jersey Evidence Rule 26(2)(c).

(d) When the lawyer acts as attesting witness, the approval of the client to his so doing may safely be assumed, and waiver of the privilege as to any relevant lawyer-client communications is a proper result. California Evidence Code, section 959.

(e) This paragraph states current prevailing law. McCormick, Evidence, section 91 (2d ed 1972). For similar provisions, see California Evidence Code, section 962; Kansas Code of Civil Procedure, section 60-426(b)(4); New Jersey Evidence Rule 26(2). The situation with which this provision deals is to be distinguished from the case of clients with a common interest who retain different lawyers, which is covered under paragraph (c) of subsection (2) of this section.

C. Relationship to Existing Law

This section does not change existing Oregon law, although its coverage extends to areas in which current Oregon law is silent or unclear. The existing Oregon statute relating to the lawyer-client privilege is paragraph (b) of subsection (1) of ORS 44.040 (1979 Replacement Part), a rather general statement of the privilege.

Subsection (1). (a) The definition of "client" in subsection (1) of this section is generally in accord with current Oregon case law on the issue of who may assert the lawyer-client privilege, that is, on the issue of who is a "client." Like the definition of "client" under subsection (1) of this section, current Oregon law does not require actual employment or litigation for the privilege to attach. McNamee v. First National Bank, 88 Or 636, 72 P 801 (1918); Bryant v. Dukehart, 106 Or 359, 210 P 454 (1922).

In Oregon, an attorney must be acting in his professional capacity before the privilege will attach. Sitton v. Peyree, 117 Or 107, 241 P 62, 242 P 1112 (1926); Booker v. Brown, 173 Or 464, 146 P2d 71 (1944). Since purely personal or business matters may not fall within the scope of professional activity, the scope of the current Oregon privilege in this respect coincides with that of this section.

Existing Oregon law is silent on the issue of corporations and governmental organizations asserting the attorney-client privilege.

(b) Paragraph (b) of subsection (1) of this section is in accord with existing Oregon law. In Oregon, only confidential communications are privileged. Communications knowingly made by a client to his attorney in the presence and hearing of a third person are not privileged. Leathers v. United States, 250 F2d 159 (9th Cir 1957). Similarly, if a client directs his attorney to negotiate with third parties, the negotiations are not privileged. Baum v. Denn, 187 Or 401, 211 P2d 478 (1949).

(5) Exception for certain examinations. Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of a physical examination performed under ORCP 44.

JUDICIARY COMMITTEE COMMENTARY

Section 33a (Rule 504-1) deals with privileged communications made to physicians, including chiropractic and naturopathic physicians and Christian Science Practitioners treating physical ailments. The privilege may be invoked only in civil proceedings. There is no privilege for court-ordered examinations or for examinations pursuant to ORCP 44.

SECTION 33b. A licensed professional nurse shall not, without the consent of a patient who was cared for by such nurse, be examined in a civil action or proceeding, as to any information acquired in caring for the patient, which was necessary to enable the nurse to care for the patient.

SECTION 33c. (1) A certificated staff member of an elementary or secondary school shall not be examined in any civil action or proceeding, as to any conversation between the certificated staff member and a student which relates to the personal affairs of the student or family of the student, and which if disclosed would tend to damage or incriminate the student or family. Any violation of the privilege provided by this subsection may result in the suspension of certification of the professional staff member as provided in ORS 342.175, 342.177 and 342.180.

(2) A certificated school counselor regularly employed and designated in such capacity by a public school shall not, without the consent of the student, be examined as to any communication made by the student to the counselor in the official capacity of the counselor in any civil action or proceeding or a criminal action or proceeding in which such student is a party concerning the past use, abuse or sale of drugs, controlled substances or alcoholic liquor. Any violation of the privilege provided by this subsection may result in the suspension of certification of the professional school counselor as provided in ORS 342.175, 342.177 and 342.180. However, in the event that the student's condition presents a clear and imminent danger to the student or to others, the counselor shall report this fact to an appropriate responsible authority or take such other emergency measures as the situation demands.

SECTION 33d. A clinical social worker registered by the State Board of Clinical Social Workers shall not be examined in a civil or criminal court proceeding as to any communication given the clinical social worker by a client in the course of noninvestigatory professional activity when such communication was given to enable the registered clinical social worker to aid the client, except:

(1) When the client or those persons legally responsible for the client's affairs give consent to the disclosure;

(2) When the client initiates legal action or makes a complaint against the registered clinical social worker to the board;

(3) When the communication reveals the intent to commit a crime or harmful act;

(4) When the information reveals that a minor was the victim of a crime, abuse or neglect; or

(5) When the registered clinical social worker is a public employe and the public employer has determined that examination in a civil or criminal court proceeding is necessary in the performance of the duty of the social worker as a public employe.

JUDICIARY COMMITTEE COMMENTARY

Sections 33b, 33c and 33d restore privileges which the Advisory Committee had proposed to repeal. They are taken from paragraphs (g), (i), (k) and (L) of subsection (1) of ORS 44.040. Members of the Judiciary Committee felt that it is important to protect confidential communications in the particular relationships mentioned in these sections.

SECTION 34. Rule 505. Husband-wife privilege. (1) Definitions. As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication by a spouse to the other spouse and not intended to be disclosed to any other person.

(b) "Marriage" means a marital relationship between husband and wife, legally recognized under the laws of this state.

(2) Privilege as to confidential communications. In any civil or criminal action, a spouse has a privilege to refuse to disclose and to prevent the other spouse from disclosing any confidential communication made by one spouse to the other during the marriage. The privilege created by this subsection may be claimed by either spouse. The authority of the spouse to claim the privilege and the claiming of the privilege is presumed in the absence of evidence to the contrary.

(3) Privilege as to testimony. In any criminal proceeding, neither spouse, during the marriage, shall be examined adversely against the other as to any other matter occurring during the marriage unless the spouse called as a witness consents to testify.

(4) Exceptions. There is no privilege under this section:

(a) In all criminal actions in which one spouse is charged with bigamy or with an offense or attempted offense against the person or property of the other spouse or of a child of either, or with an offense against the person or property of a third person committed in the course of committing or attempting to commit an offense against the other spouse; or

(b) As to matters occurring prior to the marriage.

Subsection (5). This subsection retains the current Oregon exception for communications made in the course of a physical or mental examination performed under ORCP 44.

There are also a number of existing statutes which currently affect the operation of the physician-patient and psychologist-patient privilege. Except as noted below, these statutes are not affected by this Act.

ORS 44.040(1)(j). A physician licensed to practice medicine by the Board of Medical Examiners for the State of Oregon and a local health authority officer or employe shall not be examined in a civil or criminal court proceeding as to the existence or contents of any records of a person examined or treated for an infectious venereal disease without the consent of the person examined or treated for such disease unless the public interest by clear and convincing evidence requires disclosure in the particular instances.

This provision is repealed by section 98 of this Act. See section 98 of this Act and the commentary thereto.

ORS 107.600(2). All communications, verbal or written, between spouses and from spouses to counselors, the court, attorneys, doctors or others engaged in the conciliation proceedings, made in conciliation conferences, hearings and other proceedings had pursuant to the exercise of the court's conciliation jurisdiction shall be confidential within the meaning of paragraph (e) of subsection (1) of ORS 44.040.

This section is amended by section 88 of this Act. See section 88 of this Act and the commentary thereto.

ORS 146.750(1). Except as required in subsection (3) of this section, any physician, including any intern and resident, having reasonable cause to suspect that a person brought to him or coming before him for examination, care or treatment has had injury, as defined in ORS 146.710, inflicted upon him other than by accidental means, shall report or cause reports to be made in accordance with the provisions of subsection (2) of this section.

Subsection (3) relates to child abuse, i.e., suspicious injuries to unmarried persons under 18.

Under ORS 161.735, a court may order a psychiatric examination of a person convicted of a felony to determine whether the person is suffering from a severe personality disorder indicating a propensity toward criminal activity. Subsection (4) of ORS 161.735 declares that no statement made by a defendant under the section shall be used against him in any civil proceeding or in any other criminal proceeding. It should be noted that ORS 161.735 extends the psychiatrist-patient privilege to criminal cases.

Under ORS 418.750, all public or private officials have a duty to report possible cases of child abuse except that psychiatrists, psychologists, clergymen and attorneys are not required to report the privileged communications of adults. ORS 418.775 also provides that the physician-patient privilege is not a ground for excluding evidence in court proceedings on child abuse. Therefore, even though the psychologist and the psychiatrist both have similar duties with regard to reporting possible child abuse situations, the psychiatrist, whose privilege is founded upon the physician-patient privilege, may also be compelled to testify at trial. The psychologist in contrast, may not be required to testify in a child abuse proceeding since there is no mention of the psychologist-patient privilege

in ORS 418.775 which abolishes certain privileges in those proceedings. ORS 418.775 is amended by section 95 of this Act to abolish the distinction just described between psychiatrists and psychologists. See the commentary to section 95 of this Act.

ORS 434.055. No local health authority officer or employe shall be examined in a civil, criminal, special or other proceeding as to the existence or contents of pertinent records of a person examined or treated for an infectious venereal disease in a local health authority facility, without the consent of the person examined or treated for such disease.

This is essentially the same privilege as described in paragraph (j) of subsection (1) of ORS 44.040 without reference to the public interest exception. Note that this extends the physician-patient privilege to criminal cases in cases involving venereal disease communications.

SECTION 33a. Rule 504-1. Physician-patient privilege. (1) Definitions. As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication not intended to be disclosed to third persons except: Persons present to further the interest of the patient in the consultation, examination or interview; persons reasonably necessary for the transmission of the communication; or persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) "Patient" means a person who consults or is examined or interviewed by a physician.

(c) "Physician" means a person authorized and licensed or certified to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a physical condition. "Physician" includes Christian Science Practitioners and licensed or certified naturopathic and chiropractic physicians.

(2) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications in a civil action, suit or proceeding, made for the purposes of diagnosis or treatment of the patient's physical condition, among the patient, the patient's physician or persons who are participating in the diagnosis or treatment under the direction of the physician.

(3) Who may claim the privilege. The privilege created by this section may be claimed by the patient, by a guardian or conservator of the patient, or by the personal representative of a deceased patient. The person who was the physician may claim the privilege but only on behalf of the patient. Such person's authority so to do is presumed in the absence of evidence to the contrary.

(4) General exceptions. If the judge orders an examination of the physical condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

While there may be justification for according different legal effects to communications to a psychologist and communications to a physician treating a physical ailment, the members of the Advisory Committee agree with the court in State ex rel Juv. Dept. v. Martin, 19 Or App 28 526 P2d 647 (1974) that "in terms of the functions and purposes of the privileges, any distinction between a licensed psychologist and a psychiatrist would seem to be a specious one." (at 36). This section, therefore, establishes a single testimonial privilege for physicians, surgeons, psychiatrists and psychologists.

Subsection (1). (a) The definition of "confidential communication" in paragraph (a) of subsection (1) of this section does not change existing Oregon law. Currently, the physician-patient privilege in Oregon includes a physician's examination as well as laboratory tests and X-ray pictures. Also covered are oral and written communications intended to convey information as well as the physician's records. Neilson v. Bryson, 256 Or 179, 477 P2d 714 (1970). Regarding the burden of establishing confidentiality, the Oregon courts follow the general rule that the burden of establishing the conditions which give rise to a privilege against disclosure is on the party asserting the privilege. Groff v. S.I.A.C., 246 Or 557, 426 P2d 738 (1967).

(b) The Oregon courts have not yet given a specific definition of "patient" for purposes of this privilege, but there should be little controversy surrounding the definition in this section except for persons who are subjects for medical research. Because of the current Oregon requirement that the physician be consulted for treatment in order that the physician-patient privilege attach, it would appear that persons who are the subjects of research in Oregon are not presently covered by the privilege. State v. O'Neill, 274 Or 59, 545 P2d 97 (1976), rev'g 21 Or App 710, 536 P2d 552. Therefore, the adoption of paragraph (a) of subsection (1) of this section will not change current Oregon law.

(c) Definitions of psychiatrist and psychologist are combined under paragraph (c) of subsection (1) of this section. With regard to psychiatrists, this paragraph does not change existing Oregon law. Psychiatrists are included within the term "regular physician or surgeon" under paragraph (d) of subsection (1) of ORS 44.040. Hampton v. Hampton, 241 Or 277, 405 P2d 549 (1965). However, the definition of psychologist in this section is more expansive than the definition in paragraph (h) of subsection (1) of ORS 44.040 in that it extends the privilege to any person licensed as a psychologist under the laws of any state or nation rather than a person licensed to practice psychology under the provisions of ORS chapter 675. Because of the requirement under ORS chapter 675 that any person practicing psychology in this state be licensed under the chapter, this difference in definition will have little practical effect.

Whether or not the privilege would apply when the patient reasonably but falsely believed the person consulted was a physician or psychiatrist has not been decided in Oregon.

(d) Paragraph (d) of subsection (1) of this section changes existing Oregon law with regard to naturopaths. Regular physicians or surgeons include persons with M.D. degrees licensed to practice medicine. Hampton v. Hampton, 241 Or 277, 405 P2d 549 (1965). The definition excludes osteopaths, chiropractors, naturopaths and faith healers. Chapter 731, Oregon Laws 1979, amended ORS 44.040 to provide a testimonial privilege in civil actions for "a naturopathic physician licensed under ORS chapter 685 . . . as to any information acquired in attending the patient, which was necessary to enable him to act for the patient."

Subsection (2). Existing Oregon law is changed in two ways in subsection (2) of this section. Under the existing statute relating to the physician (psychiatrist)-patient privilege, the privilege is limited to information acquired in the diagnosis and treatment of a patient. The physician (psychiatrist)-patient privilege does not apply in criminal cases, as it is limited to civil actions or proceedings. State v. Betts, 235 Or 127, 384 P2d 193 (1963). The psychologist-patient privilege is not so limited; it applies to any communication made in the course of the psychologist's professional employment, and may be invoked in both civil and criminal actions. Subsection (2) of this section has the effect of limiting the psychologist-patient privilege in the same way that the physician (psychiatrist)-patient privilege is currently limited in Oregon.

The current Oregon statutes relating to the physician (psychiatrist)-patient and psychologist-patient privilege would also probably include communications made for the treatment of drug addiction since there is no suggestion in those statutes that certain afflictions are not included within the scope of the privileges. Subsection (6) of ORS 426.460 currently provides some degree of confidentiality to drug or alcohol treatment records, indicating legislative concern for protecting information relating to drug abuse treatment.

Subsection (3). Subsection (3) of this section does not change existing Oregon law. The physician (psychiatrist)-patient privilege is not terminated by the death of the patient. Woosley v. Dunning, 268 Or 233, 520 P2d 340 (1974). Although there is no rebuttable presumption in Oregon that the physician or psychologist may claim the privilege on behalf of the patient, the courts have declared that the privilege is intended to benefit the patient and normally cannot be invoked by another person. Hampton v. Hampton, 241 Or 277, 405 P2d 549 (1965). There seem to be good policy reasons for allowing the physician or psychologist to claim the privilege on behalf of the patient.

Subsection (4). (a) This changes existing Oregon law in that there is no current provision in Oregon law exempting a commitment proceeding from a claim of privilege. ORS 426.075, however, does require a treating physician to notify the court prior to a commitment proceeding of any treatment which might affect the patient's ability to prepare for the hearing. The medical record of such treatment must also be provided.

(b) The exception set forth in paragraph (b) of subsection (4) of this section relates only to court-ordered examinations, not court appointment of a physician or psychologist, and is only effective to the extent of the purpose for which the examination is ordered. This exception changes existing Oregon law in so far as it erases the distinction between communications made to psychologists and communications made to physicians and psychiatrists during such examinations. Under current law, the physician (psychiatrist)-patient privilege extends to information "acquired . . . which was necessary to enable him to prescribe or act for the patient." ORS 44.040(1)(d); Hampton v. Hampton, 241 Or 277, 405 P2d 549 (1965). The licensed psychologist-patient privilege currently contains no such limitation. Thus, if a psychiatrist performs a court-ordered examination, communications not relevant to the purpose for which the examination is ordered would not appear to be privileged. Communications to a psychologist in such circumstances would appear to be privileged at least to the extent that the communications were not relevant to the purpose for which the examination was ordered.

treatment under the direction of the psychotherapist or regular physician or surgeon.

(3) Who may claim the privilege. The privilege created by this section may be claimed by the patient, by a guardian or conservator of the patient, or by the personal representative of a deceased patient. The person who was the psychotherapist or regular physician or surgeon may claim the privilege but only on behalf of the patient. Such person's authority so to do is presumed in the absence of evidence to the contrary.

(4) General exceptions. (1) There is no privilege under this section for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist or regular physician or surgeon in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(b) If the judge orders an examination of the mental, physical or emotional condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(5) Exception for certain examinations. Except as provided in ORS 44.640, there is no privilege under this section for communications made in the course of a physical or mental examination performed under ORCP 44.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on proposed Rule 504 of the Federal Rules of Evidence, which was prescribed by the Supreme Court of the United States and submitted to Congress, but which was not enacted. Aside from minor changes made to conform this section to the form and style of Oregon statutes, there are major differences between this section and proposed Federal Rule 504. This section includes communications made to regular physicians and surgeons within the scope of the privilege, whereas the federal rule only relates to psychotherapists. The inclusion of communications to regular physicians and surgeons necessitated the inclusion of communications made for the purpose of treating physical conditions, as well as the emotional and mental conditions to which the federal rule is limited. Another difference is that this section limits the privilege to communications made for the purposes of diagnosis or treatment. Unlike the federal rule, mere consultation, not a part of diagnosis or treatment, does not give rise to a physician and psychotherapist-patient privilege. Finally, this section limits applicability of the privilege to civil actions, whereas the more limited federal privilege applies to both civil and criminal actions.

B. Summary

Subsection (1). (a) Confidential communication is defined in terms conformable with those of the lawyer-client privilege, with changes appropriate to the difference in circumstance.

(b) The definition of patient does not include a person submitting to examination for scientific purposes.

(c) The definition of psychotherapist embraces a medical doctor while engaged in the diagnosis or treatment of mental or emotional conditions, including drug addiction, in order not to exclude the general practitioner and to avoid the making of needless refined distinctions concerning what is and what is not the practice of psychiatry. The requirement that the psychologist be in fact licensed, and not merely be believed to be so, is believed to be justified by the number of persons, other than psychiatrists, purporting to render psychotherapeutic aid and the variety of their theories.

The clarification of mental or emotional condition as including drug addiction is consistent with current approaches to drug abuse problems.

(d) The definition of regular physician or surgeon includes only those persons licensed under ORS chapter 677 or otherwise authorized under that chapter to practice medicine in this state.

Subsections (2) and (3). The lawyer-client rule is drawn upon for the phrasing of the general rule of privilege and the determination of those who may claim it. See section 32 (Rule 503) of this Act.

The specific inclusion of communications made for the diagnosis and treatment of drug addiction recognizes the continuing contemporary concern with rehabilition of drug dependent persons and is designed to implement that policy by encouraging persons in need thereof to seek assistance.

Subsection (4). The exceptions differ substantially from those of the attorney-client privilege, as a result of the basic differences in the relationships. While it has been argued convincingly that the nature of the psychotherapist-patient relationship demands complete security against legally coerced disclosure in all circumstances, the Advisory Committee concluded that there are some instances in which the need for disclosure is sufficiently great to justify the risk of possible impairment of the relationship between patient and physician or psychotherapist. These exceptions are incorporated in subsection (4) of this section.

(a) The interests of both patient and public call for a departure from confidentiality in commitment proceedings. Since disclosure is authorized only when the psychotherapist or physician determines that hospitalization is needed, control over disclosure is placed largely in the hands of a person in whom the patient has already manifested confidence. Hence damage to the relationship is unlikely.

(b) In a court-ordered examination, the relationship is likely to be an arm's length one, though not necessarily so. In any event, an exception is necessary for the effective utilization of this important and growing procedure. The exception, it will be observed, deals with a court-ordered examination rather than with a court-appointed psychotherapist or physician. Also, the exception is effective only with respect to the particular purpose for which the examination is ordered.

C. Relationship to Existing Law

This section changes existing Oregon law by eliminating the separate and different privileges for physicians (including psychiatrists) and psychologists that currently exist under paragraphs (d) and (h) of subsection (1) of ORS 44.040 (1979 Replacement Part).

(b) "Patient" means a person who consults or is examined or interviewed by a psychotherapist.

(c) "Psychotherapist" means a person who is licensed, registered, certified or otherwise authorized under the laws of any state to engage in the diagnosis or treatment of a mental or emotional condition, or reasonably believed by the patient so to be, while so engaged.

(2) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of the patient's mental or emotional condition among the patient, the patient's psychotherapist or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(3) Who may claim the privilege. The privilege created by this section may be claimed by the patient, by a guardian or conservator of the patient, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. The psychotherapist's authority so to do is presumed in the absence of evidence to the contrary.

(4) General exceptions. (a) For the purpose of a civil commitment hearing held pursuant to ORS 426.005 to 426.395, there is no privilege under this section for communications and observations relevant to diagnosis and treatment of an allegedly mentally ill person during a prehearing detention period authorized by ORS 426.070 (5) or 426.175 to 426.215.

(b) If the judge orders an examination of the mental, physical or emotional condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(c) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(5) Exception for certain examinations. Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of mental examination performed under ORCP 44.

JUDICIARY COMMITTEE COMMENTARY

A majority of the Judiciary Committee believed that there should be a distinction between psychotherapist-patient privilege and the privilege applied in the situation of a doctor treating a physical ailment.

Section 33 (Rule 504) is a modified version of the proposed Federal Rule 504. It defines "psychotherapist" as a person authorized to be engaged in, while in fact engaged in, the diagnosis or treatment of a mental or emotional condition. The definition of "psychotherapist" is broad because there are professionals other than psychiatrists and psychologists who engage in treatment of mental or emotional conditions. Such persons include nurses and clinical social workers.

The general rule of privilege is that a patient may refuse to disclose, and prevent anyone else from disclosing, any confidential communication to a psychotherapist. This applies to any proceeding, civil or criminal, except those listed in subsections (4) and (5) of section 33.

Paragraph (a) of subsection (4) provides that in a civil commitment hearing there is no privilege either as to communications or as to observations during a pre-hearing detention period. This paragraph was adopted on the recommendation of Subcommittee 3 of the Governor's Task Force on Mental Health. That subcommittee pointed out that the relationship between an allegedly mentally ill person and hospital medical staff during a period of involuntary pre-hearing detention is more likely to be adversarial than therapeutic and, therefore, the policy reasons for the privilege are not as compelling as in an on-going treatment relationship.

Paragraph (c) of subsection (4) means, among other things, that there is no privilege if a defendant in a criminal trial raises a defense of not responsible by reason of mental disease or defect. It also means that there would be no privilege in a will contest in which the testator's soundness of mind is an issue.

ADVISORY COMMITTEE PROPOSAL

SECTION 33. Rule 504. Physician and psychotherapist-patient privilege. (1) Definitions. As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication not intended to be disclosed to third persons other than those present to further the interest of the patient in the examination or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist or regular physician or surgeon.

(b) "Patient" means a person who is examined or interviewed by a psychotherapist or regular physician or surgeon.

(c) "Psychotherapist" means:

(A) A person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction; or

(B) A person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(d) "Regular physician or surgeon" means a person authorized and licensed or certified to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental, emotional or physical condition, including drug addiction.

(2) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications in a civil action, suit or proceeding, made for the purposes of diagnosis or treatment of the patient's mental, physical or emotional condition, including drug addiction, among the patient, the patient's psychotherapist, regular physician or surgeon or persons who are participating in the diagnosis or

Current Oregon law relating to the testimony of eavesdroppers is similar to that set forth in this section. In Bryant v. Dukehart, 106 Or 359, 210 P 454 (1923), the court refused to admit a letter which was written by the client to his attorney but offered by the opposing party. The court held that the lawyer-client privilege applies "regardless of how such communications may have come into the possession of the party seeking to use them in evidence." 106 Or at 363.

(c) Because the issue has never confronted the Oregon appellate courts, it is uncertain whether the lawyer-client privilege would apply if a client reasonably believed that a person consulted was a lawyer, though in fact he was not. Prevailing authority, and paragraph (b) of subsection (1) of this section, would support the application of the privilege, but in Oregon the issue remains unsettled.

Similarly, Oregon law is silent on whether the application of the privilege is contingent upon the lawyer being licensed to practice in a jurisdiction that recognizes the lawyer-client privilege.

In accord with this section's definition of lawyer as a "person authorized . . . to practice law . . .," current Oregon law provides that the lawyer-client privilege is not limited to communications made to attorneys in private practice. State v. Ayer, 122 Or 537, 259 P 427 (1927).

(d) It is unclear just how far Oregon courts will go in recognizing the lawyer-client privilege in the case of communications between an attorney and a client's representative. It seems clear that the Oregon courts, to date, have not applied the privilege as broadly as is allowed under this section's definition of "representative of the client." The privilege was applied in the case of communications between an appraiser hired by a client and the client's attorney, Brink v. Multnomah County, 224 Or 507, 356 P2d 536 (1960). In that case, the court declared that "a communication by any form of agency employed or set in motion by the client is within the privilege." 224 Or at 516. In the case of a corporate client, the Oregon courts will probably recognize as privileged communications between an attorney and the corporation's officers, board members or registered agent. See ORS 57.065 and 57.070. The members of the Advisory Committee recognize that paragraph (d) of subsection (1) of this section probably expands the scope of the lawyer-client privilege in Oregon.

(e) Paragraph (e) of subsection (1) is consistent with existing Oregon law. The paragraph recognizes and incorporates the current exception to the lawyer-client privilege set forth in ORS 44.610 to 44.640, relating to medical examinations of an injured person.

Subsection (2). This subsection and paragraph (b) of subsection (1) of ORS 44.040 (1979 Replacement Part) are in accord, even though the current statute does not set forth the specific categories of communications protected by the privilege. The Oregon courts, however, have excluded certain types of communications from the scope of the privilege. In Baum v. Denn, 187 Or 401, 211 P2d 478 (1949), the court held that when a client authorizes his attorney to negotiate a settlement or adjustment, communications made to the attorney for the purpose of dealing with third persons are not privileged because they are not confidential. Similarly, the court in Minard v. Stillman, 31 Or 164, 49 P 476 (1897), held that when an attorney represents all parties in settlement negotiations, communications made during those negotiations which are for the mutual information of all are not privileged in a dispute between the parties themselves. Thus, although the Oregon courts have limited the types of communications subject to the lawyer-client privilege by an exclusionary

approach, rather than the approach taken under subsection (2) of this section, current Oregon law and this section do not appear to conflict.

Subsection (3). This subsection does not change existing Oregon law. The Oregon cases clearly indicate that the lawyer-client privilege is intended to benefit only the client, and is not available to others. Bergsvik v. Bergsvik, 205 Or 670, 291 P2d 724 (1956). Because the privilege is for the protection of the client, the privilege is not limited to the protection of parties, but will protect a client called as a witness. Bergsvik v. Bergsvik, supra; Bryant v. Dukehart, 106 Or 359, 210 P 454 (1923). One Oregon case has also impliedly held that the privilege will survive the death of the client and may be asserted after death by the client's personal representative. Booker v. Brown, 173 Or 464, 146 P2d 71 (1944). Since an Oregon attorney is ethically prohibited from divulging a client's secrets or confidences, he would, therefore, be bound to claim the privilege on behalf of his client if called to testify. See DR 4-101(2) and 7-102(B) of the American Bar Association Code of Professional Responsibility.

Subsection (4). (a) This exception to the lawyer-client privilege is in accord with existing Oregon law. State v. Phelps, 24 Or App 329, 545 P2d 901 (1976).

(b) This exception to the privilege is also in accord with existing Oregon law. In Tanner v. Farmer, 243 Or 431, 414 P2d 340 (1960), the court declared that the privilege did not prohibit an attorney from testifying about the execution of a will, after the death of a client, in litigation between parties claiming under the client.

(c) There is no current authority supporting the existence of this exception in Oregon.

(d) There is no current authority supporting the existence of this exception in Oregon.

(e) This exception is in accord with existing Oregon law. Communications for the mutual information of joint clients are not confidential, and hence not privileged in a subsequent dispute between the clients. Minard v. Stillman, 31 Or 164, 49 P 476 (1897).

Other exceptions to the lawyer-client privilege recognized in Oregon are the exception for assets left with an attorney, State ex rel Hardy v. Gleason, 19 Or 159, 23 P 817 (1890), and an exception for the fact of employment and the name and address of a client. Cole v. Johnson, 103 Or 319, 205 P 282 (1922); In re Illidge, 162 Or 393, 91 P2d 1100 (1939). These latter exceptions will not be affected by the adoption of this section.

SECTION 33. Rule 504. Psychotherapist-patient privilege. (1) Definitions. As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication not intended to be disclosed to third persons except: Persons present to further the interest of the patient in the consultation, examination or interview; persons reasonably necessary for the transmission of the communication; or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee rewrote the Advisory Committee's proposed rule on spousal privilege but did not change the substance. Either spouse may assert a privilege regarding confidential communications. As to other matters, in criminal cases one spouse may not prevent the other from testifying but the spouse called as a witness must consent to testify and may not be compelled. This is in accord with Trammel v. United States, 100 S.Ct. 906 (1980).

"Other matters" includes nonconfidential communications and observations.

The privilege as to confidential communications made during the marriage applies to actions and proceedings occurring either during the marriage or after the marriage. The privilege not to testify regarding other matters ceases upon termination of the marriage.

ADVISORY COMMITTEE PROPOSAL

SECTION 34. Rule 505. Husband-wife privilege. (1) Definitions. As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication not intended to be disclosed by a spouse to any person other than the other spouse.

(b) "Marriage" means a legally recognized relationship under the laws of this state.

(2) General rule of privilege. In any civil or criminal action, a spouse has a privilege to refuse to disclose and to prevent the other spouse from disclosing any confidential communication made by one spouse to the other during the marriage.

(3) Who may claim the privilege. The privilege created by subsection (2) of this section may be claimed by either spouse as to communications. A spouse may testify to observations of the other spouse if the observing spouse consents to testify. The authority of the spouse to claim the privilege is presumed in the absence of evidence to the contrary.

(4) Neither husband nor wife shall be examined either during the marriage or afterward as to any other matter occurring during the marriage unless the spouse called as a witness consents to testify.

(5) Exceptions. There is no privilege under this section:

(a) In all criminal actions in which one spouse is charged with bigamy or with an offense or attempted offense against the person or property of the other spouse or of a child of either, or with an offense against the person or property of a third person committed in the course of committing or attempting to commit an offense against the other spouse; or

(b) As to matters occurring prior to the marriage.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is original and therefore entirely different from proposed Rule 505 of the Federal Rules of Evidence relating to the husband-wife privilege. The Advisory Committee did not adopt that rule because it only recognized the privilege of an accused in a criminal case to prevent his or her spouse from testifying, and specifically rejected the privilege against disclosure of confidential communications between spouses. The Advisory Committee believes that the privilege against disclosure of confidential communications is an aspect of the marital privilege that merits continuation.

B. Summary

Common law rules of evidence have evolved around the marriage relationship in four respects: (1) incompetency of one spouse to testify for the other; (2) privilege of one spouse not to testify against the other; (3) privilege of one spouse not to have the other testify against him; and (4) privilege against disclosure of confidential communications between spouses.

With the disappearance of the disqualification of parties and interested persons, the basis for spousal incompetency no longer existed. It has virtually disappeared in both civil and criminal actions with the abolition of the common law disqualification of parties and interested persons. McCormick, Evidence, section 66 (2d ed 1972). This section contains no recognition of the incompetency of one spouse to testify for the other. However, the section preserves the other three aspects of the marital privilege.

Subsection (1). (a) The requisite confidentiality of communication is defined in terms of intent. A communication made in public or meant to be relayed to outsiders can scarcely be considered confidential. The intent is inferable from the circumstances. Unless intent to disclose is apparent, the husband-wife communication is confidential. Taking or failing to take precautions may be considered as bearing on intent.

(b) The privilege may be claimed only by persons who are validly married in this state according to the appropriate statutes, or whose marriage is recognized as valid by the courts of this state notwithstanding the fact that the marriage would not have been valid if it had been solemnized in this state. An example of the latter is a marriage between first cousins solemnized in a jurisdiction that permits and recognizes such a marriage. The parties are not spouses if the marriage was a sham or if they have been divorced, and the privilege is therefore not applicable.

Subsection (2). This is the statement of the marital "communications" privilege. It allows the privilege to be applied in both civil and criminal actions, but restricts its applicability to confidential communications made during the marriage. Subsection (2) of this section contains the section's only recognition of that aspect of the common law marital privilege that allowed one spouse not to have the other spouse testify against him.

Subsection (3). Either spouse may claim the "communications" privilege. However, with regard to testimony concerning observations, the privilege may be claimed only by the observing spouse. The purpose of the last sentence of the subsection is to provide a procedure for preventing the taking of a spouse's testimony concerning confidential communications when the other spouse is absent and does not know that a situation appropriate for a claim of privilege is presented. An example of such a situation is a proceeding before a grand jury. If the privilege is not claimed by the testifying spouse, the protection of section 40 (Rule 512) of this Act is available.

Subsection (4). This subsection deals with the testimony of a spouse concerning his or her observations of the conduct or manner of the other spouse during the marriage. A traditional justification for a privilege not to testify against a spouse and not to be testified against by one's spouse has been the prevention of marital dissension and the preservation of the marital union. However, the Advisory Committee believes that the testifying spouse should determine whether the marital union can or should be preserved. It leaves the decision to testify as to matters other than confidential communications, therefore, to the spouse who is called to testify.

Subsection (5). This subsection contains two exceptions to the privilege against spousal testimony. The need of limitation upon the privilege in order to avoid grave injustice in cases of offenses against the other spouse or a child of either can scarcely be denied. This section therefore disallows any privilege against spousal testimony in those cases. The second exception renders the privilege inapplicable as to matters occurring prior to the marriage. This provision eliminates the possibility of suppressing testimony by marrying a witness.

C. Relationship to Existing Law

The current Oregon statutes relating to the marital privilege are paragraph (a) of subsection (1) of ORS 44.040 (1979 Replacement Part) and ORS 136.655 (1979 Replacement Part). The latter statute applies only when one of the spouses is the defendant in a criminal case. Currently, it allows the defendant spouse to prevent the other spouse from testifying as to any matter with certain exceptions. ORS 136.655 is amended by section 89 of this Act to conform it to the provisions of this section and thereby eliminate the privilege of the defendant spouse to prevent the testimony of the other spouse regarding matters other than confidential communications. See section 89 of this Act and the commentary thereto.

This section replaces paragraph (a) of subsection (1) of ORS 44.040 and changes existing Oregon law in several ways. This section applies to both civil and criminal actions. Under current Oregon law, it is unclear whether the privilege set forth in paragraph (a) of subsection (1) of ORS 44.040 is applicable to criminal prosecutions. State v. Suttles, 287 Or 15, ___, P2d ___ (1979).

By defining "confidential communication" and allowing the privilege to be applied only to such communications, this section changes existing Oregon law, under which the privilege apparently applies to all marital communications whether or not considered confidential. Pugsley v. Smyth, 98 Or 448, 194 P 686 (1921).

By defining "marriage" as it does, this section is in accord with current Oregon law. Even though common law marriages are not valid in Oregon and are deemed to be contrary to public policy, a common law marriage validly consummated in another state will be recognized as valid in Oregon. Huard v. McTeigh, 113 Or 279, 291, 232 P 658 (1925); Wadsworth v. Brigham, 125 Or 428, 444, 259 P 299, 266 P 875 (1926); Boykin v. S.I.A.C., 224 Or 76, 81-82, 355 P2d 724 (1960). Similarly, a proxy marriage solemnized in this state is a marriage for the purposes of this section. State v. Anderson, 239 Or 200, 396 P2d 558 (1964).

This section specifically declares that there is no marital privilege for matters occurring before the marriage. In this respect, this section differs from the result reached in State v. Anderson, supra, in which the privilege was held

to prevent the defendant's wife from testifying even though the crime had occurred and the defendant imprisoned before the marriage.

The basic change worked by this section is that it allows, with certain exceptions, either husband or wife to assert the privilege only when the testimony relates to confidential communications made during the marriage. In all other cases, the privilege may be asserted only by the testifying spouse. Under the current statutes, with certain exceptions, the consent of both spouses is required before a spouse can testify in a criminal case in which the other spouse is the party accused.

SECTION 35. Rule 506. Clergyman-penitent privilege. (1) Definitions. As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) "Member of the clergy" means a minister of any church, religious denomination or organization who in the course of the discipline or practice of that church, denomination or organization is authorized or accustomed to hearing confidential communications and, under the discipline or tenets of that church, denomination or organization, has a duty to keep such communications secret.

(2) General rule of privilege. A member of the clergy shall not, without the consent of the person making the communication, be examined as to any confidential communication made to the member of the clergy in the member's professional character.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

Except for the definition of "confidential communication" and a reorganization into subsections and paragraphs for the purposes of clearer organization and easier understanding, this section is identical to paragraph (c) of subsection (1) of ORS 44.040 (1979 Replacement Part).

B. Summary

This privilege allows and encourages individuals to fulfill their religious, emotional or other needs by protecting confidential disclosures to religious practitioners.

C. Relationship to Existing Law

This section restates existing Oregon law. It is not intended that the definition of "confidential communication" change the current scope of the clergyman-penitent privilege in Oregon. The clergyman-penitent privilege has not been construed by an appellate court in this state. State v. Forsyth, 20 Or App 624, 533 P2d 176 (1975).

NOTE: Section 36 was deleted. Subsequent sections were not renumbered.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee could see no significant policy reasons for continuing the stenographer-employer privilege.

ADVISORY COMMITTEE PROPOSAL

SECTION 36. Rule 508. Stenographer-employer privilege. A stenographer shall not, without the consent of his or her employer, be examined as to any communication or dictation made by the employer to him or her in the course of professional employment.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to paragraph (f) of subsection (1) of ORS 44.040.

B. Relationship to Existing Law

The Advisory Committee, by adopting this section, intends to retain the current stenographer-employer privilege as it has been interpreted and construed by the courts of this state.

Although the privilege has received limited construction, it is the intent of the Advisory Committee that the privilege be applicable only to communications received from the employer, rather than those received in the employer's course of business. Communications received from persons with whom the employer deals are not privileged under this section.

As under current law, the privilege applies only to a person's stenographic duties and not to other professional duties handled by the person. State v. Gengston, 230 Or 19, 367 P2d 366 (1961).

SECTION 37. Rule 509. Public officer privilege. A public officer shall not be examined as to public records determined to be exempt from disclosure under ORS 192.500.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to paragraph (e) of subsection (1) of ORS 44.040.

B. Relationship to Existing Law

The testimonial privilege is a rule of evidence which a public officer can assert on the witness stand to fulfill the legislative intent to exempt specific records from disclosure. The privilege is qualified, and requires the court, in

some cases, to decide the public interest in disclosure. However, it protects against compelled disclosure in the courtroom, which could frustrate the legislative exemptions from administrative disclosure.

The privilege has existed in Oregon law for 116 years, and, while it has rarely been applied or interpreted by the courts, on those occasions when it has been exercised, it has proved a workable tool for the protection and determination of the public interest. Its repeal would leave the public officer with no clear course of action when called to testify concerning exempt public records in a court of law.

The testimonial privilege at present reads, "A public officer shall not be examined as to public records determined to be exempt from disclosure under ORS 192.500." ORS 44.040(1)(e). The privilege has existed in Oregon law in some form since 1862. General Laws of Oregon, section 702, p 325 (Deady 1845-1862).

Prior to 1973, the privilege extended to communications made to the public officer in official confidence, when the public interest would suffer by the disclosure. In its original form, the privilege was applied by the courts to both oral and written communications in the few cases dealing with the statute. State v. Morrow, 158 Or 412, 75 P2d 737, 76 P2d 971 (1938); State v. Ayer, 122 Or 532, 259 P 427 (1927); State v. Yee Guck, 99 Or 231, 195 P 363 (1921).

In its 1973 amendment, the Legislative Assembly kept the privilege, but restricted it to specific documents and communications exempt from disclosure. There have been no subsequent cases interpreting the privilege.

ORS 192.500(1) exempts a long list of public records from disclosure unless the public interest requires disclosure in the particular instance, and ORS 192.500(2) exempts certain records without qualification. It is to those exempt records that the privilege applies. In 1973, ORS 192.410 to 192.500 were enacted to replace ORS 192.030, which required a public records custodian to furnish reasonable opportunities for inspection of public records, and several additional statutes which preserved the confidentiality of various records. Prior to 1973, there was a conflict between the disclosure requirement of ORS 192.030 and the privilege granted under ORS 44.040(1)(e) which placed the public officer in inconsistent positions. See Papadopoulos v. State Board of Higher Education, 8 Or App 445, 492 P2d 260 (1972).

The 1973 amendments sought to eliminate the conflict by clearly exempting specified records, and restricting the testimonial privilege to those records. The privilege, therefore, is a qualified one and may be invoked only for exempt documents, and then only if the public interest, a term undefined by the statute, does not require disclosure. ORS 192.500(1).

The courts apply a balancing test to the determination of whether the public interest is served by disclosure or nondisclosure. The test used was stated by the Oregon Court of Appeals in Papadopoulos v. State Board of Higher Education, 8 Or App 445, 494 P2d 260 (1972), citing MacEwan v. Holm, 226 Or 27, 359 P2d 413 (1961):

> *In balancing the interests . . . the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidential right of the agency to be free from unreasonable interference. . . . The citizen's predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the*

burden is cast upon the agency to explain why the records sought should not be furnished. . . .

Ultimately, of course, it is for the courts to decide whether the explanation is reasonable and to weigh the benefits accruing to the agency from non-disclosure against the harm which may result to the public if such records are not made available for inspection. Id. at 458.

In Turner v. Reed, 22 Or App 177, 538 P2d 373 (1975), the only case to apply the balancing test to disclosure proceedings under ORS 192.500(1), the court declared that ". . . disclosure decisions should be based on balancing those public interests that favor disclosure of governmental records against those public interests that favor governmental confidentiality, with the presumption always being in favor of disclosure." Id. at 187.

Various factors have been listed by courts as important to the determination of the public interest in disclosure. Some of these are confidentiality of personal information, Papadopoulos v. State Board of Higher Education, 8 Or App 445, 494 P2d 260 (1972); public policy favoring public access to public records, Id.; possibility of unreasonable interference with the business of government, MacEwan v. Holm, 226 Or 27, 359 P2d 413 (1961); and the interests of justice, Shepherd v. Superior Court of Alameda County, 17 Cal 3d 107, 550 P2d 161, 130 Cal Rptr 257 (1976).

Oregon law spells out the procedures whereby a citizen can seek disclosure of exempt documents. The party seeking the disclosure must file the appropriate petition with the Attorney General, District Attorney, or court depending on whether the records are in custody of a state agency, elected official, or local governmental agency. ORS 192.450 to 192.490. Both in administrative and judicial review, the burden is on the officer or agency to show the interest in nondisclosure. ORS 192.490(1); Turner v. Reed, 22 Or App 177 at 182, 538 P2d 373 at 375 (1975).

A review of the law reveals, however, that ORS 192.500 does not deal with admissibility of evidence, and thus would not clearly operate in litigation either as a privilege or a rule of exclusion. Thus, it may not suffice as a substitute for the public officer privilege if that privilege is repealed.

With the privilege, the officer can refuse to testify as to exempt records in discovery or at trial. ORS 44.040(1)(e). This requires a judicial ruling in camera as to whether the records are exempt or not and the privilege thus validly exercised. Papadopoulos v. State Board of Higher Education, 8 Or App 445 at 463; Turner v. Reed, 22 Or App 177 at 188 (1975).

Without the privilege, it is not clear what the officer could do under the discovery statutes or on the witness stand as to exempt documents. There is no other privilege which he could claim. It would appear that if the contents of a written record were in issue, the officer would not have to testify, unless the document was disclosed and introduced as evidence under the best evidence rule. ORS 41.610. However, there are two statutory exceptions to the best evidence rule which might allow compulsion of the officer's testimony as permissible secondary evidence. The first is when the writing is in custody of the adverse party and he fails to produce it after reasonable notice. Section 74 (Rule 1004) of this 1981 Act. The second is when the original cannot be produced by a party, in a reasonable time, with proper diligence. Section 71(2). Further protection would be afforded the officer, if the privilege were repealed, by the availability of court orders limiting disclosure in discovery proceedings if justice so requires.

ORS 41.618 and 41.631. These sections require the court to make a determination of the public interest in disclosure, and, if necessary, issue a protective order which could extend to testimony and which would overcome the possible best evidence rule exceptions mentioned above.

A search for legislative intent sheds no additional light on the privilege. It is significant, however, that the privilege has been kept, despite numerous and substantial revisions of Oregon public records law since 1862. The privilege also exists in similar form in 17 other states. 8 Wigmore, Evidence (McNaughton rev 1961) section 2378.

The Advisory Committee believes that there are several good reasons for retaining the privilege:

First, the legislature obviously wants it because they have kept it.

Second, the privilege is a rule of evidence which applies the disclosure exemptions to courtroom testimony. If the privilege is repealed, the dearth of case law and the inadequate evidence of legislative intent make it unclear as to whether the public interest and statutory exemptions alone would be sufficient to adequately protect against undesired disclosure in litigation. Currently, the privilege provides the means by which, in the courtroom, the legislative effort to exempt specified public records from disclosure may be realized.

Third, the privilege has caused few problems in its 116 years of existence. Courts ruling on its application have found it adequate to its task of protecting the public interest. Papadopoulos v. State Board of Higher Education, 8 Or App 445, 494 P2d 260 (1972); State v. Ayer, 122 Or 537, 259 P 420 (1927); State v. Yee Guck, 99 Or 231, 195 P 363 (1921).

On balance, it would seem the risk of loss is greater than possible gain in the trade off of three lines of time-honored, workable statute for uncertainty and the possibility of judicial frustration of legislative intent against disclosure. In addition, the privilege provides the public officer with a clearer indication of his own role in the process of disclosure than he would have should the privilege be repealed and thereby confront him with a myriad of evidentiary rules and procedures.

SECTION 38. Rule 510. Identity of informer. (1) The state or a political subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(2) The privilege created by this section may be claimed by an appropriate representative of the state or political subdivision if the information was furnished to an officer thereof.

(3) No privilege exists under this section:

(a) If the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the state.

(b) If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the state or political subdivision is a party, and the state or political subdivision invokes the privilege, and the judge gives the state or political subdivision an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the state or political subdivision elects not to disclose identity of the informer, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. In civil cases, the judge may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the state or political subdivision. All counsel and parties shall be permitted to be present at every stage of proceedings under this paragraph except a showing in camera, at which no counsel or party shall be permitted to be present.

(c) If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, the judge may require the identity of the informer to be disclosed. The judge shall, on request of the state or political subdivision, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this paragraph except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the state or political subdivision.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 510 of the Federal Rules of Evidence, except that the words "state or political subdivision" replace the word "government" wherever it appears in the federal rule.

B. Summary

The Advisory Committee adopts the commentary of the federal advisory committee. FED. R. EVID. 510, Advisory Committee's Note, p 216.

> *The rule recognizes the use of informers as an important aspect of law enforcement, whether the informer is a citizen who steps forward with information or a paid undercover agent. In either event, the basic importance of anonymity in the effective use of informers is apparent, Bocchicchio v. Curtis Publishing Co., 203 F Supp 403 (ED Pa 1962), and the privilege of withholding their identity was well established at common law. Roviaro v. United States, 353 US 53, 59, 77 SCt. 623, 1 LEd 2d 639 (1957); McCormick,*

Evidence, section 111 (2d ed 1972); 8 Wigmore section 2374 (McNaughton rev 1961).

Subsection (1). The public interest in law enforcement requires that the privilege be that of the state or political subdivision, rather than that of the witness. The rule blankets in as an informer anyone who tells a law enforcement officer about a violation of law without regard to whether the officer is one charged with enforcing the particular law. The rule also applies to disclosures to legislative investigating committees and their staffs, and is sufficiently broad to include continuing investigations.

Although the tradition of protecting the identity of informers has evolved in an essentially criminal setting, noncriminal law enforcement situations involving possibilities of reprisal against informers fall within the purview of the considerations out of which the privilege originated. In Mitchell v. Roma, 265 F2d 633 (3d Cir 1959), the privilege was given effect with respect to persons informing as to violations of the Fair Labor Standards Act, and in Wirtz v. Continental Finance & Loan Co., 326 F2d 561 (5th Cir 1964), a similar case, the privilege was recognized, although the basis of decision was lack of relevancy to the issues in the case.

Only identity is privileged; communications are not included except to the extent that disclosure would operate also to disclose the informer's identity. The common law was to the same effect. 8 Wigmore section 2374, at p 765 (McNaughton rev 1961). See also Roviaro v. United States, supra, 353 US at p 60, 77 SCt 623; Bowman Dairy Co. v. United States, 341 US 214 221, 71 SCt 675, 95 LEd 879 (1951).

Subsection (2). Normally the "appropriate representative" to make the claim will be counsel. However, it is possible that disclosure of the informer's identity will be sought in proceedings to which the state or subdivision, as the case may be, is not a party. Under these circumstances effective implementation of the privilege requires that other representatives be considered "appropriate." See, for example, Bocchicchio v. Curtis Publishing Co., 203 F Supp 403 (ED Pa 1962), a civil action for libel, in which a local police officer not represented by counsel successfully claimed the informer privilege.

Subsection (3) deals with situations in which the informer privilege either does not apply or is curtailed.

(a) If the identity of the informer is disclosed, nothing further is to be gained from efforts to suppress it. Disclosure may be direct, or the same practical effect may result from action revealing the informer's interest in the subject matter. See, for example, Westinghouse Electric Corp. v. City of Burlington, 122 US App DC 65, 351 F2d 762 (1965), on remand City of Burlington v. Westinghouse Electric Corp., 246 F Supp 839 (DDC 1965), which held that the filing of civil antitrust actions destroyed as to plaintiffs the informer privilege claimed by the Attorney General with respect to complaints of criminal antitrust violations. While allowing the privilege in effect to be waived by one not its holder, i.e. the informer himself, is something of a novelty in the law of privilege, if the informer chooses to reveal his identity, further efforts to suppress it are scarcely feasible.

The exception is limited to disclosure to "those who would have cause to resent the communication," in the language of Roviaro v. United States, 253 US 53, 60, 77 SCt 623, 1 LEd 2d 639 (1957), since disclosure otherwise, e.

g., to another law enforcing agency, is not calculated to undercut the objects of the privilege.

If the informer becomes a witness for the state or a political subdivision, the interests of justice in disclosing his status as a source of bias or possible support are believed to outweigh any remnant of interest in nondisclosure which then remains. See Harris v. United States, 371 F2d 365 (9th Cir 1967), in which the trial judge permitted detailed inquiry into the relationship between the witness and the government. Cf Attorney General v. Briant, 15 M & W 169, 153 Eng Rep 808 (Exch 1846). The purpose of the limitation to witnesses for the state or political subdivision is to avoid the possibility of calling persons as witnesses as a means of discovery whether they are informers.

(b) The informer privilege, it was held by the leading case, may not be used in a criminal prosecution to suppress the identity of a witness when the public interest in protecting the flow of information is outweighed by the individual's right to prepare his defense. Roviaro v. United States, supra. The rule extends this balancing to include civil as well as criminal cases and phrases it in terms of "a reasonable probability that the informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case." Once the privilege is invoked a procedure is provided for determining whether the informer can in fact supply testimony of such nature as to require disclosure of his identity, thus avoiding a "judicial guessing game" on the question. United States v. Day, 384 F2d 464, 470 (3d Cir 1967). An investigation in camera is calculated to accommodate the conflicting interests involved. The rule also spells out specifically the consequences of a successful claim of the privilege in a criminal case; the wider range of possibilities in civil cases demands more flexibility in treatment.

(c) One of the acute conflicts between the interest of the public in nondisclosure and the avoidance of unfairness to the accused as a result of nondisclosure arises when information from an informer is relied upon to legitimate a search and seizure by furnishing probable cause for an arrest without a warrant or for the issuance of a warrant for arrest or search. McCray v. Illinois, 386 US 300, 87 SCt 1056, 18 LEd 2d 62 (1967), rehearing denied 386 UW 1012. A hearing in camera provides an accommodation of these conflicting interests. United States v. Jackson, 384 F2d 825 (3d Cir 1967). The limited disclosure to the judge avoids any significant impairment of secrecy, while affording the accused a substantial measure of protection against arbitrary police action. The procedure is consistent with McCray and the decisions there discussed.

C. Relationship to Existing Law

The Advisory Committee believes that the adoption of this section will not change the law in Oregon relating to an informer's privilege. See ORS 135.855; State v. Evans, 1 Or App 489, 463 P2d 370 (1970); State ex rel Kerns v. Read, 11 Or App 48, 501 P2d 82 (1972); 266 Or 382, 514 P2d 1160 (1973).

SECTION 39. Rule 511. Waiver of privilege by voluntary disclosure. A person upon whom sections 32 to 42 (Rules 503 to 514) of this Act confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege

voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication. Voluntary disclosure does not occur with the mere commencement of litigation but rather at the holder's offering of the holder as a witness and testifying on direct examination as to the subject matter of the confidential matter or communication.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee added language to the Advisory Committee's proposed Rule 511 to make it clear that, like the Advisory Committee, the Judiciary Committee intends that a restrictive view of waiver be taken.

ADVISORY COMMITTEE PROPOSAL

SECTION 39. Rule 511. Waiver of privilege by voluntary disclosure. A person upon whom sections 32 to 42 (Rules 503 to 514) of this Act confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication. Voluntary disclosure does not occur with the mere commencement of litigation but rather at the holder's offering of himself or herself as a witness.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 511 of the Federal Rules of Evidence.

B. Summary

The Advisory Committee adopts the commentary of the federal advisory committee. FED. R. EVID. 511, Advisory Committee's note, p 219.

> *The central purpose of most privileges is the promotion of some interest or relationship by endowing it with a supporting secrecy or confidentiality. It is evident that the privilege should terminate when the holder by his own act destroys this confidentiality. McCormick, Evidence, sections 93 and 103 (2d ed. 1972); 8 Wigmore sections 2242, 2327-2329, 2374, 2389-2390 (McNaughton rev 1961).*
>
> *The section is designed to be read with a view to what it is that the particular privilege protects. For example, the lawyer-client privilege covers only communications, and the fact that a client has discussed a matter with his lawyer does not insulate the client against disclosure of the subject matter discussed, although he is privileged not to disclose the discussion itself. See McCormick section 93. The waiver here provided for is similarly restricted. Therefore a client, merely by disclosing a subject which he has discussed with his attorney, would not waive the applicable privilege; he would have to make disclosure of the communication itself in order to effect a waiver.*

By traditional doctrine, waiver is the intentional relinquishment of a known right. Johnson v. Zerbst, 304 US 458, 464, 58 SCt 1019, 82 LEd 1461 (1938). However, in the confidential privilege situations, once confidentiality is destroyed through voluntary disclosure, no subsequent claim of privilege can restore it, and knowledge or lack of knowledge of the existence of the privilege appears to be irrelevant. California Evidence Code section 912; 8 Wigmore section 2327 (McNaughton rev 1961).

C. Relationship to Existing Law

Under subsection (2) of ORS 44.040 (1979 Replacement Part), if a party to an action, suit or proceeding offers himself as a witness, it is deemed a consent to the examination also of a wife, husband, attorney, clergyman, physician or surgeon, stenographer, licensed professional nurse, licensed psychologist, a certificated staff member of local health authority officer or employe on the same subject. See Patterson v. Skoglund, 181 Or 167, 276 P 248 (1947); Fowler v. Phoenix Ins. Co. 35 Or 559, 57 P 421 (1899). However, a person does not offer himself as a witness by answering questions asked by an adversary in a deposition. Reynolds Metals Co. v. Yturbide, 258 P2d 321 (9 Cir 1958).

There is some inconsistency in the Oregon cases as to whether testimony in general on the same subject will waive the privilege or whether it is necessary for the holder of the privilege to testify on direct examination on a particular privileged communication. Bryant v. Dukehart, 106 Or 359, 366, 210 P 454 (1922); McNamee v. First Nat. Bank of Roseburg, 88 Or 636, 640-41, 172 P 801 (1918); Stark Street Properties, Inc. v. Teufel, 277 Or 649, 658 n 12, 562 P2d 531 (1977).

The Advisory Committee, by adopting this section, expresses its intention that a restrictive view of waiver be taken.

This section clarifies existing Oregon law with respect to the issues raised by the court in Stark Street Properties, 277 Or at 658 n 12. Waiver rules have also been developed for specific privileges:

Husband-Wife

Civil - marital communications privilege must be affirmatively waived; McKinnon v. Chenoweth, 176 Or 74 (1945).

Criminal - active consent of both spouses required for the waiver of testimonial privilege. State v. Lefils, 209 Or 666 (1957).

Attorney-Client

Waiver by ORS 44.040(2) only extends to matters covered upon direct examination.

It is not necessary that client testify to every detail in for waiver to be complete and effective. Bryant v. Dukehart, 106 Or 359 (1922), and Gerlinger v. Frank, 74 Or 517 (1915).

Privilege is also waived if client calls his attorney as a witness. State v. Sullivan, 230 Or 136, (1962).

Physician-Patient

Consent may be given by contractual stipulation as often occurs in insurance policies.

Patient does not waive the privilege by filing a personal injury action, Neilson v. Bryson, 257 Or 174 (1970).

SECTION 40. Rule 512. Privileged matter disclosed under compulsion or without opportunity to claim privilege. Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was:

(1) Compelled erroneously; or

(2) Made without opportunity to claim the privilege.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 512 of the Federal Rules of Evidence.

B. Summary

The Advisory Committee adopts the commentary of the federal advisory committee. FED. R. EVID. 512, Advisory Committee's note, p 220.

Ordinarily a privilege is invoked in order to forestall disclosure. However, under some circumstances consideration must be given to the status and effect of a disclosure already made. Section 39 (Rule 511) of this Act gives voluntary disclosure the effect of a waiver, while this section covers the effect of disclosure made under compulsion or without opportunity to claim the privilege.

Confidentiality, once destroyed, is not susceptible of restoration, yet some measure of repair may be accomplished by preventing use of the evidence against the holder of the privilege. The remedy of exclusion is therefore made available when the earlier disclosure was compelled erroneously or without opportunity to claim the privilege.

With respect to erroneously compelled disclosure, the argument may be made that the holder should be required in the first instance to assert the privilege, stand his ground, refuse to answer, perhaps incur a judgment of contempt, and exhaust all legal resources, in order to sustain his privilege. However, this exacts of the holder greater fortitude in the face of authority than ordinary individuals are likely to possess, and assumes unrealistically that a judicial remedy is always available. In self-incrimination cases, the writers agree that erroneously compelled disclosures are inadmissible in a subsequent criminal prosecution of the holder, Maguire, Evidence of Guilt 66 (1959); 8 Wigmore section 2270 (McNaughton Rev. 1961), and the principle is equally sound when applied to other privileges. The modest departure from usual principles of res judicata which occurs when the compulsion is judicial is justified by the advantage of having one simple rule, assuring at least one opportunity for judicial supervision in every case.

The second circumstance stated as a basis for exclusion is disclosure made without opportunity to the holder to assert his privilege. Illustrative possibilities are disclosure by an eavesdropper, by a person used in the transmission of a privileged communication, by a family member participating in psychotherapy, or privileged data improperly made available from a computer bank.

C. Relationship to Existing Law

There is no judicial or legislative authority in Oregon for the principles set forth in this section. However, there is no reason to believe that the courts in Oregon would not accept the generally accepted view that erroneously compelled disclosure of privileged matter is not admissible against the holder in any subsequent proceeding.

SECTION 41. Rule 513. Comment upon or inference from claim of privilege. (1) The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn from a claim of privilege.

(2) In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(3) Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 513 of the Federal Rules of Evidence.

B. Summary

The Advisory Committee adopts the federal advisory committee's note to Federal Rule 513. FED. R. EVID. 513, Advisory Committee's note, p 71.

Subsection (1). In Griffin v. California, 380 US 609, 614, 85 SCt 1229, 14 L Ed 2d 106 (1965), the court pointed out that allowing comment upon the claim of a privilege "cuts down on the privilege by making its assertion costly." Consequently it was held that comment upon the election of the accused not to take the stand infringed upon his privilege against self-incrimination so substantially as to constitute a constitutional violation. While the privileges governed by these rules are not constitutionally based, they are nevertheless founded upon important policies and are entitled to maximum effect. Therefore, the section forbids comment upon the exercise of a privilege, in accord with the weight of authority. 8 Wigmore sections 2243, 2322, 2386; McCormick, Evidence section 76 at 156 (2d ed 1972).

Subsection (2). The value of a privilege may be greatly depreciated by means other than expressly commenting to a jury that it was exercised. Thus, the calling of a witness in the presence of the jury and subsequently excusing him after a sidebar conference may effectively convey to the jury the fact that a

privilege has been claimed, even though the actual claim has not been made in their hearing. Whether a privilege will be claimed is usually ascertainable in advance and the handling of the entire matter outside the presence of the jury is feasible. Destruction of the privilege by innuendo can and should be avoided. 6 Wigmore section 1808 pp 275-276. This position is in accord with the general agreement of the authorities that an accused cannot be forced to make his election not to testify in the presence of the jury. 8 Wigmore section 2268, p 407 (McNaughton rev 1961).

Unanticipated situations are, of course, bound to arise, and much must be left to the discretion of the jury and the professional responsibility of counsel.

Subsection (3). Opinions will differ as to the effectiveness of a jury instruction not to draw an adverse inference from the making of a claim of privilege. See Bruton v. United States, 389 US 818, 88 SCt 126, 19 L Ed 2d 70 (1968). Whether an instruction shall be given is left to the sound judgment of counsel for the party against whom the adverse inference may be drawn. The instruction is a matter of right, if requested.

C. Relationship to Existing Law

This section changes Oregon law relating to comments upon or inferences drawn from a claim of privilege that is not constitutionally guaranteed.

Practically all the cases in Oregon dealing with the issue involve the husband-wife privilege in the criminal setting.

In Oregon, the prosecution, in a criminal proceeding, may call the defendant's wife as a witness and thus require the defendant to assert the privilege before the jury. After the marital privilege is claimed, the trial judge is not required to instruct the jury not to draw any inference from defendant's refusal to allow his wife to testify. Prosecutorial comment upon a defendant's claim of marital privilege is allowed. State v. Inman, 8 Or App 180, 492 P2d 804 (1972); State v. Hixon, 237 Or 402, 291 P2d 388 (1964).

However, it may be improper for an attorney to comment upon failure to consent to testimony of an examining physician. Kelly v. Highfield, 15 Or 277, 14 P 744 (1887).

In State v. Inman, supra, the court, citing State v. Johnson, 243 Or 532, 431 P2d 383 (1966), implied that if the prosecution had been aware the wife intended to refuse to testify based on the Fifth Amendment privilege against self-incrimination, it could not have utilized her as a witness.

SECTION 42. Rule 514. Effect on existing privileges. Unless expressly repealed by section 98 of this Act, all existing privileges either created under the statutes of the State of Oregon or developed by the courts of Oregon are recognized and shall continue to exist until changed or repealed according to law.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This is a new section adopted by the Advisory Committee to retain all existing privileges currently recognized under the statutes or case law of Oregon.

B. Summary

The Advisory Committee recognizes that the seven privileges adopted under sections 32 to 38 (Rules 503 to 510) of this Act are not, and should not be the only testimonial privileges granted in Oregon. There are others currently observed under the requirements of statutes or judicial decisions. The Advisory Committee wishes to stress that the adoption of sections 32 to 38 (Rules 503 to 510) of this Act is not intended to affect any of those privileges not expressly repealed by section 98 of this Act. Similarly, there is no intent that sections 32 to 41 (Rules 503 to 513) of this Act affect the discovery statutes of Oregon or the Oregon decisional law relating to the work product of attorneys.

C. Relationship to Existing Law

This section has the effect of maintaining all existing privileges in Oregon, except those expressly repealed by section 98 of this Act. A partial list of testimonial privileges currently recognized in Oregon, and not repealed by this Act are:

(1) Information designated confidential by a person as to a matter before the Legislative Counsel Committee. ORS 173.230.

(2) Income tax returns. ORS 314.835.

(3) Disclosure by a voter of his choices at an election. State ex rel Heath v. Kraft, 20 Or 28, 23 P 663 (1890).

(4) Veneral disease records. ORS 434.055.

(5) Nervous disorder reports filed with the Motor Vehicles Division. ORS 482.141.

(6) Juvenile court records and proceedings. ORS 419.567.

Section 98 of this Act repeals ORS 44.040 (1979 Replacement Part), the section in Title 4 of the Oregon Revised Statutes (Evidence and Witnesses) which creates 13 testimonial privileges. Eight of the 13 privileges so created are maintained by this Act, although in an altered form in some instances.

The marital privilege, the attorney-client privilege, the clergyman-penitent privilege, the physician (psychiatrist)-patient privilege, the public officer privilege and the stenographer-employer privilege created by paragraphs (a) to (f) of subsection (1) of ORS 44.040 are maintained under sections 32 to 37 (Rules 503 to 509) of this Act.

The licensed psychologist-patient privilege created by paragraph (h) of subsection (1) of ORS 44.040 is retained, but merged with the physician (psychiatrist)-patient privilege under section 33 (Rule 504) of this Act.

The privilege for physicians, local health authority officers and employes not to be examined in a civil or criminal proceeding as to the existence or contents of any records of a person examined or treated for an infectious venereal disease is repealed. However, the Advisory Committee believed that this

privilege, created by paragraph (j) of subsection (1) of ORS 44.040, is repetitious and unnecessary. With regard to the local health authority officer or employe, it duplicates the privilege created under ORS 434.055. With respect to the physician, it is unnecessary in civil actions because of the existence of the physician-patient privilege. The only unique feature of the privilege is to make the physician-patient privilege applicable in criminal cases in which treatment for venereal disease is a relevant issue. The Advisory Committee did not believe there was sufficient justification for extending the physician-patient privilege to a very limited number of criminal cases.

The privileges for licensed professional nurses, certificated staff members of schools, certificated school counselors, clinical social workers and naturopaths created under paragraphs (g), (i), (k), (L) and (m) of subsection (1) of ORS 44.040 are repealed. The members of the Advisory Committee did not believe that the protection of the relationships represented by these privileges justified the exclusion of relevant evidence necessary to ascertain the truth, accurately adjudicate cases and protect the constitutional right to a fair trial.

41.675 Inadmissibility of certain hospital data. (1) As used in subsection (2) of this section "data" means written reports, notes or records of tissue committees or other medical staff committees in connection with the professional training, supervision or discipline of the medical staff of hospitals, and any written reports, notes or records of similar committees of professional societies in connection with training, supervision or discipline of physicians. The term includes the written reports, notes or records of utilization review and professional standards review organizations.

(2) All data shall be confidential and shall not be admissible in evidence in any judicial proceeding, but this section shall not affect the admissibility in evidence of records dealing with a patient's hospital care and treatment.

(3) A person serving on or appearing before any medical review committee shall not be examined as to any communication made before that committee or the findings thereof.

(4) A person serving on a medical review committee shall not be subject to an action for civil damages for affirmative actions taken in good faith as a member of the committee.

44.510 Definitions for ORS 44.510 to 44.540. As used in ORS 44.510 to 44.540, unless the context requires otherwise:

(1) "Information" has its ordinary meaning and includes, but is not limited to, any written, oral, pictorial or electronically recorded news or other data.

(2) "Medium of communication" has its ordinary meaning and includes, but is not limited to, any newspaper, magazine or other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system. Any information which is a portion of a governmental utterance made by an official or employe of government within the scope of his or her governmental function, or any political publication subject to ORS 260.512, 260.522 and 260.532, is not included within the meaning of "medium of communication."

(3) "Processing" has its ordinary meaning and includes, but is not limited to, the compiling, storing and editing of information.

(4) "Published information" means any information disseminated to the public.

(5) "Unpublished information" means any information not disseminated to the public, whether or not related information has been disseminated. "Unpublished information" includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not themselves disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

44.520 Limitation on compellable testimony from media persons; search of media persons' papers, effects or work premises prohibited; exception. (1) No person connected with, employed by or engaged in any medium of communication to the public shall be required by a legislative, executive or judicial officer or body, or any other authority having power to compel testimony or the production of evidence, to disclose, by subpena or otherwise:

(a) The source of any published or unpublished information obtained by the person in the course of gathering, receiving or processing information for any medium of communication to the public; or

(b) Any unpublished information obtained or prepared by the person in the course of gathering, receiving or processing information for any medium of communication to the public.

(2) No papers, effects or work premises of a person connected with, employed by or engaged in any medium of communication to the public shall be subject to a search by a legislative, executive or medium of communication to the public shall be subject to a search by a legislative, executive or judicial officer or body, or any other authority having power to compel the production of evidence, by search warrant or otherwise. The provisions of this subsection, however, shall not apply where probable cause exists to believe that the person has committed, is committing or is about to commit a crime.

44.530 Application of ORS 44.520. (1) ORS 44.520 applies regardless of whether a person has disclosed elsewhere any of the information or source thereof, or any of the related information.

(2) ORS 44.520 continues to apply in relation to any of the information, or source thereof, or any related information, even in the event of subsequent termination of a person's connection with, employment by or engagement in any medium of communication to the public.

(3) The provisions of subsection (1) of ORS 44.520 do not apply with respect to the content or source of allegedly defamatory information, in civil action for defamation wherein the defendant asserts a defense based on the content or source of such information.

44.540 Effect of informant as witness. If the informant offers himself as a witness, it is deemed a consent to the examination also of a person described in ORS 44.520 on the same subject.

ADVISORY COMMITTEE COMMENTARY TO DELETED MATERIALS

Proposed Rules 501, 502, 507, 508 and 509 of the Federal Rules of Evidence are deleted from the proposals adopted by the Advisory Committee on Evidence Law Revision.

The Advisory Committee did not adopt proposed Federal Rule 501 because it simply restates, in negative form, the general principle that only privileges created by statute or by constitutional mandate are recognized. See State v. Buchanan, 250 Or 244, 436 P2d 729 (1968). The Advisory Committee considered its adoption unnecessary.

Proposed Federal Rule 502 granted a privilege to any person making a report required by law to refuse to disclose the contents of the report if the law requiring it to be made so provides. The existence of ORS 192.410 to 192.500 and section 36 of this Act, a comprehensive statutory scheme relating to the disclosure and inspection of public records, renders proposed Federal Rule 502 unnecessary in Oregon. See especially subsection (2) of ORS 192.500 and the commentary to section 36 of this Act.

Proposed Federal Rule 507, allowing a person to refuse to disclose the tenor of his vote at a political election conducted by secret ballot, is in accord with current Oregon law. See State ex rel Heath v. Kraft, 20 Or 28, 23 P 633 (1890). The Advisory Committee considers the adoption of proposed Federal Rule 507 to be unnecessary in Oregon.

The Advisory Committee believes that the adoption of proposed Federal Rule 508 is unnecessary. See, for example, paragraph (f) of subsection (1) of ORS 41.618 and paragraph (b) of subsection (1) of ORS 192.500.

Proposed Federal Rule 509 was considered inappropriate for enactment at the state level of government. The Advisory Committee also believes that this proposed rule is contrary to the public policy of Oregon as set forth in section 14, Article IV, Oregon Constitution and ORS 192.410 to 192.500 and 192.610 to 192.690.

Proposed Federal Rules 501, 502, 507, 508 and 509 are as follows:

Rule 501.
PRIVILEGES RECOGNIZED ONLY AS PROVIDED
[Not enacted.]

Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Rule 502
REQUIRED REPORTS PRIVILEGED BY STATUTE
[Not enacted.]

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so

provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

Rule 507.
POLITICAL VOTE
[Not enacted.]

Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

Rule 508.
TRADE SECRETS
[Not enacted.]

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

Rule 509.
SECRETS OF STATE AND OTHER OFFICIAL INFORMATION
[Not enacted.]

(a) Definitions.

(1) Secret of state. A 'secret of state' is a governmental secret relating to the national defense or the international relations of the United States.

(2) Official information. 'Official information' is information within the custody or control of a department or agency of the government the disclosure of which is shown to be contrary to the public interest and which consists of: (A) intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions, or (B) subject to the provisions of 18 U.S.C. section 3500, investigatory files compiled for law enforcement purposes and not otherwise available, or (C) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to 5 U.S.C. section 552.

(b) General rule of privilege. The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.

(c) Procedures. The privilege for secrets of state may be claimed only by the chief officer of the government agency or department administering the subject matter which the secret information sought concerns, but the

privilege for official information may be asserted by any attorney representing the government. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of secrets of state, the judge upon motion of the government, may permit the government to make the required showing in the above form in camera. If the judge sustains the privilege upon a showing in camera, the entire text of the government's statements shall be sealed and preserved in the court's records in the event of appeal. In the case of privilege claimed for official information the court may require examination in camera of the information itself. The judge may take any protective measure which the interests of the government and the furtherance of justice may require.

(d) Notice to government. If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

(e) Effect of sustaining claim. If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.

SECTION 43. Rule 601. General rule of competency. Except as provided in sections 43 to 50 of this Act, any person who, having organs of sense can perceive, and perceiving can make known the perception to others, may be a witness.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on the first sentence of ORS 44.020.

B. Summary

At common law, one might have been disqualified from testifying because of conviction of a crime, interest in the outcome, marital relationship, sex, race or religion. The common law rules of incompetency have been undergoing a process of piecemeal revision by statutes for over a century so that today most of the former grounds for excluding a witness altogether have been converted into mere grounds of impeaching his credibility. McCormick, Evidence, section 4, p 5 (2d ed 1972).

Sections 43 to 50 (Rules 601 to 606-1) of this Act are broad statements which effectively remove the old common law disqualifications, thus aiding the courts in their search for information and truth.

Under sections 43 to 50 (Rules 601 to 606-1) of this Act, any person called upon to testify must meet certain testimonial requisites: He must have knowledge of the matter from personal observation; he must have some recollection of that knowledge at the time he is to testify; and he must be able to communicate that knowledge. Furthermore, he must be free of any disqualification which would preclude his testimony because of its presumed tendency to be inaccurate, misleading, or prejudicial. In addition, the witness must recognize and be reminded of the necessity of telling the truth.

Except for the basic requirements of perception, recollection and communication, this section eliminates all grounds of incompetency not specifically recognized under sections 43 to 50 (Rules 601 to 606-1) of this Act.

C. Relationship to Existing Law

Currently, the Oregon Revised Statutes contain two sections concerning competency in general: ORS 44.020 (1979 Replacement Part), relating to persons capable of being witnesses, and ORS 44.030 (1979 Replacement Part), containing two common law disqualifications, mental incompetency and infancy.

This section with its exception, is a reiteration of the first sentence of ORS 44.020. The Advisory Committee did not adopt the remainder of ORS 44.020 because the members believed that the language was simply unnecessary in light of the adoption of sections 44 to 55 (Rules 602 to 612) of this Act.

The Advisory Committee repeals ORS 44.030 because it believes that the question of whether any person has sufficient ability to perceive, recollect and communicate so that it is worthwhile to hear him at all is a question for the trial court to decide in the exercise of sound legal discretion. In accord, with

regard to mental capacity, is State v. Pace, 187 Or 498, 212 P2d 755 (1949). In State v. Jackson, 9 Or 457 (1881) and State v. Jensen, 70 Or 156, 140 P 740 (1914), the Oregon Supreme Court declared that it is essential that children-witnesses have sufficient intelligence to observe and narrate and possess a due sense of the nature and obligations of an oath. Thus, even under ORS 44.030, the competency of a child appears to be a preliminary question of fact to be decided by the trial judge. State v. Stich, 5 Or App 511, 484 P2d 861 (1971). Furthermore, such decisions regarding competency will not be reviewed unless there is a clear abuse of discretion. State v. Griffin, 19 Or App 822, 529 P2d 399 (1974).

In light of the cases just discussed, the Advisory Committee believes that, with the exception of a witness less than 10 years of age, the adoption of section 43 (Rule 601) of this Act will work no change in Oregon law with regard to the determination of a witness' competency.

Although no longer required to ascertain by separate examination whether or not a child under 10 years of age is a competent witness, as required under ORS 44.030, a trial court may still do so in order to determine whether the child witness is a competent witness under this Article.

SECTION 44. Rule 602. Lack of personal knowledge. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee decided to follow the wording of rule 602 of the Federal Rules of Evidence except for the removal of the words "he" and "himself" and the reference to rule 703. Rule 703 was not adopted. See page 143. This is not intended to change the effect of the Advisory Committee proposal nor parts B and C of the Advisory Committee commentary.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is a slightly modified version of Rule 602 of the Federal Rules of Evidence. The exception involving Rule 703 of this Act, relating to opinion testimony by expert witnesses, which appears as the final sentence of Federal Rule 703, has been inserted as an introductory clause in this section.

B. Summary

". . .[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information." McCormick, Evidence, section 10, p 20 (2d ed 1972). This section simply codifies that common law requirement.

The party offering the testimony has the burden of laying the foundation that the witness had an opportunity to observe the fact. Such burden, according to this section, may consist of testimony of the witness himself. Absolute personal knowledge is not a requisite, but it is necessary that the witness sincerely believe himself to have the knowledge. This section does not govern the situation in which a witness testifies to a hearsay statement when he has personal knowledge of the making of the statement; sections 62 and 66 (Rules 801 and 805) of this Act would be applicable. However, this section would prevent a witness from testifying to the subject matter of the hearsay statement since he has no personal knowledge of it.

The reference to section 59 (Rule 703) of this Act is designed to avoid any question of conflict between this section and provisions allowing an expert to express opinions based on facts of which he does not have personal knowledge.

C. Relationship to Existing Law

The current analogous Oregon statute, ORS 44.060 (1979 Replacement Part), does not differ from this section in application.

The exception made in this section allows an expert witness to express opinions based on facts of which the expert does not have personal knowledge. This is in accord with the status of the law as interpreted by the courts in Oregon. Nutt v. So. Pacific Co., 25 Or 291, 35 P 653 (1894).

SECTION 45. Rule 603. Oath or affirmation. (1) Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience of the witness and impress the mind of the witness with the duty to do so.

(2) An oath may be administered as follows: The person who swears holds up one hand while the person administering the oath asks: "Under penalty of perjury, do you solemnly swear that the evidence you shall give in the issue (or matter) now pending between _____ and _____ shall be the truth, the whole truth and nothing but the truth, so help you God." If the oath is administered to any other than a witness, the same form and manner may be used. The person swearing must answer in an affirmative manner.

(3) An affirmation may be administered as follows: The person who affirms holds up one hand while the person administering the affirmation asks: "Under penalty of perjury, do you promise that the evidence you shall give in the issue (or matter) now pending between _____ and _____ shall be the truth, the whole truth and nothing but the truth." If the affirmation is administered to any other than a witness, the same form and manner may be used. The person affirming must answer in an affirmative manner.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee combined sections 45 and 46 of the Advisory Committee's proposal and rather than adopting the suggested form of oath or affirmation in section 46, created two subsections. One sets out a suggested form for an oath; the other for an affirmation. Committee members felt that some witnesses would be more impressed with their duty to tell the truth if they swore

an oath which says "So help me God," while others may be more impressed with the "under penalty of perjury" language.

ADVISORY COMMITTEE PROPOSAL

SECTION 45. Rule 603. Oath or affirmation. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience of the witness and impress the mind of the witness with the duty to do so.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 603 of the Federal Rules of Evidence.

B. Summary

The oath may be important in two aspects: As a ceremonial and religious symbol it may induce in the witness a feeling of special obligation to speak the truth, and it may impress upon the witness the danger of criminal punishment for perjury, to which the judicial oath or an equivalent solemn affirmation would be a prerequisite condition. At a time when witnesses were viewed with more suspicion, the oath was regarded as "a summoning of Divine vengence upon false swearing;" if the witness remained untouched by the hand of God, then he was telling the truth. 6 Wigmore, section 1816. Under modern common law theory, the witness is reminded of ultimate Divine punishment for failing to speak truthfully and so must have belief in "superhuman . . . retribution to follow false swearing." 6 Wigmore, section 181. Because atheists and non-believers may be unwilling or incapable of taking an oath, the affirmation, a solemn undertaking to tell the truth, has been devised to impress upon the witness the legal ramifications of perjury.

This section is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives and children. Although section 46 (Rule 603-1) of this Act sets forth a suggested form for an oath or affirmation, neither this section or section 46 (Rule 603-1) of this Act requires any particular verbal formula for an oath or affirmation, and allows an oath or affirmation to be administered by any person authorized by law to administer oaths.

C. Relationship to Existing Law

ORS 44.310 to 44.360 (1979 Replacement Part) and section 7, Article I of the Oregon Constitution are the current Oregon provisions relating to oaths and affirmations.

Except in the case of a witness under 10 years of age, there are no measurable differences between this section and current Oregon law concerning form of the oath or affirmation and who may administer one. Section 7, Article I, is consistent with this section in that both allow for much leeway in the mode of administration of an oath or affirmation so long as that mode is calculated to awaken the witness' conscience.

ORS 44.310 (1979 Replacement Part) makes a distinction between child witnesses under 10 years of age and all other witnesses with regard to the necessity for an oath or affirmation. That section allows testimony of a child under the age of 10 years to be given on a promise in open court to tell the truth if the court determines the child can safely be admitted to testify in accordance with ORS 44.030 (1979 Replacement Part). This section makes no such distinction among witnesses.

The Advisory Committee believes this section is preferable to ORS 44.310 for several reasons: 1) the lack of an oath may suggest incompetence on the part of the child; 2) the only reason that a promise would be allowed for a child would seem to be that the child is unable to understand an oath, but this contradicts a finding that the child is of sufficient intelligence to testify; and 3) it is desirable to impress the child with the importance of the occasion and the need to exercise care in speaking. To eliminate an unnecessary distinction, the Advisory Committee proposes repeal of ORS 44.310.

NOTE: Section 46 was deleted. Subsequent sections were not renumbered.

ADVISORY COMMITTEE PROPOSAL

Section 46. ORS 44.330 is amended to read:

44.330. Rule 603-1. Form of oath or affirmation. An oath or affirmation may be administered as follows: The person who swears or affirms holds up [his] a hand, while the person administering the oath [addresses him] or affirmation asks: "Do you [do solemnly swear that the evidence you shall give in the issue (or matter) now pending between ---------- and ---------- shall be the truth,] promise to tell the whole truth [and nothing but the truth, so help you God." If the oath is administered to any other than a witness, the same form and manner may be used], under penalty of perjury?" The person swearing or affirming must answer in an affirmative manner.

ADVISORY COMMITTEE COMMENTARY

Under section 45 (Rule 603) of this Act, every witness is "required to declare that he will testify truthfully, by oath or affirmation . . . ." This section is therefore amended to provide a model for administering an affirmation as well as an oath.

The members of the Advisory Committee determined that the form of oath or affirmation used in judicial proceedings in this state ought to be simplified in order to better impress the witness with his duty to testify truthfully, and to more clearly indicate the penalty for falsehood. The traditional form of the witness' oath has been changed to one requiring the witness only to promise to tell the whole truth under penalty for perjury.

The section now expressly requires an affirmative response from the witness upon administration of an oath or affirmation.

The Advisory Committee does not propose, through its amendment of this section, to require a rigid and invariable observance of the form of oath or affirmation set forth in the statute. Indeed, section 7, Article I of the Oregon

Constitution prohibits anyone from doing so. ORS 44.330, as amended, simply sets forth the ordinary, usual mode of administering an oath or affirmation. However, any other mode of administering an oath or affirmation which is binding upon the conscience of the person to whom the oath or affirmation is administered is allowable.

SECTION 47. Rule 604. Interpreters. (1) An interpreter is subject to the provisions of this Act relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.

(2) Use of qualified interpreter for handicapped witness or party. When a witness or a party in a civil or criminal proceeding is a handicapped person, the court shall appoint a qualified interpreter, unless the handicapped person knowingly and voluntarily files a statement with the court indicating that the handicapped person does not desire the court to appoint a qualified interpreter.

(3) The court shall fix the fees and expenses of an interpreter appointed under subsection (2) of this section. In a criminal proceeding the county in which the proceeding is held shall pay the fees and expenses of a qualified interpreter for the defendant or the witness of the defendant if:

(a) The defendant makes a verified statement and provides other information in writing under oath showing inability to obtain a qualified interpreter, and provides any other information required by the court concerning the inability to obtain such an interpreter; and

(b) It appears to the court that the defendant is without means and is unable to obtain a qualified interpreter. Except as provided in ORS 183.418, in a civil proceeding the party plaintiff or defendant requiring the services of a qualified interpreter shall pay the interpreter's fees and expenses.

(4) As used in this section:

(a) "Handicapped person" means a person who cannot readily understand or communicate the English language, or cannot understand the proceedings because of deafness, or because of a physical hearing impairment or physical speaking impairment.

(b) "Qualified interpreter" means a person who is readily able to communicate with the handicapped person, translate the proceedings, and accurately repeat and translate the statements of the handicapped person to the court.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee decided to add the provisions of ORS 44.095 to section 47 (Rule 604) of the Advisory Committee proposal. Thus, subsection (1) of section 47 (Rule 604) is identical to rule 604 of the Federal Rules of Evidence while subsection (2) is identical to ORS 44.095 except that male gender references have been removed. The committee recommends the repeal of ORS 44.095.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 604 of the Federal Rules of Evidence.

B. Summary

This section requires an individual, before serving as an interpreter, to demonstrate or prove proficiency in communicating with a handicapped witness, translating the proceedings for the witness and accurately repeating and translating the statements of the handicapped witness to the court. It also requires the administration of an oath or affirmation to the interpreter that a true translation will be made.

C. Relationship to Existing Law

The current Oregon statutes relating to interpreters in legal or administrative proceedings are ORS 44.095, 45.520 (1979 Replacement Part), 133.515 and 183.418.

The Advisory Committee believes that with the adoption of this section, ORS 45.520 becomes superfluous and should be repealed. ORS 44.095 repeats the requirement contained in ORS 45.520 that an interpreter be appointed for any witness who does not understand or speak English, and this section restates the requirement found in ORS 45.520 that the interpreter be under oath. The Advisory Committee considers this section to be preferable to ORS 45.520 because it affirmatively stresses the interpreter's obligation to make a true translation, and because it emphasizes the broad discretionary power of the trial court to determine the fitness and qualifications of interpreters.

It is the opinion of the Advisory Committee that the adoption of this section, together with the retention of ORS 44.095, would not change current Oregon practice with regard to the appointment and use of interpreters in legal proceedings.

ORS 44.095, relating to the use of a qualified interpreter for a handicapped person, sets forth definitions and procedures to be followed. It was adopted by the 1973 Legislative Assembly as a part of an Act to make available to the handicapped the use of interpreters. Two sections identical to ORS 44.095 were enacted, and were codified as ORS 183.418, relating to interpreters for handicapped persons in contested case hearings, and ORS 133.515, relating to interpreters for handicapped persons in criminal proceedings.

ORS 44.095 has not been challenged or construed in an Oregon court. However, the Court of Appeals for the Ninth Circuit held in United States v. Barrios, 457 F2d 680, 682 (1972), that the trial judge has broad discretion in appointment and in determining the fitness and qualifications of interpreters, and exercise thereof will not be disturbed on review in the absence of prejudice. There is nothing to indicate that the Oregon courts would not follow this general rule of law.

SECTION 48. Rule 605. Competency of judge as witness. The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 605 of the Federal Rules of Evidence.

B. Summary

The Advisory Committee believes that the role of a judge as witness is manifestly inconsistent with the judge's customary role of impartiality in the adversary system of trial. Three views exist concerning testimony by a judicial officer. McCormick, Evidence, section 68, p 147 (2d ed 1972). First, under the oldest view the judge was generally regarded as a competent witness with the discretion to decline to testify. 6 Wigmore, Evidence, section 1909, n 1. Under the second view the judge is disqualified from testifying to material facts in dispute. McCormick, Evidence, section 68, p 147 (2d ed 1972). The third view is that a judge is incompetent to testify in a case which he or she is trying. In keeping with the growing trend of jurisdictions to follow the third view, this section is a broad rule of incompetency. Because an objection is automatic and need not be made to preserve the point, the opponent is not confronted with a choice between not objecting, resulting in allowing the testimony, and objecting, "with the probable result of excluding testimony but at the price of continuing the trial before a judge likely to feel that his integrity has been attacked by the objector." FED. R. EVID. 605, Advisory Committee's note, p 51.

This section does not prevent a judge from testifying as a witness when he has disqualified himself from presiding, but recognizes the poor policy of a presiding judge testifying even as to formal matters in a proceeding in which impartiality is required of the judge.

C. Relationship to Existing Law

The current Oregon statute law adopts the first position discussed above, allowing the testimony of the presiding officer. ORS 44.050 (1979 Replacement Part).

In State v. Houghton, 45 Or 110, 75 P 887 (1908), the court held that a trial judge was a competent witness in a criminal case to testify that there was no inconsistency between the testimony of a witness at the trial in question and that given in court. However, the opinion gives the impression that the court would have preferred the rule set forth in this section if the issue had not been foreclosed by legislative mandate.

> In the absence of a statute making him competent as a witness, the weight of authority seems to be opposed to the admission of such testimony: 3 Rice, Ev. Section 196; Maitland v. Zanga, 14 Wash. 92 (44 Pac. 117); People v. Dohring, 59 N.Y. 374 (17 Am. Rep. 349); Rogers v. State, 60 Ark. 76 (29 S.W. 894, 31 L.R.A. 465, 46 Am. St. Rep. 154).
>
> The position and influence of the trial judge, the weight his testimony would necessarily have with the jury in case of a conflict with some other witnesses, and many other reasons which readily suggest themselves to the legal mind point to the conclusion that his testimony would, as said by Mr. Justice Dunbar in Maitland v. Zanga, 14 Wash. 82 (44 Pac. 117), 'lead to embarrassment and would have a tendency to lower the standard of courts and bring them into contempt.' State v. Houghton, supra, at 112.

For these reasons, the Advisory Committee adopts this section and proposes repeal of ORS 44.050.

SECTION 49. Rule 606. Competency of juror as witness. A member of the jury may not testify as a witness before that jury in the trial of the case in which the member has been sworn to sit as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee deleted subsection (2) of section 49 (Rule 606) of the Advisory Committee's proposal. Members of the Judiciary Committee believed that case law adequately states circumstances under which there may be an inquiry into the validty of a jury verdict. See State v. Gardner, 230 Or 569, 371 P2d 558 (1962) and State v. Imlah, 204 Or 43, 281 P2d 973 (1955).

ADVISORY COMMITTEE PROPOSAL

SECTION 49. Rule 606. Competency of juror as witness. (1) A member of the jury may not testify as a witness before that jury in the trial of the case in which the member is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(2) Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by a juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 606 of the Federal Rules of Evidence.

B. Summary

Subsection (1). The policy considerations underlying the question of the competency of a juror as a witness are similar to those relevant to the competency of a judicial officer. However, the traditional common law and much present-day practice holds the juror competent to testify. McCormick, Evidence, section 70, p 148 (2d ed 1972).

There are two additional general objections to the testimony of a juror as a witness: 1) opposing counsel might be prevented from adequately cross-examining or impeaching the juror/witness due to a fear of offending the juror; and 2) the juror might later be disposed to give excessive weight to his own testimony and generally treat too favorably the testimony of the side whose partisan he has been.

Subsection (2). The familiar rule that a juror may not impeach his own verdict stems from a doctrine nurtured by Lord Mansfield in the 1700s, 8 Wigmore, Evidence (McNaughten rev.) sections 2352 and 2353. It is an oversimplication of the policies involved: 1) prevention of invasion of the privacy of the jury room by litigants or the public (freedom of deliberation); 2) promotion of finality and stability in jury verdicts; and 3) protection of jurors from annoyance, embarrassment and harassment. On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. This subsection offers an accommodation between these competing considerations.

This subsection does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations, nor does it permit a juror to testify about his mental processes or about the effect of anything upon his or another juror's mind as influencing an assent or dissent from a verdict or indictment. A juror may testify, however, on the questions of whether extraneous prejudicial information was improperly brought to the jury's attention and whether any outside influence was improperly brought to bear on any juror.

As an example of the operation of this subsection, consider a bailiff who makes improper statements to a jury during its deliberations. Under this subsection, the jurors could testify as to the statements made by the bailiff but could not testify as to the effect those statements may have had on the jurors or on their deliberations. It would be up to the trial judge to determine whether the bailiff's statements were, in fact, prejudicial.

C. Relationship to Existing Law

Subsection (1). The section is contrary to current Oregon law set forth in ORS 44.050 (1979 Replacement Part) and ORCP 59C. which allow jurors to be called as witnesses by either party.

This subsection imposes upon counsel the responsibility of insuring that any prospective juror is not also a potential witness who will be kept from the stand if counsel fails to challenge the person being empanelled during voir dire. Because current Oregon law allows jurors to testify, this responsibility does not weigh so heavily as under this section. However, in State v. Nagel, 185 Or 486, 202 P2d 640 (1944), the Oregon court stated that whenever possible, opposing counsel should determine through voir dire examination whether a prospective juror will be called as a witness to testify, and, if so, counsel should challenge his being empanelled on the jury. This decision indicates that while the court was bound by statute to allow a juror to testify, it did not favor the dual role; the policies mentioned earlier against allowing a juror to testify were obviously considered and found persuasive.

Subsection (2). This subsection is more restrictive than current Oregon law with respect to the matters that may be inquired about when seeking to impeach a jury's verdict. In Oregon, "there is no absolute rule . . . prohibiting the use of a juror's affidavit to impeach a verdict; the affidavit may be considered, but its significance in determining whether a new trial will be ordered is for the court to decide in each case. . . . The court must choose between two conflicting

interests; on one hand, the interest of the individual who claims that the misconduct deprived him of a fair trial, and on the other hand, the interest of the public in protecting the verdict from attack. . . . A verdict is impeachable if justice demands that it be set aside." State v. Gardner, 230 Or 569, 573-574, 371 P2d 558 (1962).

However, the court declared that, in so saying, it did not depart from the view taken in State v. Imlah, 204 Or 43, 54-55, 281 P2d 973 (1955) that verdicts should not be set aside except in those cases of "utmost gravity and importance" where it is "manifest that enforcement of the rule (that a juror may not impeach his verdict) would violate the plainest principles of justice," citing McDonald v. Pless, 238 US 264, 269, 55 SCt 783, 59 LEd 1300 (1915).

In Gardner, 230 Or at 575, the court accepted the limitation expressed in Rule 41 of the Uniform Rules of Evidence that no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined.

It will be recognized that the language in Uniform Rule 41, accepted by the Gardner court, is similar to the language of this subsection, and therefore that part of the subsection works no change in current Oregon practice. However, this subsection also prohibits inquiry into "any matter or statement occurring during the course of the jury's deliberations." This latter prohibition does not appear to be the rule in Oregon currently.

Thus, under current Oregon practice, it appears that a juror could testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations, about the jury's refusal to follow the trial judge's instructions or that some of the jurors did not take part in the deliberations. Under this subsection, such testimony would not be permitted. The Advisory Committee believes that a public policy of finality to litigation and the preservation of privacy for jurors to engage in full and free debate requires the rule set forth in subsection (2) of this section.

The members of the Advisory Committee intend, by the adoption of this subsection, to prohibit the practice of questioning jurors after a trial concerning their deliberations or the methods by which they reached a verdict. Questioning regarding "quotient verdicts," for example, would be prohibited.

For the effect of constitutional considerations in this area, see Parker v. Gladden, 385 US 363, 87 SCt 468, 17 LEd 2d 420 (1966) and the discussion of the case in 2 Litigation 31 (1975). In that case, the court held that a bailiff's remarks to a jury constituted a violation of the Sixth Amendment's confrontation requirement.

SECTION 50. Rule 606-1. Competency of attorney as witness. An attorney representing a party litigant at trial shall not offer to be a witness or offer a member of the attorney's firm as a witness at that trial unless:

(1) The testimony of the attorney or member will relate solely to an uncontested matter;

(2) The testimony of the attorney or member will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) The testimony of the attorney or member will relate solely to the nature and value of legal services rendered in the case by the lawyer or the lawyer's firm to the client;

(4) As to any matter, refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or the lawyer's firm as counsel in the particular case; or

(5) The court finds that the interests of justice require the testimony.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This is a new section based on Oregon's case law and Disciplinary Rule 5-101(B) of the American Bar Association Code of Professional Responsiblility (1969).

B. Summary

This section sets forth the conditions that must exist before an attorney may offer himself as a witness at a trial in which he is serving as counsel for one of the parties.

C. Relationship to Existing Law

Although the most common problems that arise when an attorney is called as a witness involve the attorney-client privilege, the next most common question is whether counsel can continue with the trial. Under current Oregon law, any attorney, including the one trying the case, can be called as a witness to any fact of his own knowledge, and if called, must testify. It may be unprofessional conduct, however, for an attorney who knows that he will be a witness to undertake the trial of his client's case. Newman v. Stover, 187 Or 641, 213 P2d 137 (1950); Bronson v. Dept. of Revenue, 265 Or 211, 508 P2d 423 (1973). An attorney who appears as a witness in the trial court, except as to merely formal matters, will not be allowed to argue the case on appeal. Oregon Supreme Court, Rules of Procedure, Rule 43.

In section 50 (Rule 606-1) of this Act, the Advisory Committee is codifying the principle enunciated by the Oregon Supreme Court in Bronson v. Dept. of Revenue, supra. That principle is, simply stated, a lawyer is not allowed to offer himself as a witness in his own trial unless certain conditions are met. The Advisory Committee, by codifying this principle, seeks to establish a minimum standard for attorneys to observe. In a given case, however, considerably broader ethical considerations may prevent the trial attorney, as a matter of professional ethics, from testifying and continuing as counsel in that trial.

By adopting this section, the Advisory Committee does not intend to narrow the scope of the ethical considerations mentioned in the Newman and Bronson cases.

SECTION 51. Rule 607. Who may impeach. The credibility of a witness may be impeached by any party, including the party calling the witness, except in order to impeach the credibility of a party's own witness with a prior inconsistent statement, the testimony of the witness at trial must be actually injurious to the calling party's case.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee modified the Advisory Committee's proposed rule 607. As proposed, the rule required that two elements be present before one could impeach one's own witness by prior inconsistent statements: Surprise and harmful effect on the calling party's case. The committee deleted the requirement of surprise, adopting instead a rule that the credibility of a party's witness may be impeached with a prior inconsistent statement if the testimony of the witness at trial is injurious to the calling party's case.

While recognizing that the deletion of the element of surprise could result in calling a witness solely for the purpose of putting a prior inconsistent statement before the trier of fact, the committee concluded that this danger was outweighed by other policy considerations. Insofar as the credibility of a witness affects the likelihood of the trier of fact finding the truth, the reliability of a witness' testimony should be allowed to be called into question even if the party knew at the time of trial that the testimony would be inconsistent with a prior statement. The trier of fact then has more information on which to base a judgment of the likelihood that given testimony is reliable.

As to the requirement that the testimony be injurious to the calling party, the committee adopts the Advisory Committee's view as expressed in its commentary.

ADVISORY COMMITTEE PROPOSAL

SECTION 51. Rule 607. Who may impeach. The credibility of a witness may be impeached by any party, including the party calling the witness, except in order to impeach the credibility of a party's own witness with a prior inconsistent statement, the testimony of the witness at trial must be contrary to that which the calling party anticipates and must be actually injurious to the calling party's case.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is a modified version of Rule 607 of the Federal Rules of Evidence. The federal rule does not treat impeachment by prior inconsistent statements differently from other methods of impeachment.

B. Summary

The traditional common law rule against impeaching one's own witness is abandoned in this section as based on false premises. The policies behind the common law rule are 1) that a party vouches for the credibility of his own witnesses, and 2) a party could coerce his witnesses if it were not for the traditional rule.

Yet a party does not vouch for his witnesses because, except for expert and character witnesses, a party's witnesses are not chosen but those persons who happen to be present and see the event which is the basis of the case. The second policy is concerned with the situation where a party's witness decides to change his story, testify unfavorably, and is prevented from doing so by the party's threat of impeachment. Yet, the policy falsely assumes that whenever a witness changes his testimony, it will be from falsehood to truth, that the party coerces the witnesses by threatening impeachment, and that the truth is thereby suppressed. Certainly witnesses could be changing their testimony from truth to falsehood and so the coercion, if there is any, could be supporting, not suppressing, the truth. Montana Rules of Evidence, Rule 607, Commission Comment, (1977), p 44.

"The voucher rule [the common-law rule that a party may not impeach his own witness] has been condemned as archaic, irrational, and potentially destructive of the truth-gathering process." Chambers v. Mississippi, 410 US 284, 296 n 8, 935 SCt 1038, 35 LEd 2d 297 (1973). The Chambers case clearly indicates that the application of the common-law "voucher rule," in criminal cases, at least, may present grave constitutional problems.

Denial of the right of impeachment of one's own witness thus leaves a party at the mercy of the witness and the opposing party. The substantial inroads into the old rule made over the years by decisions, rules and statutes evidence the doubts as to its soundness and workability. FED. R. EVID. 607, Advisory Committee's note, pp 55-56. Cases collected in 3 Wigmore, section 905.

This section accomplishes two principal goals: (1) it makes it clear that a party calling a witness does not vouch for that witness; and (2) it would limit impeachment of one's own witness by means of prior inconsistent statements, a method of impeachment often used as a device to introduce the prior inconsistent statement as substantive evidence.

The limitation on impeachment of one's own witness by prior inconsistent statements is twofold: (1) the testimony at trial must be actually injurious to the calling party's case; and (2) the testimony at trial must be contrary to that which the calling party anticipates.

As discussed below, it is not clear whether, under current law, the element of surprise is necessary in order to impeach one's own witness with a prior inconsistent statement. Since impeachment by means of prior inconsistent statements is unique in that it presents the danger of having the trier of fact accept the prior statements as substantive evidence, a majority of the Advisory Committee decided to make impeachment of one's own witness by means of prior inconsistent statements more certain by requiring the element of surprise. Requiring surprise also forestalls the possibility that trial counsel will call a witness to the stand, knowing his testimony will be unfavorable, solely to introduce a prior inconsistent statement of the witness.

It should be noted that impeachment of any witness by evidence of bias or interest requires the laying of a foundation for such impeachment. Therefore, even though a party may impeach his own witness under this section by evidence of bias or interest, the conditions required for such impeachment under section 54 (Rule 609-1) of this Act must be satisfied.

C. Relationship to Existing Law

The law in Oregon relating to who may impeach is stated in ORS 45.590 and 45.600 (1979 Replacement Part).

ORS 45.600 is declaratory of the common law. Sheppard v. Yocum, 10 Or 402, 410 (1882); State v. Hunsaker, 16 Or 497, 499, 19 P 605 (1888); State v. Edwards, 106 Or 58, 210 P 1079 (1922); State v. Motley, 127 Or 415, 272 P 561 (1928); State v. Gilbert, 138 Or 291, 4 P2d 923 (1932). This section does not differ from ORS 45.600 in its lack of restrictions concerning impeachment of an adverse witness. The distinctions lie in the manner of impeachment which will be discussed under following sections of this Act.

ORS 45.590, relating to the impeachment of one's own witness, differs greatly from this section.

Oregon law relating to impeachment of one's witness has altered over the years from the posture of declaring the common law to its current status in ORS 45.590. Leverich v. Frank, 6 Or 212 (1896); State v. Hunsaker, 16 Or 497, 19 P 605 (1888). The testimony of a witness must be material and prejudicial to the party calling him before he may be impeached by the party calling him. Langford v. Jones, 18 Or 307, 326, 22 P 1064 (1890); State v. Steever, 29 Or 85, 104, 43 P 947 (1896); State v. Yee Gueng, 57 Or 509, 112 P 424 (1910); State v. Merlo, 92 Or 678, 173 P 317, 182 P 153 (1919); Tauscher v. Doernbecher Mfg. Co., 153 Or 152, 56 P2d 318 (1936); State v. Gardner, 2 Or App 265, 467 P2d 125 (1970) SCt review denied. The purpose of the change from the common law was to remove the roadblock which prevented the party who called his adversary from impeaching the latter. State v. Cummings, 205 Or 500, 288 P2d 1036, 289 P2d 1083 (1955). The principle of allowing such impeachment is a wholesome one because it treats the witness as a "channel through which to get at the truth" rather than a partisan of the one calling him. Uniform Rules of Evidence Rule, 20, Comment (1953). While the party producing the witness may not impeach the witness' credibility by evidence of bad character, two means of impeachment of one's own witness are set forth in the statute: 1) one may contradict the witness by other evidence; or 2) the party may show, upon laying a proper foundation, that his own witness has at other times made statements inconsistent with his present testimony. The limitation as to foundation does not apply to calling as a witness the adverse party or the assignor, agent, officer or employe thereof.

In Rhodes v. Harwood, 273 Or 903, 544 P2d 147 (1975), the Supreme Court reaffirmed the rule that, under ORS 45.590, impeachment by a party of his own witness by evidence of a prior inconsistent statement may occur only when the testimony of the witness is prejudicial or damaging to the party calling him. In State v. Bruce, 31 Or App 1189, 572 P2d 351 (1977), a case reaffirming the principles stated in Rhodes, the court declared that the conditions which permit impeachment of one's own witness under ORS 45.590 are that the witness' testimony relate to a material matter and be prejudicial to the case of the party who has called him. In Bruce, 31 Or App at 1194, the court declared that the answer "I don't remember" in response to questions asked concerning the prior inconsistent statements was the equivalent of "No, I did not say that" and was sufficiently prejudicial to allow the introduction of the prior inconsistent statements.

The Advisory Committee intends that the response "I don't know" by a witness who previously had indicated a knowledge of the facts not be considered testimony actually injurious to the calling party's case for the purposes of this section. To the extent that this intention is contrary to Bruce, the Advisory Committee intends to change current Oregon law.

Subsection (2) of section 24 (Rule 404) of this Act does not allow the admission of character evidence for the purpose of proving that a person acted in conformity therewith, subject, however, to several exceptions. One such exception is the admission of character evidence of a witness as bearing upon his credibility. This section develops that exception.

In accordance with the bulk of judicial authority, the inquiry is limited to character for veracity, rather than character generally. The result is to sharpen relevancy, and reduce surprise, waste of time and confusion. McCormick, Evidence, section 44, p 91 (2d ed 1972).

The use of opinion and reputation evidence as means of proving the character of witnesses is consistent with subsection (1) of section 25 (Rule 405) of this Act. While the modern practice has purported to exclude opinion, witnesses who testify to reputation seem in fact often to be giving their opinions disguised as reputation. See McCormick, section 44.

Character evidence in support of credibility is admissible under this section only after the witness' character has first been attacked, as has been the case at common law. McCormick, section 49, p 105; 4 Wigmore, section 1104. Opinion or reputation that the witness is untruthful specifically qualifies as an attack under this section, and evidence of misconduct, including conviction of crime, and of corruption, also fall within this category. Evidence of bias or interest does not. McCormick section 49; 4 Wigmore, sections 1106, 1107.

In conformity with section 25 (Rule 405) of this Act, which forecloses use of evidence of specific incidents as proof of character unless character is an issue in the case, this section generally bars evidence of specific instances of conduct of a witness for the purpose of attacking or supporting his credibility. There is an exception, however. Specific instances of conduct, though not the subject of criminal conviction, may be inquired into upon cross-examination of a witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The Advisory Committee stresses that under this section a party may not directly impeach the credibility of a witness by evidence of prior bad acts which did not result in a conviction for a crime.

C. Relationship to Existing Law

Oregon law relating to evidence of the character of a witness is set forth in ORS 45.590, 45.600 and 45.620.

ORS 45.600, relating to impeachment of adverse witnesses, allows impeachment by evidence that a witness' reputation for truthfulness or untruthfulness is bad. McIntosh v. McNair, 53 Or 87, 99 P 74 (1909); Lucas v. Kaylor, 136 Or 541, 299 P2d 197 (1931).

This section, then, is a departure from current Oregon law in that it allows a witness to express his own opinion about another person's credibility, rather than relying upon the general reputation of the person in his community. This section allows one witness to pass upon the credibility of another witness if he knows that witness.

Paragraph (b) of subsection (1) of this section allows character evidence in support of a witness' credibility only after that character has been attacked. This paragraph does not differ from the current Oregon law set forth in ORS

45.620. Evidence may be introduced to support an impeached witness by showing good character only if the impeachment constitutes an attack on character for truth and veracity. State v. Smith, 4 Or App 261, 478 P2d 417 (1970).

The Advisory Committee amended Federal Rule 608 by deleting paragraph (1) of subsection (b) to preserve current procedure in Oregon that does not allow the credibility of a witness to be attacked by evidence of prior bad acts that did not result in conviction. The Oregon courts have been consistent in prohibiting such evidence. Mannix v. Portland Telegram, 144 Or 172, 23 P2d 138 (1933); State v. White, 48 Or 416, 87 P 137 (1906).

This section does allow a character witness, during cross-examination concerning the character for veracity of another witness as to which character the witness being cross-examined has testified, to be asked whether he has heard about or is aware of specific instances of conduct of that other witness that may be probative of truthfulness or untruthfulness. This is in accord with current Oregon procedure.

SECTION 53. Rule 609. Impeachment by evidence of conviction of crime. (1) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime in other than a justice's court or a municipal court shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime involved dishonesty or false statement.

(2) Evidence of a conviction under this section is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

(3) When the credibility of a witness is attacked by evidence that the witness has been convicted of a crime, the witness shall be allowed to briefly explain the circumstances of the crime or former conviction.

(4) The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(5) An adjudication by a juvenile court that a child is within its jurisdiction is not a conviction of a crime.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee abandoned the traditional approach to impeachment by prior crimes which allows impeachment by any prior felony conviction. A majority of the committee felt that the distinction between felonies and misdemeanors was arbitrary and that the mere fact that a crime is designated a felony does not make conviction of that crime necessarily relevant to the credibility of a witness. Thus, the committee proposes that prior convictions be admitted for purposes of impeaching a witness' credibility only if the conviction was for a crime - felony or misdemeanor - involving dishonesty or false statement. Conviction of such crimes is directly and obviously relevant to the propensity of the witness to testify truthfully.

"Crimes involving dishonesty or false statement" means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit or falsifiction bearing on the witness' propensity to testify truthfully. No attempt has been made in this commentary to list every crime which would be included in the category "crime involving dishonesty or false statement."

ADVISORY COMMITTEE PROPOSAL

SECTION 53. Rule 609. Impeachment by evidence of conviction of crime.

(1) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime in other than a justice's court or a municipal court shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime:

(a) Was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted; or

(b) Involved false statement, regardless of the punishment.

(2) Evidence of a conviction under this section is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

(3) When the credibility of a witness is attacked by evidence that the witness has been convicted of a crime, the witness shall be allowed to briefly explain the circumstances of the crime or former conviction.

(4) The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(5) An adjudication by a juvenile court that a child is within its jurisdiction is not a conviction of a crime.

ADVISORY COMMITTEE COMMENTARY

A. Derivation.

This section is based on Rule 609 of the Federal Rules of Evidence.

B. Summary.

A witness may be impeached, by the party against whom he was called, by a showing that he has been convicted of a crime in other than justice's court or a municipal court. The showing may be made by cross-examination or by offering in evidence the record of the judgment. The crime may be either a felony or a misdemeanor if the misdemeanor involved false statement.

A felony conviction may be used to impeach credibility because the magnitude of the violation of societal standards indicated by the conviction makes it relevant to the credibility of the witness as a testifier. For lesser crimes to be relevant to credibility, however, they should be crimes showing the witness to

be dishonest. For that reason, the section allows the use of prior misdemeanor convictions to impeach only if the misdemeanor involved false statement. By that phrase, the Advisory Committee means crimes such as perjury, false swearing, criminal fraud, theft by deception, or any other offense in the nature of crimen falsi, the commission of which involves some element of untruthfulness, deceit or falsification bearing on the witness' propensity to testify truthfully. In so far as false statement is involved in the commission of the offense, such misdemeanors currently described in Oregon's criminal laws include: false swearing, ORS 162.075; unsworn falsification, ORS 162.085; tampering with a witness, ORS 162.285; tampering with public records, ORS 162.305; simulating legal process, ORS 162.355; criminal impersonation, ORS 162.365; initiating a false report, ORS 162.375; criminal defamation, ORS 163.605; forgery in the second degree, ORS 165.007; criminal simulation, ORS 165.037; fraudulently obtaining a signature, ORS 165.042; negotiating a bad check, ORS 165.065; falsifying business records, ORS 165.080; issuing a false financial statement, ORS 165.100; obtaining execution of documents by deception, ORS 165.102; misrepresentation of age by a minor, ORS 165.805; and sale of a drugged horse, ORS 165.825.

The above is not intended to be, nor should it be construed to be, a complete listing of misdemeanors that may be used to impeach a witness under paragraph (b) of subsection (1) of this section.

The section incorporates certain basic safeguards to insure exclusion of convictions when the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. Convictions in an Oregon justice's court or in an Oregon municipal court, or in similar courts of other states, however designated, may not be used for impeachment. The reasons for this exclusion are that offenses triable in a justice's or municipal court do not involve serious moral depravity, and that the relatively informal proceedings in such courts often stray from accepted standards for criminal trials in a court of record.

Similarly, an adjudication by a juvenile court that a child is within its jurisdiction is not a conviction of a crime within the meaning of this section. Practical problems of administration are raised by the provisions in ORS chapter 419 that records of juvenile court proceedings be kept confidential.

The Advisory Committee believes that practical considerations of fairness and relevancy demand that some time limit be recognized on impeachment by evidence of conviction. Subsection (2) provides that upon expiration of 10 years from the date of a conviction of a witness, or of his release from confinement for that offense, that conviction may no longer be used for impeachment. The Advisory Committee was of the view that after 10 years following a person's release from confinement (or from the date of his conviction) the probative value of the conviction with respect to that person's credibility diminished to a point where it should no longer be admissible.

The presumption of correctness which ought to attend judicial proceedings supports the position that pendency of an appeal does not preclude use of a conviction for impeachment. However, the pendence of an appeal is a qualifying circumstance which may properly be considered.

The section allows a witness impeached by evidence of a prior conviction to briefly explain the circumstances of the crime or former conviction.

C. Relationship to Existing Law.

Subsection (1). Under current Oregon law, a witness may be impeached by a showing that he has been convicted of a crime, which crime may be either a felony or a misdemeanor. ORS 45.600 (1979 Replacement Part). Although there is some authority for the view that a violation of a city ordinance can never be used for impeachment, State v. Crawford, 58 Or 116, 113 P 440 (1911); Redsecker v. Wade, 69 Or 153, 164, 134 P 5, 138 P 485 (1914), it seems clear that such a violation, at least when the punishment therefor is incarceration, is admissible for impeachment purposes. State v. Bunse, 27 Or App 299, 555 P2d 1269 (1977); State v. Rush, 248 Or 568, 571, 436 P2d 266 (1968).

Under this subsection, impeachment of a witness by evidence of a conviction for crime may occur only during cross-examination of the witness. Under existing Oregon procedure, however, it is permissible to so impeach a witness at times other than during cross-examination.

This subsection, therefore, changes existing law in Oregon in four ways:

(1) Misdemeanor convictions can be used to impeach only when the misdemeanor is one involving dishonesty or false statement;

(2) Convictions in a justice's court may not be used for impeachment purposes;

(3) Convictions in a municipal court may not be used for impeachment purposes; and

(4) A witness may be impeached by evidence of a conviction of a crime only during the cross-examination of the witness.

Subsection (2). Currently, Oregon statutes and case law recognize no time limit on impeachment by evidence of conviction. This subsection changes existing law, therefore, by establishing a 10-year limit.

Subsection (3) is in accord with current Oregon law. State v. Washington, 36 Or App 547, __P2d __(1978); State v. Gilbert, 282 Or 309, 577 P2d 939 (1978).

Subsection (4) is in accord with current Oregon law. State v. Forsyth, 20 Or App 624, 533 P2d 176, SCt review denied (1975).

Subsection (5) is in accord with current Oregon law. State v. Gustafson, 248 Or 1, 432 P2d 323 (1967); ORS 419.543.

SECTION 54. Rule 609-1. Impeachment for bias or interest. (1) The credibility of a witness may be attacked by evidence that the witness engaged in conduct or made statements showing bias or interest. However, before this can be done, the statements must be related to the witness and the conduct described, with the circumstances of times, places and persons present, and the witness shall be asked whether the witness made the statements or engaged in such conduct, and, if so, allowed to explain. If the statements are in writing, they shall be shown to the witness.

(2) If a witness fully admits the facts claimed to show the bias or interest of the witness, additional evidence of that bias or interest shall not be admitted. If the witness denies or does not fully admit the facts claimed to show

bias or interest, the party attacking credibility of the witness may then offer evidence to prove those facts.

(3) Evidence to support or rehabilitate a witness whose credibility has been attacked by evidence of bias or interest shall be limited to evidence showing a lack of bias or interest.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This is a new section based on Oregon's case law.

B. Relationship to Existing Law

Oregon courts have long recognized the slanting effect upon testimony of the emotions or feelings of witnesses toward the parties in a case or the self-interest of witnesses in the outcome of a case. Acts, relationships or motives likely to produce bias or affect self-interest may be shown in order to impeach credibility.

Bias may take the form of favor or friendly feeling toward a party, and may be evidenced by family or business relationship, by employment by a party or his insurer, or by particular conduct or statements by the witness.

Bias may also take the form of hostility to a party, and may be shown by the fact that the witness has had a fight or quarrel with the party, or has a lawsuit pending against him.

Self-interest commonly takes the form of having a stake in the outcome of the litigation, as when a witness testifies for the state in a criminal case and it is shown that an indictment is pending against him or that he is an accomplice in the crime.

In its extreme form, self-interest may be manifested in corrupt activity by a witness, such as taking or offering to take a bribe to testify falsely, or writing a letter designed to intimidate another witness into giving perjured testimony. State v. Moore, 180 Or 502, 176 P2d 631 (1947).

In order to evaluate the credibility of a witness, and to fairly determine the weight to be given his testimony, the jury is entitled to hear all the facts relating to the possible bias and self-interest of the witness. State v. Ellsworth, 30 Or 145, 47 P 199 (1896); Clevenger v. Shallhorn, 205 Or 209, P2d 651 (1955). In State v. Sheeler, 15 Or App 96, 514 P2d 1370 (1973), it was held to be prejudicial error to refuse to permit the defendant to cross-examine the victim as to whether his testimony was motivated by the possibility he might be charged with an offense.

In State v. Estlick, 269 Or 75, 523 P2d 1029 (1974), the majority declared that ORS 45.590 (1979 Replacement Part), modified the common law by enacting a very limited ban on impeaching a party's own witness. Since ORS 45.590 does not prohibit a party from impeaching a witness it has produced by a showing of bias or interest, the majority refused to adopt such a prohibition by judicial decision. As a result, a trial court may allow a party to introduce, on direct examination, testimony of his own witness' bias or interest.

Whether on direct examination or cross-examination, matters which would otherwise be irrelevant may be offered to show the bias or interest of a witness. However, relevancy being a question of degree, the trial judge may and should draw the line to exclude that which is of little or no value. O'Harra v. Pundt, 210 Or 533, 310 P2d 1110 (1957). Even matters that may be prejudicial may be elicited to show bias or interest. In State v. Guerrero, 11 Or App 284, 501 P2d 988 (1972), questions concerning the witness' acquaintance with the defendant, used to show bias, were admissible although the inquiry and answer revealed that the defendant and witness had been in the penitentiary together. The trial court, in such a case, has a responsibility to make clear to the jury, by means of proper limiting instructions, the purpose for which such testimony may be considered.

Before a witness can be impeached by calling other witnesses to prove acts or declarations showing bias or interest, the witness under attack must first have been asked about these facts on either direct examination or cross-examination. In State v. Dowell, 274 Or 547, 547 P2d 619 (1976), the court reiterated its previous holdings that ORS 45.610 requires that a foundation be laid before a witness can be impeached by an offer of evidence that the witness made a prior statement showing that he had a bias or interest, notwithstanding the fact that ORS 45.610, by its terms, does not extend to such statements. State v. Stewart, 11 Or 52, 4 P 128 (1883); State v. Holbrook, 98 Or 43, 188 P 947 (1920). The foundation required by the statute is that the statements must be related to the witness, with the circumstances of times, places and persons present, and that the witness shall be asked whether he made the statements, and if so, allowed to explain them.

The court noted, however, that it had not previously had occasion to consider whether such a foundation should also be required before a witness could be impeached by an offer of evidence that the witness had engaged in conduct showing that he was biased or had an interest in the case.

Quoting McCormick on Evidence section 40, pp 80-81, (2d ed 1972), the Dowell court at 274 Or 553 declared:

> *Some courts, adhering to the analogy of inconsistent statements, make a difference between declarations and conduct evidencing bias, requiring the preliminary question as to the former and not as to the latter. But as suggested in a leading English case, words and conduct are usually intermingled in proof of bias, and 'nice and subtle distinctions' should be avoided in shaping this rule of trial practice. Better require a 'foundation' as to both or neither.*

The court adopted that view, and required a preliminary foundation be laid for both declarations and conduct evidencing bias.

Some jurisdictions take the position that if a witness fully admits the facts claimed to show bias or interest, the impeaching questioner should not be allowed to repeat the same attack by calling other witnesses to testify to admitted facts. If the witness denies or does not fully admit the facts claimed to show bias or interest, the attacking party has the right to prove those facts by extrinsic evidence. This appears to be the rule in Oregon. The reason for the rule seems to be the prevention of needless delay and the injection of collateral issues. State v. Hing, 77 Or 462, 151 P 706 (1915).

For the same reasons, no "supporting" evidence of lack of bias or interest is admissible unless and until evidence of bias or interest has been offered. State v. Estlick, supra.

In Oregon, a party may not add credit to his own witness by showing his lack of bias or interest unless and until evidence of bias or interest has been offered. State v. Van Hooser, 10 Or App 642, 501 P2d 78 (1972); State v. Estlick, supra. Evidence to support or rehabilitate a witness who has been shown to have some bias or interest must be confined to evidence showing a lack of bias or interest, i.e., the "supporting" evidence must be such as to meet the particular kind of impeaching evidence. Sheppard v. Yocum and DeLashmutt, 10 Or 402 (1882); State v. Estlick, supra. Thus, for example, when the state calls a witness who was an accomplice or who is in jail on another charge, it may show such facts upon the direct examination of the witness and may then show that no promises of leniency have been made. But the fact that no promise had been made cannot be shown unless and until it has been shown that the witness was an accomplice or in jail on another charge. And evidence of good character of the witness cannot be shown in such a case regardless of whether the evidence of bias or interest is shown.

In Oregon, the trial judge has discretion to control the extent to which proof of bias or interest may go. McCarty v. Hedges, 212 Or 497, 309 P2d 186 (1958). The scope of inquiry into bias or self-interest is within the discretion of the trial judge. Schrock v. Goodell, 270 Or 504, 528 P2d 1048 (1974).

The trial judge is most often required to exercise that discretion when the testimony is that of an expert witness or when the testimony interjects the element of insurance into the case.

Generally, the pecuniary interest of an expert witness, or his prejudice or bias in favor of the party calling him, can always be shown, limited only as to the extent of the inquiry by the sound discretion of the trial judge. An expert may be examined as to fees, compensation, previous relationships with the parties or the attorneys, and the frequency of testimony in behalf of plaintiff or defendant. State v. Sack, 210 Or 522, 300 P2d 427 (1957); State Highway Commission v. Superbilt Manufacturing Co., Inc., 204 Or 393, 281 P2d 707 (1955); Hahn v. Dewey, 157 Or 433, 72 P2d 593 (1937).

However, an expert cannot be questioned on the amount of fees paid him for his testimony in unrelated trials. State Highway Commission v. Superbilt Manufacturing Co., Inc., supra.

After reviewing this last case, the members of the Advisory Committee intend that section 54 (Rule 609-1) of this Act be construed to overrule that portion of State Highway Commission v. Superbilt Manufacturing Co., Inc., 204 Or 393, 281 P2d 707 (1955), which declared that an expert cannot be questioned on the amount of fees paid him for his testimony in unrelated trials.

State Highway Commission v. Superbilt Manufacturing Co., Inc., supra, was a condemnation action brought by the State of Oregon against Superbilt Manufacturing Co., Inc. At the trial, the sole factual issue was the amount of money to be paid Superbilt.

An expert witness for the Highway Commission, testified regarding the value of the property being appropriated. Cross-examination developed the fact that he had testified as an expert on property valuation for the Highway Commission on many previous occasions. Over objection, the witness was allowed to answer an

inquiry concerning the amount that the Highway Commission had paid him for appraisal work and for testifying in condemnation cases for the period January 1, 1946 to August 31, 1953. The Oregon Supreme Court ruled that the question was improper. The court declared that, if the question were proper, the witness would have had the right, in explanation of his answer, to show that the fees previously paid him in each case were fully justified.

At page 406, the court declared:

> *It is well settled that a wide latitude is permitted upon the cross-examination of a witness, the scope and extent of such cross-examination resting largely in the sound discretion of the trial court. However, the right of cross-examination and the extent thereof have limitations. The pecuniary interest of a witness, or his prejudice or bias in favor of the party calling him, can always be shown, limited only as to the extent of the inquiry by the sound discretion of the trial judge. If a witness is being paid more than the fixed witness fee for testifying in the case, that fact may be developed on cross-examination. More latitude is permitted in the cross-examination of expert witnesses than is the case with ordinary witnesses, because expert testimony is viewed with some suspicion. The natural bias which the expert may have in favor of the party who employed and is paying him is the chief cause for the discredit that has been cast upon expert testimony as a whole. The questions directed to the witness respecting the number of times he had acted as appraiser and testified for the Highway Commission in condemnation cases was proper cross-examination; also, inquiry might properly be made of him as to the amount of money he was being paid as a witness in this particular case. However, the question as to how much money he had received as an appraiser and witness in prior unrelated cases was improper and the objection thereto should have been sustained. Such an inquiry opened the doors to purely collateral matters.*

As authority, the court relied upon a statement at 70 CJ 954, section 1158 (h), to the effect that compensation in excess of regular witness fees paid to an expert in other distinct previous cases may not be shown. In addition, the court also cited Furbeck v. I. Gevurtz & Son, 72 Or 12, 143 P 654 (1914), a case which denied cross-examination relating to collateral matters.

The court acknowledged that the Illinois Supreme Court, in similar cases, reached a different decision, but obviously did not find the reasoning in those cases persuasive.

In City of Chicago v. Schaak Bros. Chemical Works, 330 Ill 264, 161 NE 486 (1928), a case in which the city sought to enforce a special sidewalk assessment, two real estate dealers testified for the city on the benefits that would accrue to the defendants because of the construction, and on the reasonableness of the assessment amount.

On cross-examination, it was shown that one of the witnesses had testified a number of times in the preceding three years for the city in cases of the same nature. Objections to questions concerning the basis on which he was paid and how much money he had received from the city for testifying in that class of cases during the previous year were sustained by the trial court.

The Illinois Supreme Court declared that: "While the extent of cross-examination is largely within the discretion of the trial court, it is proper to show the interest of a witness, and, under certain conditions of the evidence, it may have a very material bearing." Quoting Kerfoot v. City of Chicago, 195 Ill

229, 63 NE 101 (1902), a case involving similar facts, the court went on to say "that it would manifestly be important, where witnesses had repeatedly testified for the city, to know whether they were receiving only fair and ordinary compensation for their time, or whether the employment was of such a character and the compensation such as to make it desirable that the employment should continue and that the city should be fully satisfied with the opinions given. Undoubtedly it was necessary for the city to employ the witnesses, but we think the defendants were entitled to have the jury know what the arrangement was under which the opinions were formed and testified to." The court then ruled that the trial court committed reversible error by excluding the two questions mentioned on cross-examination.

Thus, it would appear that the Oregon and Illinois courts differ on the admissibility of evidence of a continuing relationship between an expert and the party employing him because of different judgments of the relevancy of that evidence and different estimates of the length and relevancy of the testimony that must be received during the effort to rehabilitate and support the credibility of the witness. Although facts showing bias may be explained in Illinois, People v. Burke, 52 Ill App 2d 159, 201 NE 2d 636 (1964), the Illinois court, unlike the Oregon court, apparently, believes that such explanation will not unduly burden the proceedings with time-consuming collateral matters.

At least one commentator, after analysis of the different positions taken by the Oregon and Illinois courts with regard to the impeachment of a professional expert in situations similar to that which existed in Superbilt, concludes that the decisions of the Illinois court are better-reasoned and more persuasive. See Graham, Impeaching the Professional Expert Witness by a Showing of Financial Interest, 53 Indiana Law Journal 35.

Particular caution must be exercised by the trial judge and attorneys when testimony relating to bias or interest touches upon the existence of liability insurance. In Smith v. Pacific Truck Express, 164 Or 318, 100 P2d 474 (1940), the trial court committed reversible error when it excluded testimony by plaintiff showing that an insurance adjustor for the defendant took an impeaching statement from the plaintiff and wrote it out. Upon review, the appellate court declared that "when an insurance agent takes the stand for the defense, his connection with a company which has insured the defendant, is conducting the defense, and whose money is at stake, may be brought out on cross-examination to affect his credibility." In Quigley v. Roath, 227 Or 336, 362 P2d 328 (1961), it was held proper for a plaintiff to show on cross-examination that a stenographer who recorded statements made by the plaintiff was employed by an insurance adjustor, after she had testified on direct examination that she was employed by a prosecuting attorney. In Null v. Siegrist, 262 Or 264, 497 P2d 664 (1972), the court stated that "while, in general, evidence that a defendant is insured is not admissible, such evidence may be admitted when it shows interest or bias of an adverse witness."

However, in Strandholm v. General Construction Company, 235 Or 145, 382 P2d 843 (1963), when defendant and his counsel purposefully and, in the judgment of the trial court, wrongfully introduced evidence of insurance, the trial court properly allowed a new trial. In Fairbrother v. Rinker, 274 Or 525, 547 P2d 605 (1976), the trial court did not allow introduction of evidence that a private investigator, who testified about plaintiff's strenuous physical activities prior to trial, had been hired and paid by defendant's insurer. The investigator did testify that he was engaged in the business of making investigations for "firms or lawyers"; that he had been employed on defendant's behalf to make the investigation in this case, and that he was paid $473 for his services. The

appellate court held that the investigator's testimony at trial revealed to the jury the facts from which bias could be inferred, and that it was not necessary for the jury to know that an insurance company was the witness' employer. Mention of an insurance company would have added nothing to the inference of bias, and the trial court, therefore, did not err in rejecting the proffered evidence.

The preceding has been a brief statement of the principles controlling impeachment of witnesses for bias or interest in Oregon. It should be noted that these principles are not established by statute, but have been developed by judicial decision. The Advisory Committee intends section 54 (Rule 609-1) of this Act to be a codification of these principles, with the exception, already mentioned in the discussion of the Superbilt case, of admissibility of evidence of a continuing relationship between an expert witness and the party employing him.

SECTION 54a. Rule 610. Religious beliefs or opinions. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the credibility of the witness is impaired or enhanced.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee chose to adopt Federal Rule 610 concerning religious beliefs, believing it to be consistent with section 6, Article I of the Oregon Constitution. The committee also adopted the commentary by the federal advisory committee which reads as follows:

> *"While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule. Cf. Tucker v. Reil, 51 Ariz. 357, 77 P2d 203 (1938). To the same effect, though less specifically worded, is California Evidence Code §789. See 3 Wigmore §936."*

ADVISORY COMMITTEE COMMENTARY

Because section 6, Article I of the Oregon Constitution controls the question of religious tests for witnesses or jurors, Rule 610 relating to the religious beliefs or opinions of witnesses was not adopted by the Advisory Committee.

SECTION 54b. Rule 611. Mode and order of interrogation and presentation. (1) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth, avoid needless consumption of time and protect witnesses from harassment or undue embarrassment.

(2) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of

the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(3) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee recommended the adoption of the language of Federal Rule 611 and the repeal of ORS 45.530 through 45.570. The committee believes that, with one possible exception, discussed below, this rule does not change Oregon law. The reason for adoption of the federal rule is that it will give Oregon courts and attorneys the benefit of decisional law from other jurisdictions which have adopted the same rule. It was felt that, particularly where no changes are made in current state law, the benefit of these decisions outweighs whatever benefit there may be in current statutory wording.

The one respect in which adoption of Rule 611 might change current law is use of leading questions to interrogate adverse parties or witnesses. In Sinclair v. Barker, 236 Or 599, 390 P2d 391 (1964) the court said: "The trial court took the position that when an adverse party is called as a witness he may be examined by leading questions as in cross-examination. The privilege is not quite that broad. Leading questions may be allowed upon the direct examination of an adverse party if he appears to be hostile to the examiner." 236 Or 599, 607. Thus the rule in Oregon would appear to be that a witness must be both adverse and hostile before leading questions may be used on direct examination.

On the face of it, subsection (3) of Rule 611 permits leading questions to any adverse party or witness identified with an adverse party, regardless of hostility. To the extent that the rule is so interpreted, it changes the rule of Sinclair v. Barker.

ADVISORY COMMITTEE COMMENTARY

Believing that the Federal Rules of Evidence or other changes should be adopted only in those areas in which current Oregon law requires revision, and also believing that the current Oregon statutes relating to the examination of witnesses were satisfactory, the Advisory Committee retained ORS 45.530 to 45.570 and did not adopt Federal Rule 611. The members of the Advisory Committee recognized that the last sentence of Rule 611 would work a change in current Oregon law by allowing an adverse party or a witness identified with an adverse party to be interrogated by means of leading questions. However, this was a change not favored by the members of the Advisory Committee.

SECTION 55. Rule 612. Writing used to refresh memory. If a witness uses a writing to refresh memory for the purpose of testifying, either while testifying, or before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the

witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this section, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

Section 55 of this Act is identical to Rule 612 of the Federal Rules of Evidence.

B. Summary

It has long been established trial procedure that in the interrogation of a witness counsel may hand him a written memorandum to inspect in order to "refresh his recollection," resulting in the witness speaking from memory thus revived. It is accepted doctrine that when the witness, being shown the writing, testifies that the writing does not revive his memory he cannot testify from a refreshed recollection. If he recognizes the writing as his own, or written at his direction, when the facts were fresh in his mind, he may testify that the facts were as recited in the memorandum. McCormick, Evidence, section 9, p 15 (2d Ed 1972).

This section does not make any distinction as to the source of the writings to be utilized. According to McCormick, two schools of thought exist. That championed by Wigmore and most present day courts is that any memoranda, without regard to authorship, time of recordation or accuracy may be used when the purpose is to revive memory. The law in Oregon and a minority of jurisdictions is that the memorandum must have the same qualities as a record of past recollection that is, it must be written by the witness, or at his direction, at or near the time of the event when the facts were still fresh in the witness' memory.

It is well settled that writings used to refresh the witness' memory while testifying must be made accessible to opposing counsel at the hearing. Dispute exists concerning the means of access to the writing by opposing counsel when the writing is used to refresh recollection prior to testifying.

This section affirmatively provides for access to the writing if the court determines such access is necessary in the interests of justice.

The phrase "for the purpose of testifying" provides a safeguard against wholesale exploration of an opponent's files. FED. R. EVID. 612, Advisory Committee's note, p 73.

Under this section, the party required to produce the writing may submit it to the court for examination in camera. The court will then excise the portions unrelated to the witness' testimony. If the adverse party objects to the withholding of any portion, that segment is to be preserved for appellate review.

The consequence of prosecution nonproduction in a criminal case is that the witness' testimony is ordered stricken or mistrial is declared. In civil cases, when a party fails to produce a writing the court has available such remedies as contempt, dismissal and finding issues against the offender. FED. R. EVID. 612, Advisory Committee's note, p 74.

C. Relationship to Existing Law

The law in Oregon relating to writings used to refresh the memory is set forth in ORS 45.580 and 45.630 (1979 Replacement Part).

Until 1969 it was the law in Oregon that before a witness' recollection refreshed by means of a self-composed or self-directed writing could be received in evidence, the witness had to demonstrate a lack of present recollection of the subject matter of the memorandum. This was changed in State v. Sutton, 253 Or 24, 450 P2d 748 (1969). The witness now need only identify the written memorandum, recall its making at or near the time of the event, and testify as to its accuracy.

Early in Oregon the courts strictly construed the restrictions imposed in ORS 45.580 concerning the source of the memorandum used. In Manchester Assur. Co. v. Oregon Ry. & Nav. Co., 46 Or 162, 79 P 60, (1905) the court held that only those writings made by or under the direction of the witness could be used to refresh the witness' memory. According to the court in Walling v. Van Pelt, 132 Or 243, 285 P 262 (1930), a map is not a memorandum for purposes of the statute.

More recent cases indicate a willingness of the courts to creatively construe the statute in order to allow the use of writings not written by or under the direction of the witness. For example, in Banks v. Community Church, 178 Or 1, 7 165 P2d 65 (1946), the court held that entries in minute books not made by the witnesses were appropriate for the refreshment of memory under section 4-707, O.C.L.A., the predecessor to ORS 45.580. In Waterways Terminals Co. v. P.S. Lord Mechanical Contractors, 242 Or 1, 57, 406 P2d 556, 13 A.L.R. 3d 1 (1965), the court stated:

> *The statute is not applicable because the memorandum, if such it can be called, was neither written by, nor under the direction of, the witness. In fact, it has been strongly suggested by this court that ORS 45.580 is applicable only where a memorandum is used as a record of past recollection and not for the purpose of reviving present recollection . . . .*
>
> *We do not deal here with past recollection recorded, but with refreshing present recollection, which may be done by calling to the attention of the witness his earlier oral statements: State v. Dixon, 212 Or 572, 579-580, 321 P2d 305; Weygandt v. Bartle, 88 Or 310, 318, 171 P 587, or by a memorandum not made by the witness: Banks v. Community Church, 178 Or 1, 7, 165 P2d 65; Wigmore, supra, section 759. 'It has been said that anything which will refresh the memory of a witness may be resorted to--as, for example, a pictorial preservation of facts.' Waterway, supra, p 57-58, quoting 4 Jones on Evidence, section 965.*

In its quest for a fair remedy, the court avoided the plain meaning of ORS 45.580, relying instead on an outside authority to justify its position.

In State v. Liston, 18 Or App 26, 523 P2d 609, SCt review denied (1974), the court cited Waterways, supra, and held that use at and prior to trial of a previously dictated statement by a witness to refresh his recollection was within

the discretion of the trial court. The testimony of the witness concerning such statement was proper under the facts.

It is important to note that in Oregon the testimony is the evidence, not the writing. State v. Sutton, supra; Hall v. Brown, 102 Or 389, 202 P 719 (1921).

Access by opposing counsel to writings used to refresh a witness' memory is provided for in ORS 45.580. Anytime a writing is used to refresh memory by a witness at trial, the writing must be produced for the opposing counsel who may inspect it, cross-examine the witness upon it, and read it to the jury. This rule was expanded in Waterway Terminals, supra, p 61, where the court held that opposing counsel has the right to inspect a witness' transcript whether or not it is shown to the witness when counsel reads part of it for the purpose of refreshing the witness' recollection.

This section sets forth guidelines to the court in allowing access to writings used by a witness to refresh memory before the witness testifies. The discovery procedures in the Oregon Rules of Civil Procedure can be utilized to prevent the kind of "wholesale exploration" of files that this section is intended to guard against. This section makes accessible only those writings used to refresh memory. ORCP 36C. provides for the issuance of a protective order by the court to control, limit or disallow discovery where the request has been made from annoyance, embarrassment, oppression or undue burden or expense. By requiring that designated items be at least reasonably calculated to lead to the discovery of admissible evidence, some protection is afforded against "wholesale exploration" of one's files.

Criminal discovery procedures in ORS 135.805 through 135.873 provide for disclosure of all recorded and written statements or memoranda of all witnesses to testify at trial, with the exception of the defendant. This exception is afforded due to the Fifth Amendment protection against self-incrimination. ORS 135.873, concerning protective orders, contains provisions for in camera review of disclosures subject to a protective order of the court. Sanctions for failing to comply with discovery are provided for in ORS 135.865 and are very similar to those in this section.

Several additional distinctions may be drawn between current Oregon law and this section. First, the term "a writing" under this section presumably encompasses any writing that would serve to refresh the witness' memory. In Oregon the situation currently is unclear. ORS 45.580 requires that writings used to refresh memory meet the traditional requirements of past recollection recorded. There is substantial doubt as to whether the statute applies to refreshing a witness' memory at all. Recent Oregon case law indicates that the traditional requirements will not be strictly adhered to in order to allow the use of any writings to refresh a witness' memory. Secondly, access to writings under this section is much broader in scope than under ORS 45.580. Under this section access to writings used to refresh the witness' memory for the purpose of testifying prior to testifying is possible if the court decides in the interests of justice such access is necessary. In Oregon, similar provisions exist in the recently enacted discovery statutes. However, access at the hearing or trial to writings used prior to trial appears to be unavailable under ORS 45.580.

By adopting this section, the Advisory Committee recommends repeal of ORS 45.580 and 45.630.

Section 55a. ORS 45.610 is amended to read:

45.610. A witness may be impeached by evidence that [he] the witness has made, at other times, statements inconsistent with [his] the witness' present testimony; but before this can be done, the statements must be related to [him] the witness, with the circumstances of times, places and persons present, and [he] the witness shall be asked whether [he] the witness made the statements, and if so, allowed to explain them. If the statements be in writing, they shall be shown to the witness before any question is put to [him] the witness concerning them.

ADVISORY COMMITTEE COMMENTARY

The Advisory Committee favored retention of ORS 45.610 instead of the adoption of Federal Rule 613, after recognizing that the principal difference between the two provisions was the requirement, under ORS 45.610, to show a written prior inconsistent statement to a witness before any question is put to the witness. No such requirement exists under Rule 613.

SECTION 55b. Rule 614. Calling and interrogation of witnesses by court. (1) Calling by court. The court may, on its own motion or at the suggetsion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(2) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(3) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

JUDICIARY COMMITTEE COMMENTARY

Recognizing that judges have inherent power to call and examine witnesses, Frangos v. Edmunds, 179 Or 577, 610, 173 P2d 596 (1946), the Judiciary Committee decided to adopt Rule 614 of the Federal Rules of Evidence.

ADVISORY COMMITTEE COMMENTARY

Although concluding that Federal Rule 614 was consistent with current Oregon law relating to the calling and interrogation of witnesses by the court, the Advisory Committee was reluctant to provide the court with an expanded role in the examination or cross-examination of witnesses. By not adopting Federal Rule 614, the members of the Advisory Committee do not intend to deny or limit the inherent power of a trial court to call and interrogate witnesses.

SECTION 56. Rule 615. Exclusion of witnesses. At the request of a party the court may order witnesses excluded until the time of final argument and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employe of a party which is not a natural person designated as its representative by its attorney, or (3) a

person whose presence is shown by a party to be essential to the presentation of the party's cause.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee adopted a modified version of Federal Rule 615. Rather than saying that witnesses shall be excluded ". . . so that they cannot hear the testimony of other witnesses . . .", the rule adopted by the committee says witnesses may be excluded ". . . until the time of final argument . . .". Committee members believe that the purpose of the rule is better served if witnesses, when excluded, are excluded from all phases of the trial at which testimony might be discussed. Potentially, this includes voir dire, opening statements and offers of proof. The decision whether to exclude or not is within the judge's decision.

ADVISORY COMMITTEE PROPOSAL

Section 56. ORS 45.510 is amended to read:

45.510. Rule 615. Exclusion of witnesses from courtroom. (1) In a civil action, suit or proceeding, if either party [requires it] requests the exclusion of a witness, the [judge] court may exclude from the courtroom any witness of the adverse party not at the time under examination, so that [he] the witness may not hear the testimony of other witnesses.

(2) In a criminal action or proceeding, if either party moves to exclude a witness from the courtroom and the other party does not object, the court shall exclude the witness. If the motion to exclude a witness is opposed, the court, in its discretion and upon good cause shown for not excluding the witness, may deny the motion.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section amends ORS 45.510, and was adopted in lieu of enacting Rule 615 of the Federal Rules of Evidence. See commentary to deleted materials at end of this Article.

B. Summary

This section is amended to conform to current Oregon practice.

C. Relationship to Existing Law

ORS 45.510 is amended to conform the section to the holding of the Court of Appeals in State v. Bishop, 7 Or App 558, 492 P2d 509 (1972).

Under the decision in that case and under this section, as amended, when one party moves to exclude witnesses and the other party voices no objection, the motion should always be granted. When the motion is opposed, the trial court's discretion must be exercised. Thus, if some showing of good cause for not excluding the witnesses is made, the trial court must make a reasonable choice between the good cause shown and the policy favoring exclusion.

Since it is not clear whether the Oregon courts in State v. Bishop, supra, and the cases cited therein, recognize a distinction between civil and criminal cases with regard to the exclusion of witnesses, the Advisory Committee, although recognizing that there is little good reason for the distinction, has maintained the distinction in the section. However, the Advisory Committee intends to work no substantive change in current Oregon law relating to exclusion of witnesses.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

SECTION 57. Rule 701. Opinion testimony by lay witnesses. If the witness is not testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are:

(1) Rationally based on the perception of the witness; and

(2) Helpful to a clear understanding of testimony of the witness or the determination of a fact in issue.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 701 of the Federal Rules of Evidence.

B. Summary

This section establishes the parameters of admissibility for opinion testimony by lay witnesses.

Subsection (1) is the familiar requirement of firsthand knowledge or observation.

Subsection (2) is phrased in terms requiring testimony to be helpful to a clear understanding of lay testimony. The purpose of this limitation is to allow shorthand designation of what a person has perceived, such as the speed of an automobile, the identity of a person, the appearance of another person, the sound of footsteps, footprints, distance, uncomplicated illness or injury, apparent age, etc. This section does not permit lay witness opinion as to point of impact, the estimate of speed based upon observation of skid marks and certainly not opinions as to fault. However, this limitation is not intended to make inadmissible an opinion that is presently admissible under existing law, even though the requirements of subsections (1) and (2) are not satisfied. For example, this section leaves undisturbed existing Oregon law permitting a lay witness to give his evaluation of property he owns and other, similar practices judicially established.

Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. Moreover, the practical impossibility of determining by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also. 7 Wigmore, Evidence, section 1919 (3d ed 1940). The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, 5 Vand. L Rev 414, 415-17 (1952). Similar provisions are found in California Evidence Code, section 60-456(a); New Jersey Evidence Rule 56(1) and Uniform Rule 56(1).

A minority of members of the Advisory Committee advocated deletion of the last phrase of subsection (2) "or the determination of the fact in issue." They were of the opinion that deletion of the phrase would properly limit the scope of the rule by excluding certain kinds of opinions of lay witnesses, such as opinions relating to fault, point of impact, etc. On the other hand, the majority position is clear that the inclusion of this provision would not serve to admit this type of evidence.

C. Relationship to Existing Law

This section probably expresses existing Oregon law. A witness who is not testifying as an expert may testify in the form of an opinion only if the opinion is based upon firsthand knowledge and his own perception. In addition, the opinion must be "helpful to a clear understanding of his testimony." Older Oregon cases suggest that an opinion by a lay witness must be based on necessity rather than helpfulness, Everart v. Fischer, 75 Or 316, 145 P 33 (1915). However, the Supreme Court has recently suggested an approach to nonexpert opinions that allows the trial judge more leeway in admitting lay opinions, and thus corresponds more to the standard of "helpfulness" adopted in this section. See State v. Garver, 190 Or 291, 316, 225 P2d 771 (1950). This section is not intended to make inadmissible an opinion already held admissible under existing Oregon law.

SECTION 58. Rule 702. Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify, thereto in the form of an opinion or otherwise.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 702 of the Federal Rules of Evidence.

B. Summary

The Advisory Committee adopts the commentary of the federal advisory committee. FED. R. EVID. 702, Advisory Committee's note, p 79.

This section recognizes that an intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common course of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in nonopinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by this section, however. It will continue to be

permissible for the expert to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand. L Rev 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and, therefore, superfluous and a waste of time. 7 Wigmore, Evidence, section 1918 (3d ed 1940).

This section is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of this section are not only experts in the strictest sense of the word, e.g., physicians, physicists and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

C. Relationship to Existing Law

This section provides that when specialized knowledge of a field will aid the trier of fact, a witness qualified as an expert in the field may testify on the subject. Oregon courts have long held that when the nature of a question is such that a man of ordinary intelligence and experience is incapable of drawing correct conclusions from the facts in evidence without the assistance of someone who has special skill or knowledge on the subject, the opinion of the expert is desirable and competent evidence. Fisher v. Oregon Short Line Ry. Co., 22 Or 533, 30 P 425 (1892). Therefore, this section does not change existing law.

NOTE: Section 59 was deleted. Subsequent sections were not renumbered.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee decided against adopting section 59, Rule 703 of the Advisory Committee's Proposed Evidence Code. While recognizing that Oregon courts have allowed "reasonable reliance" exceptions to the rule that expert testimony must be based on facts in evidence, the committee did not want to broaden the scope of these exceptions.

The feeling of those opposed to adoption of Rule 703 was that the jury would be better able to understand and assess the validity of the expert's opinion if they knew the basis for it.

Failure to adopt Rule 703 is not intended to change current Oregon law regarding the facts in evidence doctrine or its exceptions.

ADVISORY COMMITTEE PROPOSAL

SECTION 59. Rule 703. Bases of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 703 of the Federal Rules of Evidence.

B. Summary

This section establishes the permissible bases of opinion testimony by experts. Facts or data upon which expert opinions are based may, under the section, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. Under section 61 (Rule 705) of this Act, the expert would first have to relate his observations of the witness.

The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. In the latter situation, under section 61 (Rule 705) of this Act, the expert would first have to disclose the facts on which he bases his opinion. However, the Advisory Committee believes that merely having an expert attend the trial and listen to other opinion testimony is not a sufficient basis for testimony by the expert himself. In such an instance, the expert is in the position of basing his testimony on other opinions and is actually only judging the credibility of other witnesses who are offering opinions. Therefore, an attorney who relies upon testimony presented at trial for the basis of his expert's testimony must gather the facts relevant to his questioning from such testimony. The attorney then must either submit those facts to the expert witness in the form of a hypothetical question, asking the expert to assume the facts to be true, or have the expert disclose those facts obtained from prior testimony on which he bases his opinion. This practice departs from that allowed under the similar wording of Rule 703 of the Federal Rules of Evidence, which would permit a witness to base his opinion on prior testimony of other witnesses, including opinion testimony, without alerting the jury that the basis of the testimony has not yet been established or if established, may not be credible.

The third source contemplated by this section consists of the presentation of data to the expert outside of court and other than by his own perception. In this respect the section is designed to broaden the basis for expert opinions beyond that current in many jurisdictions, including Oregon, and to bring the judicial practice into line with the practice of experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and a considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors,

hospital records and X-rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life and death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. As McCormick notes, "If the statements are attested by the expert as the basis for a judgment upon which he would act in the practice of his profession, it seems that they should ordinarily be a sufficient basis even standing alone for his direct expression of professional opinion on the stand. . . ." McCormick, Evidence, section 15 at 36 (2nd ed 1972). A similar provision is incorporated in the California Evidence Code, section 801(b).

Fear that this enlargement of permissible data may tend to break down the rules of exclusion unduly should be quelled by noting that this section requires that the facts or data "be of the type reasonably relied upon by experts."

C. Relationship to Existing Law

This section provides for three possible sources upon which the expert may base his testimony. Firsthand observation of the expert has traditionally been allowed by Oregon courts, and thus the rule does not modify existing Oregon law in this respect. Second, the expert may base his opinion on testimony of other witnesses at trial. This also is in accordance with present Oregon practice. The third source provided for by the rule is the presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that permitted in Oregon. However, the change is not drastic. Although Oregon courts have stated that the facts relied upon by the witness in the formation of his opinion must be facts in evidence, recent cases have made inroads into this exception. For example, in condemnation cases a properly qualified expert may base his opinion in part upon hearsay evidence from which he determines the market for the "going" price in the community for comparable land. State Highway Commission v. Oswalt, 1 Or App 449, 463 P2d 602 (1970). Also, expert medical witnesses may properly base their opinions upon doctor and hospital charts and records to the same extent that they would normally rely upon the same documents in the treatment of their patients. Lewis v. Baker, Richardson-Merrill, Inc., 243 Or 317, 326, 413 P2d 400 (1966), State v. Norton, 7 Or App 122, 490 P2d 194 (1971). Thus, in so far as the facts or data are of a type reasonably relied upon by the expert in the particular field, this section permits the expert to base his opinion on facts not in evidence, generally contrary to present Oregon practice.

SECTION 60. Rule 704. Opinion on ultimate issue. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 704 of the Federal Rules of Evidence.

B. Summary

The Advisory Committee adopts the commentary of the federal advisory committee. FED. R. EVID. 704, Advisory Committee's note, p 82.

Under this section, opinion testimony is not objectionable merely because it embraces an ultimate issue. The basic approach to opinions, lay and expert, in this Act is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by this section.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore, Evidence, sections 1920, 1921 (3d ed 1940); McCormick, Evidence, section 12 (2nd ed 1972). The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 Wigmore, Evidence, section 1920, p 17 (3d ed 1940). Efforts to meet the felt needs of particular situations led to odd verbal circumstances which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standards. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of "might or could" rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. People v. Wilson, 25 Cal 2d 341, 153 P2d 720 (1944), whether abortion necessary to save life of patient; Clifford-Jacobs Forging Co. v. Industrial Comm., 19 Ill 2d 236, 166 NE 2d 582 (1960), medical causation; Dowling v. L.H. Shattuck, Inc., 91 NH 234, 17 A2d 529 (1941), proper method of shoring ditch; Schwieger v. Solbeck, 191 Or 454, 230 P2d 195 (1951), cause of landslide. In each instance the opinion was allowed.

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under sections 57 and 58 (Rules 701 and 702) of this Act, opinions must be helpful to the trier of fact, and the rules of relevancy provide for the exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. McCormick, Evidence, section 12 (2nd ed 1972).

For similar provisions see Uniform Rule 56(4); California Evidence Code, section 805; Kansas Code of Civil Procedure, section 60-456(d); New Jersey Evidence Rule 56(3).

C. Relationship to Existing Law

This section codifies existing Oregon case law. If in the opinion of the trial judge the expert is qualified to answer opinion questions and if the issue cannot be resolved equally well by the jury from the same evidence on which the expert bases his opinion, then the expert may express his opinion on an ultimate fact. Ritter v. Beals, 225 Or 504, 525, 358 P2d 1080 (1961).

SECTION 61. Rule 705. Disclosure of fact or data underlying expert opinion. The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

JUDICIARY COMMITTEE COMMENTARY

A majority of the Judiciary Committee rejected the Advisory Committee's Proposed Rule 705 and adopted instead Federal Rule 705. The adoption of the Federal Rule, in conjunction with the rejection of Proposed Rule 703 leaves present Oregon law, as enunciated in Wulff v. Sprouse-Reitz, 262 Or 293, 498 P2d 766 (1972), in tact. An expert may testify as to an opinion without first disclosing the underlying facts or data although those facts must be in evidence or come into evidence. This means that the hypothetical question may be eliminated although the judge has discretion to require disclosure of the facts before the opinion is given.

A majority of the committee believed that the current law is working well and that the current practice has not led to an increased number of mistrials.

ADVISORY COMMITTEE PROPOSAL

SECTION 61. Rule 705. Disclosure of fact or data underlying expert opinion. The expert may testify in terms of opinion or inference and give reasons therefor after first disclosing the underlying facts or data on which the expert bases an opinion. The question need not be in hypothetical form unless the court, in its discretion, requires it.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is a statement of Oregon case law before the decision of the Supreme Court in Wulff v. Sprouse-Reitz, 262 Or 293, 498 P2d 766 (1972). The Advisory Committee adopted this section in lieu of enacting Rule 705 of the Federal Rules of Evidence. See commentary to deleted materials at end of this Article.

B. Summary

Under this section, the expert must first disclose the facts or data underlying his opinion before he may testify as to that opinion.

The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle

of the case and as complex and time consuming. It has also been mishandled by counsel in numerous instances.

In Wulff v. Sprouse-Reitz, 262 Or 293, 498 P2d 766 (1972), the Oregon Supreme Court adopted Uniform Rule 58, a rule similar to the provision subsequently enacted by Congress as Rule 705 of the Federal Rules of Evidence. The court held, in accordance with Uniform Rule 58, that "questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as a hypothesis or otherwise; but upon cross-examination he may be required to specify such data." 262 Or at 307-308. The court thus approved a new method of examining expert witnesses.

A majority of the Advisory Committee believes that this new method, although sanctioned by the Supreme Court, has led to confusion, unfairness and mistrials. For example, the proponent of the expert witness may fail to establish the facts on which the expert bases his testimony. Likewise, the expert may not base his opinion on facts which he perceived directly. The expert may also ground his testimony on some other impermissible basis. Therefore, under existing discovery rules in Oregon the adversary may not know the basis of his opponent's expert testimony. If the testimony is erroneously based, the opponent either must move to strike the testimony, a largely ineffective device, or he may move for a mistrial.

For these reasons, a majority of the members of the Advisory Committee has chosen to retreat from this so-called advance in evidence law and adhere to tradition by requiring the witness to first disclose by his testimony the facts and data on which he bases his opinion. Federal Rule 705 was promulgated against the backdrop of broad pretrial discovery rules in the federal courts. See Rule 26(b)(4) of the Federal Rules of Civil Procedure, which eliminates many obstacles in the discovery of findings underlying data and even the identity of experts. Existing discovery rules in Oregon do not have as broad a sweep.

The majority of the Advisory Committee does not believe that a hypothetical question should be mandatory in all cases, nor should it be eliminated in all cases. Hypothetical questions can be used effectively by counsel. Further, in appropriate cases the court can require a hypothetical question. Whether or not questions posed to experts are to be couched in hypothetical form is left to the discretion of the trial court.

C. Relationship to Existing Law

This section is a departure from Oregon law as adopted in Wulff v. Sprouse-Reitz, 262 Or 293, 498 P2d 766 (1972). In that decision the Oregon Supreme Court held that an expert witness may state his opinion and reasons therefor without first specifying the data on which the opinion is based. By requiring the witness to first disclose the facts and data for this opinion in his testimony and then render the opinion, this section marks a return to Oregon practice as it existed before the Sprouse-Reitz decision. See Lehmen v. Knott, 100 Or 59, 70, 196 P 476 (1921).

SECTION 61a. Rule 706. Court appointed experts. (1) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to

submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of findings, if any; the deposition of the witness may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness as a witness.

(2) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like-manner as other costs.

(3) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(4) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee adopted Federal Rule 706 believing that the court's inherent power to appoint expert witnesses should be codified. This is consistent with the adoption of Rule 614, Calling and Interrogation of Witnesses by the Court.

ADVISORY COMMITTEE COMMENTARY

The Advisory Committee did not adopt Rule 706 of the Federal Rules of Evidence, relating to court appointed experts, because the members of the Advisory Committee believe that the practice of courts appointing expert witnesses should be discouraged. The members believe that court appointed experts are an unnecessarily burdensome expense, and that an opinion rendered by a court appointed expert may carry special weight in the minds of jurors. By not adopting Federal Rule 706, the Advisory Committee does not intend to limit the inherent power or practice of courts to appoint experts, but only to discourage the practice.

SECTION 62. Rule 801. Definitions. As used in sections 62 to 67 (Rules 801 to 806) of this Act, unless the context requires otherwise:

(1) Statement. A "statement" is:

(a) An oral or written assertion; or

(b) Nonverbal conduct of a person, if intended as an assertion.

(2) Declarant. A "declarant" is a person who makes a statement.

(3) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(4) Statements which are not hearsay. A statement is not hearsay if:

(a) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

(A) Inconsistent or at variance with the testimony of the witness, and was given under oath at a trial, hearing, or in a deposition if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination;

(B) Consistent with the testimony of the witness and is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive; or

(C) One of identification of a person made after perceiving the person.

(b) Admission by party-opponent. The statement is offered against a party and is:

(A) That party's own statement, in either an individual or a representative capacity;

(B) A statement of which the party has manifested the party's adoption or belief in its truth;

(C) A statement by a person authorized by the party to make a statement concerning the subject;

(D) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

JUDICIARY COMMITTEE COMMENTARY

Rule 801(4)(a)(A) [(Section 62 (4)(a)(A)]. The Judiciary Committee intends that testimony at a preliminary hearing not be automatically admissible in a subsequent proceeding. The committee believes that it is not necessarily the case that a preliminary hearing affords the party against whom the testimony could later be offered either an opportunity or a similar motive to develop the testimony. If, however, it can be shown by the proponent of the preliminary hearing testimony that there was in fact an effective opportunity and a similar motive for developing the testimony, it is admissible in a subsequent proceeding under Rule 801(4)(a)(A).

Failure to cross-examine a witness at a preliminary hearing does not necessarily constitute a waiver of the right to object to admission of the testimony in a subsequent proceeding.

Rule 801(4)(a)(B) [(Section 62(4)(a)(B)]. The Judiciary Committee does not intend, in adopting Rule 801(4)(a)(B), to overrule either Cook v. Safeway Stores, Inc. 266 Or 77, 511 P2d 375 (1975) or Hale v. Smith 254 Or 300, 460 P2d 351 (1969). The committee recognizes that in both of those cases the court may have expressed willingness to allow admission of prior consistent statements for purposes other than rebuttal of "...an express or implied charge against the witness of recent fabrication or improper influence or motive...".

Rule 801(4)(a)(C) [(Section 62(4)(a)(C)]. The Judiciary Committee deleted that part of the Advisory Committee's proposed Rule 801 (4)(a)(C) which required corroboration of a prior identification. This rule deals with circumstances which make some kinds of evidence admissible as nonhearsay. By deleting the corroboration requirement for admissibility of the evidence, the Judiciary Committee is not necessarily saying that an uncorroborated prior identification is sufficient evidence to sustain a conviction. People v. Gould 54 Cal 2d 621, 354 P2d 865 (1960).

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is a modified version of Rule 801 of the Federal Rules of Evidence. Subparagraph (A) of paragraph (a) of subsection (4) was modified by the addition of some of the language contained in Rule 804(b) (1) of the Federal Rules of Evidence. Subparagraph (C) of paragraph (a) of subsection (4) is identical to Rule 801(d) (1) (C) of the 1973 Supreme Court draft of the Federal Rules of Evidence, which subparagraph was not enacted by Congress.

(B) Summary

Subsection (1). The definition of "statement" set forth in subsection (1) of this section assumes importance because the term is used in the definition of hearsay in subsection (3) of this section. The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one. "The word 'person' is used advisedly in the definition in order to avoid any questions regarding nonhuman hearsay. Some examples are: The parking meter said, 'this time expired'; the bloodhound that tracked him said, 'this is the killer'; the radar equipment said, 'the defendant was driving his automobile at 80 miles per hour.' While evidence of this sort may have its problems, the hearsay rule is not one of

them. A bloodhound is not a person at least if it has not been incorporated." Waltz, Jon R., New Federal Rules of Evidence (2nd ed 1975).

It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of "statement." Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of a verbal assertion, and should be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv L Rev 177, 214, 217 (1948), and the elaboration in Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 Stan L Rev 682 (1962).

However, the Advisory Committee, by adopting the definition of "statement" found in this section and in Rule 801 of the Federal Rules of Evidence, specifically rejects the concept of nonassertive conduct as hearsay as expressed in the celebrated case of Wright v. Tatham, 7 Adolph & E 313, 386, 112 Eng Rep 488 (Exch Ch 1837), and 5 Cl & F 670, 739, 47 Rev Rep 136 (HL 1838). Examples of evidence of nonassertive conduct that would be rejected as hearsay by courts following the principles enunciated in Wright v. Tatham are, on the issue of seaworthiness, evidence that a deceased captain examined every part of a vessel and then embarked in it with his family and evidence that pedestrians were carrying open umbrellas offered to prove it was raining.

Under this section, such evidence will not be considered hearsay, and will be admitted, if otherwise relevant, as circumstantial evidence of the fact sought to be proved.

Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. Falknor, The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct, 33 Rocky Mt L Rev 133 (1961). Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted. This kind of verbal conduct is also excluded from the definition of hearsay by the language of subsection (3) of this section.

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact.

Maguire, The Hearsay System: Around and Through the Thicket, 14 Vand L Rev 741, 765-767 (1961).

For similar approaches, see Uniform Rule 62(1); California Evidence Code, sections 225, 1200; Kansas Code of Civil Procedure, section 60-459 (1); New Jersey Evidence Rule 62(1).

Subsection (3). The definition of "hearsay" in subsection (3) of this section includes only statements offered to prove the truth of the matter asserted. McCormick, Evidence, section 246 (2d ed 1972); 5 Wigmore, section 1361; 6 Wigmore, section 1766. The effect of this definition is to exclude from hearsay the entire category of "operative facts," "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights. For example, the statement "Cancel my automobile insurance!" made by an insured to his insurance agent is a verbal act and is not within the definition of "hearsay" under subsection (3) of this section.

The definition of "hearsay" must, of course, be read with reference to the definition of a "statement" set forth in subsection (1) of this section.

Testimony given by a witness in the course of court proceedings is excluded since there is compliance with all the ideal conditions for testifying.

Subsection (4). Several types of statements which would otherwise literally fall within the definition are expressly excluded from it:

Paragraph (a). Paragraph (a) of subsection (4) of this section focuses upon the admissibility of prior statements by a witness. Considerable controversy has attended the question whether a prior out-of-court statement by an individual should be considered hearsay when the individual is presently available for cross-examination under oath in the presence of the trier of fact. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth. The argument in favor of treating these latter statements as hearsay is based upon the ground that the conditions of oath, cross-examination, and demeanor observation did not prevail at the time the statement was made and cannot adequately be supplied by the later examination. The logic of the situation is troublesome. In so far as the oath is concerned, its mere presence has never been regarded as sufficient to remove a statement from the hearsay category, and it receives much less emphasis than cross-examination as a truth-compelling device. While strong expressions are found to the effect that no conviction can be had or important right taken away on the basis of statements not made under fear of prosecution for perjury, Bridges v. Wixon, 326 US 135, 65 SCt 1443, 89 LEd 2103 (1945), the fact is that, of the many common law exceptions to the hearsay rule, only that for reported testimony has required the statement to have been made under oath.

Nor is it satisfactorily explained why cross-examination cannot be conducted subsequently with success. The decisions contending most vigorously for its inadequacy in fact demonstrate quite thorough exploration of the weaknesses and doubts attending the earlier statement. State v. Saporen, 205 Minn 358, 285 NW 898 (1939); Ruhala v. Roby, 379 Mich 102, 150 NW 2d 146 (1967); People v. Johnson, 68 Cal 2d 646, 68 Cal Rptr 599, 441 P2d 111 (1968). In respect to demeanor, as Judge Learned Hand observed in Di Carlo v. United States, 6 F2d 364 (2d Cir 1925), when the jury decides that the truth is not what the witness says

now, but what he said before, they are still deciding from what they see and hear in court. The bulk of the case law nevertheless has been against allowing prior statements of witnesses to be used generally as substantive evidence. Most of the writers and Uniform Rule 63(1) have taken the opposite position.

The position taken by the Advisory Committee on Evidence Law Revision in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence, but with a recognition that particular circumstances call for a contrary result. The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates three situations in which the statement is excepted from the category of hearsay. Compare Uniform Rule 63(1) which allows any out-of-court statement of a declarant who is present at the trial and available for cross-examination.

Subparagraph (A). Prior inconsistent statements traditionally have been admissible to impeach but not for use as substantive evidence. To the extent permitted by subparagraph (A) of paragraph (a) of subsection (4) of this section, however, the prior variant statements are admissible as substantive evidence. The California Law Revision Commission declared with respect to a similar provision:

"Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case." Comment, California Evidence Code, section 1235. See also McCormick, Evidence, section 39 (2d ed 1972). The constitutionality of the Advisory Committee's view was upheld in California v. Green, 399 US 149, 90 SCt 1930, 26 LEd 2d 489 (1970). Moreover, the requirement that the statement be inconsistent or at variance with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.

The rule requires that the prior inconsistent or variant statement be given under oath at a trial, hearing, or other proceeding, or in a deposition. The inclusion of the phrase "inconsistent or at variance" is intended by the Advisory Committee to encompass situations where the witness denies making a prior statement or does not remember the content of the statement. The rule as adopted does not cover statements before a grand jury or other nonadversary proceedings. Prior inconsistent statements may, of course, be used for impeaching the credibility of a witness. However, prior statements which are at variance with present testimony may not be used under section 51 (Rule 607) of this Act to impeach the credibility of a witness. Thus, if a witness at a trial responds "I don't know" to a question about a prior statement made under oath, the prior statement is not hearsay and may be admitted as substantive evidence because the prior statement and the current testimony are at variance. Section 51 (Rule 607) of this Act requires inconsistency of statements and not mere variance. When the

prior inconsistent statement is one made by a defendant in a criminal case, it constitutes an admission under paragraph (a) of subsection (4) of this section.

Subparagraph (B). Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence.

Prior statements admissible under subparagraph (B) of paragraph (a) of subsection (4) of this section, however, are admitted as substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

Subparagraph (C). The admission of evidence of identification finds substantial support, although it falls beyond a doubt in the category of prior out-of-court statements. See: California Evidence Code, section 1238; New Jersey Evidence Rule 63(1) (c); NY Code of Criminal Procedure, section 393-b. The basis is the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions. The Supreme Court considered the admissibility of evidence of prior identification in Gilbert v. California, 388 US 263, 87 SCt 1951, 18 LEd 2d 1178, (1967). Exclusion of lineup identification was held to be required because the accused did not then have the assistance of counsel. Significantly, the court carefully refrained from placing its decision on the ground that testimony as to the making of a prior out-of-court identification, ("That's the man"), violated either the hearsay rule or the right of confrontation because it was not made under oath, subject to immediate cross-examination, in the presence of the trier. Instead the court observed:

> *"There is a split among the States concerning the admissibility of prior extra-judicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 ALR2d 449. It has been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at the trial. See 5 ALR 2d Later Case Service 1225-1228 . . ." 388 US at 272 n3.*

See also United States v. De Sisto, 329 F2d 929 (2d Cir 1964) and People v. Gould, 54 Cal 2d 621, 354 P2d 865 (1960), in which the courts allowed evidence of extrajudicial identifications to be admitted as independent, substantive evidence of identity.

Under subparagraph (C) of paragraph (a) of subsection (4) of this section, a statement of identification must be corroborated by other evidence before it may be admitted as substantive evidence. The corroboration requirement was added to prevent convictions based largely on the testimony of police officers that the victim had identified the defendant as the perpetrator of an offense even though the victim is unable to so identify the defendant at trial.

Paragraph (b). Admissions by a party-opponent under paragraph (b) of subsection (4) of this section are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U Pa L Rev 484, 564 (1937); Morgan, Basic Problems of Evidence, 265 (1962); 4 Wigmore, section 1048.

No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

Paragraph (b) of subsection (4) of this section specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against him:

Subparagraph (A). A party's own statement is the classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required; the statement need only be relevant to representative affairs. To the same effect is California Evidence Code, section 1220. Compare Uniform Rule 63(7), requiring a statement to be made in a representative capacity to be admissible against a party in a representative capacity.

Subparagraph (B). Under established principles an admission may be made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: "X is a reliable person and knows what he talking about." See McCormick, Evidence, section 270 at p 651 n 72 (2d ed 1972). Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, troublesome questions have been raised by decisions holding that failure to deny is an admission. The inference involved is a fairly weak one; silence may be motivated by advice of counsel or realization that "anything you say may be used against you." Unusual opportunity is afforded to manufacture evidence. Encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, in Doyle v. Ohio, 426 US 610, 96 SCt 2240, 49 LEd 2d 91 (1976) and United States v. Hale, 422 US 171, 95 SCt 2133, 45 LEd 2d 99 (1975), the United States Supreme Court held that evidence of a defendant's silence during police interrogation was inadmissible at the defendant's subsequent trial for the purpose of impeaching the defendant's credibility. Such evidence was declared to be insolubly ambiguous, fundamentally unfair and possessed of an intolerably prejudicial impact. The Advisory Committee agrees, and intends that subparagraph (B) of paragraph (b) of subsection (4) of this section not be construed to allow the admission for any purpose in criminal cases of evidence of the defendant's silence during police interrogation after being informed of his right to remain silent as provided in Miranda v. Arizona, 384 US 436, 86 SCt 1602, 16 LEd 2d 694 (1966). In light of the United States Supreme Court decisions in Doyle and Hale, this section contains no special provisions concerning failure to deny in criminal cases.

Subparagraph (C). No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party. However, the question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. Subparagraph (C) of paragraph (b) of subsection (4) of this section is phrased broadly so as to encompass both. While it may be argued that the agent authorized to make statements to his principal does not speak for him, Morgan, Basic Problems of Evidence, 273 (1962), communication to an outsider has not

generally been thought to be an essential characteristic of an admission. Thus a party's books or records are usable against him, without regard to any intent to disclose to third persons. 5 Wigmore, section 1557. See also McCormick, Evidence, section 267 at pp 639-647 (2d ed 1972). In accord is New Jersey Evidence Rule 63(8) (a). Cf Uniform Rule 63(8) (a) and California Evidence Code section 1222 which limits status as an admission in this regard to statements authorized by the party to be made "for" him, which is perhaps an ambiguous limitation to statements to third persons. Falknor, Vicarious Admissions and the Uniform Rules, 14 Vand L Rev 855, 860-861 (1961).

Subparagraph (D). The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment?

Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment. Grayson v. Williams, 256 F2d 61 (10th Cir 1958); Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines v. Tuller, 110 US App DC 282, 292 F2d 775, 784 (1961); Martin v. Savage Truck Lines, Inc. 121 FSupp 417 (DDC 1954), and numerous state court decisions colleced in 4 Wigmore, 1964 Supp, pp 66-73, with comments by the editor that the statements should have been excluded as not within scope of agency. Similar provisions are found in Uniform Rule 63(9) (a), Kansas Code of Civil Procedure, section 60-460(i)(1), and New Jersey Evidence Rule 63(9) (a).

Subparagraph (E). Subparagraph (E) of paragraph (b) of subsection (4) of this section limits admissibility of statements of a coconspirator to those made "during the course and in furtherance of the conspiracy." While the broadened view of agency taken in subparagraph (D) of paragraph (b) of subsection (4) of this section might suggest wider admissibility of statements of coconspirators, the agency theory of conspiracy is at best a fiction and ought not serve as a basis for admissibility beyond that already established. See Levie, Hearsay and Conspiracy, 52 Mich L Rev 1159 (1954); Comment, 25 U Chi L Rev! 530 (1958). Subparagraph (E) is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. Krulewitch v. United States, 336 US 440, 69 SCt 716, 93 LEd 790 (1949); Wong Sun v. United States, 371 US 471, 490, 83 SCt 407, 9 LEd 2d 441 (1963).

C. Relationship to Existing Law

Subsections (1) and (2). The Oregon courts have not had occasion to define "statement" or "declarant."

Subsection (3). The definition of "hearsay" is in accord with the Oregon approach that relies upon McCormick's definition of hearsay. McCormick, Evidence, section 246 (2d ed 1972); Timber Access Industries Co. v. U.S. Plywood-Champion Papers, Inc. 263 Or 509, 503 P2d 482 (1972). If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. See: Sheedy v. Stall, 255 Or 594, 468 P2d 529 (1970); State v. Dixon, 5 Or App 113, 481 P2d 629 (1971).

Subsection (4). Paragraph (a). Subparagraph (A). This subparagraph changes existing Oregon law, under which prior inconsistent statements are only

admissible for impeachment purposes and not as substantive evidence. State v. Derryberry, 270 Or 482, 528 P2d 1034 (1974); Madron v. Thompson, 245 Or 513, 419 P2d 611 (1966); State v. Watchman, 20 Or App 709, 533 P2d 361 (1975).

Subparagraph (B). This subparagraph does not change existing Oregon procedure, under which prior consistent statements are admissible to rebut charges of recent fabrication or improper influence or motive. Cook v. Safeway Stores, Inc., 266 Or 77, 511 P2d 375 (1975); Hale v. Smith, 254 Or 300, 460 P2d 351 (1969); Maeder Steel Products Co. v. Zanello, 109 Or 562, 220 P 155 (1923).

Subparagraph (C). This subparagraph changes current Oregon law by taking extrajudicial identifications out of the class of hearsay evidence when the identification is corroborated by other evidence. Under current Oregon law, extrajudicial identifications are hearsay evidence, but are admissible under certain circumstances.

Otherwise, Oregon law concerning extrajudicial identifications is somewhat unclear. The Oregon Supreme Court cases indicate that the victim may testify at trial that he had previously identified the defendant in a lineup or from a picture. State v. Nunes, 251 Or 49, 444 P2d 542 (1968). However, a police officer's testimony concerning a victim's prior extrajudicial identification has been ruled inadmissible. State v. Evans, 98 Or 214, 192 P 1062, 193 P 927 (1920); State v. Thompson, 228 Or 496, 364 P2d 783 (1961).

In State v. Fennell, 7 Or App 256, 489 P2d 964 (1971), the Oregon Court of Appeals declared that when witnesses had previously identified the defendant from a picture but then could not identify the defendant at trial, testimony of police officers concerning the witnesses' previous identification was admissible over a hearsay objection. The witnesses in the case were available for cross-examination.

The corroboration requirement under subparagraph (C) of paragraph (a) of subsection (4) of this section for extrajudicial identifications is also probably required under the Fennell decision. The court strongly implied a necessity for corroboration when it cited People v. Gould, 54 Cal 2d 621, 631, 354 P2d 865 (1960), for the principle that an "extrajudicial identification that cannot be confirmed by an identification at trial is insufficient to sustain a conviction in the absence of other evidence tending to connect the defendant with the crime." 7 Or App at 260.

Thus, even though the current Oregon law is somewhat unclear, subparagraph (C) of paragraph (a) of subsection (4) of this section appears to be consistent with Oregon practice after Fennell.

Subsection (4). Paragraph (b). Paragraph (b) of subsection (d) changes current Oregon law with regard to admissions by a party opponent. Under current Oregon law, an admission by a party opponent is hearsay, but is admissible under an exception to the hearsay rule. Under paragraph (b) of subsection (4) of this section, the admission is not hearsay. However, the result is the same.

Subparagraph (A). Under subparagraph (A) of paragraph (b) of subsection (4) of this section, there is no inquiry into whether the agent was acting in his representative capacity in making the statement. Subsection (2) of ORS 41.900 (1979 Replacement Part) provides that the declaration, act or omission of a party is admissible against the party, but Oregon case law indicates that the declarations of an executor or administrator of an estate made before his appointment may not be used against him in his representative capacity. Johnson

v. Underwood, 102 Or 680, 203 P 879 (1922); Williams v. Culver, 39 Or 337, 64 P 763 (1901).

Subparagraph (B). This subparagraph does not alter existing Oregon law. Subsection (3) of ORS 41.900 (1979 Replacement Part); Oxley v. Linnton Plywood Ass'n, 205 Or 78, 284 P2d 766 (1955).

Subparagraph (C). The Oregon courts have not decided whether the admission of agent may extend to a statement made to the principal, but current Oregon law is otherwise in accord. See Hildebrand v. United Artisans, 50 Or 159, 91 P 542 (1907).

Subparagraph (D). Subparagraph (D) of paragraph (b) of subsection (4) of this section, represents a departure from Oregon law in that it allows statements by agents to be admitted if related to matters within the scope of the agency or employment. In contrast, the traditional rule, followed in Oregon, is to determine whether the admission was made by the agent acting within the scope of his employment. Timber Access Industries Co. v. U.S. Plywood-Champion Papers, Inc., 263 Or 509, 503 P2d 482 (1972), citing with approval Hansen v. Oregon-Washington R. & N. Co., 97 Or 190, 188 P 963 (1920); Madron v. Thompson, 245 Or 513, 419 P2d 611 (1966). Due to the restrictive nature of the traditional rule, the modern rule set forth in subparagraph (D) of paragraph (b) of subsection (4) of this section was adopted to prevent the loss of valuable and helpful evidence.

Subparagraph (E). Under subsection (6) of ORS 41.900 (1979 Replacement Part), a declaration or act of a conspirator relating to the conspiracy is admissible against his coconspirator. See also State v. Garrison, 16 Or App 588, 519 P2d 1295 (1974); State v. Keller, 143 Or 589, 21 P2d 807 (1933). The limitation upon the admissibility of statements of coconspirator to those made "during the course and in furtherance of the conspiracy" is in accord with Oregon decisional law. State v. Gardner, 225 Or 376, 358 P2d 557 (1961); State v. Weitzel, 157 Or 334, 69 P2d 958 (1937).

SECTION 63. Rule 802. Hearsay rule. Hearsay is not admissible except as provided in sections 62 to 67 (Rules 801 to 806) of this Act or as otherwise provided by law.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee does not intend to preclude admission of hearsay evidence that may be allowed by specific sections of Oregon Revised Statutes outside the Evidence Code.

ADVISORY COMMITTEE PROPOSAL

SECTION 63. Rule 802. Hearsay rule. Hearsay is not admissible except as provided in sections 62 to 67 (Rules 801 to 806) of this Act.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is a modified version of Rule 802 of the Federal Rules of Evidence. This section differs from the federal rule in that it provides no exceptions to the admission of hearsay evidence except as provided in sections 62 to 67 (Rules 801 to 806) of this Act. Federal Rule 802 provides an exception also for "other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

B. Relationship to Existing Law

This section is in complete accord with Oregon law which embraces the traditional rule against hearsay.

SECTION 64. Rule 803. Hearsay exception; availability of declarant immaterial. The following are not excluded by section 63 of this Act, even though the declarant is available as a witness:

(1) Present sense impression. This subsection of Rule 803 of the Federal Rules of Evidence was not adopted.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain or bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause of external source thereof in so far as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the memory of the witness and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of subsection (6) of this section. Evidence that a matter is not included in the memoranda reports, records, or data compilations, and in any form, kept in accordance with the provisions of subsection (6) of this section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth:

(a) The activities of the office or agency;

(b) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding however, in criminal cases matters observed by police officers and other law enforcement personnel; or

(c) In civil actions and proceedings and against the government in criminal cases, factual findings, resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with section 69 of this Act, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal and similar certificates. Statement of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of facts concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a

public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence 20 years or more the authenticity of which is established.

(17) Market reports and commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. This subsection of Rule 803 of the Federal Rules of Evidence was not adopted.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates of the person or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of no contest, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. (a) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that:

(A) The statement is offered as evidence of a material fact;

(B) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) The general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence.

(b) A statement may not be admitted under this subsection unless the proponent of it makes known to the adverse party the intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance of the trial or hearing, or as soon as practicable after it becomes apparent that such statement is relevant and probative to the issues at hand, to provide the adverse party with a fair opportunity to prepare to meet it.

JUDICIARY COMMITTEE COMMENTARY

Rule 803(2). The Judiciary Committee intends that statements of an unidentified bystander may be admissible under subsection (2) of Rule 803, Wright v. Swann, 261 Or 440, 493 P2d 148 (1972).

Rule 803(3). The Judiciary Committee specifically concurs with the Advisory Committee in limiting the doctrine of Mutual Life Ins. Co. v. Hillmon, 145 US 285, 12 SCt 909, 36 LEd 706 (1892) and thus rejecting State v. Farnam, 82 Or 211, 161 P 417 (1916), insofar as it accepted that doctrine.

Rule 803(6). The Judiciary Committee does not intend by its adoption of Rule 803 (6) to allow automatically all records containing opinions or diagnoses. It recognizes that a judge, exercising discretion, might find that a given record does not exhibit the degree of trustworthiness necessary to admit the opinion or diagnosis under this rule.

Rule 803(8)(c). The Judiciary Committee deleted the word "observations" and inserted the word "findings" in proposed Rule 803 (8)(c). The committee intends that this rule not provide a sweeping exception from public records containing evaluations or opinions. "Factual findings" is to be strictly construed to allow as evidence only those reports, otherwise in accord with the rule, which are based on firsthand observation by the public official making the report.

By not specifically including complaint of sexual misconduct as an exception to the hearsay rule, the Judiciary Committee does not intend to disallow testimony of such complaints. See State v. Waites, 7 Or App 137, 490 P2d 188 (1971) and cases cited therein.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 803 of the Federal Rules of Evidence, except that subsections (1) and (18), relating to the hearsay exceptions for present sense impressions and learned treatises, have been omitted.

B. Summary

The exceptions to the rule against admissibility of hearsay evidence set forth in this section are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

This section is based upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. This section is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness and neither this section nor section 65 (Rule 804) of this Act dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. See also section 44 (Rule 602) of this Act.

Subsection (1). Subsection (1) of this section is reserved because the Advisory Committee expressly rejected adoption of the "present sense impression" exception to the hearsay rule, which is set forth in the equivalent paragraph of Federal Rule 803. The exception in the federal rule for present sense impressions allows the admission of a statement describing an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Although similar to the "excited utterance" exception to the hearsay rule, which was adopted by the Advisory Committee, the exception for "present sense impressions" does not require the statement sought to be admitted to have been made under a condition of emotional excitement, nor, as stated in Federal Rule 803, does it require strict contemporaneity of statement and event. In discarding the requirement of strict contemporaneity and permitting use of a statement made soon after the event, the federal rule expands the scope of this exception beyond that heretofore recognized in the few jurisdictions which adopted the exception.

An example of the operation of the "present sense impression" exception to the hearsay rule is found in Houston Oxygen Co., Inc. v. Davis, 139 Tex 1, 161 SW2d 474 (1942). Defendant had offered the testimony of a Mrs. Cooper that when the plaintiff's car passed her about four miles before the accident at issue she had said that "they must have been drunk, that we would find them somewhere on the road wrecked if they kept that rate of speed up." Objection to the testimony concerning the remark was sustained, and the Texas Supreme Court reversed. "[The statement] is sufficiently spontaneous to save it from the suspicion of being manufactured evidence. There was no time for a calculated statement." 161 SW2d at 476.

Although strong arguments have been made in support of this exception, McCormick, Evidence, section 298 (2d ed 1972), the Advisory Committee believes that the exception is so broad as to allow admission of practically every unexcited declaration made at or near the scene and time of an event, and that those declarations lack whatever assurance of reliability there is in the effect of an exciting event.

Subsection (2). The theoretical basis for the "excited utterances" exception to the hearsay rule set forth in subsection (2) of this section is that an event may produce a condition of excitement which temporarily stills the capacity for reflection and produces utterances free of conscious fabrication. 6 Wigmore, Evidence, section 1747, P135 (3d ed 1940). Spontaneity is the key factor in the "excited utterances" exception to the hearsay rule.

While the theory of subsection (2) of this section has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating

conscious fabrication, Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 Colum L Rev. 432 (1928), it finds support in numerous cases. See cases in 6 Wigmore, Evidence, section 1750 (3d ed 1940); Annot., 53 A.L.R. 2d 1245 (statements as to cause of or responsibility for motor vehicle accident); Annot., 4 A.L.R. 3d 149 (accusatory statements by homicide victims).

With respect to contemporaneity of event and utterance, the standard of measurement under the "excited utterances" exception is the duration of the state of excitement. How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor. Slough, Spontaneous Statements and State of Mind, 46 Iowa L Rev 224, 243 (1961); McCormick, Evidence, section 297, p 706 (2nd ed 1972).

Participation in the event by the declarant is not required: a nonparticipant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Slough, supra; McCormick, Evidence, section 297, p 705 (2nd ed 1972); 6 Wigmore, Evidence, section 1755 (3d ed 1940); Annot., 78 A.L.R. 2d 300.

Whether proof of the startling event may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. For cases in which the evidence consists of the condition of the declarant (injuries, state of shock), see Insurance Co. v. Mosely, 75 US (8 Wall) 397, 19 LEd 437 (1869); Wheeler v. United States, 93 US App DC 159, 211 F2d 19 (1953), cert. denied 347 US 1019, 74 SCT 876, 98 LEd 1140; Wetherbee v. Safety Casualty Co., 219 F2d 274 (5th Cir 1955); Lampe v. United States, 97 US App DC 160, 229 F2d 43 (1956). Nevertheless, on occasion the only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as "increasing," Slough, supra at 246, and as "prevailing," McCormick, Evidence, section 297, p 705 (2nd ed 1972). Illustrative are Armour & Co. v. Industrial Commission, 78 Colo 569, 243 P 546 (1926); Young v. Stewart, 191 NC 297, 131 SE 735 (1926). Moreover, under section 5 (Rule 104) of this Act the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. People v. Poland, 22 Ill 2d 175, 174 NE 2d 804 (1961). However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, Garrett v. Howden, 73 NM 307, 387 P2d 874 (1963); Beck v. Dye, 200 Wash 1, 92 P2d 1113 (1939), a result which would under appropriate circumstances be consistent with subsection (2) of this section.

Under the "excited utterances" exception to the hearsay rule, the declarant's statement need only "relate" to the startling event or condition, thus affording a broad scope of subject matter coverage. 6 Wigmore, Evidence, section 1750, 1754 (3d ed 1940). Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63 (4), 6 Wayne L Rev 204, 206-209 (1960).

Subsection (3). The exclusion of a "statement of memory or belief to prove the fact remembered or believed" from the exception set forth in subsection (3) of this section is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind. Maguire, The Hillmon Case--Thirty-three Years

After, 38 Harv L Rev 709, 719-731 (1925); Hinton, States of Mind and the Hearsay Rule, 1 U Chi L Rev 394, 421-423 (1934).

With regard to the use under subsection (3) of this section of a declaration to prove an act on the part of a person other than the declarant when that act is itself an important issue in the case, the Advisory Committee adopts the reasoning of the dissenting opinion by Mr. Justice Traynor in People v. Alcalde, 24 Cal 2d 177, 148 P2d 627, 633 (1944):

> *It is my opinion that the trial court erred in admitting the testimony that the deceased said . . . that she was going out with 'Frank' [the evening of her murder] . . . . A declaration of intention is admissible to show that the declarant did the intended act. . . . A declaration as to what one person intended to do, however, cannot safely be accepted as evidence of what another probably did . . . . The declaration of the deceased in this case that she was going out with Frank is also a declaration that he was going out with her, and it could not be admitted for the limited purpose of showing that she went out with him at the time in question without necessarily showing that he went with her.*

Therefore, the Advisory Committee intends that subsection (3) of this section be construed to limit the doctrine of Mutual Life Insurance Co. v. Hillmon, 145 US 285, 295-300 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.

The carving out, from the exclusion for a "statement of memory or belief to prove the fact remembered or believed" contained in subsection (3) of this section, of declarations relating to the execution, revocation, identification, of terms of declarant's will represents an ad hoc judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. McCormick, Evidence, section 296, pp 702-703 (2nd ed 1972); Annot., 34 A.L.R. 2d 588, 62 A.L.R. 2d 855. A similar recognition of the need for and practical value of this kind of evidence is found in California Evidence Code, section 1260.

Subsection (4). Subsection (4) of this section creates an exception to the hearsay rule for statements made for the purposes of medical diagnosis or treatment. Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. McCormick, Evidence, section 292, p 690 (2nd ed 1972). The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, Shell Oil Co. v. Industrial Commission, 2 Ill 2d 590, 119 NE 2d 224 (1954); McCormick, Evidence, section 292, p 691 and 692 (2nd ed 1972); New Jersey Evidence Rule 63 (12) (c). Statements as to fault would not ordinarily qualify under the language of subsection (4) of this section, however.

Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception set forth in subsection (4) of this section, the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family may be included.

Conventional doctrine has excluded from this hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify.

While these statements were not admissible as substantive evidence, the expert was usually allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. Therefore, the Advisory Committee, in adopting subsection (4) of this section, rejects the limitation. This position is consistent with the provision of section 56 (Rule 703) of this Act that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field. This exception is not intended in any way to adversely affect present privilege rules or those subsequently adopted.

Subsection (5). A hearsay exception for recorded recollection as set forth in subsection (5) of this section is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question." United States v. Kelly, 349 F2d 720, 770 (2d Cir 1965), citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., 82 A.L.R. 2d 473, 520. The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them.

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, impairment of the memory of the witness adds nothing to it and should not be required. McCormick, Evidence, section 303, p 715 (2nd ed 1972); 3 Wigmore, Evidence, section 738, p 76 (3d ed 1940); Jordan v.People, 151 Colo 133, 376 P2d 699 (1962), cert. denied 373 US 944, 83 SCt 1553, 10 LEd 2d 699; Hall v. State, 223 Md 158, 162 A2d 751 (1960); State v. Bindhammer, 44 NJ 372, 209 A2d 124 (1965). Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys' investigators or claim adjusters. Hence the exception set forth in subsection (5) of this section includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately." To the same effect are California Evidence Code, section 1237 and New Jersey Rule 63 (1), (b), and this has been the position of the federal courts.

No attempt is made in the "recorded recollection" exception under subsection (5) of this section to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in Rathbun v. Brancatella, 93 NJL 222, 107 A 279 (1919), is entirely consistent with the exception.

Subsection (5) of this section provides that the record admissible under the "recorded recollection" exception may only be read into evidence and may not be admitted in evidence as an exhibit unless offered by the adverse party.

When the verifying witness has not prepared the record but merely examined it and found it accurate, he has adopted the record and it is therefore admissible. Subsection (5) of this section should also be interpreted to cover other

situations involving multiple participants, e.g., employer dictating to secretary, secretary making memorandum at direction of employer, or information being passed along a chain of persons, as in Curtis v. Bradley, 65 Conn 99, 31 Atl 591 (1894). See also, Rathbun v. Brancatella, 93 NJL 222, 107 Atl 279 (1919).

Subsection (6). Subsection (6) of this section requires that the records be those of a regularly conducted "business" activity, "business" being broadly defined to include the records of institutions and associations like schools, churches and hospitals.

The element of unusual reliability of business records making them admissible is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. McCormick, Evidence, sections 306, 308 and 310 (2nd ed 1972); Laughin, Business Entries and the Like, 46 Iowa L Rev 276.

Amplification of the kinds of activities producing admissible records has given rise to problems which conventional business records by their nature avoid. They are problems of the source of the recorded information, of entries in opinion form, of motivation and of involvement as participant in the matters recorded.

Source of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course of business, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: The officer qualifies as acting in the regular course of business, but the informant does not. The leading case, Johnson v. Lutz, 253 NY 124, 170 NE 517 (1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. Gencarella v. Fyfe, 171 F2d 419 (1st Cir 1948); Gordon v. Robinson, 210 F2d 192 (3d Cir 1954); Standard Oil Co. of California v. Moore, 251 F2d 188, 214 (9th Cir 1957), cert. denied 356 US 975, 78 SCt 1139, 2 LEd 2d 1148; Yates v. Bair Transport, Inc., 249 F Supp 681 (SDNY 1965); Annot., 69 ALR 2d 1148. Cf. Hawkins v. Gorea Motor Express, Inc., 360 F2d 933 (2d Cir 1966). Contra, 5 Wigmore, Evidence, section 1530a, n 1, pp 391-392 (3d ed 1940).

Entries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses and test results, as well as occasionally in other areas.

Subsection (6) of this section specifically includes both diagnoses and opinions, in addition to acts, events and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been a source of difficulty and disagreement. The rule proceeds from the base that records made in the course of a regularly conducted business activity will be taken as admissible but subject to authority to exclude if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

Occasional decisions have reached for enhanced accuracy by requiring involvement as a participant in matters reported. Clanor v. United States, 82 US App DC 278, 163 F2d 593 (1947) (error to admit police records of convictions); Standard Oil Co. of California v. Moore, 251 F2d 188 (9th Cir 1957), cert denied 356 US 975, 78 SCt 1139, 2 LEd 2d 1148 (error to admit employes' records of observed business practices of others). Subsection (6) of this section includes no requirement of this nature. Wholly acceptable records may involve matters merely observed, e.g., the weather.

The form which the "record" may assume under the rule is described broadly as a "memorandum, report, record or data compilation, in any form."

The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. The term is borrowed from revised Rule 34(a) of the Federal Rules of Civil Procedure.

It is the intent of the Advisory Committee that the use of the phrase "person with knowledge" not imply that the party seeking to introduce the memorandum, report, record or data compilation must be able to produce, or even identify, the specific individual upon whose firsthand knowledge the memorandum, report, record or data compilation is based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memoranda, reports, records or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or, in the case of a computer printout, upon a report from the company's computer programmer or one who has knowledge of the particular record system. In short, the scope of the phrase "person with knowledge" is meant to be coterminous with the custodian of the evidence or other qualified witness. The committee believes this represents the desired rule in light of the complex nature of modern business organizations.

Subsection (7). Subsection (7) of this section declares that failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. While probably not hearsay as defined in subsection (3) of section 62 (Rule 801) of this Act, decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. McCormick, Evidence, section 307, p 722 (2nd ed 1972); Morgan, Basic Problems of Evidence, 314 (1962); 5 Wigmore, Evidence, section 1531 (3d ed 1940); Uniform Rule 63 (14); California Evidence Code, section 1272; Kansas Code of Civil Procedure, section 60-460 (n); New Jersey Evidence Rule 63 (14).

Subsection (8). The public records exception to the hearsay rule embodied in subsection (8) of this section is a recognized hearsay exception at common law and has been the subject of numerous statutes. McCormick, Evidence, section 315 (2nd ed 1972).

Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record.

As to paragraphs (a) and (b) of this subsection, further support is found in the reliability factors underlying records of regularly conducted activities generally. See subsection (6) of this section.

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The most controversial area of public records is that of so-called "evaluative" report. The disagreement among the decisions has been due in part, no doubt, to the variety of situations encountered, as well as to differences in principle. Sustaining admissibility are such cases as United States v. Dumas, 149 US 278, 13 SCt 872, 37 LEd 734 (1893) (statement of account certified by Postmaster General in action against postmaster); McCarty v. United States, 185 F2d 520 (5th Cir 1950), reh. denied 187 F2d 234 (Certificate of Settlement of General Accounting Office showing indebtedness and letter from army official stating government had performed, in action on contract to purchase and remove waste food from army camp); Moran v. Pittsburgh-Des Moines Steel Co., 183 F2d 467 (3d Cir 1950) (report of Bureau of Mines as to cause of gas tank explosion); Petition of W--, 164 F Supp 659 (E D Pa 1958) (report by Immigration and Naturalization Service investigator that petitioner was known in community as wife of man to whom she was not married). To the opposite effect and denying admissibility are Franklin v. Skelly Oil Co., 141 F2d 568 (10th Cir 1944) (State Fire Marshal's report of cause of gas explosion); Lomax Transp. Co. v. United States, 183 F2d 331 (9th Cir 1950) (Certificate of Settlement from General Accounting Office in action for naval supplies lost in warehouse fire); Yung Jin Teung v. Dulles, 229 F2d 244 (2d Cir 1956) ("Status Reports" offered to justify delay in processing passport application).

Factors which may be of assistance in passing upon the admissibility of evaluative reports include: (1) The timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigations?, 42 Iowa L Rev 363 (1957); (2) The special skill or experience of the official, id.; (3) whether a hearing was held and the level at which conducted, Franklin v. Skelly Oil Co., 141 F2d 568 (10th Cir 1944); (4) possible motivation problems suggested by Palmer v. Hoffman, 318 US 109, 63 SCt 477, 87 LEd 645 (1943). Others no doubt could be added.

The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in subsection (6) of this section, assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the public records exception to the hearsay rule with respect to evaluative reports under paragraph (c) of this paragraph is very specific. Such reports are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.

Subsection (9). Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence, Uniform Vital Statistics Act, 9 CULA 350 (1957). Subsection (9) of this section is in principle narrower than Uniform Rule 63 (16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment Uniform Rule 63 (16). The exception as drafted is in the pattern of California Evidence Code, section 1281.

Subsection (10). The principle under which nonoccurrence of an event may be proven by evidence of the absence of a record which would regularly be made of its occurrence, developed in subsection (7) of this section with respect to regularly conducted (business) activities, is extended in subsection (10) of this section to public records of the kind mentioned in subsections (8) and (9) of this section. 5 Wigmore, Evidence, section 1633 (6), p 519 (3d ed 1940). Some harmless duplication no doubt exists with subsection (7) of this section.

Subsection (10) of this section encompasses situations in which absence of a record may itself be the ultimate focal point of inquiry, e.g., People v. Love, 310 Ill 558, 142 NE 204 (1923) (certificate of Secretary of State admitted to show failure to file documents required by Securities Law), as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

The refusal of the common law to allow proof by certificates of the lack of a record or entry has no apparent justification. 5 Wigmore, Evidence, section 1678 (7), p 752 (3d ed 1940). Subsection (10) of this section takes the opposite position, as does Uniform Rule 63 (17); California Evidence Code, section 1284; Kansas Code of Civil Procedure, section 60--460 (c); New Jersey Evidence Code, 63 (17).

Subsection (11). Subsection (11) of this section excepts the records of religious organizations from exclusion by the hearsay rule. Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore, Evidence, section 1523, p 371 (3d ed 1940). However, both the business records exception and subsection (6) of this section require that the person furnishing the information be one in the business or activity. The result is such decisions as Daily v. Grand Lodge, 311 Ill 184, 142 NE 478 (1924), holding a church record admissible to prove fact, date and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be furnished on occasions of this kind, subsection (11) of this section contains no requirement that the informant be in the course of the activity. See California Evidence Code, section 1315 and Comment.

Subsection (12). Subsection (12) of this section sets forth the hearsay exception for marriage, baptismal and similar certificates. The principle of proof by certification is recognized as to public officials in subsections (8) and (10) of this section. The present exception is a duplication to the extent that it deals with a certificate by a public official, such as a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen who perform marriages and other ceremonies or administer sacraments. Thus, certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable as evidence as certificates of public officers. See 5 Wigmore, Evidence, section 1645 (3d ed 1940), as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see section 69 (Rule 902) of this Act, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, see Uniform Rule 63 (18); California Evidence Code, section 1316; Kansas Code of Civil Procedure, section 60-460 (p); New Jersey Evidence Code, 63 (18).

Subsection (13). The family records exception to the rule against hearsay is set forth in subsection (13) of this section. "Statements of fact concerning personal or family history" should be read to include the specific types of such statements enumerated in subsection (11) of this section.

Records of family history kept in family bibles have by long tradition been received in evidence. 5 Wigmore, Evidence, sections 1495 and 1496 (3d ed 1940), citing numerous statutes and decisions. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees and engravings on rings. Wigmore, Evidence, supra. Subsection (13) of this section is substantially identical in coverage with California Evidence Code, section 1312.

Subsection (14). Records of documents affecting an interest in property are excepted under subsection (14) of this section from exclusion by the general rule rejecting hearsay evidence. The recording of title documents is a purely statutory development and under any theory of the admissibility of public records, the records of title documents should be receivable as evidence of the contents of the recorded document. Otherwise, the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of firsthand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgment or a form of probate, to have been executed and delivered. 5 Wigmore, Evidence, sections 1647 to 1651 (3d ed 1940).

Subsection (15). Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last owner of record. Under subsection (15) of this section, these recitals are exempted from exclusion under the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of subsection (15) of this section if dealings with the property have been inconsistent with the document. The age of the document is of no significance though in practical application the document will most often be an ancient one. See Uniform Rule 63 (29), Comment.

Similar provisions are contained in Uniform Rule 63 (29); California Evidence Code, section 1330; Kansas Code of Civil Procedure, section 60-460 (aa); New Jersey Evidence Rule 63 (29).

Subsection (16). Subsection (16) of this section creates a hearsay exception for authenticated ancient documents. Authenticating a document as ancient, essentially in the pattern of the common law as provided in section 68 (Rule 901) of this Act, leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore, Evidence, section 2145a (3d ed 1940). Wigmore, citing numerous decisions, states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps and certificates, in addition to title documents. Id. at section 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 Wigmore, Evidence, section 1573, p 429 (3d ed 1940), referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick, Evidence, section 323 (2nd ed 1972), danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. See Dallas County v. Commercial Union Assurance Co., 286 F2d 388 (5th Cir 1961), upholding admissibility of a 58-year-old newspaper story. Cf. Morgan, Basic Problems of Evidence, 364 (1962), but see id. 254.

Subsection (17). Ample authority at common law supported the admission in evidence of items falling within the categories listed in subsection (17) of this section, i.e., market reports and publications. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore, Evidence, section 1702 (3d ed 1940), authorities are cited which include other kinds of publications, such as newspaper market reports, telephone directories and city directories. Id. sections 1702 to 1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, see Uniform Rule 63 (30); California Evidence Code, section 1340; Kansas Code of Civil Procedure, section 60-460 (bb); New Jersey Evidence Rule 63 (30). Uniform Commercial Code section 2-724 provides for admissibility in evidence of "reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such (established commodity) market."

Subsection (18). Subsection (18) of this section is reserved because the Advisory Committee expressly rejected the adoption of a "learned treatises" exception to the hearsay rule. The Advisory Committee wishes to retain the existing Oregon practice of using learned treatises in the cross-examination of expert witnesses and not admitting the treatises as substantive evidence. The Advisory Committee believes that learned treatises should not be admissible as substantive evidence because of possible misunderstanding and misapplication in the absence of expert assistance and supervision.

Subsections (19), (20) and (21) of this section all involve reputation as an exception to the rule against hearsay. Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed is likely to be a trustworthy one." 5 Wigmore, Evidence, section 1580 (3d ed 1940).

On this common foundation, reputation as to land boundaries, customs, general history, character and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad exception, but tradition has in fact been much narrower and more particularized, and this is the pattern of these exceptions in the rule.

Subsection (19). Subsection (19) of this section is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore, Evidence, section 1602 (3d ed 1940). As to such items as legitimacy, relationship, adoption, birth and death, the decisions are divided. Id., section 1605. All seem to be susceptible to being the subject of well-founded repute. The "world" in which the reputation may exist may be family, associates or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation and social activity, in each of which a reputation may be generated, People v. Reeves, 360 Ill 55, 195 NE 443 (1935); State v. Axilrod, 248 Minn 204, 79 NW 2d 677 (1956); 5 Wigmore, Evidence, section 1616 (3d ed 1940). The family has often served as the point of beginning for allowing community reputation. 5 Wigmore, Evidence, section 1488 (3d ed 1940). For comparable provisions see Uniform Rule 63 (26), (27) (c); California Evidence Code, sections 1313 and 1314.

Subsection (20). The first portion of subsection (20) of this section is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick, Evidence, section 324, p 749 n 54 (2nd ed 1972). The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, id., and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered. For similar provisions see Uniform Rule 63 (27) (a), (b); California Evidence Code, sections 1320 to 1322; Kansas Code of Civil Procedure, section 60-460 (y), (1), (2); New Jersey Evidence Rule 63 (27) (a), (b).

Subsection (21). Subsection (21) of this section recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick, Evidence, sections 44 and 158 (2nd ed 1972). The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in section 24 (Rule 404) of this Act (relevancy of character evidence generally), and section 52 (Rule 608) of this Act, (character of witness). The exception is in effect a reiteration, in the context of hearsay, of section 25 (Rule 405) of this Act. Similar provisions are contained in Uniform Rule 63 (28); California Evidence Code, section 1324; Kansas Code of Civil Procedure, section 60-460 (z).

Subsection (22). Subsection (22) of this section recognizes a judgment of previous conviction as an exception to the hearsay rule. When the status of a former judgment is under consideration in subsequent litigation, three possibilities must be noted: (1) The former judgment is conclusive under the doctrine of res judicata, either as a bar or a collateral estoppel; (2) it is admissible in evidence for what it is worth; or (3) it may be of no effect at all. The first situation does not involve any problem of evidence except in the way that principles of substantive law generally bear upon the relevancy and materiality of evidence. Subsection (22) of this section does not deal with the substantive effect of the judgment as a bar or collateral estoppel. When, however, the doctrine of res judicata does not apply to make the judgment either a bar or a collateral estoppel, a choice is presented between the second and third alternatives. Subsection (22) of this section adopts the second for judgments of criminal conviction of felony grade. This is the direction of the decisions, Annot., 18 A. L. R. 2d 1287, 1299, which manifest an increasing reluctance to reject in toto the validity of the law's factfinding processes outside the confines of res judicata and collateral estoppel. While this may leave a jury with the evidence of conviction but without means to evaluate it, it seems safe to assume that the jury will give it substantial effect unless defendant offers a satisfactory explanation, a possibility not foreclosed by the provision. But see North River Inc. Co. v. Militello, 104 Colo 28, 88 P2d 567 (1939), in which the jury found for plaintiff on a fire policy despite the introduction of his conviction for arson. For supporting federal decisions see Clark, J., in New York & Cuba Mail S. S. Co. v. Continental Cas. Co., 117 F 2d 404, 411 (2d Cir 1941); Connecticut Fire Ins. Co. v. Farrara, 277 F2d 388 (8th Cir 1960).

Practical considerations require exclusion of convictions of minor offenses, not because the administration of justice in its lower echelons must be inferior, but because motivation to defend at this level is often minimal or nonexistent. Cope v. Goble, 39 Cal App 2d 448, 103 P2d 598 (1940); Jones v. Talbot, 87 Idaho 498, 394 P2d 316 (1964); Warren v. Marsh, 215 Minn 615, 11 NW 2d 528 (1943); Annot., 18 A.L.R. 2d 1287, 1295-1297; 16 Brooklyn L Rev 286 (1950); 50 Colum L

Rev 529 (1950); 35 Cornell L Q 872 (1950). Hence, subsection (22) of this section includes only convictions of felony grade.

Judgments of conviction based upon pleas of nolo contendere are not included.

While this proposed Oregon Evidence Code does not in general purport to resolve constitutional issues, it has generally been drafted with a view to avoiding collision with constitutional principles. Consequently, the exception to the hearsay rule in subsection (22) of this section does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation. In Kirby v. United States, 174 US 47, 19 SCt 574, 43 LEd 890 (1899), it was held to be error to convict of possessing stolen postage stamps with the only evidence of theft being the record of conviction of the thieves. The situation is to be distinguished from cases in which conviction of another person is an element of the crime, e.g., 15 USC section 902 (d), interstate shipment of firearms to a known convicted felon, and, as specifically provided, from impeachment.

For comparable provisions see Uniform Rule 63 (20); California Evidence Code, section 1300; Kansas Code of Civil Procedure, section 60-460 (r).

Subsection (23). The hearsay exception set forth in subsection (23) of this section was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless, the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. See City of London v. Clerke, Carth 181, 90 Eng Rep 710 (KB 1691); Neill v. Duke of Devonshire, 8 App Cas 135 (1882). The shift appears to be correct, since the process of inquiry, sifting and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and subsection (21) goes no further, not even including character.

The leading case in the United States, Patterson v. Gaines, 47 US (6 How) 550, 599, 12 LEd 553 (1847), follows in the pattern of the English decisions, mentioning as illustrative matters thus provable: Manorial rights, public rights of way, immemorial custom, disputed boundary and pedigree. More recent recognition of the principle is found in Grant Bros. Construction Co. v. United States, 232 US 647, 34 SCt 452, 58 LEd 776 (1914) (in action for penalties under Alien Contract Labor Law, decision of board of inquiry of Immigration Service admissible to prove alienage of laborers, as a matter of pedigree); United States v. Mid-Continent Petroleum Corp., 67 F2d 37 (10th Cir 1933) (records of commission enrolling Indians admissible on pedigree); Jung Yen Loy v. Cahill, 81 F2d 809 (9th Cir 1936) (board decisions as to citizenship of plaintiff's father admissible in proceeding for declaration of citizenship).

Subsection (24). Subsection (24) of this section recognizes the Advisory Committee belief that there are certain exceptional circumstances when evidence, which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of probativeness and necessity, could properly be admissible.

The case relied upon by the drafters of Federal Rule 803 (24), Dallas County v. Commercial Union Assoc. Co., Ltd., 286 F2d 388 (5th Cir 1961) illustrates this

point. The issue in that case was whether the tower of the county courthouse collapsed because it was struck by lightning (covered by insurance) or because of structural weakness and deterioration of the structure (not covered). Investigation of the structure revealed the presence of charcoal and charred timbers. In order to show that lightning may not have been the cause of the charring, the insurer offered a copy of a local newspaper published over 50 years earlier containing an unsigned article describing a fire in the courthouse while it was under construction. The court found that the newspaper did not qualify for admission as a business record or an ancient document and did not fit within any other recognized hearsay exception. The court concluded, however, that the article was trustworthy because it was inconceivable that a newspaper reporter in a small town would report a fire in the courthouse if none had occurred. See also United States v. Barbati, 284 F Supp 409 (EDNY 1968).

Because exceptional cases like Dallas County may arise in the future, the Advisory Committee has decided to adopt this residual exception for this section and paragraph (d) of subsection (2) of section 65 (Rule 804) of this Act.

However, it is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The Advisory Committee does not intend to establish broad authority for trial judges to admit hearsay statements in this section and paragraph (d) of subsection (2) of section 65 (Rule 804) of this Act.

C. Relationship to Existing Law

Subsection (1). Although the Oregon Supreme Court has approved, under general res gestae language the admission into evidence of a statement made contemporaneously with an unexciting event, Hornschuch v. Southern Pacific Co., 101 Or 280, 203 P 886 (1921), it cannot be said that a "present sense impression" exception to the hearsay rule is currently recognized in Oregon. Therefore, the rejection of that exception by the Advisory Committee marks no change in existing Oregon law.

Subsection (2). Subsection (2) of this section maintains Oregon's current recognition of an "excited utterances" exception to the hearsay rule, and does not alter the conditions which currently must be met in order for a statement to be admitted under this exception. The Oregon Supreme Court has recently held that the time interval between the startling event and the statement is one of the most important factors in determining spontaneity, particularly if there is evidence that the declarant engaged in reflective thought during the interval. Zeller v. Dahl, 262 Or 515, 499 P2d 1316 (1972).

Existing Oregon law, in agreement with subsection (2) of this section, does not require participation by the declarant in a startling event in order for his declaration to be admissible under this exception to the hearsay rule. Wright v. Swann, 261 Or 440, 493 P2d 148, 50 A.L.R. 3d 706 (1972); State v. Wilson, 20 Or App 553, 532 P2d 825 (1975).

Subsection (3). Oregon courts have recognized a similar exception to the hearsay rule for statements of a presently existing mental state, attitude, feeling or emotion of the declarant. State v. Wright, 12 Or App 73, 504 P2d 1065 (1973); State v. McCauley, 8 Or App 571, 494 P2d 438 (1972); State v. Shirley, 7 Or App 166, 488 P2d 1401 (1971). The exclusion of "statements of memory or belief to prove the fact remembered or believed" from this exception to the hearsay rule is consistent with current Oregon law. Timber Access Indus. v. U.S. Plywood-

Champion Papers, Inc. 263 Or 509, 503 P2d 482 (1972); In re Bond, 172 Or 509, 143 P2d 244 (1943).

However, in so far as subsection (3) of this section is construed, in accordance with the intent of the Advisory Committee, to limit the doctrine enunciated in Mutual Life Ins. Co. v. Hillmon, 145 US 285, 12 SCt 909, 36 LEd 706 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct and not the conduct of another, subsection (3) of this section rejects a doctrine accepted in State v. Farnam, 82 Or 211, 161 P 417 (1916), and changes existing Oregon law.

Subsection (4). Subsection (4) of this section changes existing Oregon law. The exception set forth in subsection (4) of this section differs from the current Oregon hearsay exception for statements made for purposes of medical diagnosis or treatment in three ways: (1) Subsection (4) of this section includes within the hearsay exception statements made by a patient to a physician concerning past symptoms, conditions and medical history for the purpose of diagnosis or treatment. Oregon courts have not indicated their acceptance of this position. See Reid v. Yellow Cab Co., 131 Or 27, 279 P 635 (1929). (2) Subsection (4) of this section does not require that statements admissible under that subsection be made to a physician. Statements to hospital attendants, ambulance drivers or even members of the family may be within the scope of the exception. No Oregon case indicates that the scope of the existing Oregon hearsay exception for statements made for purposes of medical diagnosis or treatment is quite so broad. (3) Subsection (4) of this section permits admission, as substantive evidence, of statements made to a nontreating physician only for the purpose of enabling him to testify as an expert witness. Under current Oregon law, such statements are admissible only to lay the foundation for the opinion testimony of the physician. See Henderson v. Union Pac. R.R., 189 Or 145, 219 P2d 170 (1950); Reid v. Yellow Cab Co., 131 Or 27, 279 P 635 (1929).

Subsection (5). The Oregon Supreme Court recently held that a writing is admissible as a "recorded recollection" only when the witness has insufficient recollection, without referring to the writing, to enable him to testify fully and accurately. Elam v. Soares, 282 Or 93, 577 P2d 1336 (1978). In this regard, therefore, subsection (5) of this section is consistent with existing Oregon practice.

However, subsection (5) of this section changes current Oregon law by allowing the writing sought to be admitted as a "recorded recollection" to be received as an exhibit only when it is offered by the adverse party. Otherwise, the writing may only be read into evidence. Under current Oregon law, the writing itself may be admitted as evidence or handed or shown to the jury by the party offering it if it is verified and adopted by the witness. Simms v. School District No. 1, 13 Or App 119, 508 P2d 236 (1973).

Subsection (6). Subsection (6) of this section is in accord with existing Oregon law.

The Oregon courts recognize a hearsay exception for business records based upon the unusual reliability of business records, which reliability is due to systematic checking, habits of precision and the reliance of businesses upon the accuracy of business records. Sullivan v. Carpenter, 184 Or 485, 199 P2d 655 (1948).

The definition of "business" in subsection (6) of this section is very broad. ORS 41.680 (1979 Replacement Part) similarly defines a business as "every kind of

business, profession, occupation, calling or operating of institutions, whether carried on for profit or not." A recent Oregon case, State v. Roisland, 1 Or App 68, 459 P2d 555 (1969), has broadly interpreted the statute to include a jail within the definition of business.

Subsection (6) of this section is in accord with existing Oregon law in requiring that the record be made by, or from information transmitted by, a person with knowledge. In considering the admissibility of a report of an investigation made by the medical investigator for the State Board of Health, the Oregon Supreme Court recently indicated that ORS 43.370 (Official Records Act) and ORS 41.680 to 41.710 (1979 Replacement Part) (Business Records as Evidence Act) require that the official making the entry either have personal knowledge of the facts or a duty to ascertain the truth of the facts recorded. Wynn v. Sundquist, 259 Or 125, 485 P2d 1085 (1971).

Under subsection (6) of this section, a court may refuse to admit a record otherwise admissible when "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

Likewise, ORS 41.690 (1979 Replacement Part) requires admission of a business entry only "if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." This provision has been interpreted to vest the trial court with wide discretion in admitting or refusing to admit business records as evidence. State v. White, 4 Or App 151, 477 P2d 917 (1970).

The form which the "record" may assume under subsection (6) of this section is described broadly as a "memorandum, report, record or data compilation, in any form." Similar latitude is provided in ORS 41.720 (1979 Replacement Part). See State v. White, 4 Or App 151, 477 P2d 917 (1970) (admission of a Xerox copy of a document).

Entries in the form of opinions are commonly encountered with respect to medical diagnoses, prognoses and test results, as well as occasionally in other areas. Subsection (6) of this section specifically includes both diagnoses and opinions, in addition to acts, events and conditions, as proper subjects of admissible entries.

ORS 41.915 to 41.945, relating to hospital records, provides that all or part of hospital records relating to treatment of a patient at the hospital may be admitted if produced by the proper custodian. The Oregon Supreme Court had previously held admissible a patient's medical history in a hospital record if relevant to diagnosis and treatment. See Mayor v. Dowsett, 240 Or 196, 400 P2d 234 (1965), Gallagher v. Portland Traction Co., 181 Or 385, 182 P2d 354 (1947).

However, with regard to opinions contained in hospital records, subsection (6) of this section should be construed in light of the decision in Streight v. Conroy, 279 Or 289, 566 P2d 1198 (1977). In that case, in sustaining the trial court's refusal to allow a medical witness to read another doctor's report into the record verbatim, the Supreme Court cited McCormick on Evidence, 732, section 313 (2d ed 1972):

> *When an expert opinion is offered by a witness personally testifying, the expert is available for cross-examination on that opinion. If the opinion is offered by means of a hospital record, no cross-examination is possible. Consequently, there is a tendency somewhat to limit those opinions which can be introduced by this method. The admissibility of ordinary diagnostic*

findings customarily based on objective data and not usually presenting more than average difficulty of interpretation is usually conceded. On the other end of the continuum, diagnostic opinions which on their face are speculative are reasonably excluded. In the absence of the availability of the declarant for explanation and cross-examination, the probative value of this evidence is outweighed by the danger that it will be abused or mislead the jury. 279 Or at 295.

Subsection (7). Under existing Oregon law, there is no general hearsay exception for the absence of an entry in business records to prove the nonoccurrence or nonexistence of some matter. However, there are certain specialized statutes which give effect to the principle underlying the exception. See, for example, ORS 57.781, which declares that a "certificate by the Corporation Commissioner . . . as to the . . . nonexistence of the facts relating to corporations which would appear from the . . . absence of documents filed in his office . . . shall be taken and received . . . as prima facie evidence of the . . . nonexistence of the facts stated therein."

Subsection (8). Existing Oregon law contains a general hearsay exception for public records in ORS 43.370. Consistent with subsection (8) of this section, Oregon cases have tended to admit "factual findings resulting from an investigation made pursuant to authority granted by law." For example in Finchcum v. Lyons, 247 Or 255, 428 P2d 890 (1967), the Supreme Court held admissible the findings of a pathologist indicating that plaintiff's potatoes were infected with bacterial ring rot because nothing in the evidence suggested that this investigation involved any exercise of discretion or judgment. More recently, the Oregon Supreme Court permitted the admission of documents introduced for the purpose of showing the jury the results of an investigation by the State Sanitary Authority that indicated the amount of fallout from defendant's mill, because the statements in the documents were ones of fact and not opinion. Davis v. Georgia Pac., 251 Or 239, 445, P2d 481 (1958).

However, one should be careful to note that, notwithstanding the general hearsay exception for public records provided for in ORS 43.370, there are a number of Oregon statutes declaring inadmissible certain public writings. See ORS 41.675 (hospital data relating to tissue committees or other medical staff committees in connection with professional training, supervision or discipline of the medical staff of hospital); ORS 179.045 (crime conviction reports made to the Corrections Division); ORS 483.610 (accident reports made to the Department of Motor Vehicles); ORS 486.061 (records of action taken by Department of Motor Vehicles under financial responsibility law); ORS 654.720 (accident reports made to the Public Utility Commissioner); ORS 657.665 (unemployment compensation records, except where the assistant director or the state is a party).

Subsection (9). Subsection (9) of this section is not inconsistent with current Oregon law. ORS 43.380 allows admission, as prima facie evidence of the facts stated therein, of each certificate provided for in ORS chapter 432 (Vital Statistics) when filed within six months after the time prescribed for its filing.

Subsection (10). Oregon has no statute or case law providing a general hearsay exception for the absence of a public record or an entry in a public record. However, there are certain specialized statutes giving effect to the principle underlying this exception. See, for example, ORS 57.781 and Swearingen, How the Adoption of the Uniform Rules of Evidence Would Affect the Law of Evidence in Oregon, Rules 62-66, 42 Or L Rev 200, 232 (1963).

Subsection (11). The Oregon position relating to a hearsay exception for records of religious organizations is unclear. Although records of religious organizations may currently be admissible at least to the extent of the business records exception to the hearsay rule, subsection (11) of this section clarifies the issue.

Subsection (12). The Oregon position relating to a hearsay exception for marriage, baptismal and other similar certificates is unclear also.

Although not admitted under a hearsay exception, a marriage certificate was admitted by an Oregon court as part of the res gestae in connection with proof of the identity of the parties to establish the fact of marriage. State v. Isenhart, 32 Or 170, 52 P 569 (1898). In another case, statements in a death certificate were competent evidence of the facts stated therein, although they related to matters not within the personal knowledge of the officer making them. State v. McDonald, 55 Or 419, 104 P 967 (1909), aff'd on rehearing, 59 Or 520, 117 P 281 (1911), appeal dismissed, 63 Or 467, 128 P 835 (1912).

However, the latest case relating to this exception indicates that the exception is not recognized in Oregon. Seater v. Penn Mutual Life Ins. Co., 176 Or 542, 156 P2d 386 (1945) (statements in a death certificate that death was due to an accident and that a fall was the means of injury were held inadmissible in so far as Seater is declarative of existing Oregon law). Subsection (12) of this section changes that law.

Subsection (13). There is no indication that Oregon currently recognizes a hearsay exception for family records.

Subsection (14). ORS 93.650 is similar to subsection (14) of this section and allows admission into evidence of the record or transcript of a conveyance duly recorded and certified by the county clerk in whose office the document is recorded. In addition, ORS 43.340 provides that a public record of a private writing may be proved by the original record or by a copy certified by the legal keeper of the record. Other more specialized statutes give effect to the principle underlying the exception for records of title documents. ORS 43.420 (record or copy of sheriff's deed as evidence where original destroyed); ORS 93.670 (land sale contracts may be read as evidence); ORS 93.680 (admits government land grant patents, decrees of equity courts requiring execution of a conveyance; approved lists of lands granted to the state and conveyance of state lands by any state officer).

Subsection (15). Subsection (15) of this section is consistent with current Oregon law.

Two early Oregon cases have admitted recitals of facts in dispositive documents. In Sperry v. Wesco, 26 Or 483, 38 P 623 (1894), a description in a deed was held admissible to show the location of a boundary line. In Altschul v. Casey, 45 Or 182, 76 P 1083 (1904), a recital in a deed was held to be prima facie evidence of the authority to execute the deed. Finally, ORS 43.420 provides that under specified circumstances the record of a sheriff's deed is "prima facie evidence of all facts therein recited."

Subsection (16). Although existing Oregon law recognizes the ancient documents rule for purposes of authentication (ORS 41.360 (34) and 42.080), there are no reported cases holding that statements in an ancient document are admissible as substantive evidence as an exception to the hearsay rule.

Subsection (17). This subsection is consistent with existing Oregon law. Although there are no reported cases in Oregon in which market reports or commercial publications have been admitted as exceptions to the hearsay rule, reports of standard mortality tables have been admitted as evidence in several cases. Snyder v. Portland Tractor Co., 182 Or 344, 185 P2d 563 (1947); Frangos v. Edmunds, 179 Or 577, 173 P2d 596 (1946).

In addition, ORS 72.7240 admits market reports in official publications, trade journals and newspapers of general circulation to prove the prevailing price of goods.

Paragraph (18). Under current law, Oregon courts do not recognize a hearsay exception for learned treatises. Therefore, by rejecting such an exception, the Advisory Committee retains existing Oregon practice.

Subsection (19). Subsection (19) of this section is consistent with existing Oregon law. ORS 41.840 provides that the declaration, act or omission of a member of a family, deceased or out of state, is admissible as evidence of common reputation. One Oregon case, Lipp v. Mutual Life Ins. Co., 125 Or 522, 267 P 519 (1928), has noted that the admission of evidence of reputation as applied to questions of pedigree, marriages, births and deaths is an exception to the general rule rejecting hearsay evidence.

ORS 41.900 (1979 Replacement Part) allows admission of common reputation of pedigree existing before the controversy arose.

Subsection (20). In Oregon the hearsay exception for reputation concerning boundaries is established by subsection (11) of ORS 41.900 (1979 Replacement Part), which admits evidence of common reputation regarding boundaries existing prior to the controversy. In addition, subsection (12) of ORS 41.360 (1979 Replacement Part) creates a disputable presumption that a person is the owner of property from common reputation of his ownership.

Under subsection (11) of ORS 41.900 (1979 Replacement Part), common reputation of facts of public or general interest, more than 30 years old, is admissible if in existence before the controversy arose. In addition, ORS 41.670 provides that historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are primary evidence of facts of general notoriety and interest.

Therefore, subsection (20) of this section does not change existing Oregon law.

Subsection (21). Subsection (21) of this section is consistent with current Oregon law, but may represent an extension of the current Oregon exception in that subsection (21) of this section allows admission of evidence of a person's reputation among his associates, as well as his reputation in the community.

Currently, the admissibility of reputation evidence to prove character is recognized under both statute and case law. ORS 45.600 (1979 Replacement Part) declares that a witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth and veracity is bad. In Brooks v. Bergholm, 256 Or 1, 470 P2d 154 (1970), an action for assault, evidence of the defendant's bad reputation in the community for pugnacity was admitted. In Rich v. Cooper, 234 Or 300, 380 P2d 613 (1963), the court allowed proof of a person's character by reputation evidence when self-defense was pleaded by the defendant in an action for assault and battery. In

State v. Holbrook, 98 Or 43, 192 P 640 (1920), a prosecution for homicide, evidence that the deceased's general reputation was that of a peaceful, law-abiding citizen was admitted to refute an assertion that he was about to commit a lawless act at the time of the killing.

Subsection (22). In Casey v. Northwestern Security Ins. Co., 260 Or 484, 490 P2d 208 (1971) and Meyers v. Burwell, 271 Or 84, 530 P2d 833 (1975), the Oregon Supreme Court adopted a very broad application of collateral estoppel. Under those decisions, a judgment of conviction of a crime is admissible in a subsequent civil action to prove the facts upon which the judgment was rendered.

The Meyers case has since been overruled by legislative action with regard to judgments of conviction of traffic offenses, so that such judgments are not admissible in subsequent civil actions. ORS 41.905; ORS 484.395; Reinsch v. Quines, 274 Or 97, 546 P2d 135 (1976).

There is no indication that the Supreme Court will refuse to maintain the broad application of collateral estoppel enunciated in Meyers when faced with a judgment of conviction for a nontraffic felony offense. Since subsection (22) of this section applies only to felony convictions, subsection (22) of this section appears to be in accord with the Casey and Meyers decisions.

However, the current Oregon rule admitting prior criminal judgments in civil actions is limited to judgments conclusive under the doctrine of res judicata, either as a bar or a collateral estoppel. There are no Oregon cases admitting a prior judgment "for what it is worth." Since this is allowed under subsection (22) of this section, subsection (22) changes existing Oregon law.

Subsection (23). Judgments relating to personal, family or general history are admissible under subsection (23) of this section. There is one Oregon case contrary to the exception set forth in subsection (23) of this section. In Routledge v. Githens, 118 Or 70, 245 P 1072 (1926), the Oregon Supreme Court refused to admit a decree of divorce in a suit to declare a marriage void. Subsection (23) of this section may therefore mark a change in existing Oregon law.

Subsection (24). Subsection (24) of this section provides for the admissibility of evidence which could not be admitted under any other hearsay exception, but which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees found in the other exceptions to the hearsay rule, and to be highly probative and necessary.

The following Oregon cases suggest a similar common sense attitude favoring admission of any data that would be reasonably relied upon in serious affairs outside the courtroom: State Highway Commission v. Arnold, 218 Or 43, 341 P2d 1089 (1959); Lewis v. Baker, Richardson-Merrell, Inc., 243 Or 317, 413 P2d 400 (1966); State Highway Commission v. Fisch - Or, Inc., 241 Or 412, 399 P2d 1011, 406 P2d 539 (1965); State Highway Commission v. Oswalt, 1 Or App 449, 463 P2d 602 (1970).

It should be noted at this point that a majority of the Advisory Committee does not regard Oregon's Timber Access Industries Company v. US Plywood-Champion Paper, Inc., 263 Or 509, 503 P2d 482 (1972), to be such an exceptional case under subsection (24) of this section.

Timber Access agreed to sell "peeler logs" to US Plywood at a specific price. At issue was whether US Plywood had unconditionally agreed to purchase six

million board feet, or whether it had conditionally agreed to that amount upon delivery by a specific date. Timber Access attempted to introduce a hearsay statement of Girard, the buying agent for US Plywood at the time of the contract, but no longer the buying agent at the same plant when the contract expired. Girard died prior to the time of trial. Defendant objected that it was hearsay to allow Timber Access' president to testify that Girard told him it was his, Girard's, intention to buy the logs unconditionally. In its decision, the Supreme Court recognized that the statement fell into no traditional exception to the hearsay rule. The court found that it was not an admission, proof of a mental state or condition or an admission against pecuniary interest. Yet the court concluded that the declaration was trustworthy because Girard was in a position to have knowledge of the facts and wouldn't normally make a statement against his interest (pecuniary, or otherwise) unless it was truthful. Accordingly, the court ruled the evidence admissible.

The exceptional element in Dallas County v. Commercial Union Assoc. Co., Ltd., 286 F2d 388 (5th Cir 1961), the case often cited as justifying a general hearsay exception, was the court's conclusion that it was inconceivable that a newspaper reporter in a small town would report a fire in the courthouse if none had occurred. In short, the article in Dallas County had an aura of trustworthiness that was not equalled, in the opinion of a majority of the Advisory Committee, by Girard's statement in Timber Access.

Similarly, a majority of the Advisory Committee believes that Girard's statement should not have been admitted unless the statement was more probative on the point in controversy than any other evidence reasonably procurable by the proponent. There is no indication in the Timber Access opinion that any reasonable efforts were made by the plaintiff to procure other evidence.

The majority of the Advisory Committee questions the court's determination that Girard's statement was not against proprietary or pecuniary interest or those of his employer since he remained in the employ of US Plywood at all times. The majority believes that it is unrealistic to conclude that when Girard made his statement he was not acting within the course and scope of his employment.

Granting, however, the court's conclusion that there was no declaration against his proprietary or pecuniary interest, the Advisory Committee nevertheless believes that Timber Access should remain an appropriate example of the expanded declaration against interest exception embodied in paragraph (c) of subsection (2) of section 65 (Rule 804) of this Act.

The Advisory Committee wishes to stress that subsection (24) of this section is not a broad grant of authority to admit virtually all hearsay statements, but a provision designed to satisfy the requirements of justice in those few cases where application of the hearsay rule and the other exceptions to it set forth in this section would result in injustice.

As previously discussed, a majority of the members of the Advisory Committee are convinced that the court in the Timber Access case went too far in admitting a hearsay statement under a general exception to the hearsay rule. It is believed by the Advisory Committee that the statement in Timber Access could not be admitted into evidence under subsection (24) of this section. In so far as this is true, this subsection changes existing Oregon law.

In a recent case, however, the Supreme Court indicated that Timber Access may have marked the outer limits of admissiblity under a general hearsay exception,

and that current Oregon law is not very dissimilar from subsection (24) of this section. See Reynoldson v. Jackson, 275 Or 641, 644, 552 P2d 236 (1976).

SECTION 65. Rule 804. Hearsay exceptions where the declarant is unavailable. (1) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

(a) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of a statement;

(b) Persists in refusing to testify concerning the subject matter of a statement despite an order of the court to do so;

(c) Testifies to a lack of memory of the subject matter of a statement;

(d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of an exception under paragraph (b), (c) or (d) of subsection (3) of this section, the declarant's attendance or testimony) by process or other reasonable means.

(2) A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(3) Hearsay exceptions. The following are not excluded by section 63 (Rule 802) of this Act if the declarant is unavailable as a witness:

(a) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(b) Statement under belief of impending death. A statement made by a declarant while believing that death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(c) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(d) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or

family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(e) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this paragraph unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

JUDICIARY COMMITTEE COMMENTARY

Rule 804 (3)(a). The Judiciary Committee intends that testimony at a preliminary hearing not be automatically admissible in a subsequent proceeding. The committee believes that it is not necessarily the case that a preliminary hearing affords the party against whom the testimoney could later be offered either an opportunity or a similar motive to develop the testimony. If, however, it can be shown by the proponent of the preliminary hearing testimony that there was in fact an effective opportunity and a similar motive for developing the testimony, it is admissible in a subsequent proceeding under Rule 804 (3)(a).

Failure to cross-examine a witness at a preliminary hearing does not necessarily constitute a waiver of the right to object to admission of the testimony in a subsequent proceeding.

The Committee also recognizes that the taking of a deposition is not necessarily a situation in which a party has a "similar motive" to examine or cross-examine a potential witness. A party who believes that a deposition is solely for discovery purposes, as opposed to one designed to perpetuate testimony, might not have the same motive to cross-examine as he or she would in a subsequent proceeding.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on Rule 804 of the Federal Rules of Evidence and existing Oregon law relating to the admissibility of dying declarations. Paragraph (b) of subsection (3) of Federal Rule 804 has been amended in this section to make the paragraph comply with the holding in McCarty v. Sirianni, 132 Or 290, 285 P 825 (1930), which holding allowed dying declarations to be admitted in all criminal and civil cases. Under Federal Rule 804, such declarations are admissible only in civil actions and prosecutions for homicide.

B. Summary

Subsection (1). The definition of unavailability in subsection (1) of this section implements the division of hearsay exceptions into two categories under section 64 (Rule 803) of this Act and subsection (3) of this section.

Five instances of unavailability are specified:

Paragraph (a). Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony). Wyatt v. State, 35 Ala App 147, 46 So 2d 837 (1950); State v. Stewart, 85 Kan 404, 116 P 489 (1911); Annot., 45 A.L.R.2d 1354; Uniform Rule 62(7)(a); California Evidence Code, section 240 (a) (1).

Under paragraph (a) of subsection (1) of this section, a ruling by the court that a privilege exists is required, which clearly implies that an actual claim of privilege must be made.

Paragraph (b). Under paragraph (b) of subsection (1) of this section, a witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality. Johnson v. People, 152 Colo 586, 384 P2d 454 (1963); People v. Pickette, 339 Mich 294, 63 NW 2d 681, 45 A.L.R.2d 1341 (1954). Contra, Pleau v. State, 255 Wis 362, 38 NW 2d 496 (1949).

Paragraph (c). The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. McCormick, Evidence, section 253, p 611 (2nd ed 1972). If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

Paragraph (d). Death, illness and infirmity find general recognition as grounds for declaring a witness to be unavailable. McCormick, Evidence, sections 253, 280 and 322 (2nd ed 2972); Uniform Rule 62(7)(c); California Evidence Code, section 240(a)(3); Kansas Code of Civil Procedure, section 60-459 (g)(3); New Jersey Evidence Rule 62(6)(c). See also the provisions on use of depositions in Rule 32(a) (3) of the Federal Rules of Civil Procedure and Rule 15(e) of the Federal Rules of Criminal Procedure.

Paragraph (e). Absence from the hearing coupled with inability to compel attendance by process or other reasonable means also satisfies the requirement of unavailability under paragraph (e) of subsection (1) of this section. McCormick, Evidence, section 253 (2nd ed 1972); Uniform Rule 62(7)(d) and (e); California Evidence Code, section 240 (a) (4) and (5); Kansas Code of Civil Procedure, section 60-459(g) (4) and (5); New Jersey Rule 62(6) (b) and (d).

After the word "attendance" in paragraph (e) of subsection (1) of this section, the parenthetical expression "(or in the case of an exception under paragraph (b), (c) or (d) of subsection (3) of this section, the declarant's attendance or testimony)" is intended to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable.

Subsection (2). Subsection (2) of this section provides that if the conditions otherwise constituting unavailability under subsection (1) of this section result from the procurement or wrongdoing of the proponent of the statement, the requirement of unavailability is not satisfied.

Subsection (3). Section 64 (Rule 803) of this Act is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that the declarant's availability or unavailability is not a relevant factor in determining admissibility. Subsection (3) of this section is based upon a different theory: Hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: Testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. The exceptions developed by the common law with respect to declarations of unavailable declarants furnish the basis for the exceptions enumerated in subsection (3) of this section.

Paragraph (a). Paragraph (a) of subsection (3) of this section sets forth an exception for former testimony. Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present when the former testimony was given. The only missing condition for the ideal giving of testimony is the presence of trier and opponent (demeanor evidence). This is lacking with all hearsay exceptions. Hence, it may be argued that former testimony is the best hearsay evidence and should be included under section 64 (Rule 803) of this Act without regard to the unavailability of the declarant. However, opportunity to observe demeanor is what in large measure confers depth and meaning upon oath and cross-examination. Thus, in cases under section 64 (Rule 803) of this Act, demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception under paragraph (a) of subsection (3) of this section indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

Under the exception, the testimony may be offered (1) against the party against whom it was previously offered or (2) against the party by whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. If the party against whom now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. If the party against whom now offered is the one by whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, i.e., by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party, of litigants' ability to pick and choose witnesses and of vouching for one's own witnesses. Cf McCormick, Evidence, section 269, pp 650 and 651 (2nd ed 1972). 4 Wigmore, Evidence, section 1075 (3d ed 1940). A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examination of an opponent's witness. Falknor, Former Testimony and the Uniform Rules: A Comment, 38 NYU L Rev 651 n 1 (1963); McCormick, Evidence, section 255, p 617 (2nd ed 1972). See also 5

Wigmore, Evidence, section 1389 (3d ed 1940). Allowable techniques for dealing with hostile, double-crossing, forgetful and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. McCormick, Evidence, section 257 at 621 (2nd ed 1972).

Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. Testimony given at a preliminary hearing was held in California v. Green, 399 US 149, 90 SCt 1930, 26 LEd 2d 489 (1970) to satisfy confrontation requirements in this respect.

As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. The Advisory Committee emphasizes that the party's predecessor in interest in a civil action or proceeding must have had an opportunity and similar motive to examine the witness. Falknor, supra, at 652; McCormick, Evidence, section 256, pp 617 and 618 (2nd ed 1972). The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered.

Paragraph (b). Paragraph (b) of subsection (3) of this section is the familiar common law hearsay exception for dying declarations, expanded somewhat beyond its traditionally narrow limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. See 5 Wigmore, Evidence, section 1443 (3d ed 1940) and the classic statement of Chief Baron Eyre in Rex v. Woodcock, 1 Leach 500, 502, 168 Eng Rep 352, 353 (KB 1789). The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecutions for other crimes, e.g., a declaration by a rape victim who dies in childbirth, and all declaration in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions or has expanded the area of offenses to include abortions, 5 Wigmore, Evidence, section 1432, p 224, n 4 (3d ed 1940). The Kansas courts extended the exception to civil cases in Thurston v. Fritz, 91 Kan 468, 138 P 625 (1914). While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases. The same considerations suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. The actual death of the declarant is not necessary for his "dying declaration" to be admissible under paragraph (b) of subsection (3) of this section, in light of subsection (1) of this section. Any problem as to declarations phrased in terms of opinion is laid at rest by section 57 (Rule 701) of this Act, and continuation of the requirement of firsthand knowledge is assured by section 44 (Rule 602) of this Act.

Comparable provisions are found in Uniform Rule 63(5); California Evidence Code, section 1242; Kansas Code of Civil Procedure, section 60-460 (e); New Jersey Evidence Rule 63(5).

Paragraph (c). Paragraph (c) of subsection (3) of this section embodies the statement against interest exception to the hearsay rule. The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. Hileman v. Northwest Engineering Co., 346 F2d 668 (6th Cir 1965). If the statement is that of a party, offered by his opponent, it comes in as an admission under paragraph (b) of subsection (4) of section 62 (Rule 801) of this Act, and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.

The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against-interest aspect. Higham v. Ridgway, 10 East 109, 103 Eng Rep 717 (KB 1808); Reg. v. Overseers of Birmingham, 1 B & S 763, 121 Eng Rep 897 (QB 1861); McCormick, Evidence, section 279, p 675, nn 42 and 43 (2nd ed 1972).

Paragraph (c) of subsection (3) of this section discards the common law limitation and expands the exception to its logical limit. One result, in accord with the trend of the decisions in this country, is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him. McCormick, Evidence, section 277, pp 671 and 672 (2nd ed 1972). Another result is to make exposure to criminal liability satisfy the against-interest requirements. An increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. People v. Spriggs, 60 Cal 2d 868, 36 Cal Rptr 841, 389 P2d 377 (1964); Sutter v. Easterly, 354 Mo 282, 189 SW 2d 284 (1945); Band's Refuse Removal, Inc. v. Fairlawn Borough, 62 NJ Super 522, 163 A2d 465 (1960); Newberry v. Commonwealth, 191 Va 445, 61 SE 2d 318 (1950); Annot., 162 A.L.R 446. A requirement of corroboration is included in paragraph (c) of subsection (3) of this section in order to effect an accommodation between these competing considerations. When the statement is offered by the accused by way or exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence, and hence the corroboration provision is cast in terms of a requirement preliminary to admissibility. See subsection (1) of section 5 (Rule 104) of this Act. The requirement of corroboration should be construed in such manner as to effectuate its purpose of circumventing fabrication.

Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case. The confession may include statements implicating him, and under the general theory of declarations against interest, they would be admissible as related statements. Douglas v. Alabama, 380 US 415, 85 SCt 1074, 13 LEd 2d 934 (1965), and Bruton v. United States, 389 US 818, 88 SCt 126, 19 LEd 2d 70 (1968), both involved confessions by codefendants which implicated the accused. While the confession was not actually offered in evidence in Douglas, the procedure followed effectively put it before the jury, which the Supreme Court held to be error. Whether the confession might have been admissible as a declaration against penal interest was not considered or discussed. Bruton assumed the inadmissibility, as against the accused, of the implicating confession of his codefendant, and centered upon the question of the effectiveness of a limiting instruction. These decisions, however, by no means require that all statements implicating another

person be excluded from the category of declarations against interest. Whether a statement is in fact against the declarant's interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as being against the declarant's interest. See the dissenting opinion of Mr. Justice White in Bruton. On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. Paragraph (c) of subsection (3) of this section does not purport to deal with questions of the right of confrontation.

The balancing of self-serving against disserving aspects of a declaration is discussed in McCormick, Evidence, section 279 (2nd ed 1972).

For comparable provisions, see Uniform Rule 63(10); California Evidence Code, section 1230; Kansas Code of Civil Procedures, section 60-460(j); New Jersey Evidence Rule 63(10).

Paragraph (d). Under paragraph (d) of subsection (3) of this section, the statements of personal or family history are excepted from the general rule against admission of hearsay evidence. The general common law requirement that a declaration concerning personal or family history must have been made at a time when the declarant had no motive to distort truth, usually before the controversy arose or the action was commenced, has been dropped, as bearing more appropriately on weight than admissibility. See 5 Wigmore, Evidence, section 1483 (3d ed 1940). Subparagraph (A) of paragraph (d) of subsection (3) of this section specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. In some instances, declarant's knowledge is self-evident (marriage) and in others impossible and traditionally not required (date of birth). Subparagraph (B) of paragraph (d) of subsection (3) of this section deals with declarations concerning the history of another person. As at common law, the declarant is qualified if related by blood or marriage. 5 Wigmore, Evidence, section 1489 (3d ed 1940). In addition, and contrary to the common law, declarant qualifies by virtue of intimate association with the family. Id., section 1487. The requirement sometimes encountered that, when the subject of the statement is the relationship between two other persons, the declarant must qualify as to both is omitted. Relationship is reciprocal. Id., section 1491.

For comparable provisions, see Uniform Rule 63(23), 63(24) and 63(25); California Evidence Code, sections 1310 and 1311; Kansas Code of Civil Procedure, section 60-460(u), (v) and (w); New Jersey Evidence Rule 63(23), 63(24) and 63(25).

Paragraph (e). In language and purpose, paragraph (e) of subsection (3) of this section is identical with subsection (24) of sections 64 (Rule 803) of this Act. See the Advisory Committee's commentary to that provision.

C. Relationship to Existing Law

Subsection (1). The definition of "unavailability" set forth in subsection (1) of this section is much more expansive than the definition found in existing Oregon law, in that it increases the number of situations in which a witness is considered to be unavailable. The Oregon courts currently limit "unavailability" to situations involving an exercise of a claim of privilege, State v. Rawls, 252 Or 556, 451 P2d 127 (1969) and State v. Bryant, 20 Or App 562, 532 P2d 815 (1975); a mental or physical inability to testify, Loam v. Green, 106 Or 311, 211 P 791 (1923) and Hansen-Rynning v. Oregon-Wash. R.R. & Nar. Co., 105 Or 67, 209 P

462 (1922) (dicta); death or infirmity, subsection (8) of ORS 41.900 (1979 Replacement Part), State v. Crowly, 242 Or 601, 410 P2d 1012 (1966), State v. Walton, 53 Or 557, 99 P 431 (1909); and absence from the state, Rogers v. Donovan, 268 Or 24, 518 P2d 1306 (1974) and subsection (8) of ORS 41.900 (1979 Replacement Part).

Subsection (1) of this section changes existing Oregon law by extending the definition of unavailability to include a refusal by a witness to testify and to a claimed lack of memory on the subject matter of his statement by a witness.

In addition, subsection (1) of this section clarifies existing Oregon law by eliminating the ambiguity in subsection (8) of ORS 41.900 (1979 Replacement Part) detected by the court in Rogers v. Donovan. That ambiguity involved the question of whether the statute authorized the admission of the former statements of a party to the present action who is out of state as well as the admission of the former statements of a nonparty witness who is out of state. The court's decision did not clearly resolve the question. However, subsection (1) of this section applies equally to parties to an action and nonparty witnesses in that action.

Subsection (3): Paragraph (a). The common law hearsay exception for former testimony required that the parties in both the previous and current proceedings be identical. An early Oregon case is in accord with the common law insistence upon identity of the parties. Patty v. Salem Flouring Mills Co., 53 Or 350, 96 P 1106 (1908). Under paragraph (a) of subsection (3) of this section, there is no requirement that the parties in both proceedings be the same. Paragraph (a) of subsection (3) of this section works a change in existing Oregon law.

Paragraph (b). Paragraph (b) of subsection (3) of this section is a modified version of Federal Rule 804(b)(2). By allowing admission of dying declarations in all criminal and civil cases, paragraph (b) of subsection (3) of this section becomes a broader hearsay exception than the federal provision which allows the use of dying declarations only in civil actions and homicide prosecutions.

The only change worked in current Oregon law under paragraph (b) of subsection (3) of this section is the removal of the requirement that the declarant must actually have died. Subsection (4) of ORS 41.900 (1979 Replacement Part) implies that the declarant must have died in that it declares "Evidence may be given of the following facts . . . and also the declaration or act of a dying person, made or done under a sense of impending death, respecting the cause of his death." In no Oregon cases has a dying declaration been admitted when the declarant has not died prior to the commencement of the action. Paragraph (b) of subsection (3) of this section eliminates the requirement of the death of the declarant.

In all other respects, however, current Oregon law is maintained. Although the only criminal cases in which dying declarations have been admitted have been prosecutions for homicide, State v. Achziger, 10 Or App 198, 497 P2d 383 (1972), State v. Brewton, 220 Or 266, 344 P2d 744 (1959), and State v. Garner, 190 Or 291, 225 P2d 771 (1950), dying declarations may be admitted in all criminal cases. McCarty v. Sirianni, 132 Or 290, 285 P 825 (1930). Under current Oregon law, dying declarations may also be admitted in civil actions. Mercep v. State Indus. Accident Comm'n., 167 Or 460, 118 P2d 1061 (1941).

Existing Oregon law requires that the declarant make the statement while believing that his death is imminent, and that the declaration relate to the circumstances of the impending death. Mercep v. State Indus. Accident Comm'n. supra; McCarty v. Sirianni, supra; and State v. Doris, 51 Or 136, 94 P 44 (1908).

Paragraph (c). Paragraph (c) of subsection (3) of this section is in accord with current Oregon law except for statements against the declarant's penal interest.

The Oregon courts have admitted declarations against a person's pecuniary or proprietary interest if made by a person with personal knowledge of the facts and without motive to falsify. Mace v. Timberman, 120 Or 144, 251 P 763 (1926). In addition, several Oregon statutes admit declarations against interest in certain situations. See ORS 41.830 (1979 Replacement Part) (declarations of grantor); ORS 41.850 (1979 Replacement Part) (declarations of deceased person); ORS 41.860 (1979 Replacement Part) (writings of deceased person); ORS 41.890 (1979 Replacement Part) (declarations of nonparties); subsection (4) of ORS 41.900 (1979 Replacement Part) (declarations of decedent relating to pedigree and real property). The Oregon Court of Appeals, affirmed its adherence to the common law position by holding that declarations against one's penal interest are not admissible as a hearsay exception. State v. Anderson, 10 Or App 34, 497 P2d 1216 (1962), citing State v. Coleman, 119 Or 430, 249 P 1049 (1928), State v. Farnam, 82 Or 211, 161 P 417 (1916), State v. Fletcher, 24 Or 295, 33 P 575 (893). See also State v. Morse, 35 Or 462, 57 P 631 (1899). However, a statement against the declarant's penal interest qualifies as a statement against interest under paragraph (c) of subsection (3) of this section.

Whether existing Oregon law is changed thereby is unclear because the Oregon Supreme Court has recently cast doubt on the position taken by the Court of Appeals in State v. Anderson by observing that limiting the scope of the exception to only those declarations which fit neatly within the classification of pecuniary or proprietary interest has long been questioned. Timber Access Inds. Co. v. U.S. Plywood-Champion Papers, Inc., 263 Or 509, 520, 503 P2d 482, 488 (1972), citing 5 Wigmore, Evidence, section 1455, at 259 (3d ed 1940).

Paragraph (d). Paragraph (d) of subsection (3) of this section maintains, with two exceptions, the existing Oregon law codified in ORS 41.840 (1979 Replacement Part) and subsection (4) of ORS 41.900 (1979 Replacement Part).

ORS 41.840 provides that "The declaration, act or omission of a member of a family, who is deceased or out of the state, is admissible as evidence of common reputation in cases where, on questions of pedigree, such reputation is admissible." The statute differs from subparagraph (A) of paragraph (d) of subsection (3) of this section in its more restrictive scope of unavailability (deceased or out of state).

Subsection (4) of ORS 41.900 is comparable to subparagraph (B) of paragraph (d) of subsection (3) of this section because it allows the admission of "The declaration or act, verbal or written, of a deceased person, in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person . . . ." However, unavailability is limited to death under this statute. In addition, and in agreement with subparagraph (B) of paragraph (d) of subsection (3) of this section, early Oregon cases have required a showing that the declarant and the person whose family history is to be proved are related. State v. McDonald, 55 Or 419, 103 P 512 (1910); Thompson v. Woolf, 8 Or 454 (1880).

Paragraph (e). See Advisory Committee's commentary to subsection (24) of section 64 (Rule 803) of this Act.

SECTION 66. Rule 805. Hearsay within hearsay. Hearsay included within hearsay is not excluded under section 63 (Rule 802) of this Act if each part of the combined statements conforms with an exception set forth in section 64 (Rule 803) or 65 (Rule 804) of this Act.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on Rule 805 of the Federal Rules of Evidence. The references in Federal Rule 805 to "hearsay rule" and "these rules" have been made more specific.

B. Summary

Regarding the principle of this section, it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirement of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurances of trustworthiness. Likewise, a dying declaration may incorporate a declaration against interest by another declarant. Still another example is a police accident report that contains an assertion made by one driver soon after the accident. The driver's statement might be an excited utterance, and the police report a business record. The police report would therefore be admissible to prove the truth of the driver's excited utterance. See McCormick, Evidence, section 310, p 726 and section 313, p 731 2nd ed 1972).

It should be noted that this section's requirement of conformity with an "exception" to the hearsay rule encompasses extra-judicial statements which are not strictly "exceptions" to the hearsay rule, but are "exclusions" from the category of hearsay, such as the "admission" of a party which is excluded from the category of hearsay by paragraph (a) of subsection (4) of section 62 (Rule 801) of this Act. See State v. Waite, 377 A2d 96 (Maine, 1977).

C. Relationship to Existing Law

This section is in accord with the current Oregon practice regarding hearsay within hearsay. See Justice Denecke's concurring opinion in Mayor v. Dowsett, 240 Or 196, 440 P2d 234 (1965), commented upon by Lacy, Oregon Evidence Law in the Sixties: Problems, Patterns and Projections, 49 O LR 188 at 198 and 199, and Williams v. Laurence-David, Inc. 75 OAS 1355, 534 P2d 173 (1975).

SECTION 67. Rule 806. Attacking and supporting credibility of declarant. When a hearsay statement, or a statement defined in subparagraph (C), (D) or (E) of paragraph (b) of subsection (4) of section 62 (Rule 801) of this Act, has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the hearsay statement of

the declarant, is not subject to any requirement under ORS 45.610 relating to impeachment by evidence of inconsistent statements. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on Rule 806 of the Federal Rules of Evidence. The words "under ORS 45.610 relating to impeachment by evidence of inconsistent statements" have been substituted for the federal phrase "that he may have been afforded an opportunity to deny or explain." This change was made necessary by the Advisory Committee's retention of ORS 45.610.

B. Summary

This section recognizes that the declarant of a hearsay statement may be impeached. The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See sections 52 to 54 (Rules 608 to 609-1) of this Act. There are, however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless the statements are related to him, with the circumstances of times, places and persons present, and unless he is asked whether he made the statements, and if so, allowed to explain them.

The principal difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably be a prior statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a subsequent one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. McCormick, Evidence, section 37, p 72 (2nd ed 1972); 3 Wigmore, Evidence, section 1033 (3d ed 1940). The cases, however, are divided. Cases allowing the impeachment include People v. Collup, 27 Cal2d 829, 176 P2d 714 (1946); People v. Rosoto, 58 Cal2d 304, 23 Cal Rptr 779, 373 P2d 867 (1962); Carver v. United States, 164 US 694, 17 SCt 228, 41 LEd 602 (1897). Contra, Mattox v. United States, 156 US 237, 15 SCt 337, 39 LEd 409 (1895); People v. Hines, 284 NY 93, 29 NE 2d 483 (1940). The difference in the particular brand of hearsay seems unimportant when the inconsistent statement is a subsequent one. True, the opponent is not totally deprived of cross-examination when the hearsay is former testimony or a deposition but he is deprived of cross-examination on the statement or along lines suggested by it.

When the impeaching statement was made prior to the hearsay statement, differences in the kinds of hearsay appear which arguably may justify differences in treatment. If the hearsay consisted of a simple statement by the witness, e.g., a dying declaration or a declaration against interest, the feasibility of

affording him an opportunity to deny or explain encounters the same practical impossibility as where the statement is a subsequent one, just discussed, although here the impossibility arises from the total absence of anything resembling a hearing at which the matter could be put to him. The courts by a large majority have ruled in favor of allowing the statement to be used under these circumstances. McCormick, Evidence, section 37, p 72 (2nd ed 1972); 3 Wigmore, Evidence, section 1033 (3d ed 1940). If, however, the hearsay consists of former testimony or a deposition, the possibility of calling the prior statement to the attention of the witness or deponent is not ruled out, since the opportunity to cross-examine was available. It might thus be concluded that with former testimony or depositions the conventional foundation should be insisted upon. Most of the cases involve depositions, and Wigmore describes them as divided. 3 Wigmore, Evidence, section 1031 (3d ed 1940). Deposition procedures at best are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. With respect to both former testimony and deposition the possibility exists that knowledge of the statement might not be acquired until after the time of the cross-examination. Moreover, the expanded admissibility of former testimony and deposition under paragraph (a) of subsection (3) of section 65 (Rule 804) of this Act calls for a correspondingly expanded approach to impeachment. This section dispenses with the requirement in all hearsay situations, which is readily administered and best calculated to lead to fair results.

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination. A similar provision is found in California Evidence Code, section 1203. The phrase "or a statement defined in subparagraph (C), (D) or (E) of paragraph (b) of subsection (4) of section 62 (Rule 801) of this Act" is added to the rule in order to subject the declarant of such statements like the declarant of hearsay statements, to attacks on his credibility.

C. Relationship to Existing Law

There are no Oregon statutes or cases dealing with this matter. However, see McConney v. United States, 421 F2d 248 (9th Cir 1969) in which the court declared that "while the general rule is that a witness may be impeached by his prior inconsistent statements only after a proper foundation has been laid by inquiring as to whether he made the prior inconsistent statements, that rule has been dispensed with in situations where the witness is unavailable and hearsay evidence is offered to impeach the previously admitted hearsay evidence of the statements of the absent witness." 421 F2d at 251. See also Carver v. United States, 164 US 694, 17 SCt 228, 41 LEd 602 (1892).

SECTION 68. Rule 901. Requirement of authentication or identification. (1) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(2) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of subsection (1) of this section:

(a) Testimony of witness with knowledge. Testimony by a witness with knowledge that a matter is what it is claimed to be.

(b) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(c) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(d) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with cirmumstances.

(e) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(f) Telephone conversation. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if:

(A) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(g) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(h) Ancient documents or data compilation. Evidence that a document or data compilation, in any form:

(A) Is in such condition as to create no suspicion concerning its authenticity;

(B) Was in a place where it, if authentic, would likely be; and

(C) Has been in existence 20 years or more at the time it is offered.

(i) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(j) Methods provided by statute or rule. Any method of authentication or identification otherwise provided by law or by other rules prescribed by the Supreme Court.

ADVISORY COMMITTEE COMMENTARY

A. DERIVATION

This section is a modified version of Rule 901 of the Federal Rules of Evidence. The phrase "by a witness with knowledge" has been added to paragraph (a) of subsection (2) of this section to emphasize that a witness must have firsthand knowledge of the subject matter of his testimony. The phrase "pursuant to statutory authority," which appears in Federal Rule 901(b)(10) is omitted from paragraph (j) of subsection (2) of this section in order to make the paragraph apply to rules prescribed by the Supreme Court pursuant to its constitutional and supervisory powers as well as those powers granted by statute.

B. SUMMARY

Authentication and identification represent a special aspect of relevancy. Michael and Adler, Real Proof, 5 Vand L Rev 344, 362 (1952); McCormick, Evidence, sections 212 and 218 (2d ed 1972); Morgan, Basic Problems of Evidence, 378 (1962). Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as "an inherent logical necessity." 7 Wigmore, Evidence, section 2129, p 564 (3d ed 1940).

This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in subsection (2) of section 5 (Rule 104) of this Act.

The common law approach to authentication of documents has been criticized as an "attitude of agnosticism," McCormick, Cases on Evidence, 388 n 4 (3rd ed 1956), as one which "departs sharply from men's customs in ordinary affairs," and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and expense devoted to proving genuine writings which correctly show their origin on their face. McCormick, Evidence, section 218, pp 544 and 545 (2d ed 1972). Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification. Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least prima facie genuine items of the kind treated in section 69 (Rule 902) of this Act, infra. However, the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures; unforeseen contingencies may arise, and cases of genuine controversy will still occur.

Subsection (1). Subsection (1) of this section sets forth the well-accepted requirement that whenever a piece of evidence is offered there must be certain minimum assurances that the evidence is what it purports to be, is what it is offered as being and is what its value depends upon.

The treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subsection (1) of this section.

Subsection (2). The examples in subsection (2) of this section are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.

The examples relate for the most part to documents, with some attention given to voice communications and computer print-outs. As Wigmore noted, no special rules have been developed for authenticating chattels. Wigmore, Code of Evidence, section 2086 (3rd ed 1942).

It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain.

Paragraph (a). Paragraph (a) of subsection (2) of this section contemplates a broad spectrum of testimony ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis. McCormick, Evidence, section 219 (2d ed 1972). See California Evidence Code, section 1413, eyewitness to signing.

Paragraph (b). Paragraph (b) of subsection (2) of this section states conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the handwriting of another person may be acquired by seeing him write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions. McCormick, Evidence, section 221 (2d ed 1972). See also California Evidence Code, section 1416. Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert under the example which follows.

Paragraph (c). The history of common law restrictions upon the techinque of proving or disproving the genuineness of a disputed specimen of handwriting through comparison with a genuine specimen, by either the testimony of expert witnesses or direct viewing by the triers themselves, is detailed in 7 Wigmore, Evidence, sections 1991 to 1994 (3d ed 1940). In breaking away, the English Common Law Procedure Act of 1854, 17 and 18 Vict, c 125 section 27, cautiously allowed expert or trier to use exemplars proved to the satisfaction of the judge to be genuine for purposes of comparison. The language found its way into numerous statutes in this country, e.g. California Evidence Code, sections 1417 and 1418. While explainable as a measure of prudence in the process of breaking with precedent in the handwriting situation, the reservation to the judge of the question of the genuiness of exemplars and the imposition of an unusually high standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. See section 5 (Rule 104) of this Act. No similar attitude is found in other comparison situations, e.g. ballistics comparison by jury, as in Evans v. Commonwealth, 230 Ky 411, 19 SW 2d 1091 (1929), or by experts, Annot., 26 A.L.R. 2d 892, and no reason appears for its continued existence in handwriting cases. Consequently, paragraph (c) of subsection (2) of this section sets no higher standard for handwriting specimens, and treats all comparison situations alike, to be governed by subsection (2) of section 5 (Rule 104) of this Act.

Federal precedent supports the acceptance of visual comparison as sufficiently satisfying preliminary authentication requirements for admission in evidence. Brandon v. Collins, 267 F2d 731 (2d Cir 1959); Wausau Sulphate Fibre Co. v. Commissioner of Internal Revenue, 61 F2d 879 (7th Cir 1932); Desimone v. United States, 227 F2d 864 (9th Cir 1955).

Paragraph (d). In paragraph (d) of subsection (2) of this section, the characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. The Advisory Committee on Evidence Law Revision suggests the following guidelines for application of this example: (adapted from Weinstein Evidence: Commentary on Rules of Evidence for the United States Courts and Magistrates, (M. Bender 1976)).

(i) Subject Matter. A document or telephone conversation may be shown to have emanated from a particular person or business by the fact that it would be unlikely for anyone other than the purported author or declarant to be familiar with the subject matter of the document or conversation. McCormick, Evidence, section 225 (2d ed 1972); Globe Automatic Sprinkler Co. v. Braniff, 89 Okl 105, 214 P 127 (1923); California Evidence Code, section 1421; State ex rel Kunz v. Woodmansee, 156 Or 607, 60 P2d 298 (1937).

(ii) Physical Attributes. The appearance, physical characteristics, and identifying marks of a writing may sufficiently identify the source of the document.

(iii) Internal Patterns. Writings may be authenticated by evidence that the internal word or thought patterns are particularly characteristic of the purported writer. Magnuson v. State, 187 Wis 122, 203 NW 749 (1925); Arens and Meadow, Psycholinguists and the Confession of Dilemma, 56 Colum L Rev 19 (1956).

(iv) External Circumstances. Circumstances preceding, surrounding and following the transmission of a writing may sufficiently authenticate the writing.

(v) Reply-letter Techinque. A letter or telegram may be authenticated by testimony or other proof that the writing was sent in reply to a duly authenticated writing. McCormick, Evidence, section 225 (2d ed 1972); California Evidence Code, section 1420.

Paragraph (e). Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting. Cf Paragraph (b) of subsection (2) of this section; McCormick, Evidence, section 226 (2d ed 1972); See State v. Miller, 6 Or App 366, 487 P2d 1387 (1971) (impliedly recognizing aural identifications part of tape recording authentication); People v. Nichols, 389 Ill 487, 38 NE 2d 766 (1942); McGuire v. State, 200 Md 601, 92 A2d 582 (1952); State v. McGee, 336 Mo 1082, 83 SW 2d 98 (1935).

Paragraph (f). The cases are in agreement that a mere assertion of identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of the person's identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements or the reply technique, under paragraph (d) of

subsection (2) of this section, or voice identification under paragraph (e) of subsection (2) of this section may furnish the necessary foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity. The calling of a number assigned by the telephone company reasonably supports the assumption that the listing is correct and that the number is the one reached. If the number is that of a place of business, the mass of authority allows an ensuing conversation if it relates to business reasonably transacted over the telephone, on the theory that the maintenance of the telephone connection is an invitation to do business without further identification. Matton v. Hoover Co., 350 Mo 506, 166 SW 2d 557 (1942); City of Pawhuska v. Crutchfield, 147 Okla 4, 293 P 1095 (1932); Zurich General Acc. & Liability Ins. Co. v. Baum, 159 Ga 404, 165 SE 518 (1932). Otherwise, some additional circumstances of identification of the speaker are required. The authorities divide on the question whether the self-identifying statement of the person answering suffices. Paragraph (f) of subsection (2) of this section answers in the affirmative on the assumption that usual conduct respecting telephone calls furnishes adequate assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact. In general, See McCormick, Evidence, section 226 (2d ed 1972); 7 Wigmore, Evidence, section 2155 (3d ed 1940) Annot., 71 A.L.R. 5.

Paragraph (g). Public records are regularly authenticated by proof of custody. McCormick, Evidence, section 224 (2d ed 1972); 7 Wigmore, Evidence, section 224 (2d ed 1972); 7 Wigmore, Evidence, sections 2158 and 2159 (3d ed 1940). Paragraph (g) of subsection (2) of this section extends the principles to include data stored in computers and similar methods, of which increasing use in the public records area may be expected. See California Evidence Code, sections 1532 and 1600.

Paragraph (h). The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

Any time period selected is bound to be arbitrary. The common law period of 30 years is here reduced to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikeliness of a still viable fraud after the lapse of time. The shorter period is specified in the English Evidence Act of 1938, 1 & 2 Geo 6, c 28. See also the numerous statutes prescribing periods of less than 30 years in the case of recorded documents. 7 Wigmore, Evidence, section 2143 (3d ed 1940).

The applicability of paragraph (h) of subsection (2) of this section is not subject to any limitation to title documents or to any requirement that possession, in the case of a title document, has been consistent with the document. See McCormick, Evidence, section 223 (2d ed 1972).

It should again be emphasized that, despite the utility of the example set forth in paragraph (h) of subsection (2) of this section, it is merely a rule of authentication, the satisfaction of which does not necessarily guarantee the admission of the writing authenticated. Thus, it is sometimes forgotten that a writing may be properly authenticated under any of the methods suggested and yet remain inadmissible as being, for example, hearsay or secondary evidence. This source of confusion is compounded by a partial overlap between the requirements of this section and those of a distinct doctrine which holds that recitals in certain types of ancient instruments may be received as evidence of the facts

recited. The latter doctrine, however, constitutes an exception to the rule against hearsay and is quite distinct from the principles of this section concerning authentication. McCormick, Evidence, section 223 at p 550 (2d ed 1972).

Paragraph (i). Paragraph (i) of subsection (2) of this section is designed for situations in which the accuracy of a result is dependent upon a process or system which produces it. X-rays afford a familiar instance. Among more recent developments is the computer, as to which see Transport Indemnity Co. v. Seib, 178 Neb 253, 132 NW 2d 871 (1965); State v. Veres, 7 Ariz App 117, 436 P2d 629 (1968); Merrick v. United States Rubber Co., 7 Ariz App 443, 440 P2d 314 (1968); Freed, Computer Print-Outs as Evidence, 16 Am Jur Proof of Facts 273; Symposium, Law and Computers in the Mid-Sixties, ALI-ABA (1966); 37 Albany L Rev 61 (1967). Paragraph (i) of subsection (2) of this section does not, of course, foreclose taking judicial notice of the accuracy of the process or system.

It should be emphasized that this example only contemplates authentication of the process or system itself. Thus, further foundation may be required to insure that the process or system in question was properly utilized to obtain the product offered into evidence. McCormick, Evidence, section 214 (2d ed 1972).

Paragraph (j). Paragraph (j) of subsection (2) of this section makes clear that other methods of authentication provided by the Legislative Assembly or by the Supreme Court are not intended to be superceded.

C. Relationship to Existing Law

This section is consistent with existing Oregon law, except for paragraph (c) of subsection (2) of this section, relating to authentication through comparison by the trier of fact or expert witness. Present Oregon law requires that the exemplar for comparison be admitted as genuine by the party against whom it is offered or be treated as genuine by such party. See State v. Cahill, 208 Or 538, 293 P2d 169, 298 P2d 214 (1956), interpreting ORS 42.070. The justification advanced for this rule is that it prevents the raising of collateral issues regarding the genuiness of the writing offered as the standard of comparison. 41 Ore L Rev 154 at 159 (1962). However, the rule has been criticized by legal scholars because it seriously limits the documents which may be used as exemplars and often leaves none at all available. 7 Wigmore, Evidence, section 193 (3rd ed 1940).

Under paragraph (c) of subsection (2) of this section, however, the exemplar may be used for comparison if the foundation evidence for the exemplar is sufficient to support a finding by the trier of fact that the exemplar is "genuine." See subsection (b) of section 5 of this Act.

SECTION 69. Rule 902. Self-authentication. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature, in an official capacity, of an officer or employe of any entity included in subsection (1) of this section, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employe certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position of (A) the executing or attesting person, or (B) any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with subsection (1), (2) or (3) of this section or otherwise complying with any law or rule prescribed by the Supreme Court.

(5) Official publications. Books, pamphlets or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon and documents relating thereto to the extent provided by ORS chapters 71 to 83.

(10) Presumptions under law. Any signature, documents or other matter declared by law to be presumptively or prima facie genuine or authentic.

(11) Document bearing seal of tribal government. (a) A document bearing a seal purporting to be that of a federally recognized Indian tribal government or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(b) A document purporting to bear the signature, in an official capacity, of an officer or employe of any entity included in paragraph (a) of this subsection, having no seal, if a public officer having a seal and having official duties in the district or political subdivision or the officer or employe certifies under seal that the signer has the official capacity and that the signature is genuine.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is a modified version of Rule 902 of the Federal Rules of Evidence. Federal Rules 902(4), 902(9) and 902(10) were slightly modified and subsection (11) of this section was added to clarify the authentication procedures for Indian tribal documents. Subsection (11) of this section was derived from Rule 902(1) and Rule 902(2) of the Federal Rules of Evidence.

In subsection (4) of this section, the words "with any law or rule prescribed by the Supreme Court" were substituted for the federal phrase "with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority."

In subsection (9) of this section, the words "ORS chapters 71 to 83" were substituted for the federal phrase "general commercial law."

In subsection (10) of this section, the words "by law" were substituted for the federal phrase "by Act of Congress."

B. Summary

Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect. Sometimes this occurs for reasons of policy, but perhaps more often because practical considerations reduce the possibility of fraud and error to a very small dimension. This section collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity.

Subsection (1). The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records, is actually of broad application.

Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore, Evidence, section 2161, p 638 (3d ed 1940); California Evidence Code, section 1452.

Subsection (2). While statutes are found which raise a presumption of genuiness of purported official signatures in the absence of an official seal, 7 Wigmore, Evidence, section 2167 (3d ed 1940) and California Evidence Code, section 1453, the greater ease of effecting a forgery under these circumstances is apparent. Hence, subsection (2) of this section calls for authentication by an officer who has a seal. Other special situations are covered in subsection (10) of this section.

Subsection (2) of this section applies only to officials "having no seal." However, the officer using his seal to authenticate another officer's signature will by inference also be certifying that there is no seal in the other's possession which he could himself have used. When presented with the document under the seal of the second officer, the courts should assume that he had the authority to affix such seal to the document. Weinstein Evidence, section 902 (2) [01] at 902-15 (M. Bender 1976).

Subsection (3) of this section provides a method for extending the presumption of authenticity to foreign official documents by a procedure of certification. It is derived from Rule 44(a) (2) of the Federal Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records.

Subsection (4). The common law and numerous statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with subsection (1), (2) or (3) of this section. Rule 44(a) of the Federal Rules of Civil Procedure and Rule 27 of the Federal Rules of Criminal Procedure have provided authentication procedures of this nature for both domestic and foreign public records. It will be observed that the certification procedure here provided extends only to public records, reports and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under subsection (1), (2) or (3) of this section may not be provable by certified copy under subsection (4) of this section.

Subsection (5). Dispensing with preliminary proof of the genuiness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore, Evidence, section 1684 (Chadbourn rev 1974). Subsection (5) of this section, it will be noted, does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility.

Subsection (6). The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them pursuant to (6) of this section. Establishing the authenticity of the publication may, of course, still leave open questions of authority and responsibility for items therein contained. See 7 Wigmore, Evidence, section 2150 (3d ed 1940). Cf 39 USC section 4005(b) (public advertisement prima facie evidence of agency of person named, in postal fraud order proceedings) and Canadian Uniform Evidence Act, Draft of 1936 (printed copy of newspaper prima facie evidence that notices or advertisements were authorized).

Subsection (7). Several factors justify dispensing with preliminary proof of genuiness of commercial and mercantile labels and the like. The risk of forgery is minimal. Trademark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them. Hence the fairness of this treatment finds recognition in the cases. Curtiss Candy Co. v. Johnson, 163 Miss 426, 141 So 762 (1932) (Baby Ruth candy bar); Doyle v. Continental Baking Co., 262 Mass 516; 160 NE 325 (1928) (loaf of bread); Weiner v. Mager & Throne, Inc., 167 Misc 338, 3 NY S2d 981 (1938) (same). And see W Va Code 1966, sections 3 to 5 (trademark on bottle prima facie evidence of ownership). Contra, Keegan v. Green Giant Co., 150 Me 283, 110 A2d 599 (1954); Murphy v. Campbell Soup Co., 62 F2d 564 (1st Cir 1933). Cattle brands have received similar acceptance in the western states. Rev Code Mont

1947, section 46-606; State v. Wolfley, 75 Kan 406, 89 P 1046 (1908); Annot., 11 LRA (NS) 87. Inscriptions on trains and vehicles are held to be prima facie evidence of ownership or control. Pittsburgh, Ft. W. & C. Ry. v. Callaghan, 157 Ill 406, 41 NE 909; 9 Wigmore, Evidence, section 2510a (3d ed 1940). See also 19 USC section 1615(2) declaring that marks, labels, brands or stamps indicating foreign origins are prima facie evidence of foreign origin of merchandise.

Subsection (8). In virtually every state, acknowledged title documents are receivable in evidence without further proof.

Statutes are collected in 5 Wigmore, Evidence, section 1676 (Chadbourn rev 1974). If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved. Instances of broadly inclusive statutes are California Evidence Code, section 1451 and NY CPLR 4538, McKinney's Consol. Laws 1963.

"The theory behind this form of authentication is simple. If a person comes before a notary and is known to the notary so that the notary knows that the name on the document is the same as the name of the person before him and additionally, the person before him says that he did in fact execute the document, it can reasonably be assumed that the document was executed by such person. The notary or other authorized officer preserves this chain of events in the certificate of acknowledgment for use at a later time. His seal attached to the certificate attests that the certificate is itself authentic." Weinstein Evidence, section 902(8)[01] at 902-31 (M. Bender 1976).

Subsection (9). Under subsection (9) of this section, commercial paper and related documents, to the extent provided by ORS chapters 71 to 83, should be admitted in the same way as other self-authenticating documents if on their face they appear to be what the proponent claims them to be.

Subsection (10). Subsection (10) of this section indicates that any mode of self-authentication specifically provided for by law may be employed in addition to the procedures specifed in this section.

Subsection (11). Subsection (11) of this section was added by the Advisory Committee on Evidence Law Revision to clarify the procedures for authentication of Indian tribal documents. It was the consensus of the Advisory Committee that the procedure should not be obscured somewhere in the commentary of another subsection, but should be specifically set forth in a separate subsection.

Subsection (11) of this section treats Indian tribal documents in the same manner as documents from any other political subdivision in the United States. See subsections (1) and (2) of this section.

C. Relationship to Existing Law

This section is basically consistent with existing authentication practices in Oregon with a few exceptions.

It should be noted that this section sets forth several very general principles of authentication while existing Oregon law, in contrast, consists of numerous exacting statutes which pertain to specific types of documents. It is possible, therefore, that many of these principles may be judicially extended beyond the scope of existing authentication procedures.

Subsection (1). The acceptance of documents bearing a public seal and signature without extrinsic evidence of authenticity is in accord with the following Oregon statutes which include this method as a permissible mode of authentication:

ORS 43.110-Authentication of the judicial records of Oregon or of the United States;

ORS 43.410-Authentication of records in the custody of the State Archivist (legislative record or public record of certain writings);

ORS 43.430-Authentication of books, records and documents of the United States executive department or government owned corporation.

However, the broad application of subsection (1) of this section to other states and territories of the United States is contrary to some of the existing authentication practices in this state. For example, under current Oregon law governing authentication of the judicial record of a sister state or of a territory of the United States, the legal keeper of the records must certify a copy of the record and affix the seal of the court, and the chief judge of the court must also certify that the keeper's certificate is in due form and made by the person having legal custody of the records. ORS 43.110.

Subsection (2). While the practice of having a public officer use his seal to authenticate another officer's signature is not specifically provided for under existing Oregon law, some authority for the procedure of an officer certifying a purportedly official signature may be gleaned from ORS 43.110, which requires that the chief judge of a foreign court certify the validity of the certification by the legal keeper of judicial records.

Subsection (3). Under current Oregon practice, a judicial record of a foreign country may be proved by a copy of the record certified by the clerk or other person having legal custody of the record, with the seal of the court affixed, together with a certification by the chief judge or presiding magistrate that the certificate is in due form and made by the person having legal custody of the original. ORS 43.110. Subsection (3) of this section, in contrast, provides a much broader rule, in that it allows the copy to be attested or certified by any authorized official instead of restricting it to the custodian or chief judge only. Weinstein Evidence, section 902 (8) [01] at 902-31 (M. Bender 1976).

Subsection (4). ORS 43.340 and 43.350 are examples of Oregon law in accord with the principles set forth in subsection (4) of this section.

Subsection (5). Numerous existing Oregon statutes have the same basic effect, except that subsection (5) of this section requires only that the books or publications purport to be printed by public authority. See subsections (1), (2), (4) and (5) of ORS 43.330 and 43.310. Thus, any reputable private printer's version should be accepted since typically it is such versions upon which the bench and bar rely.

Subsection (6). Subsection (6) of this section is consistent with current Oregon law.

Subsection (7). Subsection (7) of this section is consistent with current Oregon law. See ORS 604.180 which provides that the brand of any animal is prima facie evidence that the animal belongs to the owner of the brand.

Subsection (8). Subsection (8) of this section is consistent with current Oregon law. See ORS 93.380.

Subsection (9). Four specific provisions of the Oregon Uniform Commercial Code are relevant to the discussion of the method of authentication outlined in subsection (9) of this section. ORS 71.1020 makes certain documents required by an existing contract "prima facie" evidence of their own authenticity. ORS 73.3070 and 78.1050 presume the genuineness of signatures on negotiable instruments. ORS 73.5100 provides that a formal certificate of protest, a stamp by the drawee that the payment was refused, or bank records are all admissible in evidence and create a presumption of dishonor.

Subsection (10). Subsection (10) of this section is consistent with existing Oregon law.

Subsection (11). Subsection (11) of this section provides methods for authenticating Indian tribal documents which were not provided for under existing law. In State v. Gowdy, 1 Or App 424, 462 P2d 461 (1969), tribal regulations were admitted into evidence after certification under the official seal of the Yakima Indian agency through the U.S. Department of the Interior. That procedure is similar to the one set forth in paragraph (b) of subsection (11) of this section.

SECTION 70. Rule 903. Subscribing witness' testimony unnecessary. The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 903 of the Federal Rules of Evidence.

B. Summary

The common law required that attesting witnesses be produced or accounted for. Once the subscribing or attesting witness had been produced or his absence satisfactorily explained, authenticity could be demonstrated in the usual manners, including the testimony of others who saw the document executed or proof of the genuineness of the signature and facts surrounding the execution or circumstantial evidence. Weinstein Evidence, section 903 [01] at 903-4 (M. Bender 1976). Today the requirement has generally been abolished except with respect to documents which must be attested to be valid, e.g. wills in some states. McCormick, Evidence, section 220 (2d ed 1972). Uniform Rule 71; California Evidence Code, section 1411; Kansas Code of Civil Procedure, section 60-468.

C. Relationship to Existing Law

This section is consistent with existing Oregon law even though ORS 113.005, under most circumstances, requires the affidavit or testimony of witnesses attesting to a will. However, this section only eliminates the need for the subscribing witness where the testimony is not required "by the laws of the jurisdiction whose laws govern the validity of the writing."

ARTICLE X.
CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

SECTION 71. Rule 1001. Definitions. As used in sections 71 to 78 (Rules 1001 to 1008) of this Act, unless the context requires otherwise:

(1) Duplicate. "Duplicate" means a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, by mechanical or electronic re-recording, by chemical reproduction or by other equivalent techniques which accurately reproduce the original.

(2) Original. "Original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(3) Photographs. "Photographs" includes still photographs, X-ray films, video tapes and motion pictures.

(4) Writings and recordings. "Writings" and "recordings" mean letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording or other form of data compilation.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on Rule 1001 of the Federal Rules of Evidence.

B. Summary

Subsection (1). This subsection defines "duplicates" as counterparts produced by the same impression as the original, or from the same matrix, or by means of photography, or by mechanical or electronic re-recording, or by chemical reproductions or by other equivalent techniques which accurately reproduce the original. The definition excludes copies subsequently produced manually, whether handwritten or typed, and includes only copies produced by methods possessing an accuracy which virtually eliminates the possibility of error.

Subsection (2). An "original" is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer, any printout or other output readable by sight, shown to reflect the data accurately, is an "original." Similarly, a carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer.

Subsection (3). "Photographs" include all forms of chemically or magnetically produced pictorial representations.

Subsection (4). Traditionally, the "best evidence rule" was one essentially related to writings. Modern techniques have expanded methods of storing data, yet

the essential form which the information ultimately assumes for usable purposes is words and figures. Therefore, the considerations underlying the rule dictate its expansion to include computers, photographic systems and other modern developments.

C. Relationship to Existing Law

This section works a considerable change in existing Oregon law. There are no statutes defining terms used in the application of the "best evidence rule." In the early case of Heneky v. Smith, 10 Or 349 (1882), the Oregon Supreme Court limited the application of the "best evidence rule" to "writing." In the almost 100 years since that decision, there have been no cases specifically dealing with the issue of whether recordings or photographs are "writings" for the purpose of the rule. In so far as they are not, this section broadens Oregon law to include computer printouts, X-rays and motion pictures as "writings" and "originals."

Under subsection (2) of this section, an "original" is the original or any counterpart intended to have the same effect. For example, executed copies, computer printouts and copies of sales tickets given to customers are considered originals. In First National Bank v. Jamison, 63 Or 594, 129 P 433 (1913) and Hall v. Pierce, 210 Or 98, 309 P2d 998 (1956), carbon copies of documents were held to be "originals."

Under subsection (1) of this section, a "duplicate" means any counterpart produced by any means which accurately reproduce the original. In Oregon, however, the term "duplicate" signifies more than a mere copy; the instruments must be identical not only verbally but also in legal import. Nicholas v. Title & Trust Co., 76 Or 226, 154 P 391 (1916). Under subsection (2) of this section, a current Oregon "duplicate" would become an "original."

SECTION 72. Rule 1002. Requirement of original. To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in sections 71 to 78 (Rules 1001 to 1008) of this Act or other law.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on Rule 1002 of the Federal Rules of Evidence. The words "sections 71 to 78 of this Act or other law" have replaced the federal phrase "these rules or by Act of Congress."

B. Summary

The statement of the rule in this section is one requiring production of the original of a document to prove its contents, expanded to include writings, recordings and photographs, as defined in section 71 (Rule 1001) of this Act.

Application of this section requires a resolution of the question whether contents are sought to be proved. If the contents of a document are not sought to be proved, this section does not apply. Nor does this section apply to testimony that books or records have been examined and found not to contain any reference to a designated matter. However, situations will arise in which contents are

sought to be proved. Copyright, defamation and invasion of privacy by photograph fall in this category. Contents must be proved in situations in which a picture is offered as having independent probative value; an automatic photograph of a bank robber, for example.

The most commonly encountered example of the latter situation is the X-ray. It should be noted, however, that section 59 (Rule 703) of this Act allows an expert to give an opinion based on matters not in evidence, and this section must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under subsection (6) of section 64 (Rule 803) of this Act commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records under this section.

C. Relationship to Existing Law

Except as expanded to include recordings and photographs, the statement of the "best evidence rule" in this section is the same as the current rule in Oregon. ORS 41.610.

If the terms or contents of a writing are directly in issue, the original document must be produced and secondary evidence of the contents is excluded unless sufficient reason is given for its nonproduction. ORS 41.610 and 41.640.

The "best evidence rule" is not applicable if execution, delivery or existence of a document is at issue. Nor does it apply to issues involving the appearance or condition of physical objects. Heneky v. Smith, 10 Or 349 (1882).

The rule only applies when the actual terms or conditions of the document are in issue. Dockery v. Gardner, 141 Or 64, 15 P2d 481 (1932); Lumbermens Mutual Casualty Company v. Jamieson, 251 Or 608, 447 P2d 384 (1968).

It is also the rule in Oregon that the "best evidence rule" does not apply to testimony that records have been examined and found not to contain any reference to a designated matter. State v. Nano, 273 Or 366, 543 P2d 660 (1975). Under the holding of the case, such testimony is not proof of the contents or terms of a document, and, therefore, the "best evidence rule" has no application.

SECTION 73. Rule 1003. Admissibility of duplicates. A duplicate is admissible to the same extent as an original unless:

(1) A genuine question is raised as to the authenticity of the original; or

(2) In the circumstances it would be unfair to admit the duplicate in lieu of the original.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 1003 of the Federal Rules of Evidence.

B. Summary

When the only concern is with getting the words or other contents before a court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in subsection (1) of section 71 (Rule 1001) of this Act, a "duplicate" possesses this character.

Under this section, duplicates are given the status of originals if: (1) the method of reproduction assures the accuracy of the copy; (2) a genuine question is not raised as to the authenticity of the original; and (3) it would not be unfair to do so. For example, a photocopy would be admissible to prove the contents of the original document while a handwritten or typed copy would not be admissible.

C. Relationship to Existing Law

This section is consistent with current Oregon law.

In State v. White, 4 Or App 151, 477 P2d 917 (1970), defendant was convicted of knowingly uttering and publishing a forged money order. A photocopy of a stolen money order inventory was admitted to show the forged order used by the defendant was the same. The court held that when there is no good faith dispute about the accuracy of the document presented, the "mystical ideal" of seeking the original will not be pursued.

Under paragraph (d) of subsection (1) of ORS 41.640 (1979 Replacement Part), a duplicate is admissible when the original is a record or other document of which a certified copy, or of which a photostatic, microphotographic or photographic reproduction, is expressly made evidence by statute. Examples of such statutes are ORS 41.720 (1979 Replacement Part), admissibility of reproductions of business records, and ORS 41.730 (1979 Replacement Part), admissibility of telegraphic copies of certified instruments.

SECTION 74. Rule 1004. Admissibility of other evidence of contents. The original is not required, and other evidence of the contents of a writing, recording or photograph is admissible when:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(2) Original not obtainable. An original cannot be obtained by any available judicial process or procedure;

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording or photograph is not closely related to a controlling issue.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 1004 of the Federal Rules of Evidence.

B. Summary

Basically, the "best evidence rule" is a rule of preference: If failure to produce the original is satisfactorily explained, secondary evidence is admissible. This section specifies the circumstances under which production of the original is excused.

In an effort to avoid unwarranted complexities, this section recognizes no degrees of secondary evidence. It is believed that the normal motivation of a party to present the most convincing evidence possible makes an extended scheme of preferences unnecessary.

Subsection (1). Loss or destruction of the original, unless due to the bad faith of a proponent, is a satisfactory explanation of nonproduction.

Subsection (2). When the original is in the possession of a third party, inability to procure it from him by resort to process or other judicial procedure is a sufficient explanation of nonproduction. Judicial procedure includes subpena duces tecum as an incident to the taking of a deposition in another jurisdiction.

Subsection (3). A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can prevent the admission of secondary evidence by offering the original.

Subsection (4). Situations will arise in which no good purpose is served by production of the original. Numerous cases are collected in McCormick, Evidence, section 200, p 412, (2d ed 1972).

C. Relationship to Existing Law

This section is generally consistent with current Oregon law. Paragraphs (a) and (b) of ORS 41.640 generally reflect the exceptions set forth in this section.

ORS 41.640 (1979 Replacement Part) reads as follows:

> *Proof of contents of a writing. (1) There shall be no evidence of the contents of a writing, other than the writing itself, except:*
>
> *(a) When the original is in the possession of the party against whom the evidence is offered, and he withholds it under the circumstances mentioned in ORS 41.610.*
>
> *(b) When the original cannot be produced by the party by whom the evidence is offered, in a reasonable time, with the proper diligence, and its absence is not owing to his neglect or default. . . .*

Paragraph (a) of ORS 41.640 permits use of evidence other than the original document where the adverse party has possession but withholds it after reasonable notice to produce it has been given. ORS 41.610 (1979 Replacement Part) does not require such notice where the writing itself is a notice or where the writing was wrongfully obtained or withheld by the adverse party.

Paragraph (b) of ORS 41.640 may be traced to Wiseman v. Northern Pacific Railroad, 20 Or 425, 26 P 272 (1891), an early Oregon case. In Wiseman, the Oregon Supreme Court set out the general guidelines:

If the cause of action or defense is founded on the supposed writing, the party offering the evidence will be required to show a greater degree of diligence in the attempt to produce the original than if it is desired to be used as evidence in some collateral matter. The proof of search and proof of loss required is always proportionate to the character and value of the paper supposed to be lost . . . .

No precise rule has been or can be laid down as to what shall be considered a reasonable effort (to produce the original), but the party alleging the loss or destruction of the document is expected to show 'that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him . . . .'

In a more contemporary case, the Supreme Court looked to Wiseman and expressed approval of its doctrine, while expanding it to vest the "ultimate determination of the sufficiency of the search" entirely with the discretion of the trial court. Stipe v. First National Bank, 208 Or 251, 262, 301 P2d 175 (1956).

For other cases dealing with the introduction of secondary evidence when the original is in the possession of an opponent, see Schreyer v. Turner Flouring Co., 29 Or 1, 43 P 719 (1896) and Sugar Pine Lumber Co. v. Garrett, 28 Or 168, 42 P 129 (1895).

For cases dealing with the introduction of secondary evidence when the original is not obtainable, lost or destroyed, see Velasque v. Freeman, 244 Or 40, 415 P2d 514 (1966) and Stipe v. First National Bank, supra.

The collateral facts exception to the best evidence rule is in a state of uncertainty in Oregon. Under this exception, a writing involved in a case only collaterally may be proved without production of the original. If reference to a writing is merely incidental, the need for perfect exactitude is outweighed by the interest of expedition of the trial. The determination of whether or not a writing is "collateral" is left to the trial court's discretion and should involve a consideration of the centrality of the writing to the principal issues, the existence of a genuine dispute as to the contents of the writing and the complexity of the relevant features of the writing. McCormick, Evidence, section 234 (2d ed 1972).

This exception has been recognized in Oregon, but the exact holding of the court is in doubt by a reference to a showing of diligence. Peters v. Queen City Ins. Co., 63 Or 382, 126 P 1005 (1912).

Subsection (4) of this section eliminates the doubt and clarifies existing law by removing any necessity for a showing of diligence when applying the collateral facts exception.

SECTION 75. Rule 1005. Public records. The contents of an official record or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with section 69 (Rule 902) of this Act. If such a copy cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 1005 of the Federal Rules of Evidence.

B. Summary

Since removing public records from their usual place of storage would cause serious inconvenience to the public and to the records' custodian, this section provides that no explanation need be given for failure to produce the original of a public record. To prevent the introduction of all kinds of secondary evidence of the contents of public records, the section gives preference to certified or compared copies.

C. Relationship to Existing Law

This section is consistent with paragraph (c) of subsection (1) of ORS 41.640 (1979 Replacement Part) and ORS 192.050.

ORS 41.640 allows introduction of copies or reproductions of an original document in the custody of a public officer. ORS 192.050 provides that a photocopy of any public record in official custody shall be deemed an original.

By admitting that a writing offered in evidence was a correct copy of a public record, the requirement of producing the original or a certified copy was waived. First National Bank v. Miller, 48 Or 587, 87 P 892 (1906).

The Advisory Committee does not believe that this section changes current Oregon law.

SECTION 76. Rule 1006. Summaries. The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 1006 of the Federal Rules of Evidence.

B. Summary

The Advisory Committee believes that the admission of voluminous books, records or documents offers the only practical way of making their contents available to judge and jury. This section, with appropriate safeguards, provides that the originals of voluminous documents need not be produced.

C. Relationship to Existing Law

This section is consistent with current Oregon practice, and the Advisory Committee, by the adoption of the section, does not intend to change current Oregon law.

Paragraph (e) of subsection (1) of ORS 41.640 (1979 Replacement Part) provides that, for judicial convenience, the originals of voluminous documents need not be produced.

In Scott v. Astoria Railroad Co., 43 Or 26, 72 P 594 (1903), it was held that a calculation by an expert witness of the average daily rainfall on Astoria, Oregon, over a period of 18 years was admissible, since to have examined the actual records would have unduly burdened the court.

The Oregon Supreme Court, in Hubble v. Hubble, 130 Or 177, 279 P 550 (1929), a case in which it was necessary to determine whether a lease had been paid, allowed a bookkeeper to testify that the lease was treated as paid up. The court held that when books are voluminous, intricate or uncertain, resort may be had to the testimony of an expert bookkeeper to explain the entries and true state of accounts.

In Carrey v. Haun, 111 Or 586, 227 P 315 (1924), a statement of the affairs of a business firm prepared by an expert accountant was held admissible. However, if the summary is not the general result of the whole, or if there is no showing that the originals consisted of numerous accounts which could not be examined in court without great loss of time, the summary will not be admissible. Loggers & Contractors Machinery Co. v. Owen, 193 Or 9, 238 P 2d 309 (1951).

In State Highway Commission v. DeLong Corporation, 9 Or App 550, 495 P2d 1215 (1972), a case in which an immense volume of oral and documentary evidence was necessary to properly understand the controversy, the court, in response to defendant's challenge to the admission of summaries of other writings and records, held that summaries taken from other evidence, material or documents available to the parties for examination are admissible. The court did not limit summaries to writings composed of words and figures, but allowed the admission of other types of "graphic representations" such as charts.

See also Shephard v. Kenwisher and Hub Lumber Company, 273 Or 331, 541 P2d 439 (1975), in which it was held that, in order for a summary of accounting records to be admissible, all of the original records which set forth the facts and figures forming the basis for such a summary must be produced in court for inspection by the opposing party for the purpose of verifying the accuracy of the summary.

Other Oregon cases dealing with the voluminous writings exception to the best evidence rule are Smith v. Able, 211 Or 571, 316 P2d 793 (1957) and City of Hillsboro v. James and Yost, 240 Or 433, 420 P2d 511 (1965).

SECTION 77. Rule 1007. Testimony or written admission of party. Contents of writings, recordings or photographs may be proved by the testimony or deposition of the party against whom offered or by the party's written admission, without accounting for the nonproduction of the original.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is identical to Rule 1007 of the Federal Rules of Evidence.

B. Summary

This section limits the admissions exception to the best evidence rule to admissions made in the course of giving testimony or in writing.

The section may be thought by some to be unnecessary because admissions of a party litigant are generally admissible. However, a sworn statement by a party in which the party describes the contents of another document, which description is against his interest, can be objected to under both the hearsay and best evidence rules. The document could certainly be introduced as an admission by a party opponent. However, in the absence of this section, that portion of the statement describing the contents of another document would still be inadmissible under the best evidence rule. This section is intended to prevent such exclusion of evidence.

C. Relationship to Existing Law

The scope of the oral admissions exception to the best evidence rule in Oregon is unclear.

SECTION 78. Rule 1008. Functions of court and jury. When the admissibility of other evidence of contents of writings, recordings or photographs under sections 71 to 78 (Rules 1001 to 1008) of this Act depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with section 5 (Rule 104) of this Act. However, the issue is for the trier of fact to determine as in the case of other issues of fact when the issue raised is:

(1) Whether the asserted writing ever existed;

(2) Whether another writing, recording or photograph produced at the trial is the original; or

(3) Whether the other evidence of contents correctly reflects the contents.

ADVISORY COMMITTEE COMMENTARY

A. Derivation

This section is based on Rule 1008 of the Federal Rules of Evidence. The words "sections 71 to 78 of this Act" are substituted for the federal phrase "these rules."

B. Summary

Most preliminary questions of fact in connection with applying the rule preferring the original as evidence of contents are for the judge, under the general principles announced in section 5 (Rule 104) of this Act. Thus, the question whether the loss of the originals has been established, or of the fulfillment of other conditions specified in section 74 (Rule 1004) of this Act,

is for the judge. However, questions may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue. Levin, Authentication and Content of Writings, 10 Rutgers L Rev 632, 644 (1956). The latter portion of this section is designed to insure treatment of these situations as raising jury questions.

C. Relationship to Existing Law

Although there is no comparable current Oregon statute, the Advisory Committee believes that this section is consistent with current Oregon law.

In Rosendorf v. Hirschberg, 8 Or 240, 17 P 271 (1880), the court declared: "The paper being lost and a pretended copy being produced, this being secondary evidence, it was necessary for the party producing it to show that the original was lost and could not be produced. The question of loss was for the court. This being determined in the affirmative, then it was necessary to prove the copy." The court held that the question whether the writing produced was a copy of an original allegedly signed by the parties was for the jury.

ARTICLE XI.
MISCELLANEOUS PROVISIONS

NOTE: Section 79 was deleted. Subsequent sections were not renumbered.

JUDICIARY COMMITTEE COMMENTARY

The committee believed that ORS 41.950 to 41.980 properly belong in the Oregon Evidence Code, despite the fact that ORS 18.510 refers to them.

ADVISORY COMMITTEE PROPOSAL

SECTION 79. ORS 41.950 to 41.980 are added to and made a part of ORS chapter 18.

ADVISORY COMMITTEE COMMENTARY

ORS 41.950 to 41.980 are made a part of ORS chapter 18 because the Advisory Committee believes that the sections more appropriately belong in a chapter relating to judgments than in the Oregon Evidence Code. Clear organization requires that ORS 41.950 to 41.980 and ORS 18.510 be placed together in a single chapter of the Oregon Revised Statutes.

SECTION 80. Section 81 of this Act is added to and made a part of ORS 41.510 to 41.580.

SECTION 81. As used in ORS 41.510 to 41.580, "secondary evidence" means a copy, or oral evidence, of an original writing or object.

ADVISORY COMMITTEE COMMENTARY

This section is identical to ORS 41.060 (1979 Replacement Part). The Advisory Committee believes that, since the term "secondary evidence" appears only in ORS 41.520, 41.580 and 41.650, the term should be placed within the series of statutory sections to which it applies. ORS 41.650 is repealed under section 98 of this Act, and the defined term, therefore, only has applicability to ORS 41.510 to 41.580, relating to indispensable evidence and the Statute of Frauds.

SECTION 82. Section 83 of this Act is added to and made a part of ORS chapter 42.

SECTION 83. Except for the recital of a consideration, the truth of the facts recited from the recital in a written instrument shall not be denied by the

parties thereto, their representatives or successors in interest by a subsequent title.

ADVISORY COMMITTEE COMMENTARY

This section is based on subsection (3) of ORS 41.350 (1979 Replacement Part), relating to conclusive presumptions.

Since the Advisory Committee believes that conclusive presumptions are not true presumptions, but are expressions of a rule of law, the Advisory Committee decided to recodify certain existing conclusive presumptions as rules of law and insert them in an appropriate chapter outside the Oregon Evidence Code.

See the commentary to section 20 (Rule 311) of this Act.

SECTION 84. Section 85 of this Act is added to and made a part of ORS chapter 91.

SECTION 85. A tenant is not permitted to deny the title of the tenant's landlord at the time of the commencement of the relation.

ADVISORY COMMITTEE COMMENTARY

This section is based on subsection (5) of ORS 41.350 (1979 Replacement Part), relating to conclusive presumptions.

See the commentary to sections 20 (Rule 311) and 83 of this Act.

Section 86. ORS 41.270 is amended to read:

41.270. (1) Usage shall be proved by the testimony of at least two witnesses.

(2) Evidence may be given of usage to explain the true character of an act, contract or instrument when such true character is not otherwise plain, but usage is never admissible except as a means of interpretation.

ADVISORY COMMITTEE COMMENTARY

Subsection (2) of this section is identical to subsection (12) of ORS 41.900 (1979 Replacement Part). The subsection was added to ORS 41.270 for organizational clarity.

Section 87. ORS 41.905 is amended to read:

41.905 (1) A judgment of conviction or acquittal of a person charged with a traffic offense is not admissible in the trial of a subsequent civil action arising out of the same accident or occurrence to prove or negate the facts upon which such judgment was rendered.

(2) A plea of guilty by a person to a traffic offense may be admitted as evidence in the trial of a subsequent civil action arising out of the same accident or occurrence as an admission [against the interest] of the person entering the plea, and for no other purpose.

(3) Evidence of forfeiture of bail posted by a person as a result of a charge of a traffic offense shall not be admitted as evidence in the trial of a subsequent civil action arising out of the same accident or occurrence.

ADVISORY COMMITTEE COMMENTARY

This section was amended to delete the phrase "admission against . . . interest" which the Advisory Committee finds unsatisfactory because of the possible confusion with a "declaration against interest."

Section 88. ORS 107.600 is amended to read:

107.600. (1) All hearings, conferences and other proceedings held pursuant to circuit court exercise of conciliation jurisdiction pursuant to ORS 107.540 or 107.550 shall be held in private, and all persons other than officers of the court, conciliation services personnel, the spouses, their counsel and witnesses shall be excluded.

(2) All communications, verbal or written, between spouses and from spouses to counselors, the court, attorneys, doctors or others engaged in the conciliation proceedings, made in conciliation conferences, hearings and other proceedings had pursuant to the exercise of the court's conciliation jurisdiction shall be confidential [within the meaning of paragraph (e) of subsection (1) of ORS 44.040]. A spouse or any other individual engaged in conciliation proceedings shall not be examined in any civil or criminal action as to such communications. Exceptions to testimonial privilege otherwise applicable under sections 32 to 42 (Rules 503 to 514) of this 1981 Act do not apply to communications made confidential under this subsection.

(3) All records of the court with respect to exercise of conciliation jurisdiction shall be closed. However, any petition filed under ORS 107.550, any written reconciliation agreement between the spouses and any court order made in the matter may be opened to inspection by either spouse or [his] counsel upon written authorization by a judge of the court.

ADVISORY COMMITTEE COMMENTARY

ORS 107.600 is amended to delete a reference in subsection (2) of the section to repealed ORS 44.040, and to clarify the scope of the privilege created by subsection (2). The Advisory Committee believes that the purpose of subsection (2) is to protect all communications made during conciliation proceedings. Therefore, the subsection is amended to provide that those persons engaged in conciliation proceedings whose communications during those proceedings are not made confidential under particular statutes are granted a testimonial privilege as to such communications under ORS 107.600. Furthermore, the amendments to this section make inapplicable, in the context of conciliation proceedings, those exceptions to the lawyer-client, husband-wife, and physician and psychotherapist-patient privileges that would otherwise apply under sections 32 to 34 (Rules 503 to 505) of this Act. The amendments express the intent of the Advisory Committee

that an absolute prohibition against disclosure of communications made during conciliation proceedings be established.

Section 89. ORS 136.655 is amended to read:

136.655. (1) Except as provided in subsection (2) of this section, in all criminal actions in which the husband is the party accused, the wife is a competent witness and when the wife is the party accused, the husband is a competent witness; but neither husband nor wife in such cases shall be compelled or allowed to testify in such cases [unless by consent of both of them], except as provided in section 34 (Rule 505) of this 1981 Act.

(2) There is no privilege under this section, or under [paragraph (a) of subsection (1) of ORS 44.040] section 34 (Rule 505) of this 1981 Act in all criminal actions in which one spouse is charged with bigamy or with an offense or attempted offense against the person or property of the other spouse or of a child of either, or with an offense against the person or property of a third person committed in the course of committing or attempting to commit an offense against the other spouse.

ADVISORY COMMITTEE COMMENTARY

ORS 136.655 is amended to make it conform to the language and policy of section 34 (Rule 505) of this Act.

Section 90. ORS 162.055 is amended to read:

162.055. As used in ORS 162.055 to 162.425 and 162.465, unless the context requires otherwise:

(1) "Benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary.

(2) "Material" means that which could have affected the course or outcome of any proceeding or transaction. Whether a false statement is "material" in a given factual situation is a question of law.

(3) "Statement" means any representation of fact and includes a representation of opinion, belief or other state of mind where the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

(4) "Sworn statement" means any statement knowingly given under any form of oath or affirmation attesting to the truth of what is stated.

ADVISORY COMMITTEE COMMENTARY

ORS 162.055 is amended to make it clear that the definition of "sworn statement" in subsection (4) of the section includes any form of oath or affirmation that may be used in this state under section 45 (Rule 603) and section 46 (ORS 44.330) of this Act.

Section 91. ORS 165.845 is amended to read:

165.845. (1) Checks, duebills, promissory notes, bills of exchange and all orders or agreements for the payment or delivery of money or other thing of value may be made or drawn by telegraph, and when so made or drawn:

(a) Have the same force and effect to charge the maker, drawer, indorser or acceptor thereof;

(b) Create the same rights and equities in favor of the payee, drawee, indorsee, acceptor, holder or bearer thereof; and

(c) Are entitled to the same days of grace, as if duly made or drawn and delivered in writing.

(2) No person other than the maker or drawer thereof shall cause any such instrument to be sent by telegraph so as to charge any person thereby.

(3) [Except as provided in ORS 41.730,] Whenever the genuineness or execution of any such instrument received by telegraph is denied on oath by the person sought to be charged thereby, it is incumbent upon the party claiming under or alleging the same to prove the existence and execution of the original writing from which the telegraphic copy was transmitted.

(4) The original message shall in all cases be preserved in the telegraph office from which it is sent.

ADVISORY COMMITTEE COMMENTARY

ORS 165.845 is amended to delete the reference to ORS 41.730, a section repealed by this Act.

Section 92. ORS 192.500 is amended to read:

192.500. (1) The following public records are exempt from disclosure under ORS 192.410 to 192.500 unless the public interest requires disclosure in the particular instance:

(a) Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this paragraph shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation;

(b) Trade secrets. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service or to locate minerals or other substances, having commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it;

(c) Investigatory information compiled for criminal law purposes, except that the record of an arrest or the report of a crime shall not be confidential unless and only so long as there is a clear need in a particular case to delay disclosure in the course of an investigation. Nothing in this paragraph shall limit any right constitutionally guaranteed, or granted by statute, to disclosure or discovery in criminal cases;

(d) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination before the examination is given and if the examination is to be used again;

(e) Information consisting of production records, sale or purchase records or catch records, or similar business records of a private concern or enterprise, required by law to be submitted to or inspected by a governmental body to allow it to determine fees or assessments payable or to establish production quotas, and the amounts of such fees or assessments payable or paid, to the extent that such information is in a form which would permit identification of the individual concern or enterprise. Nothing in this paragraph shall limit the use which can be made of such information for regulatory purposes or its admissibility in any enforcement proceeding;

(f) Information relating to the appraisal of real estate prior to its acquisition;

(g) The names and signatures of employes who sign authorization cards or petitions for the purpose of requesting representation or decertification elections;

(h) Investigatory information relating to any complaint filed under ORS 659.040 or 659.045, until such time as the complaint is resolved under ORS 659.050, or a final administrative determination is made under ORS 659.060; and

(i) Investigatory information relating to any complaint or charge filed under ORS 243.676 and 663.180.

(2) The following public records are exempt from disclosure under ORS 192.410 to 192.500:

(a) Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employes of public bodies clearly outweighs the public interest in disclosure;

(b) Information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy;

(c) Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to

disclose the information, and when the public interest would suffer by the disclosure;

(d) Information or records of the Corrections Division, including the State Board of Parole, to the extent that disclosure thereof would interfere with the rehabilitation of a person in custody of the division or substantially prejudice or prevent the carrying out of the functions of the division, if the public interest in confidentiality clearly outweighs the public interest in disclosure;

(e) Records, reports and other information received or compiled by the Superintendent of Banks in the administration of ORS chapters 723, 724, 725 and 726, not otherwise required by law to be made public, to the extent that the interests of lending institutions, their officers, employes and customers in preserving the confidentiality of such information outweighs the public interest in disclosure;

(f) Reports made to or filed with the court under ORS 137.075 or 137.530;

(g) Any public records or information the disclosure of which is prohibited by federal law or regulations;

(h) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under ORS 1.440, 7.211, 7.215, 41.675, [44.040] sections 32 to 42 (Rules 503 to 514) of this 1981 Act, 57.850, 135.155, 146.780, 173.230, 179.495, 181.540, 251.205, 306.129, 308.290, 314.835, 314.840, 336.195, 341.290, 342.850, 344.600, 346.165, 346.167, 351.065, 411.320, 416.230, 418.135, 418.770, 419.567, 432.060, 432.120, 432.425, 432.430, 469.090, 474.160 (1974 Replacement Part), 476.090, 482.141, 483.610, 656.702, 657.665, 706.720, 706.730, 715.040, 722.414, 731.264, 734.650, 734.830 or 744.017;

(i) Public records or information described in this section, furnished by the public body originally compiling, preparing or receiving them to any other public officer or public body in connection with performance of the duties of the recipient, if the considerations originally giving rise to the confidential or exempt nature of the public records or information remain applicable; and

(j) Records of the Energy Facility Siting Council concerning the review or approval of security programs pursuant to ORS 469.530 (3).

(3) If any public record contains material which is not exempt under subsection (1) or (2) of this section, as well as material which is exempt from disclosure, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination.

ADVISORY COMMITTEE COMMENTARY

This is a housekeeping amendment; ORS 44.040 (1979 Replacement Part) is repealed by this Act, and therefore the reference to the section in paragraph (h) of subsection (2) of ORS 192.500 is replaced with a reference to the sections of this Act which relate to privileges.

Section 93. ORS 336.185 is amended to read:

336.185. For purposes of ORS [44.040 and] 336.185 to 336.215, the following definitions will apply:

(1) "Student records" include all records relating to students maintained by any elementary, secondary school or education service district.

(2) "Student behavioral records" are student records which include psychological tests, personality evaluations, records of conversations and any written transcript of incidents relating specifically to student behavior.

(3) "Student progress records" are student records which include transcripts of grades and courses taken, records of attendance, tests relating specifically to achievement or measurement of ability, and records of health.

(4) "Superintendent" means the highest ranking administrative officer in a school district or an educational institution, or in the absence of the superintendent, the person designated to fulfill the functions.

(5) "Board" means the board of directors of a school district or other educational institution.

ADVISORY COMMITTEE COMMENTARY

ORS 336.185 is amended to delete the reference to ORS 44.040, a section repealed by this Act. A reference to those sections in this Act relating to privileges has not replaced the deleted reference because none of the terms defined by this section appear in those sections. The defined terms did not appear in ORS 44.040 either.

Section 94. ORS 418.750 is amended to read:

418.750. Any public or private official having reasonable cause to believe that any child with whom [he] the official comes in contact in [his] an official capacity has suffered abuse, or that any [adult] person with whom [he] the official comes in contact in [his] an official capacity has abused a child shall report or cause a report to be made in the manner required in ORS 418.755. Nothing contained in [ORS 44.040] sections 32 to 42 (Rules 503 to 514) of this 1981 Act shall affect the duty to report imposed by this section, except that a psychiatrist, psychologist, clergyman or attorney shall not be required to report such information communicated [to him] by [an adult] a person if the communication is privileged under [ORS 44.040] sections 32 to 42 (Rules 503 to 514) of this 1981 Act.

ADVISORY COMMITTEE COMMENTARY

ORS 418.750 is amended to delete references to repealed ORS 44.040 and to substitute therefor references to the appropriate sections of this Act. In addition, because the members of the Advisory Committee believe that all cases of child abuse should be reported, without regard to whether the abuse was committed by an adult or a minor, the section is amended to require a report of child abuse to be made whenever an official has reasonable cause to believe that any person, rather than any adult, with whom he comes in contact in his official capacity has abused a child. This section is further amended to make the testimonial privileges created under sections 32 to 42 (Rules 503 to 514) of this Act apply

in the context of child abuse reporting without regard to the age of the person communicating child abuse information to a psychiatrist, psychologist, clergyman or attorney.

Section 95. ORS 418.775 is amended to read:

418.775. (1) In the case of abuse of a child, as defined in ORS 418.740, the psychotherapist-patient privilege, the physician-patient privilege, the privileges extended to nurses, to staff members of schools and to registered clinical social workers and the husband-wife privilege[, and the privilege extended to staff members of schools and to nurses under ORS 44.040] created by sections 33, 33a, 33b, 33c, 33d and 34 of this 1981 Act shall not be a ground for excluding evidence regarding a child's abuse, or the cause thereof, in any judicial proceeding resulting from a report made pursuant to ORS 418.750.

(2) In any judicial proceedings resulting from a report made pursuant to ORS 418.750, either spouse shall be a competent and compellable witness against the other.

ADVISORY COMMITTEE COMMENTARY

ORS 418.775 is amended to delete references to ORS 44.040 which is repealed under section 98 of this Act. The appropriate references to the privileges created by this Act have been inserted.

Section 96. ORS 675.010 is amended to read:

675.010. As used in [ORS 44.040 and] ORS 675.010 to 675.150, unless the context requires otherwise:

(1) "Accredited college or university" means any college or university offering a full-time resident graduate program of study in psychology leading to the doctoral degree or a comparable program as determined by the board.

(2) "Board" means the State Board of Psychologist Examiners.

(3) "Licensed psychologist" means a person licensed to practice psychology under the provisions of ORS 675.010 to 675.150.

(4) "Practice of psychology" means the rendering or offering to render to individuals, groups, organizations or the public any psychological service while representing [himself] oneself to be a psychologist, involving the application of principles, methods and procedures of understanding, predicting and influencing behavior, such as principles pertaining to learning, perception, motivation, thinking, emotions and interpersonal relationship; and the methods and procedures of interviewing, counseling, psychotherapy and hypnosis; of constructing, administering and interpreting tests of mental abilities, aptitudes, interests, attitudes, personality characteristics, emotions and motivation. The application of such principles and methods includes, but is not limited to, the diagnosis, prevention, treatment and amelioration of psychological problems and emotional and mental disorders of individuals and groups. Also, the offering for a fee of teaching, consultation, psychotherapy, psychodiagnostic and research services in relation to the use or development of psychological principles of such services.

(5) "State" means any state or territory of the United States and the District of Columbia.

ADVISORY COMMITTEE COMMENTARY

ORS 675.010 is amended to delete a reference to repealed ORS 44.040. A reference to sections 32 to 42 (Rules 503 to 514) of this Act has not replaced the deleted reference because none of the terms defined by this section appear in those sections.

Section 97. ORS 722.442 is amended to read:

722.442. (1) Except as provided by [ORS 44.040] sections 32 to 42 of this 1981 Act, the supervisor and any of [his] the supervisor's examiners, auditors and appraisers:

(a) Shall have free access to all books and records of an association, its subsidiaries and affiliates, that relate to its business, and the books and records kept by any officer, agent or employe, relating to or upon which any record of its business is kept;

(b) May subpena witnesses and administer oaths or affirmations in the examination of any director, officer, agent or employe of an association, its subsidiaries or affiliates or of any other person in relation to its affairs, transactions and conditions; and

(c) May require the production of records, books, papers, contracts and other documents.

(2) Each witness who appears before the supervisor under a subpena shall receive the fees and mileage provided for witnesses in civil cases in the circuit court.

(3) If a person fails to comply with a subpena so issued or a party or witness refuses to testify on any matters, the judge of the circuit court for any county, on the application of the supervisor, shall compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpena issued from such court or a refusal to testify in such court.

ADVISORY COMMITTEE COMMENTARY

ORS 722.442 is amended to delete a reference to repealed ORS 44.040 and to substitute therefor references to the appropriate sections of this Act.

Section 97a. ORCP 59C is amended to read:

C. Deliberation.

C.(1) Exhibits. Upon retiring for deliberation the jury may take with them all exhibits received in evidence, except depositions.

C.(2) Written statement of issues. Pleadings shall not go to the jury room. The court may, in its discretion, submit to the jury an impartial written statement summarizing the issues to be decided by the jury.

C.(3) Copies of documents. Copies may be substituted for any parts of public records or private documents as ought not, in the opinion of the court, to be taken from the person having them in possession.

C.(4) Notes. Jurors may take notes of the testimony or other proceeding on the trial and may take such notes into the jury room.

C.(5) Custody of and communications with jury. After hearing the charge, the jury shall retire for deliberation. When they retire, they must be kept together in some convenient place, under the charge of an officer, until they agree upon their verdict or are discharged by the court. Unless by order of the court, the officer must not suffer any communication to be made to them, or make any personally, except to ask them if they are agreed upon a verdict, and the officer must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon. Before any officer takes charge of a jury, this subsection shall be read to the officer who shall be then sworn to follow its provisions to the utmost of such officer's ability.

C.(6) Juror's use of private knowledge or information. A juror shall not communicate any private knowledge or information that the juror may have of the matter in controversy to other jurors[, except when called as a witness,] nor shall the juror be governed by the same in giving his or her verdict.

JUDICIARY COMMITTEE COMMENTARY

The Judiciary Committee amended ORCP 59C.(6) to delete the words "except when called as a witness" because section 49 (Rule 606) prohibits calling a juror as a witness.

SECTION 98. ORS 41.020, 41.030, 41.040, 41.050, 41.060, 41.070, 41.080, 41.090, 41.100, 41.120, 41.130, 41.140, 41.150, 41.210, 41.220, 41.230, 41.240, 41.250, 41.260, 41.280, 41.310, 41.320, 41.330, 41.340, 41.350, 41.360, 41.410, 41.420, 41.430, 41.440, 41.450, 41.460, 41.470, 41.480, 41.610, 41.640, 41.650, 41.670, 41.680, 41.690, 41.700, 41.710, 41.720, 41.730, 41.810, 41.820, 41.830, 41.840, 41.850, 41.860, 41.870, 41.890, 41.900, 44.020, 44.030, 44.040, 44.050, 44.060, 44.070, 44.095, 44.310, 44.330, 44.340, 44.350, 44.360, 45.510, 45.520, 45.530, 45.540, 45.550, 45.560, 45.570, 45.580, 45.590, 45.600, 45.630 and 163.475 are repealed.

SECTION 99. This Act amends statute sections repealed by chapter 842, Oregon Laws 1977. Any statute section amended by this Act that is repealed by chapter 842, Oregon Laws 1977, remains subject to the operative date of the repeal in chapter 842, Oregon Laws 1977, if the repeal becomes operative, and to applicable provisions of sections 50 and 51, chapter 842, Oregon Laws 1977, and ORS 182.605 to 182.635.

SECTION 100. Captions and headings. The article and section headings or captions included in this Act are used only for convenience in locating or explaining provisions of this Act and are not intended to be part of the statutory law of the State of Oregon.

HOUSE JUDICIARY COMMITTEE
HB 2030 - Exhibit B
January 22, 1981 - 3:15 p.m.
345-page exhibit
presented by staff
OVER-SIZED EXHIBIT

FEDERAL RULES OF EVIDENCE

FOR

UNITED STATES COURTS

AND

MAGISTRATES

Effective July 1, 1975

As Amended to April 1, 1979

also includes

UNIFORM RULES OF EVIDENCE

WEST PUBLISHING CO

Joint Interim Judiciary Comm.
347 State Capitol
Salem, Oregon 97310
(503) 378-8833

8091

FEDERAL RULES OF EVIDENCE for UNITED STATES COURTS and MAGISTRATES

Approved January 2, 1975
Effective July 1, 1975
As Amended to April 1, 1979

with

Notes by the Federal Judicial Center,
Pertinent Advisory Committee Notes and
Relevant Legislative History

and

An Appendix of Deleted and Superseded Materials

also

UNIFORM RULES OF EVIDENCE

with

Complete Indexes to the Federal Rules of Evidence and the Uniform Rules of Evidence

ST. PAUL, MINN.
WEST PUBLISHING CO.
1979

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FOREWORD

The Federal Judicial Center has caused this compilation to be prepared for the use of the bench and bar at the request of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Professor Edward W. Cleary, who was the Reporter to the Advisory Committee on Rules of Evidence, prepared the compilation, and it has been reviewed by Judge Albert B. Maris, the former Chairman of the Standing Committee, Judge Roszel C. Thomsen, the present Chairman of the Standing Committee, Judge Charles W. Joiner, who was a member of the Advisory Committee and is now a member of the Standing Committee, and Richard M. Mischke, a member of the staff of the Center.

We hope that placing after each rule as enacted by the Congress (1) the original Advisory Committee Note (with such deletions as are required by any amendment made by Congress to the rule), and (2) the legislative history of the rule (including material from committee reports and floor debate dealing with the rule) will ease the task of judges and others in construing the rules.

WALTER E. HOFFMAN, Director

Federal Judicial Center

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PUBLIC LAW 93-595; 88 STAT. 1926

[H. R. 5463]

An Act to establish rules of evidence for certain courts and proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The following rules shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act. These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply.

[Section 1. The Federal Rules of Evidence have been adopted to read as follows:]

FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope.
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Rule 101.

SCOPE

These rules govern proceedings in the courts of the United States and before United States magistrates, to the extent and with the exceptions stated in rule 1101.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

Rule 1101 specifies in detail the courts, proceedings, questions, and stages of proceedings to which the rules apply in whole or in part.

Rule 102.

PURPOSE AND CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and pro-

motion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

For similar provisions see Rule 2 of the Federal Rules of Criminal Procedure, Rule 1 of the Federal Rules of Civil Procedure, California Evidence Code § 2, and New Jersey Evidence Rule 5.

Rule 103.

RULINGS ON EVIDENCE

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended by substituting "court" in place of "judge," with appropriate pronominal change.

Advisory Committee's Note

Subdivision (a) states the law as generally accepted today. Rulings on evidence cannot be assigned as error unless (1) a substantial right is affected, and (2) the nature of the error was called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures. The objection and the offer of proof are the techniques for accomplishing these objectives. For similar provisions see Uniform Rules 4 and 5; California Evidence Code §§ 353 and 354; Kansas Code of Civil Procedure §§ 60–404 and 60–405. The rule does not purport to change the law with respect to harmless error. See 28 USC § 2111, F.R.Civ.P. 61, F.R.Crim.P. 52, and decisions construing them. The status of constitutional error as harmless or not is treated in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), reh. denied *id.* 987, 87 S.Ct. 1283, 18 L.Ed.2d 241.

Subdivision (b). The first sentence is the third sentence of Rule 43(c) of the Federal Rules of Civil Procedure [1] virtually verbatim. Its purpose is to reproduce for an appellate court, insofar as possible, a true reflection of what occurred in the trial court. The second sentence is in part derived from the final sentence of Rule 43(c).[1] It is designed to resolve doubts as to what testimony the witness would have in fact given, and, in nonjury cases, to provide the appellate court with material for a possible final disposition of the case in the event of reversal of a ruling which excluded evidence. See 5 Moore's Federal Practice § 43.11 (2d ed. 1968). Application is made discretionary in view of the practical impossibility of formulating a satisfactory rule in mandatory terms.

Subdivision (c). This subdivision proceeds on the supposition that a ruling which excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence nevertheless comes to the attention of the jury. Bruton v. United States, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968). Rule 43(c) of the Federal Rules of Civil Procedure [1] provides: "The court may require the offer to be made out of the hearing of the jury." In re McConnell, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962), left some doubt whether questions on which an offer is based must first be asked in the presence of the jury. The subdivision answers in the negative. The judge can foreclose a particular line of testimony and counsel can protect his record without a series of questions before the jury, designed at best to waste time and at worst "to waft into the jury box" the very matter sought to be excluded.

Subdivision (d). This wording of the plain error principle is from Rule 52(b) of the Federal Rules of Criminal Procedure. While judicial unwillingness to be constricted by mechanical breakdowns of the adversary system has been more pronounced in criminal cases, there is no scarcity of decisions to the same effect in civil cases. In general, see Campbell, Extent to Which Courts of Review Will Consider

1. Rule 43(c) of the Federal Rules of Civil Procedure was deleted by order of the Supreme Court entered on November 20, 1972, 93 S.Ct. 3073, 3075, 3076, 3077, 34 L.Ed.2d lxv, ccv, ccviii, which action was affirmed by the Congress in P.L. 93–595 § 3 (January 2, 1975).

Questions Not Properly Raised and Preserved, 7 Wis.L.Rev. 91, 160 (1932); Vestal, Sua Sponte Consideration in Appellate Review, 27 Fordham L.Rev. 477 (1958–59); 64 Harv.L.Rev. 652 (1951). In the nature of things the application of the plain error rule will be more likely with respect to the admission of evidence than to exclusion, since failure to comply with normal requirements of offers of proof is likely to produce a record which simply does not disclose the error.

Rule 104.

PRELIMINARY QUESTIONS

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended by substituting "court" in place of "judge," with appropriate pronominal change, and by adding to subdivision (c) the concluding phrase, "or when an accused is a witness, if he so requests." [1]

Advisory Committee's Note

Subdivision (a). The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? In each instance the admissibility of evidence will turn upon the answer to the question of the existence of the condition. Accepted practice, incorporated in the rule, places on the judge the responsibility for these determinations. McCormick § 53; Morgan, Basic Problems of Evidence 45–50 (1962).

To the extent that these inquiries are factual, the judge acts as a trier of fact. Often, however, rulings on evidence call for an evaluation in terms of a legally set standard. Thus when a hearsay statement is offered as a declaration against interest, a decision must be made whether it possesses the required against-interest characteristics. These decisions, too, are made by the judge.

In view of these considerations, this subdivision refers to preliminary requirements generally by the broad term "questions," without attempt at specification.

This subdivision is of general application. It must, however, be read as subject to the special provisions for "conditional relevancy" in subdivision (b) and those for confessions in subdivision (c).

If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n. 8, points out that the authorities are "scattered and inconclusive," and observes:

"Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay."

This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest. Again, common practice calls for considering the testimony of a witness, particularly a child, in determining competency. Another example is the requirement of Rule 602 dealing with personal knowledge. In the case of hearsay, it is enough, if the declarant "so far as appears [has] had an opportunity to observe the fact declared." McCormick, § 10, p. 19.

If concern is felt over the use of affidavits by the judge in preliminary hearings on admissibility, attention is directed to the many important judicial determinations made on the basis of affidavits. Rule 47 of the Federal Rules of Criminal Procedure provides:

"An application to the court for an order shall be by motion. . . . It may be supported by affidavit."

The Rules of Civil Procedure are more detailed. Rule 43(e), dealing with motions generally, provides:

"When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

1. The effect of the amendment was to restore language included in the 1971 Revised Draft of the Proposed Rules but deleted before the rules were presented to and prescribed by the Supreme Court.

Rule 4(g) provides for proof of service by affidavit. Rule 56 provides in detail for the entry of summary judgment based on affidavits. Affidavits may supply the foundation for temporary restraining orders under Rule 65(b).

The study made for the California Law Revision Commission recommended an amendment to Uniform Rule 2 as follows:

"In the determination of the issue aforesaid [preliminary determination], exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege." Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII, Hearsay), Cal.Law Revision Comm'n, Rep., Rec. & Studies, 470 (1962). The proposal was not adopted in the California Evidence Code. The Uniform Rules are likewise silent on the subject. However, New Jersey Evidence Rule 8(1), dealing with preliminary inquiry by the judge, provides:

"In his determination the rules of evidence shall not apply except for Rule 4 [exclusion on grounds of confusion, etc.] or a valid claim of privilege."

Subdivision (b). In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled "conditional relevancy." Morgan, Basic Problems of Evidence 45–46 (1962). Problems arising in connection with it are to be distinguished from problems of logical relevancy, e. g. evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration. Morgan, *supra*; California Evidence Code § 403; New Jersey Rule 8(2). See also Uniform Rules 19 and 67.

The order of proof here, as generally, is subject to the control of the judge.

Subdivision (c). Preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. See Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).[2] Otherwise, detailed treatment of when preliminary matters should be heard outside the hearing of the jury is not feasible. The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require.

2. At this point the Advisory Committee's Note to the 1971 Revised Draft contained the sentence, "Also, due regard for the right of an accused not to testify generally in the case requires that he be given an option to testify out of the presence of the jury upon preliminary matters." The statement was deleted in view of the deletion from the rule, mentioned in the preceding footnote.

Report of the House Committee on the Judiciary

Rule 104(c) as submitted to the Congress provided that hearings on the admissibility of confessions shall be conducted outside the presence of the jury and hearings on all other preliminary matters should be so conducted when the interests of justice require. The Committee amended the Rule to provide that where an accused is a witness as to a preliminary matter, he has the right, upon his request, to be heard outside the jury's presence. Although recognizing that in some cases duplication of evidence would occur and that the procedure could be subject to abuse, the Committee believed that a proper regard for the right of an accused not to testify generally in the case dictates that he be given an option to testify out of the presence of the jury on preliminary matters.

The Committee construes the second sentence of subdivision (c) as applying to civil actions and proceedings as well as to criminal cases, and on this assumption has left the sentence unamended.

Advisory Committee's Note

Subdivision (d). The limitation upon cross-examination is designed to encourage participation by the accused in the determination of preliminary matters. He may testify concerning them without exposing himself to cross-examination generally. The provision is necessary because of the breadth of cross-examination [possible] under Rule 611(b).

The rule does not address itself to questions of the subsequent use of testimony given by an accused at a hearing on a preliminary matter. See Walder v. United States, 347 U.S. 62 (1954); Simmons v. United States, 390 U.S. 377 (1968); Harris v. New York, 401 U.S. 222 (1971).

Report of Senate Committee on the Judiciary

Under rule 104(c) the hearing on a preliminary matter may at times be conducted in front of the jury. Should an accused testify in such a hearing, waiving his privilege against self-incrimination as to the preliminary issue, rule 104(d) provides that he will not generally be subject to cross-examination as to any other issue. This rule is not, however, intended to immunize the accused from cross-examination where, in testifying about a preliminary issue, he injects other issues

into the hearing. If he could not be cross-examined about any issues gratuitously raised by him beyond the scope of the preliminary matters, injustice might result. Accordingly, in order to prevent any such unjust result, the committee intends the rule to be construed to provide that the accused may subject himself to cross-examination as to issues raised by his own testimony upon a preliminary matter before a jury.

Advisory Committee's Note

Subdivision (e). For similar provisions see Uniform Rule 8; California Evidence Code § 406; Kansas Code of Civil Procedure § 60–408; New Jersey Evidence Rule 8(1).

Rule 105.

LIMITED ADMISSIBILITY

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court as Rule 106, amended by substituting "court" in place of "judge." Rule 105 as prescribed by the Court, which was deleted from the rules enacted by the Congress, is set forth in the Appendix hereto, together with a statement of the reasons for the deletion.

Advisory Committee's Note

A close relationship exists between this rule and Rule 403 which . . . [provides for] exclusion when "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403. In Bruton v. United States, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), the Court ruled that a limiting instruction did not effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him. The decision does not, however, bar the use of limited admissibility with an instruction where the risk of prejudice is less serious.

Similar provisions are found in Uniform Rule 6; California Evidence Code § 355; Kansas Code of Civil Procedure § 60–406; New Jersey Evidence Rule 6. The wording of the present rule differs, however, in repelling any implication that limiting or curative instructions are sufficient in all situations.

Report of House Committee on the Judiciary

Rule 106 as submitted by the Supreme Court (now Rule 105 in the bill) dealt with the subject of evidence which is admissible as to one party or for one purpose but is not admissible against another party or for another purpose. The Committee adopted this Rule without change on the understanding that it does not affect the authority of a court to order a severance in a multi-defendant case.

Rule 106.

REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court as Rule 107 without change.

Advisory Committee's Note

The rule is an expression of the rule of completeness. McCormick § 56. It is manifested as to depositions in Rule 32(a) (4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement.

The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. See McCormick § 56; California Evidence Code § 356. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.

For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial notice of adjudicative facts:
(a) Scope of rule.
(b) Kinds of facts.
(c) When discretionary.
(d) When mandatory.
(e) Opportunity to be heard.
(f) Time of taking notice.
(g) Instructing jury.

Rule 201.

JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court with the following changes:

In subdivisions (c) and (d) the words "judge or" before "court" were deleted.

Subdivision (g) as it is shown was substituted in place of, "The judge shall instruct the jury to accept as established any facts judicially noticed." The substituted language is from the 1969 Preliminary Draft. 46 F.R.D. 161, 195.

Advisory Committee's Note

Subdivision (a). This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of "adjudicative" facts. No rule deals with judicial notice of "legislative" facts. Judi-

cial notice of matters of foreign law is treated in Rule 44.1 of the Federal Rules of Civil Procedure and Rule 26.1 of the Federal Rules of Criminal Procedure.

The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. The terminology was coined by Professor Kenneth Davis in his article An Approach to Problems of Evidence in the Administrative Process, 55 Harv.L.Rev. 364, 404–407 (1942). The following discussion draws extensively upon his writings. In addition, see the same author's Judicial Notice, 55 Colum.L.Rev. 945 (1955); Administrative Law Treatise, ch. 15 (1958); A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69 (1964).

The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside the area of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite.

Legislative facts are quite different. As Professor Davis says:

"My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are 'clearly . . . within the domain of the indisputable.' Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable." A System of Judicial Notice Based on Fairness and Convenience, *supra*, at 82.

An illustration is Hawkins v. United States, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958), in which the Court refused to discard the common law rule that one spouse could not testify against the other, saying, "Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage." This conclusion has a large intermixture of fact, but the factual aspect is scarcely "indisputable." See Hutchins and Slesinger, Some Observations on the Law of Evidence—Family Relations, 13 Minn.L.Rev. 675 (1929). If the destructive effect of the giving of adverse testimony by a spouse is not indisputable, should the Court have refrained from considering it in the absence of supporting evidence?

"If the Model Code or the Uniform Rules had been applicable, the Court would have been barred from thinking about the essential factual ingredient of the problems before it, and such a result would be obviously intolerable. What the law needs at its growing points is more, not less, judicial thinking about the factual ingredients of problems of what the law ought to be, and the needed facts are seldom 'clearly' indisputable." Davis, *supra*, at 83.

Professor Morgan gave the following description of the methodology of determining domestic law:

"In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion.

He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. . . . [T]he parties do no more than to assist; they control no part of the process." Morgan, Judicial Notice, 57 Harv.L. Rev. 269, 270–271 (1944).

This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations. See Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281 (1934), where the cause was remanded for the taking of evidence as to the economic conditions and trade practices underlying the New York Milk Control Law.

Similar considerations govern the judicial use of non-adjudicative facts in ways other than formulating laws and rules. Thayer described them as a part of the judicial reasoning process.

"In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit." Thayer, Preliminary Treatise on Evidence 279–280 (1898).

As Professor Davis points out, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 73 (1964), every case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says "car," everyone, judge and jury included, furnishes, from non-evidence sources within himself, the supplementing information that the "car" is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate *Cogito, ergo sum*. These items could not possibly be introduced into evidence, and no one suggests that they be. Nor are they appropriate subjects for any formalized treatment of judicial notice of facts. See Levin and Levy, Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum, 105 U.Pa.L.Rev. 139 (1956).

Another aspect of what Thayer had in mind is the use of non-evidence facts to appraise or assess the adjudicative facts of the case. Pairs of cases from two jurisdictions illustrate this use and also the difference between non-evidence facts thus used and adjudicative facts. In People v. Strook, 347 Ill. 460, 179 N.E. 821 (1932), venue in Cook County had been held not established by testimony that the crime was committed at 7956 South Chicago Avenue, since judicial notice would not be taken that the address was in Chicago. However, the same court subsequently ruled that venue in Cook County

was established by testimony that a crime occurred at 8900 South Anthony Avenue, since notice would be taken of the common practice of omitting the name of the city when speaking of local addresses, and the witness was testifying in Chicago. People v. Pride, 16 Ill.2d 82, 156 N.E.2d 551 (1951). And in Hughes v. Vestal, 264 N.C. 500, 142 S.E.2d 361 (1965), the Supreme Court of North Carolina disapproved the trial judge's admission in evidence of a state-published table of automobile stopping distances on the basis of judicial notice, though the court itself had referred to the same table in an earlier case in a "rhetorical and illustrative" way in determining that the defendant could not have stopped her car in time to avoid striking a child who suddenly appeared in the highway and that a nonsuit was properly granted. Ennis v. Dupree, 262 N.C. 224, 136 S.E.2d 702 (1964). See also Brown v. Hale, 263 N.C. 176, 139 S.E.2d 210 (1964); Clayton v. Rimmer, 262 N.C. 302, 136 S.E.2d 562 (1964). It is apparent that this use of non-evidence facts in evaluating the adjudicative facts of the case is not an appropriate subject for a formalized judicial notice treatment.

In view of these considerations, the regulation of judicial notice of facts by the present rule extends only to adjudicative facts.

What, then, are "adjudicative" facts? Davis refers to them as those "which relate to the parties," or more fully:

"When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. . . .

"Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses." 2 Administrative Law Treatise 353.

Subdivision (b). With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent. As Professor Davis says:

"The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention." A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 93 (1964).

The rule proceeds upon the theory that these considerations call for dispensing with traditional methods of proof only in clear cases. Compare Professor Davis' conclusion that judicial notice should be a matter of convenience, subject to requirements of procedural fairness. *Id.*, 94.

This rule is consistent with Uniform Rule 9(1) and (2) which limit judicial notice of facts to those "so universally known that they cannot reasonably be the subject of dispute," those "so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute," and those "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." The traditional textbook treatment has included these general categories (matters of common knowledge, facts capable of verification), McCormick §§ 324, 325, and then has passed on into detailed treatment of such specific topics as facts relating to the personnel and records of the court. *id.* § 327, and other governmental facts, *id.* § 328. The California draftsmen, with a background of detailed statutory regulation of judicial notice, followed a somewhat similar pattern. California Evidence Code §§ 451, 452. The Uniform Rules, however, were drafted on the theory that these particular matters are included within the general categories and need no specific mention. This approach is followed in the present rule.

The phrase "propositions of generalized knowledge," found in Uniform Rule 9(1) and (2) is not included in the present rule. It was, it is believed, originally included in Model Code Rules 801 and 802 primarily in order to afford some minimum recognition to the right of the judge in his "legislative" capacity (not acting as the trier of fact) to take judicial notice of very limited categories of generalized knowledge. The limitations thus imposed have been discarded herein as undesirable, unworkable, and contrary to existing practice. What is left, then, to be considered, is the status of a "proposition of generalized knowledge" as an "adjudicative" fact to be noticed judicially and communicated by the judge to the jury. Thus viewed, it is considered to be lacking practical significance. While judges use judicial notice of "propositions of generalized knowledge" in a variety of situations: determining the validity and meaning of statutes, formulating common-law rules, deciding whether evidence should be admitted, assessing the sufficiency and effect of evidence, all are essentially nonadjudicative in nature. When judicial notice is seen as a significant vehicle for progress in the law, these are the areas involved, particularly in developing fields of scientific knowledge. See McCormick 712. It is not believed that judges now instruct juries as to "propositions of generalized knowledge" derived from encyclopedias or other sources, or that they are likely to do so, or, indeed, that it is desirable that they do so. There is a vast difference between ruling on the basis of judicial notice that radar evidence of speed is admissible and explaining to the jury its principles and degree of accuracy, or between using a table of stopping distances of automobiles at various speeds in a judicial evaluation of testimony and telling the jury its precise application in the case. For cases raising doubt as to the propriety of the use of medical texts by lay triers of fact in passing on disability claims in administrative proceedings, see Sayers v.

Gardner, 380 F.2d 940 (6th Cir. 1967); Ross v. Gardner, 365 F.2d 554 (6th Cir. 1966); Sosna v. Celebrezze, 234 F.Supp. 289 (E.D.Pa.1964); Glendenning v. Ribicoff, 213 F.Supp. 301 (W.D.Mo.1962).

Subdivisions (c) and (d). Under subdivision (c) the judge has discretionary authority to take judicial notice, regardless of whether he is so requested by a party. The taking of judicial notice is mandatory, under subdivision (d), only when a party requests it and the necessary information is supplied. This scheme is believed to reflect existing practice. It is simple and workable. It avoids troublesome distinctions in the many situations in which the process of taking judicial notice is not recognized as such.

Compare Uniform Rule 9 making judicial notice of facts universally known mandatory without request, and making judicial notice of facts generally known in the jurisdiction or capable of determination by resort to accurate sources discretionary in the absence of request but mandatory if request is made and the information furnished. But see Uniform Rule 10(3), which directs the judge to decline to take judicial notice if available information fails to convince him that the matter falls clearly within Uniform Rule 9 or is insufficient to enable him to notice it judicially. Substantially the same approach is found in California Evidence Code §§ 451–453 and in New Jersey Evidence Rule 9. In contrast, the present rule treats alike all adjudicative facts which are subject to judicial notice.

Subdivision (e). Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule requires the granting of that opportunity upon request. No formal scheme of giving notice is provided. An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subdivision (d) that judicial notice be taken, or through an advance indication by the judge. Or he may have no advance notice at all. The likelihood of the latter is enhanced by the frequent failure to recognize judicial notice as such. And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely. See the provision for hearing on timely request in the Administrative Procedure Act, 5 U.S.C. § 556(e). See also Revised Model State Administrative Procedure Act (1961), 9C U.L.A. § 10(4) (Supp.1967).

Subdivision (f). In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal. Uniform Rule 12; California Evidence Code § 459; Kansas Rules of Evidence § 60–412; New Jersey Evidence Rule 12; McCormick § 330, p. 712.

Subdivision (g). Much of the controversy about judicial notice has centered upon the question whether evidence should be admitted in disproof of facts of which judicial notice is taken.

The writers have been divided. Favoring admissibility are Thayer, Preliminary Treatise on Evidence 308 (1898); 9 Wigmore § 2567; Davis, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law, 69, 76–77 (1964). Opposing admissibility are Keeffe, Landis and Shaad, Sense and Nonsense about Judicial Notice, 2 Stan.L.Rev. 664, 668 (1950); McNaughton, Judicial Notice—

Excerpts Relating to the Morgan-Whitmore Controversy, 14 Vand.L. Rev. 779 (1961); Morgan, Judicial Notice, 57 Harv.L.Rev. 269, 279 (1944); McCormick 710–711. The Model Code and the Uniform Rules are predicated upon indisputability of judicially noticed facts.

The proponents of admitting evidence in disproof have concentrated largely upon legislative facts. Since the present rule deals only with judicial notice of adjudicative facts, arguments directed to legislative facts lose their relevancy.

Report of House Committee on the Judiciary

Rule 201(g) as received from the Supreme Court provided that when judicial notice of a fact is taken, the court shall instruct the jury to accept that fact as established. Being of the view that mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial, the Committee adopted the 1969 Advisory Committee draft of this subsection, allowing a mandatory instruction in civil actions and proceedings and a discretionary instruction in criminal cases.

Advisory Committee's Note (Continued)

[The following portion of the Advisory Committee's Note is from the 1969 Preliminary Draft. 46 F.R.D. 161, 204.]

Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof in civil cases. The judge instructs the jury to take judicially noticed facts as conclusive. This position is justified by the undesirable effects of the opposite rule in limiting the rebutting party, though not his opponent, to admissible evidence, in defeating the reasons for judicial notice, and in affecting the substantive law to an extent and in ways largely unforeseeable. Ample protection and flexibility are afforded by the broad provision for opportunity to be heard on request, set forth in subdivision (e).

Criminal cases are treated somewhat differently in the rule. While matters falling within the common fund of information supposed to be possessed by jurors need not be proved, State v. Dunn, 221 Mo. 530. 120 S.W. 1179 (1909), these are not, properly speaking, adjudicative facts but an aspect of legal reasoning. The considerations which underlie the general rule that a verdict cannot be directed against the accused in a criminal case seem to foreclose the judge's directing the jury on the basis of judicial notice to accept as conclusive any adjudicative facts in the case. State v. Main, 91 R.I. 338, 180 A.2d 814 (1962); State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951). Cf. People v. Mayes, 113 Cal. 618, 45 P. 860 (1896); Ross v. United States, 374 F.2d 97 (8th Cir. 1967). However, this view presents no obstacle to the judge's advising the jury as to a matter judicially noticed, if he instructs them that it need not be taken as conclusive.

Note on Judicial Notice of Law (by the Advisory Committee)

By rules effective July 1, 1966, the method of invoking the law of a foreign country is covered elsewhere. Rule 44.1 of the Federal Rules of Civil Procedure; Rule 26.1 of the Federal Rules of Criminal

Procedure. These two new admirably designed rules are founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure. The Advisory Committee on Evidence, believing that this assumption is entirely correct, proposes no evidence rule with respect to judicial notice of law, and suggests that those matters of law which, in addition to foreign-country law, have traditionally been treated as requiring pleading and proof and more recently as the subject of judicial notice be left to the Rules of Civil and Criminal Procedure.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in general in civil actions and proceedings.
Rule 302. Applicability of State law in civil actions and proceedings.

Rule 301.

PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Note by Federal Judicial Center

The bill passed by the House substituted a substantially different rule in place of that prescribed by the Supreme Court. The Senate bill substituted yet a further version, which was accepted by the House, was enacted by the Congress, and is the rule shown above. The earlier versions are set forth in the Appendix hereto.

Report of Senate Committee on the Judiciary

This rule governs presumptions in civil cases generally. Rule 302 provides for presumptions in cases controlled by State law.

As submitted by the Supreme Court, presumptions governed by this rule were given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it.

Instead of imposing a burden of persuasion on the party against whom the presumption is directed, the House adopted a provision which shifted the burden of going forward with the evidence. They further provided that "even though met with contradicting evidence,

a presumption is sufficient evidence of the fact presumed, to be considered by the trier of fact." The effect of the amendment is that presumptions are to be treated as evidence.

The committee feels the House amendment is ill-advised. As the joint committees (the Standing Committee on Practice and Procedure of the Judicial Conference and the Advisory Committee on the Rules of Evidence) stated: "Presumptions are not evidence, but ways of dealing with evidence." [1] This treatment requires juries to perform the task of considering "as evidence" facts upon which they have no direct evidence and which may confuse them in performance of their duties. California had a rule much like that contained in the House amendment. It was sharply criticized by Justice Traynor in Speck v. Sarver [2] and was repealed after 93 troublesome years.[3]

Professor McCormick gives a concise and compelling critique of the presumption as evidence rule:

* * * * * * * * * * *

> Another solution, formerly more popular than now, is to instruct the jury that the presumption is 'evidence', to be weighed and considered with the testimony in the case. This avoids the danger that the jury may infer that the presumption is conclusive, but it probably means little to the jury, and certainly runs counter to accepted theories of the nature of evidence.[4]

For these reasons the committee has deleted that provision of the House-passed rule that treats presumptions as evidence. The effect of the rule as adopted by the committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden of persuasion remains on the party to whom it is allocated under the rules governing the allocation in the first instance.

The court may instruct the jury that they may infer the existence of the presumed fact from proof of the basic facts giving rise to the presumption. However, it would be inappropriate under this rule to instruct the jury that the inference they are to draw is conclusive.

Conference Report

The House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut it. Even though evidence contradicting the presumption is offered, a presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption, but it does

1. Hearings Before the Committee on the Judiciary, United States Senate, H.R. 5463, p. 56.

2. 20 Cal.2d 585, 594, 128 P.2d 16, 21 (1942).

3. Cal.Ev.Code 1965 § 600.

4. McCormick, Evidence, 669 (1954); id. 825 (2d ed. 1972).

not shift to that party the burden of persuasion on the existence of the presumed fact.

Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.

The Conference adopts the Senate amendment.

Rule 302.

APPLICABILITY OF STATE LAW IN CIVIL ACTIONS AND PROCEEDINGS

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended by adding "and proceedings" after "actions."

Advisory Committee's Note

A series of Supreme Court decisions in diversity cases leaves no doubt of the relevance of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to questions of burden of proof. These decisions are Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939), Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L.Ed. 645 (1943), and Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). They involved burden of proof, respectively, as to status as bona fide purchaser, contributory negligence, and nonaccidental death (suicide) of an insured. In each instance the state rule was held to be applicable. It does not follow, however, that all presumptions in diversity cases are governed by state law. In each case cited, the burden of proof question had to do with a substantive element of the claim or defense. Application of the state law is called for only when the presumption operates upon such an element. Accordingly the rule does not apply state law when the presumption operates upon a lesser aspect of the case, i. e. "tactical" presumptions.

The situations in which the state law is applied have been tagged for convenience in the preceding discussion as "diversity cases." The designation is not a completely accurate one since *Erie* applies to any claim or issue having its source in state law, regardless of the basis

of federal jurisdiction, and does not apply to a federal claim or issue, even though jurisdiction is based on diversity. Vestal, Erie R. R. v. Tompkins: A Projection, 48 Iowa L.Rev. 248, 257 (1963); Hart and Wechsler, The Federal Courts and the Federal System, 697 (1953); 1A Moore, Federal Practice ¶ 0.305[3] (2d ed. 1965); Wright, Federal Courts, 217–218 (1963). Hence the rule employs, as appropriately descriptive, the phrase "as to which state law supplies the rule of decision." See A.L.I. Study of the Division of Jurisdiction Between State and Federal Courts, § 2344(c), p. 40, P.F.D. No. 1 (1965).

Presumptions in Criminal Cases

Note by Federal Judicial Center

The rules prescribed by the Supreme Court included Rule 303, Presumptions in Criminal Cases. The rule was not included in the rules enacted by the Congress. The rule, Advisory Committee's Note, and reasons given by the House of Representatives for excluding the rule are set forth in the Appendix hereto.

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "relevant evidence".
Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.
Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.
Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes:
(a) Character evidence generally:
(1) Character of accused.
(2) Character of victim.
(3) Character of witness.
(b) Other crimes, wrongs, or acts.
Rule 405. Methods of proving character:
(a) Reputation or opinion.
(b) Specific instances of conduct.
Rule 406. Habit; routine practice.
Rule 407. Subsequent remedial measures.
Rule 408. Compromise and offers to compromise.
Rule 409. Payment of medical and similar expenses.
Rule 410. Inadmissibility of pleas, offers of pleas, and related statements.
Rule 411. Liability insurance.
Rule 412. Rape cases; relevance of victim's past behavior.

Rule 401.

DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning.

The variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof. An enormous number of cases fall in no set pattern, and this rule is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.

Passing mention should be made of so-called "conditional" relevancy. Morgan, Basic Problems of Evidence 45–46 (1962). In this situation, probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See Rules 104(b) and 901. The discussion which follows in the present note is concerned with relevancy generally, not with any particular problem of conditional relevancy.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. James, Relevancy, Probability and the Law, 29 Calif.L.Rev. 689, 696, n. 15 (1941), in Selected Writings on Evidence and Trial 610, 615, n. 15 (Fryer ed. 1957). The rule summarizes this relationship as a "tendency to make the existence" of the fact to be proved "more probable or less probable." Compare Uniform Rule 1(2) which states the crux of relevancy as "a tendency in reason," thus perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle upon which relevancy in a particular situation depends.

The standard of probability under the rule is "more . . . probable than it would be without the evidence." Any more stringent

requirement is unworkable and unrealistic. As McCormick § 152, p. 317, says, "A brick is not a wall," or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 576 (1956), quotes Professor McBaine, ". . . [I]t is not to be supposed that every witness can make a home run." Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word "material." Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. I. General Provisions), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 10–11 (1964). The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a "material" fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission. Cf. California Evidence Code § 210, defining relevant evidence in terms of tendency to prove a disputed fact.

Rule 402.

RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, with the first sentence amended by substituting "prescribed" in place of "adopted", and by adding at the end thereof the phrase "pursuant to statutory authority."

Advisory Committee's Note

The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are "a presupposition involved in the very conception of a rational system of evidence." Thayer, Preliminary Treatise on Evidence 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests. For similar provisions see California Evidence Code §§ 350, 351. Provisions that all relevant evidence is admissible are found in Uniform Rule 7(f); Kansas Code of Civil Procedure § 60–407(f); and New Jersey Evidence Rule 7(f); but the exclusion of evidence which is not relevant is left to implication.

Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by Act of Congress, or by constitutional considerations.

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, Article V recognizes a number of privileges; Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

The Rules of Civil and Criminal Procedure in some instances require the exclusion of relevant evidence. For example, Rules 30(b) and 32(a) (3) of the Rules of Civil Procedure, by imposing requirements of notice and unavailability of the deponent, place limits on the use of relevant depositions. Similarly, Rule 15 of the Rules of Criminal Procedure restricts the use of depositions in criminal cases, even though relevant. And the effective enforcement of the command, originally statutory and now found in Rule 5(a) of the Rules of Criminal Procedure, that an arrested person be taken without unnecessary delay before a commissioner or other similar officer is held to require the exclusion of statements elicited during detention in violation thereof. Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957); 18 U.S.C. § 3501(c).

While congressional enactments in the field of evidence have generally tended to expand admissibility beyond the scope of the common law rules, in some particular situations they have restricted the admissibility of relevant evidence. Most of this legislation has consisted of the formulation of a privilege or of a prohibition against disclosure. 8 U.S.C. § 1202(f), records of refusal of visas or permits to enter United States confidential, subject to discretion of Secretary of State to make available to court upon certification of need; 10 U.S.C. § 3693, replacement certificate of honorable discharge from Army not admissible in evidence; 10 U.S.C. § 8693, same as to Air Force; 11 U.S.C. § 25(a) (10), testimony given by bankrupt on his examination not admissible in criminal proceedings against him, except that given in hearing upon objection to discharge; 11 U.S.C. § 205(a), rail-

road reorganization petition, if dismissed, not admissible in evidence; 11 U.S.C. § 403(a), list of creditors filed with municipal composition plan not an admission; 13 U.S.C. § 9(a), census information confidential, retained copies of reports privileged; 47 U.S.C. § 605, interception and divulgence of wire or radio communications prohibited unless authorized by sender. These statutory provisions would remain undisturbed by the rules.

The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); incriminating statement elicited from an accused in violation of right to counsel, Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

Report of House Committee on the Judiciary

Rule 402 as submitted to the Congress contained the phrase "or by other rules adopted by the Supreme Court". To accommodate the view that the Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence, the Committee amended the above phrase to read "or by other rules prescribed by the Supreme Court pursuant to statutory authority" in this and other Rules where the reference appears.

Rule 403.

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan.L.Rev. 1, 12–15 (1956);

Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 Van. L.Rev. 385, 392 (1952); McCormick § 152, pp. 319–321. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect he policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law. 6 Wigmore § 1849. Cf. McCormick § 152, p. 320, n. 29, listing unfair surprise as a ground for exclusion but stating that it is usually "coupled with the danger of prejudice and confusion of issues." While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure § 60–445, surprise is not included in California Evidence Code § 352 or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45. While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 612 (1964). Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate.

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106[105] and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor.

Rule 404.

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an ac-

cused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, with the second sentence of subdivision (b) amended by substituting "It may, however, be admissible" in place of "This subdivision does not exclude the evidence when offered."

Advisory Committee's Note

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 609 for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly

described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick §§ 155–161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic an underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 584 (1956); McCormick § 157. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

The limitation to pertinent traits of character, rather than character generally, in paragraphs (1) and (2) is in accordance with the prevailing view. McCormick § 158, p. 334. A similar provision in Rule 608, to which reference is made in paragraph (3), limits character evidence respecting witnesses to the trait of truthfulness or untruthfulness.

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i. e. evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 581–583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 657–658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission in its ultimate rejection of Uniform Rule 47, *id.*, 615:

"Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Much of the force of the position of those favoring greater use of character evidence in civil cases is dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152

(1964). It is believed that those espousing change have not met the burden of persuasion.

Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325 (1956).

Report of House Committee on the Judiciary

The second sentence of Rule 404(b) as submitted to the Congress began with the words "This subdivision does not exclude the evidence when offered". The Committee amended this language to read "It may, however, be admissible", the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

Report of House Committee on the Judiciary

This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i. e. prejudice, confusion or waste of time.

Rule 405.
METHODS OF PROVING CHARACTER

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of

a charge, claim, or defense, proof may also be made of specific instances of his conduct.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change. The bill reported by the House Committee on the Judiciary deleted the provision in subdivision (a) for making proof by testimony in the form of an opinion, but the provision was reinstated on the floor of the House. See Congressional Record, February 6, 1974 (daily ed. pp. H546–H549).

Advisory Committee's Note

The rule deals only with allowable methods of proving character, not with the admissibility of character evidence, which is covered in Rule 404.

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine. McCormick § 153.

In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore § 1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with "the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation'." It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion.

According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); Annot., 47 A.L.R.2d 1258. The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed

light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony.

The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under Rule 608(b). Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, *i. e.*, be confined to the nature and extent of observation and acquaintance upon which the opinion is based. See Rule 701.

Rule 406.

HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Note by Federal Judicial Center

The rule enacted by the Congress is subdivision (a) of the rule prescribed by the Supreme Court. Subdivision (b) of the Court's rule was deleted for reasons stated in the Report of the House Committee on the Judiciary set forth below. The subdivision is included in the Appendix.

Advisory Committee's Note

Subdivision (a). An oft-quoted paragraph, McCormick, § 162, p. 340, describes habit in terms effectively contrasting it with character:

"Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street.

A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic."

Equivalent behavior on the part of a group is designated "routine practice of an organization" in the rule.

Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion. Again quoting McCormick § 162, p. 341:

"Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it."

When disagreement has appeared, its focus has been upon the question what constitutes habit, and the reason for this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion. Lewan, Rationale of Habit Evidence, 16 Syracuse L.Rev. 39, 49 (1964). While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.

The rule is consistent with prevailing views. Much evidence is excluded simply because of failure to achieve the status of habit. Thus, evidence of intemperate "habits" is generally excluded when offered as proof of drunkenness in accident cases, Annot., 46 A.L.R.2d 103, and evidence of other assaults is inadmissible to prove the instant one in a civil assault action, Annot., 66 A.L.R.2d 806. In Levin v. United States, 119 U.S.App.D.C. 156, 338 F.2d 265 (1964), testimony as to the religious "habits" of the accused, offered as tending to prove that he was at home observing the Sabbath rather than out obtaining money through larceny by trick, was held properly excluded:

"It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of 'invariable regularity.' [1 Wigmore 520.] Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value." *Id.* at 272.

These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation. Slough, Relevancy Unraveled, 6 Kan.L.Rev. 38–41 (1957). Nor are they inconsistent with such cases as Whittemore v. Lockheed Aircraft Corp., 65 Cal.App.2d 737, 151 P.2d 670 (1944), upholding the admission of evidence that plaintiff's intestate had on four other occasions flown planes from defendant's

factory for delivery to his employer airline, offered to prove that he was piloting rather than a guest on a plane which crashed and killed all on board while en route for delivery.

A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission in evidence. Slough, Relevancy Unraveled, 5 Kan.L.Rev. 404, 449 (1957). This requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility. A similar position is taken in New Jersey Rule 49. The rule also rejects the requirement of the absence of eyewitnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases. For comment critical of the requirements see Frank, J., in Cereste v. New York, N. H. & H. R. Co., 231 F.2d 50 (2d Cir. 1956), cert. denied 351 U.S. 951, 76 S.Ct. 848, 100 L.Ed. 1475, 10 Vand.L.Rev. 447 (1957); McCormick § 162, p. 342. The omission of the requirement from the California Evidence Code is said to have effected its elimination. Comment, Cal.Ev.Code § 1105.

Report of House Committee on the Judiciary

Rule 406 as submitted to Congress contained a subdivision (b) providing that the method of proof of habit or routine practice could be "in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine." The Committee deleted this subdivision believing that the method of proof of habit and routine practice should be left to the courts to deal with on a case-by-case basis. At the same time, the Committee does not intend that its action be construed as sanctioning a general authorization of opinion evidence in this area.

Rule 407.

SUBSEQUENT REMEDIAL MEASURES

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of

fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rule is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., 64 A.L.R.2d 1296. Two recent federal cases are illustrative. Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And Powers v. J. B. Michael & Co., 329 F.2d 674 (6th Cir. 1964), an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant's control. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission. Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403.

For comparable rules, see Uniform Rule 51; California Evidence Code § 1151; Kansas Code of Civil Procedure § 60–451; New Jersey Evidence Rule 51.

Rule 408.

COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim

or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended by the insertion of the third sentence. Other amendments, proposed by the House bill, were not enacted, for reasons stated in the Report of the Senate Committee on the Judiciary and in the Conference Report, set forth below.

Advisory Committee's Note

As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim. As with evidence of subsequent remedial measures, dealt with in Rule 407, exclusion may be based on two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances. (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. McCormick §§ 76, 251. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.

The same policy underlies the provision of Rule 68 of the Federal Rules of Civil Procedure that evidence of an unaccepted offer of judgment is not admissible except in a proceeding to determine costs.

The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be "without prejudice," or so connected with the offer as to be inseparable from it. McCormick § 251, pp. 540–541. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself. For similar provisions see California Evidence Code §§ 1152, 1154.

The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. McCormick § 251, p. 540. Hence the rule requires that the claim be disputed as to either validity or amount.

The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule. The illustrative situations mentioned in the rule are supported by the authorities. As to proving bias or prejudice of a witness, see Annot., 161 A.L.R. 395, *contra*, Fenberg v. Rosenthal, 348 Ill.App. 510, 109 N.E.2d 402 (1952), and negativing a contention of lack of due diligence in presenting a claim, 4 Wigmore § 1061. An effort to "buy off" the prosecution or a prosecuting witness in a criminal case is not within the policy of the rule of exclusion. McCormick § 251, p. 542.

For other rules of similar import, see Uniform Rules 52 and 53; California Evidence Code § 1152, 1154; Kansas Code of Civil Procedure §§ 60–452, 60–453; New Jersey Evidence Rules 52 and 53.

Report of House Committee on the Judiciary

Under existing federal law evidence of conduct and statements made in compromise negotiations is admissible in subsequent litigation between the parties. The second sentence of Rule 408 as submitted by the Supreme Court proposed to reverse that doctrine in the interest of further promoting non-judicial settlement of disputes. Some agencies of government expressed the view that the Court formulation was likely to impede rather than assist efforts to achieve settlement of disputes. For one thing, it is not always easy to tell when compromise negotiations begin, and informal dealings end. Also, parties dealing with government agencies would be reluctant to furnish factual information at preliminary meetings; they would wait until "compromise negotiations" began and thus hopefully effect an immunity for themselves with respect to the evidence supplied. In light of these considerations, the Committee recast the Rule so that admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of unqualified factual assertions is admissible. The latter aspect of the Rule is drafted, however, so as to preserve other possible objections to the introduction of such evidence. The Committee intends no modification of current law whereby a party may protect himself from future use of his statements by couching them in hypothetical conditional form.

Report of Senate Committee on the Judiciary

This rule as reported makes evidence of settlement or attempted settlement of a disputed claim inadmissible when offered as an admission of liability or the amount of liability. The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible.

Under present law, in most jurisdictions, statements of fact made during settlement negotiations, however, are excepted from this ban and are admissible. The only escape from admissibility of statements

of fact made in a settlement negotiation is if the declarant or his representative expressly states that the statement is hypothetical in nature or is made without prejudice. Rule 408 as submitted by the Court reversed the traditional rule. It would have brought statements of fact within the ban and made them, as well as an offer of settlement, inadmissible.

The House amended the rule and would continue to make evidence of facts disclosed during compromise negotiations admissible. It thus reverted to the traditional rule. The House committee report states that the committee intends to preserve current law under which a party may protect himself by couching his statements in hypothetical form.[1] The real impact of this amendment, however, is to deprive the rule of much of its salutary effect. The exception for factual admissions was believed by the Advisory Committee to hamper free communication between parties and thus to constitute an unjustifiable restraint upon efforts to negotiate settlements—the encouragement of which is the purpose of the rule. Further, by protecting hypothetically phrased statements, it constituted a preference for the sophisticated, and a trap for the unwary.

Three States which had adopted rules of evidence patterned after the proposed rules prescribed by the Supreme Court opted for versions of rule 408 identical with the Supreme Court draft with respect to the inadmissibility of conduct or statements made in compromise negotiations.[2]

For these reasons, the committee has deleted the House amendment and restored the rule to the version submitted by the Supreme Court with one additional amendment. This amendment adds a sentence to insure that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation.

Conference Report

The House bill provides that evidence of admissions of liability or opinions given during compromise negotiations is not admissible, but that evidence of facts disclosed during compromise negotiations is not inadmissible by virtue of having been first disclosed in the compromise negotiations. The Senate amendment provides that evidence of conduct or statements made in compromise negotiations is not admissible. The Senate amendment also provides that the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

The House bill was drafted to meet the objection of executive agencies that under the rule as proposed by the Supreme Court, a party could present a fact during compromise negotiations and thereby prevent an opposing party from offering evidence of that fact at trial

1. See Report No. 93–650, dated November 15, 1973.

2. Nev.Rev.Stats. § 48.105; N.Mex. Stats.Anno. (1973 Supp.) § 20–4–408; West's Wis.Stats.Anno. (1973 Supp.) § 904.08.

even though such evidence was obtained from independent sources. The Senate amendment expressly precludes this result.

The Conference adopts the Senate amendment.

Rule 409.

PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

The considerations underlying this rule parallel those underlying Rules 407 and 408, which deal respectively with subsequent remedial measures and offers of compromise. As stated in Annot., 20 A.L.R.2d 291, 293:

"[G]enerally, evidence of payment of medical, hospital or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person."

Contrary to Rule 408, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature.

For rules on the same subject, but phrased in terms of "humanitarian motives," see Uniform Rule 52; California Evidence Code § 1152; Kansas Code of Civil Procedure § 60–452; New Jersey Evidence Rule 52.

Rule 410.

INADMISSIBILITY OF PLEAS, OFFERS OF PLEAS, AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or

any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel. As amended by P.L. 94–149, § 1(9), 89 Stat. 805, Dec. 12, 1975).

Note by Federal Judicial Center

The rule prescribed by the Supreme Court consisted only of the first sentence of the rule enacted by the Congress, exclusive of the introductory phrase, "Except as otherwise provided by Act of Congress". Reasons for the amendments are stated in the Report of the House Committee on the Judiciary, Senate Committee on the Judiciary, and Conference, set forth below. See also the explanation by Chairman Hungate in the Congressional Record, December 18, 1974, H12253.

Advisory Committee's Note

Withdrawn pleas of guilty were held inadmissible in federal prosecutions in Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in People v. Spitaleri, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961), reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in Kercheval, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326.

Pleas of *nolo contendere* are recognized by Rule 11 of the Rules of Criminal Procedure, although the law of numerous States is to the contrary. The present rule gives effect to the principal traditional characteristic of the *nolo* plea, i. e. avoiding the admission of guilt which is inherent in pleas of guilty. This position is consistent with the construction of Section 5 of the Clayton Act, 15 U.S.C. § 16(a), recognizing the inconclusive and compromise nature of judgments based on *nolo* pleas. General Electric Co. v. City of San Antonio, 334 F.2d 480 (5th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963), cert. denied 376 U.S. 939, 84 S. Ct. 794, 11 L.Ed.2d 659; Armco Steel Corp. v. North Dakota, 376 F. 2d 206 (8th Cir. 1967); City of Burbank v. General Electric Co., 329 F.2d 825 (9th Cir. 1964). See also state court decisions in Annot., 18 A.L.R.2d 1287, 1314.

Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise. As pointed out in McCormick § 251, p. 543.

"Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises."

See also People v. Hamilton, 60 Cal.2d 105, 32 Cal.Rptr. 4, 383 P.2d 412 (1963), discussing legislation designed to achieve this result. As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.[1]

Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use for or against other persons will not impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster. See A.B.A. Standards Relating to Pleas of Guilty § 2.2 (1968). See also the narrower provisions of New Jersey Evidence Rule 52(2) and the unlimited exclusion provided in California Evidence Code § 1153.

Report of House Committee on the Judiciary

The Committee added the phrase "Except as otherwise provided by Act of Congress" to Rule 410 as submitted by the Court in order to preserve particular congressional policy judgments as to the effect of a plea of guilty or of nolo contendere. See 15 U.S.C. 16(a). The Committee intends that its amendment refers to both present statutes and statutes subsequently enacted.

Report of Senate Committee on the Judiciary

As adopted by the House, rule 410 would make inadmissible pleas of guilty or nolo contendere subsequently withdrawn as well as offers to make such pleas. Such a rule is clearly justified as a means of encouraging pleading. However, the House rule would then go on to render inadmissible for any purpose statements made in connection with these pleas or offers as well.

The committee finds this aspect of the House rule unjustified. Of course, in certain circumstances such statements should be excluded. If, for example, a plea is vitiated because of coercion, statements made in connection with the plea may also have been coerced and should be inadmissible on that basis. In other cases, however, voluntary statements of an accused made in court on the record, in connection with a plea, and determined by a court to be reliable should be admissible even though the plea is subsequently withdrawn. This is particularly true in those cases where, if the House rule were in effect, a defendant would be able to contradict his previous statements and thereby lie

1. The rule as enacted, it should be noted, allows use of the statements for impeachment or in a subsequent prosecution for perjury or false statement.

with impunity.[2] To prevent such an injustice, the rule has been modified to permit the use of such statements for the limited purposes of impeachment and in subsequent perjury or false statement prosecutions.

Conference Report

The House bill provides that evidence of a guilty or nolo contendere plea, of an offer of either plea, or of statements made in connection with such pleas or offers of such pleas, is inadmissible in any civil or criminal action, case or proceeding against the person making such plea or offer. The Senate amendment makes the rule inapplicable to a voluntary and reliable statement made in court on the record where the statement is offered in a subsequent prosecution of the declarant for perjury or false statement.

The issues raised by Rule 410 are also raised by proposed Rule 11(e)(6) of the Federal Rules of Criminal Procedure presently pending before Congress. This proposed rule, which deals with the admissibility of pleas of guilty or nolo contendere, offers to make such pleas, and statements made in connection with such pleas, was promulgated by the Supreme Court on April 22, 1974, and in the absence of congressional action will become effective on August 1, 1975. The conferees intend to make no change in the presently-existing case law until that date, leaving the courts free to develop rules in this area on a case-by-case basis.

The Conferees further determined that the issues presented by the use of guilty and nolo contendere pleas, offers of such pleas, and statements made in connection with such pleas or offers, can be explored in greater detail during Congressional consideration of Rule 11(e)(6) of the Federal Rules of Criminal Procedure. The Conferees believe, therefore, that it is best to defer its effective date until August 1, 1975. The Conferees intend that Rule 410 would be superseded by any subsequent Federal Rule of Criminal Procedure or Act of Congress with which it is inconsistent, if the Federal Rule of Criminal Procedure or Act of Congress takes effect or becomes law after the date of the enactment of the act establishing the rules of evidence.

The conference adopts the Senate amendment with an amendment that expresses the above intentions.

Rule 411.

LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for

2. See Harris v. New York, 401 U.S. 222 (1971).

another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds. McCormick § 168; Annot., 4 A.L.R.2d 761. The rule is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

The second sentence points out the limits of the rule, using well established illustrations. *Id.*

For similar rules see Uniform Rule 54; California Evidence Code § 1155; Kansas Code of Civil Procedure § 60-454; New Jersey Evidence Rule 54.

Rule 412.

RAPE CASES; RELEVANCE OF VICTIM'S PAST BEHAVIOR

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of—

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

(c)(1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged. (As added by P.L. 95–540, § 2(2), Oct. 28, 1978).

ARTICLE V. PRIVILEGES

Rule 501. General rule.

Rule 501.

GENERAL RULE

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Note by Federal Judicial Center

The rules enacted by the Congress substituted the single Rule 501 in place of the 13 rules dealing with privilege prescribed by the Supreme Court as Article V. The 13 superseded rules, with Advisory Committee's Notes, are included in the Appendix. The reasons given in support of the congressional action are stated in the Report of the House Committee on the Judiciary, the Report of the Senate Committee on the Judiciary, and Conference Report, set forth below.

Report of House Committee on the Judiciary

Article V as submitted to Congress contained thirteen Rules. Nine of those Rules defined specific non-constitutional privileges which the federal courts must recognize (i. e. required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Another Rule provided that only those privileges set forth in Article V or in some other Act of Congress could be recognized by the federal courts. The three remaining Rules addressed collateral problems as to waiver of privilege by voluntary disclosure, privileged matter disclosed under compulsion or without opportunity to claim privilege, comment upon or inference from a claim of privilege, and jury instruction with regard thereto.

The Committee amended Article V to eliminate all of the Court's specific Rules on privileges. Instead, the Committee, through a single Rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases. That standard, derived from Rule 26 of the Federal Rules of Criminal Procedure, mandates the application of the principles of the common law as interpreted by the courts of the United

States in the light of reason and experience. The words "person, government, State, or political subdivision thereof" were added by the Committee to the lone term "witnesses" used in Rule 26 to make clear that, as under present law, not only witnesses may have privileges. The Committee also included in its amendment a proviso modeled after Rule 302 and similar to language added by the Committee to Rule 601 relating to the competency of witnesses. The proviso is designed to require the application of State privilege law in civil actions and proceedings governed by Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), a result in accord with current federal court decisions. See Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555–556 n. 2 (2nd Cir. 1967). The Committee deemed the proviso to be necessary in the light of the Advisory Committee's view (see its note to Court Rule 501) that this result is not mandated under *Erie*.

The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy. In addition, the Committee considered that the Court's proposed Article V would have promoted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and federal courts. The Committee's proviso, on the other hand, under which the federal courts are bound to apply the State's privilege law in actions founded upon a State-created right or defense, removes the incentive to "shop".

Report of Senate Committee on the Judiciary

Article V as submitted to Congress contained 13 rules. Nine of those rules defined specific nonconstitutional privileges which the Federal courts must recognize (i. e., required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Many of these rules contained controversial modifications or restrictions upon common law privileges. As noted supra, the House amended article V to eliminate all of the Court's specific rules on privileges. Through a single rule, 501, the House provided that privileges shall be governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience (a standard derived from rule 26 of the Federal Rules of Criminal Procedure) except in the case of an element of a civil claim or defense as to which State law supplies the rule of decision, in which event state privilege law was to govern.

The committee agrees with the main thrust of the House amendment: that a federally developed common law based on modern reason and experience shall apply except where the State nature of the issues renders deference to State privilege law the wiser course, as in the usual diversity case. The committee understands that thrust of the House amendment to require that State privilege law be applied in "diversity" cases (actions on questions of State law between citizens of different States arising under 28 U.S.C. § 1332). The language of the House amendment, however, goes beyond this in some respects, and falls short of it in others: State privilege law applies even in nondiversity, Federal question civil cases, where an issue governed

by State substantive law is the object of the evidence (such issues do sometimes arise in such cases); and, in all instances where State privilege law is to be applied, e. g., on proof of a State issue in a diversity case, a close reading reveals that State privilege law is not to be applied unless the matter to be proved is an element of that state claim or defense, as distinguished from a step along the way in the proof of it.

The committee is concerned that the language used in the House amendment could be difficult to apply. It provides that "in civil actions . . . with respect to an element of a claim or defense as to which State law supplies the rule of decision," State law on privilege applies. The question of what is an element of a claim or defense is likely to engender considerable litigation. If the matter in question constitutes an element of a claim, State law supplies the privilege rule; whereas if it is a mere item of proof with respect to a claim, then, even though State law might supply the rule of decision, Federal law on the privilege would apply. Further, disputes will arise as to how the rule should be applied in an antitrust action or in a tax case where the Federal statute is silent as to a particular aspect of the substantive law in question, but Federal cases had incorporated State law by reference to State law.[1] Is a claim (or defense) based on such a reference a claim or defense as to which federal or State law supplies the rule of decision?

Another problem not entirely avoidable is the complexity or difficulty the rule introduces into the trial of a Federal case containing a combination of Federal and State claims and defenses, e. g. an action involving Federal antitrust and State unfair competition claims. Two different bodies of privilege law would need to be consulted. It may even develop that the same witness-testimony might be relevant on both counts and privileged as to one but not the other.[2]

The formulation adopted by the House is pregnant with litigious mischief. The committee has, therefore, adopted what we believe will be a clearer and more practical guideline for determining when courts should respect State rules of privilege. Basically, it provides that in criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced.[3] Conversely, in diversity cases where the litigation in question turns on a substantive question of State law, and is brought in the Federal courts because the parties reside in different States, the committee believes it is clear that State rules of privilege should apply unless the proof is directed at a claim or defense for which Federal law supplies the rule of decision (a situation

1. For a discussion of reference to State substantive law, see note on Federal Incorporation by Reference of State Law, Hart & Wechsler, The Federal Courts and the Federal System, pp. 491–94 (2d ed. 1973).

2. The problems with the House formulation are discussed in Rothstein. The Proposed Amendments to the Federal Rules of Evidence, 62 Georgetown University Law Journal 125 (1973) at notes 25, 26 and 70–74 and accompanying text.

3. It is also intended that the Federal law of privileges should be applied with respect to pendant State law claims when they arise in a Federal question case.

which would not commonly arise.)[4] It is intended that the State rules of privilege should apply equally in original diversity actions and diversity actions removed under 28 U.S.C. § 1441(b).

Two other comments on the privilege rule should be made. The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

Further, we would understand that the prohibition against spouses testifying against each other is considered a rule of privilege and covered by this rule and not by rule 601 of the competency of witnesses.

Conference Report

Rule 501 deals with the privilege of a witness not to testify. Both the House and Senate bills provide that federal privilege law applies in criminal cases. In civil actions and proceedings, the House bill provides that state privilege law applies "to an element of a claim or defense as to which State law supplies the rule of decision." The Senate bill provides that "in civil actions and proceedings arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and removed under 28 U.S.C. § 1441(b) the privilege of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to "an element of a claim or defense." If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state privilege law applies to that item of proof.

4. While such a situation might require use of two bodies of privilege law, federal and state, in the same case, nevertheless the occasions on which this would be required are considerably reduced as compared with the House version, and confined to situations where the Federal and State interests are such as to justify application of neither privilege law to the case as a whole. If the rule proposed here results in two conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rule favoring reception of the evidence should be applied. This policy is based on the present rule 43(a) of the Federal Rules of Civil Procedure which provides: In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.

Under the provision in the House bill, therefore, state privilege law will usually apply in diversity cases. There may be diversity cases, however, where a claim or defense is based upon federal law. In such instances, federal privilege law will apply to evidence relevant to the federal claim or defense. See Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942).

In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law. As Justice Jackson has said:

> A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state.

D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447, 471 (1942) (Jackson, J., concurring). When a federal court chooses to absorb state law, it is applying the state law as a matter of federal common law. Thus, state law does not supply the rule of decision (even though the federal court may apply a rule derived from state decisions), and state privilege law would not apply. See C. A. Wright, Federal Courts 251–252 (2d ed. 1970); Holmberg v. Armbrecht, 327 U.S. 392 (1946); DeSylva v. Ballentine, 351 U.S. 570, 581 (1956); 9 Wright & Miller, Federal Rules and Procedure § 2408.

In civil actions and proceedings, where the rule of decision as to a claim or defense or as to an element of a claim or defense is supplied by state law, the House provision requires that state privilege law apply.

The Conference adopts the House provision.

ARTICLE VI. WITNESSES

Rule 601. General rule of competency.
Rule 602. Lack of personal knowledge.
Rule 603. Oath or affirmation.
Rule 604. Interpreters.
Rule 605. Competency of judge as witness.
Rule 606. Competency of juror as witness:
(a) At the trial.
(b) Inquiry into validity of verdict or indictment.
Rule 607. Who may impeach.
Rule 608. Evidence of character and conduct of witness:
(a) Opinion and reputation evidence of character.
(b) Specific instances of conduct.
Rule 609. Impeachment by evidence of conviction of crime:
(a) General rule.
(b) Time limit.
(c) Effect of pardon, annulment, or certificate of rehabilitation.

(d) Juvenile adjudications.
(e) Pendency of appeal.
Rule 610. Religious beliefs or opinions.
Rule 611. Mode and order of interrogation and presentation:
(a) Control by court.
(b) Scope of cross-examination.
(c) Leading questions.
Rule 612. Writing used to refresh memory.
Rule 613. Prior statements of witnesses:
(a) Examining witness concerning prior statement.
(b) Extrinsic evidence of prior inconsistent statement of witness.
Rule 614. Calling and interrogation of witnesses by court:
(a) Calling by court.
(b) Interrogation by court.
(c) Objections.
Rule 615. Exclusion of witnesses.

Rule 601.

GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

Note by Federal Judicial Center

The first sentence of the rule enacted by the Congress is the entire rule prescribed by the Supreme Court, without change. The second sentence was added by congressional action.

Advisory Committee's Note

This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds thus abolished are religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds.

The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind. * * *

No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. Weihofen, Testimonial Competence

and Credibility, 34 Geo.Wash.L.Rev. 53 (1965). Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence. 2 Wigmore §§ 501, 509. Standards of moral qualification in practice consist essentially of evaluating a person's truthfulness in terms of his own answers about it. Their principal utility is in affording an opportunity on voir dire examination to impress upon the witness his moral duty. This result may, however, be accomplished more directly, and without haggling in terms of legal standards, by the manner of administering the oath or affirmation under Rule 603.

Admissibility of religious belief as a ground of impeachment is treated in Rule 610. Conviction of crime as a ground of impeachment is the subject of Rule 609. Marital relationship is the basis for privilege under Rule 505. Interest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses.

Report of House Committee on the Judiciary

Rule 601 as submitted to the Congress provided that "Every person is competent to be a witness except as otherwise provided in these rules." One effect of the Rule as proposed would have been to abolish age, mental capacity, and other grounds recognized in some State jurisdictions as making a person incompetent as a witness. The greatest controversy centered around the Rule's rendering inapplicable in the federal courts the so-called Dead Man's Statutes which exist in some States. Acknowledging that there is substantial disagreement as to the merit of Dead Man's Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest. The Committee therefore amended the Rule to make competency in civil actions determinable in accordance with State law with respect to elements of claims or defenses as to which State law supplies the rule of decision. Cf. Courtland v. Walston & Co., Inc., 340 F.Supp. 1076, 1087–1092 (S.D.N.Y.1972).

Report of Senate Committee on the Judiciary

The amendment to rule 601 parallels the treatment accorded rule 501 discussed immediately above.

Conference Report

Rule 601 deals with competency of witnesses. Both the House and Senate bills provide that federal competency law applies in criminal cases. In civil actions and proceedings, the House bill provides that state competency law applies "to an element of a claim or defense as to which State law supplies the rule of decision." The Senate bill provides that "in civil actions and proceedings arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and removed under 28 U.S.C. § 1441(b) the competency of a witness, person, government, State or political subdivision thereof is deter-

mined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to "an element of a claim or defense." If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state competency law applies to that item of proof.

For reasons similar to those underlying its action on Rule 501, the Conference adopts the House provision.

Rule 602.

LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

". . . [T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information." McCormick § 10, p. 19. These foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception. 2 Wigmore § 650. It will be observed that the rule is in fact a specialized application of the provisions of Rule 104(b) on conditional relevancy.

This rule does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement. Rules 801 and 805 would be applicable. This rule would, however, prevent him from testifying to the subject matter of the hearsay statement, as he has no personal knowledge of it.

The reference to Rule 703 is designed to avoid any question of conflict between the present rule and the provisions of that rule allowing an expert to express opinions based on facts of which he does not have personal knowledge.

Rule 603.

OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. As is true generally, affirmation is recognized by federal law. "Oath" includes affirmation, 1 U.S.C. § 1; judges and clerks may administer oaths and affirmations, 28 U.S.C. §§ 459, 953; and affirmations are acceptable in lieu of oaths under Rule 43(d) of the Federal Rules of Civil Procedure. Perjury by a witness is a crime, 18 U.S.C. § 1621.

Rule 604.

INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

The rule implements Rule 43(f) of the Federal Rules of Civil Procedure and Rule 28(b) of the Federal Rules of Criminal Procedure, both of which contain provisions for the appointment and compensation of interpreters.

Rule 605.

COMPETENCY OF JUDGE AS WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

In view of the mandate of 28 U.S.C. § 455 that a judge disqualify himself in "any case in which he . . . is or has been a material witness," the likelihood that the presiding judge in a federal court might be called to testify in the trial over which he is presiding is slight. Nevertheless the possibility is not totally eliminated.

The solution here presented is a broad rule of incompetency, rather than such alternatives as incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality? The rule of general incompetency has substantial support. See Report of the Special Committee on the Propriety of Judges Appearing as Witnesses, 36 A.B.A.J. 630 (1950); cases collected in Annot. 157 A.L.R. 311; McCormick § 68, p. 147; Uniform Rule 42; California Evidence Code § 703; Kansas Code of Civil Procedure § 60-442; New Jersey Evidence Rule 42. Cf. 6 Wigmore § 1909, which advocates leaving the matter to the discretion of the judge, and statutes to that effect collected in Annot. 157 A.L.R. 311.

The rule provides an "automatic" objection. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector.

Rule 606.

COMPETENCY OF JUROR AS WITNESS

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing

him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended only by the addition of the concluding phrase "for these purposes." The bill originally passed by the House did not contain in the first sentence the prohibition as to matters or statements during the deliberations or the clause beginning "except."

Advisory Committee's Note

Subdivision (a). The considerations which bear upon the permissibility of testimony by a juror in the trial in which he is sitting as juror bear an obvious similarity to those evoked when the judge is called as a witness. See Advisory Committee's Note to Rule 605. The judge is not, however in this instance so involved as to call for departure from usual principles requiring objection to be made; hence the only provision on objection is that opportunity be afforded for its making out of the presence of the jury. Compare Rule 605.

Subdivision (b). Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. McDonald v. Pless, 238 U.S. 264, 35 S.Ct. 785, 59 L.Ed. 1300 (1915). On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. See Grenz v. Werre, 129 N.W.2d 681 (N.D.1964). The authorities are in virtually complete accord in excluding the evidence. Fryer, Note on Disqualification of Witnesses, Selected Writings on Evidence and Trial 345, 347 (Fryer ed. 1957); Maguire, Weinstein, et al., Cases on Evidence 887 (5th ed. 1965); 8 Wigmore § 2349 (McNaughton Rev.1961). As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his

testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. 8 Wigmore § 2354 (McNaughton Rev.1961). However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892).

Under the federal decisions the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. Thus testimony or affidavits of jurors have been held incompetent to show a compromise verdict, Hyde v. United States, 225 U.S. 347, 382 (1912); a quotient verdict, McDonald v. Pless, 238 U.S. 264 (1915); speculation as to insurance coverage, Holden v. Porter, 405 F.2d 878 (10th Cir. 1969), Farmers Coop. Elev. Ass'n v. Strand, 382 F.2d 224, 230 (8th Cir. 1967), cert. denied 389 U.S. 1014; misinterpretation of instructions, Farmers Coop. Elev. Ass'n v. Strand, *supra*; mistake in returning verdict, United States v. Chereton, 309 F.2d 197 (6th Cir. 1962); interpretation of guilty plea by one defendant as implicating others, United States v. Crosby, 294 F.2d 928, 949 (2d Cir. 1961). The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room, Mattox v. United States, 146 U.S. 140 (1892). See also Parker v. Gladden, 385 U.S. 363 (1966).

This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds.

See also Rule 6(e) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3500, governing the secrecy of grand jury proceedings. The present rule does not relate to secrecy and disclosure but to the competency of certain witnesses and evidence.

Report of House Judiciary Committee

As proposed by the Court, Rule 606(b) limited testimony by a juror in the course of an inquiry into the validity of a verdict or indictment. He could testify as to the influence of extraneous prejudicial information brought to the jury's attention (e. g. a radio newscast or a newspaper account) or an outside influence which improperly had been brought to bear upon a juror (e. g. a threat to the safety of a member of his family), but he could not testify as to other irregularities which occurred in the jury room. Under this formulation a quotient verdict could not be attacked through the testimony of a juror, nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations.

The 1969 and 1971 Advisory Committee drafts would have permitted a member of the jury to testify concerning these kinds of irregularities in the jury room. The Advisory Committee note in the 1971 draft stated that "* * * the door of the jury room is not a satisfactory dividing point, and the Supreme Court has refused to accept it." The Advisory Committee further commented that—

> The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room. * * * The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

Objective jury misconduct may be testified to in California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington.

Persuaded that the better practice is that provided for in the earlier drafts, the Committee amended subdivision (b) to read in the text of those drafts.

Report of Senate Judiciary Committee

As adopted by the House, this rule would permit the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of conduct in the jury room. This extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised.

The rule passed by the House embodies a suggestion by the Advisory Committee of the Judicial Conference that is considerably broader than the final version adopted by the Supreme Court, which embodied long-accepted Federal law. Although forbidding the impeachment of verdicts by inquiry into the jurors' mental processes, it deletes from the Supreme Court version the proscription against testimony "as to any matter or statement occurring during the course of the jury's deliberations." This deletion would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations.

Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court. In McDonald v. Pless, the Court stated:

* * * * * * * * * *

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the

constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.[2]

* * * * * * * * * *

As it stands then, the rule would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors.

Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.

Conference Report

Rule 606(b) deals with juror testimony in an inquiry into the validity of a verdict or indictment. The House bill provides that a juror cannot testify about his mental processes or about the effect of anything upon his or another juror's mind as influencing him to assent to or dissent from a verdict or indictment. Thus, the House bill allows a juror to testify about objective matters occurring during the jury's deliberation, such as the misconduct of another juror or the reaching of a quotient verdict. The Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations. The Senate bill does provide, however, that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention and on the question whether any outside influence was improperly brought to bear on any juror.

The Conference adopts the Senate amendment. The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations.

Rule 607.

WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling him.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under Rule 801(d) (1). Ladd, Impeachment of One's Own Witness—New Developments, 4 U.Chi.L.Rev. 69 (1936); McCormick § 38; 3 Wigmore §§ 896–918. The substantial inroads into the old rule made over the years by decisions, rules, and statutes are evidence of doubts as to its basic soundness and workability. Cases are collected in 3 Wigmore § 905. Revised Rule 32(a) (1) of the Federal Rules of Civil Procedure allows any party to impeach a witness by means of his deposition, and Rule 43(b) has allowed the calling and impeachment of an adverse party or person identified with him. Illustrative statutes allowing a party to impeach his own witness under varying circumstances are Ill.Rev.Stats. 1967, c. 110, § 60; Mass.Laws Annot.1959, c. 233 § 23; 20 N.M.Stats. Annot.1953, § 20–2–4; N.Y. CPLR § 4514 (McKinney 1963); 12 Vt. Stats.Annot.1959, §§ 1641a, 1642. Complete judicial rejection of the old rule is found in United States v. Freeman, 302 F.2d 347 (2d Cir. 1962). The same result is reached in Uniform Rule 20; California Evidence Code § 785; Kansas Code of Civil Procedure § 60–420. See also New Jersey Evidence Rule 20.

2. 238 U.S. 264, at 267 (1914).

Rule 608.

EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, changed only by amending the second sentence of subdivision (b). The sentence as prescribed by the Court read: "They may, however, if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to his character for truthfulness or untruthfulness." The effect of the amendments was to delete the phrase "and not remote in time," to add the phrase "in the discretion of the court," and otherwise only to clarify the meaning of the sentence. The reasons for the amendments are stated in the Report of the House Committee on the Judiciary, set forth below. See also Note to Rule 405(a) by Federal Judicial Center, supra.

Advisory Committee's Note

Subdivision (a). In Rule 404(a) the general position is taken that character evidence is not admissible for the purpose of proving that the person acted in conformity therewith, subject, however, to several exceptions, one of which is character evidence of a witness as bearing upon his credibility. The present rule develops that exception.

In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally. The result is to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive. McCormick § 44.

The use of opinion and reputation evidence as means of proving the character of witnesses is consistent with Rule 405(a). While the modern practice has purported to exclude opinion, witnesses who testify to reputation seem in fact often to be giving their opinions, disguised somewhat misleadingly as reputation. See McCormick § 44. And even under the modern practice, a common relaxation has allowed inquiry as to whether the witnesses would believe the principal witness under oath. United States v. Walker, 313 F.2d 236 (6th Cir. 1963), and cases cited therein; McCormick § 44, pp. 94–95, n. 3.

Character evidence in support of credibility is admissible under the rule only after the witness' character has first been attacked, as has been the case at common law. Maguire, Weinstein, et al., Cases on Evidence 295 (5th ed. 1965); McCormick § 49, p. 105; 4 Wigmore § 1104. The enormous needless consumption of time which a contrary practice would entail justifies the limitation. Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not. McCormick § 49; 4 Wigmore §§ 1106, 1107. Whether evidence in the form of contradiction is an attack upon the character of the witness must depend upon the circumstances. McCormick § 49. Cf. 4 Wigmore §§ 1108, 1109.

As to the use of specific instances on direct by an opinion witness, see the Advisory Committee's Note to Rule 405, *supra*.

Subdivision (b). In conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless

character is an issue in the case, the present rule generally bars evidence of specific instances of conduct of a witness for the purpose of attacking or supporting his credibility. There are, however, two exceptions: (1) specific instances are provable when they have been the subject of criminal conviction, and (2) specific instances may be inquired into on cross-examination of the principal witness or of a witness giving an opinion of his character for truthfulness.

(1) Conviction of crime as a technique of impeachment is treated in detail in Rule 609, and here is merely recognized as an exception to the general rule excluding evidence of specific incidents for impeachment purposes.

(2) Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite . . . . Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

The final sentence constitutes a rejection of the doctrine of such cases as People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950), that any past criminal act relevant to credibility may be inquired into on cross-examination, in apparent disregard of the privilege against self-incrimination. While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity. While it is true that an accused, unlike an ordinary witness, has an option whether to testify, if the option can be exercised only at the price of opening up inquiry as to any and all criminal acts committed during his lifetime, the right to testify could scarcely be said to possess much vitality. In Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Court held that allowing comment on the election of an accused not to testify exacted a constitutionally impermissible price, and so here. While no specific provision in terms confers constitutional status on the right of an accused to take the stand in his own defense, the existence of the right is so completely recognized that a denial of it or substantial infringement upon it would surely be of due process dimensions. See Ferguson v. Georgia, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961); McCormick § 131; 8 Wigmore § 2276 (McNaughton Rev.1961). In any event, wholly aside from constitutional considerations, the provision represents a sound policy.

Report of House Committee on the Judiciary

The second sentence of Rule 608(b) as submitted by the Court permitted specific instances of misconduct of a witness to be inquired

into on cross-examination for the purpose of attacking his credibility, if probative of truthfulness or untruthfulness, "and not remote in time." Such cross-examination could be of the witness himself or of another witness who testifies as to "his" character for truthfulness or untruthfulness.

The Committee amended the Rule to emphasize the discretionary power of the court in permitting such testimony and deleted the reference to remoteness in time as being unnecessary and confusing (remoteness from time of trial or remoteness from the incident involved?). As recast, the Committee amendment also makes clear the antecedent of "his" in the original Court proposal.

Rule 609.

IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Note by Federal Judicial Center

Subdivision (a) of the rule prescribed by the Supreme Court was revised successively in the House, in the Senate, and in the Conference. The nature of the rule prescribed by the Court, the various amendments, and the reasons therefor are stated in the Report of the House Committee on the Judiciary, the Report of the Senate Committee on the Judiciary, and the Conference Report, set forth below.

Subdivision (b) of the rule prescribed by the Supreme Court was also revised successively in the House, in the Senate, and in the Conference. The nature of the rule prescribed by the Court, those amendments, and the reasons therefor are likewise stated in the Report of the House Committee on the Judiciary, the Report of the Senate Committee on the Judiciary, and the Conference Report, set forth below.

Subdivision (c) enacted by the Congress is the subdivision prescribed by the Supreme Court, with amendments and reasons therefor stated in the Report of the House Committee on the Judiciary, set forth below.

Subdivision (d) enacted by the Congress is the subdivision prescribed by the Supreme Court, amended in the second sentence by substituting "court" in place of "judge" and by adding the phrase "in a criminal case."

Subdivision (e) enacted by the Congress is the subdivision prescribed by the Supreme Court without change.

Advisory Committee's Note

As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick § 43; 2 Wright, Federal Practice and Procedure: Criminal § 416 (1969). The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi* without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of § 14–305 of the District of

Columbia Code, P.L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving "dishonesty or false statement." Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. Luck v. United States, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. * * *

The proposed rule incorporates certain basic safeguards, in terms applicable to all witnesses but of particular significance to an accused who elects to testify. These protections include the imposition of definite time limitations, giving effect to demonstrated rehabilitation, and generally excluding juvenile adjudications.

Subdivision (a). For purposes of impeachment, crimes are divided into two categories by the rule: (1) those of what is generally regarded as felony grade, without particular regard to the nature of the offense, and (2) those involving dishonesty or false statement, without regard to the grade of the offense. Provable convictions are not limited to violations of federal law. By reason of our constitutional structure, the federal catalog of crimes is far from being a complete one, and resort must be had to the laws of the states for the specification of many crimes. For example, simple theft as compared with theft from interstate commerce. Other instances of borrowing are the Assimilative Crimes Act, making the state law of crimes applicable to the special territorial and maritime jurisdiction of the United States, 18 U.S.C. § 13, and the provision of the Judicial Code disqualifying persons as jurors on the grounds of state as well as federal convictions, 28 U.S.C. § 1865. For evaluation of the crime in terms of seriousness, reference is made to the congressional measurement of felony (subject to imprisonment in excess of one year) rather than adopting state definitions which vary considerably. See 28 U.S.C. § 1865, *supra*, disqualifying jurors for conviction in state or federal court of crime punishable by imprisonment for more than year.

Report of the House Committee on the Judiciary

Rule 609(a) as submitted by the Court was modeled after Section 133(a) of Public Law 91-358, 14 D.C.Code 305(b)(1), enacted in 1970. The Rule provided that:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.

As reported to the Committee by the Subcommittee, Rule 609(a) was amended to read as follows:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime (1) was punishable by death or imprisonment in excess of one year, unless the court determines that the danger

> of unfair prejudice outweighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement.

In full committee, the provision was amended to permit attack upon the credibility of a witness by prior conviction only if the prior crime involved dishonesty or false statement. While recognizing that the prevailing doctrine in the federal courts and in most States allows a witness to be impeached by evidence of prior felony convictions without restriction as to type, the Committee was of the view that, because of the danger of unfair prejudice in such practice and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused, cross-examination by evidence of prior conviction should be limited to those kinds of convictions bearing directly on credibility, *i. e.*, crimes involving dishonesty or false statement.

Report of the Senate Committee on the Judiciary

As proposed by the Supreme Court, the rule would allow the use of prior convictions to impeach if the crime was a felony or a misdemeanor if the misdemeanor involved dishonesty or false statement. As modified by the House, the rule would admit prior convictions for impeachment purposes only if the offense, whether felony or misdemeanor, involved dishonesty or false statement.

The committee has adopted a modified version of the House-passed rule. In your committee's view, the danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence. Therefore, with respect to defendants, the committee agreed with the House limitation that only offenses involving false statement or dishonesty may be used. By that phrase, the committee means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit or falsification bearing on the accused's propensity to testify truthfully.

With respect to other witnesses, in addition to any prior conviction involving false statement or dishonesty, any other felony may be used to impeach if, and only if, the court finds that the probative value of such evidence outweighs its prejudicial effect against the party offering that witness.

Notwithstanding this provision, proof of any prior offense otherwise admissible under rule 404 could still be offered for the purposes sanctioned by that rule. Furthermore, the committee intends that notwithstanding this rule, a defendant's misrepresentation regarding the existence or nature of prior convictions may be met by rebuttal evidence, including the record of such prior convictions. Similarly, such records may be offered to rebut representations made by the defendant regarding his attitude toward or willingness to commit a general category of offense, although denials or other representations by the defendant regarding the specific conduct which forms the basis of the charge against him shall not make prior convictions admissible to rebut such statement.

In regard to either type of representation, of course, prior convictions may be offered in rebuttal only if the defendant's statement is made in response to defense counsel's questions or is made gratuitously in the course of cross-examination. Prior convictions may not be offered as rebuttal evidence if the prosecution has sought to circumvent the purpose of this rule by asking questions which elicit such representations from the defendant.

One other clarifying amendment has been added to this subsection, that is, to provide that the admissibility of evidence of a prior conviction is permitted only upon cross-examination of a witness. It is not admissible if a person does not testify. It is to be understood, however, that a court record of a prior conviction is admissible to prove that conviction if the witness has forgotten or denies its existence.

Conference Report

The House bill provides that the credibility of a witness can be attacked by proof of prior conviction of a crime only if the crime involves dishonesty or false statement. The Senate amendment provides that a witness' credibility may be attacked if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involves dishonesty or false statement, regardless of the punishment.

The Conference adopts the Senate amendment with an amendment. The Conference amendment provides that the credibility of a witness, whether a defendant or someone else, may be attacked by proof of a prior conviction but only if the crime: (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted and the court determines that the probative value of the conviction outweighs its prejudicial effect to the defendant; or (2) involved dishonesty or false statement regardless of the punishment.

By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant*. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining

admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

Advisory Committee's Note

Subdivision (b). Few statutes recognize a time limit on impeachment by evidence of conviction. However, practical considerations of fairness and relevancy demand that some boundary be recognized. See Ladd, Credibility Tests—Current Trends, 89 U.Pa.L.Rev. 166, 176–177 (1940). This portion of the rule is derived from the proposal advanced in Recommendation Proposing in Evidence Code, § 788(5), p. 142, Cal.Law Rev.Comm'n (1965), though not adopted. See California Evidence Code § 788.

Report of the House Committee on the Judiciary

Rule 609(b) as submitted by the Court was modeled after Section 133(a) of Public Law 91–358, 14 D.C.Code 305(b)(2)(B), enacted in 1970. The Rule provided:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date.

Under this formulation, a witness' entire past record of criminal convictions could be used for impeachment (provided the conviction met the standard of subdivision (a), if the witness had been most recently released from confinement, or the period of his parole or probation had expired, within ten years of the conviction.

The Committee amended the Rule to read in the text of the 1971 Advisory Committee version to provide that upon the expiration of ten years from the date of a conviction of a witness, or of his release from confinement for that offense, that conviction may no longer be used for impeachment. The Committee was of the view that after ten years following a person's release from confinement (or from the date of his conviction) the probative value of the conviction with respect to that person's credibility diminished to a point where it should no longer be admissible.

Report of the Senate Committee on the Judiciary

Although convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness. Rather than exclude all convictions over 10 years old, the committee adopted an amendment in the form of a final clause to the section granting the court discretion to admit convictions over 10 years old,

but only upon a determination by the court that the probative value of the conviction supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

It is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances. The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact. It is expected that, in fairness, the court will give the party against whom the conviction is introduced a full and adequate opportunity to contest its admission.

Conference Report

The House bill provides in subsection (b) that evidence of conviction of a crime may not be used for impeachment purposes under subsection (a) if more than ten years have elapsed since the date of the conviction or the date the witness was released from confinement imposed for the conviction, whichever is later. The Senate amendment permits the use of convictions older than ten years, if the court determines, in the interests of justice, that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

The Conference adopts the Senate amendment with an amendment requiring notice by a party that he intends to request that the court allow him to use a conviction older than ten years. The Conferees anticipate that a written notice, in order to give the adversary a fair opportunity to contest the use of the evidence, will ordinarily include such information as the date of the conviction, the jurisdiction, and the offense or statute involved. In order to eliminate the possibility that the flexibility of this provision may impair the ability of a party-opponent to prepare for trial, the Conferees intend that the notice provision operate to avoid surprise.

Advisory Committee's Note

Subdivision (c). A pardon or its equivalent granted solely for the purpose of restoring civil rights lost by virtue of a conviction has no relevance to an inquiry into character. If, however, the pardon or other proceeding is hinged upon a showing of rehabilitation the situation is otherwise. The result under the rule is to render the conviction inadmissible. The alternative of allowing in evidence both the conviction and the rehabilitation has not been adopted for reasons of policy, economy of time, and difficulties of evaluation.

A similar provision is contained in California Evidence Code § 788. Cf. A.L.I. Model Penal Code, Proposed Official Draft § 306.6(3) (e) (1962), and discussion in A.L.I. Proceedings 310 (1961).

Pardons based on innocence have the effect, of course, of nullifying the conviction *ab initio*.

Report of House Committee on the Judiciary

Rule 609(c) as submitted by the Court provided in part that evidence of a witness' prior conviction is not admissible to attack his

credibility if the conviction was the subject of a pardon, annulment, or other equivalent procedure, based on a showing of rehabilitation, and the witness has not been convicted of a subsequent crime. The Committee amended the Rule to provide that the "subsequent crime" must have been "punishable by death or imprisonment in excess of one year", on the ground that a subsequent conviction of an offense not a felony is insufficient to rebut the finding that the witness has been rehabilitated. The Committee also intends that the words "based on a finding of the rehabilitation of the person convicted" apply not only to "certificate of rehabilitation, or other equivalent procedure", but also to "pardon" and "annulment."

Advisory Committee's Note

Subdivision (d). The prevailing view has been that a juvenile adjudication is not usable for impeachment. Thomas v. United States, 74 App.D.C. 167, 121 F.2d 905 (1941); Cotton v. United States, 355 F. 2d 480 (10th Cir. 1966). This conclusion was based upon a variety of circumstances. By virtue of its informality, frequently diminished quantum of required proof, and other departures from accepted standards for criminal trials under the theory of *parens patriae*, the juvenile adjudication was considered to lack the precision and general probative value of the criminal conviction. While In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), no doubt eliminates these characteristics insofar as objectionable, other obstacles remain. Practical problems of administration are raised by the common provisions in juvenile legislation that records be kept confidential and that they be destroyed after a short time. While *Gault* was skeptical as to the realities of confidentiality of juvenile records, it also saw no constitutional obstacles to improvement. 387 U.S. at 25, 87 S.Ct. 1428. See also Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum.L.Rev. 281, 289 (1967). In addition, policy considerations much akin to those which dictate exclusion of adult convictions after rehabilitation has been established strongly suggest a rule of excluding juvenile adjudications. Admittedly, however, the rehabilitative process may in a given case be a demonstrated failure, or the strategic importance of a given witness may be so great as to require the overriding of general policy in the interests of particular justice. See Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967). Wigmore was outspoken in his condemnation of the disallowance of juvenile adjudications to impeach, especially when the witness is the complainant in a case of molesting a minor. 1 Wigmore § 196; 3 *id.* §§ 924a, 980. The rule recognizes discretion in the judge to effect an accommodation among these various factors by departing from the general principle of exclusion. In deference to the general pattern and policy of juvenile statutes, however, no discretion is accorded when the witness is the accused in a criminal case.

Subdivision (e). The presumption of correctness which ought to attend judicial proceedings supports the position that pendency of an appeal does not preclude use of a conviction for impeachment. United States v. Empire Packing Co., 174 F.2d 16 (7th Cir. 1949), cert. denied 337 U.S. 959, 69 S.Ct. 1534, 93 L.Ed. 1758; Bloch v. United States, 226 F.2d 185 (9th Cir. 1955), cert. denied 350 U.S. 948, 76 S.Ct. 323, 100 L.Ed. 826 and 353 U.S. 959, 77 S.Ct. 868, 1 L.Ed.2d 910; and

see Newman v. United States, 331 F.2d 968 (8th Cir. 1964). *Contra*, Campbell v. United States, 85 U.S.App.D.C. 133, 176 F.2d 45 (1949). The pendency of an appeal is, however, a qualifying circumstance properly considerable.

Rule 610.

RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule. Cf. Tucker v. Reil, 51 Ariz. 357, 77 P.2d 203 (1938). To the same effect, though less specifically worded, is California Evidence Code § 789. See 3 Wigmore § 936.

Rule 611.

MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Note by Federal Judicial Center

Subdivision (a) of the rule enacted by the Congress is the subdivision prescribed by the Supreme Court, amended only by substituting "court" in place of "judge."

Subdivision (b) of the rule enacted by the Congress is substantially different from the subdivision prescribed by the Supreme Court. The nature of the changes and the reasons therefor are stated in the Report of the House Committee on the Judiciary, set forth below.

The first two sentences of subdivision (c) of the rule enacted by the Congress are the same as prescribed by the Supreme Court. The third sentence has been amended in the manner and for the reasons stated in the Report of the House Committee on the Judiciary, set forth below.

Advisory Committee's Note

Subdivision (a). Spelling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain.

Item (1) restates in broad terms the power and obligation of the judge as developed under common law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, McCormick § 5, the order of calling witnesses and presenting evidence, 6 Wigmore § 1867, the use of demonstrative evidence, McCormick § 179, and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances.

Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403(b).

Item (3) calls for a judgment under the particular circumstances whether interrogation tactics entail harassment or undue embarrassment. Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion. McCormick § 42. In Alford v. United States, 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624 (1931), the Court pointed out that, while the trial judge should protect the witness from questions which "go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate," this protection by no means forecloses efforts to discredit the witness. Reference to the transcript of the prosecutor's cross-examination in Berger v. United States, 295 U.

S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), serves to lay at rest any doubts as to the need for judicial control in this area.

The inquiry into specific instances of conduct of a witness allowed under Rule 608(b) is, of course, subject to this rule.

Subdivision (b) *. The tradition in the federal courts and in numerous state courts has been to limit the scope of cross-examination to matters testified to on direct, plus matters bearing upon the credibility of the witness. Various reasons have been advanced to justify the rule of limited cross-examination. (1) A party vouches for his own witness but only to the extent of matters elicited on direct. Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 Fed. 668, 675 (8th Cir. 1904), quoted in Maguire, Weinstein, et al., Cases on Evidence 277, n. 38 (5th ed. 1965). But the concept of vouching is discredited, and Rule 6–07[607] rejects it. (2) A party cannot ask his own witness leading questions. This is a problem properly solved in terms of what is necessary for a proper development of the testimoney rather than by a mechanistic formula similar to the vouching concept. See discussion under subdivision (c). (3) A practice of limited cross-examination promotes orderly presentation of the case. Finch v. Weiner, 109 Conn. 616, 145 Atl. 31 (1929). In the opinion of the Advisory Committee this latter reason has merit. It is apparent, however, that the rule of limited cross-examination thus viewed becomes an aspect of the judge's general control over the mode and order of interrogating witnesses and presenting evidence, to be administered as such. The matter is not one in which involvement at the appellate level is likely to prove fruitful. See, for example, Moyer v. Aetna Life Ins. Co., 126 F.2d 141 (3rd Cir. 1942); Butler v. New York Central R. Co., 253 F.2d 281 (7th Cir. 1958); United States v. Johnson, 285 F.2d 35 (9th Cir. 1960); Union Automobile Indemnity Ass'n v. Capitol Indemnity Ins. Co., 310 F.2d 318 (7th Cir. 1962). In view of these considerations, the rule is phrased in terms of a suggestion rather than a mandate to the trial judge.

The qualification "as if on direct examination," applicable when inquiry into additional matters is allowed is designed to terminate at that point the asking of leading questions as a matter of right and to bring into operation subdivision (c) of the rule.

The rule does not purport to determine the extent to which an accused who elects to testify thereby waives his privilege against self-incrimination. The question is a constitutional one, rather than a mere matter of administering the trial. Under United States v. Simmons, 390 U.S. 377 (1968), no general waiver occurs when the accused testifies on such preliminary matters as the validity of a search and seizure or the admissibility of a confession. Rule 1–04(d) [104(d)], supra. When he testifies on the merits, however, can he foreclose inquiry into an aspect or element of the crime by avoiding it on direct? The affirmative answer given in Tucker v. United States, 5 F.2d 818 (8th Cir. 1925), is inconsistent with the description of the waiver as extending to "all other relevant facts" in Johnson v. United States, 318 U.S. 189, 195 (1943). See also Brown v. United States, 356 U.S. 148 (1958). The situation of an accused who desires to

* The Advisory Committee's Note to subdivision (b) is from the 1969 Preliminary Draft. 46 F.R.D. 161, 304.

testify on some but not all counts of a multiple-count indictment is one to be approached, in the first instance at least, as a problem of severance under Rule 14 of the Federal Rules of Criminal Procedure. Cross v. United States, 335 F.2d 987 (D.C.Cir.1964). Cf. United States v. Baker, 262 F.Supp. 657, 686 (D.D.C.1966). In all events, the extent of the waiver of the privilege against self-incrimination ought not to be determined as a by-product of a rule on scope of cross-examination.

Report of House Committee on the Judiciary

As submitted by the Court, Rule 611(b) provided:

> A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

The Committee amended this provision to return to the rule which prevails in the federal courts and thirty-nine State jurisdictions. As amended, the Rule is in the text of the 1969 Advisory Committee draft. It limits cross-examination to credibility and to matters testified to on direct examination, unless the judge permits more, in which event the cross-examiner must proceed as if on direct examination. This traditional rule facilitates orderly presentation by each party at trial. Further, in light of existing discovery procedures, there appears to be no need to abandon the traditional rule.

Report of Senate Committee on the Judiciary

Rule 611(b) as submitted by the Supreme Court permitted a broad scope of cross-examination: "cross-examination on any matter relevant to any issue in the case" unless the judge, in the interests of justice, limited the scope of cross-examination.

The House narrowed the Rule to the more traditional practice of limiting cross-examination to the subject matter of direct examination (and credibility), but with discretion in the judge to permit inquiry into additional matters in situations where that would aid in the development of the evidence or otherwise facilitate the conduct of the trial.

The committee agrees with the House amendment. Although there are good arguments in support of broad cross-examination from prospectives of developing all relevant evidence, we believe the factors of insuring an orderly and predictable development of the evidence weigh in favor of the narrower rule, especially when discretion is given to the trial judge to permit inquiry into additional matters. The committee expressly approves this discretion and believes it will permit sufficient flexibility allowing a broader scope of cross-examination whenever appropriate.

The House amendment providing broader discretionary cross-examination permitted inquiry into additional matters only as if on direct examination. As a general rule, we concur with this limitation, however, we would understand that this limitation would not preclude the utilization of leading questions if the conditions of subsection (c)

of this rule were met, bearing in mind the judge's discretion in any case to limit the scope of cross-examination.[1]

Further, the committee has received correspondence from Federal judges commenting on the applicability of this rule to section 1407 of title 28. It is the committee's judgment that this rule as reported by the House is flexible enough to provide sufficiently broad cross-examination in appropriate situations in multidistrict litigation.

Advisory Committee's Note

Subdivision (c). The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774–778. An almost total unwillingness to reverse for infractions has been manifested by appellate courts. See cases cited in 3 Wigmore § 770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

The final sentence deals with categories of witnesses automatically regarded and treated as hostile. Rule 43(b) of the Federal Rules of Civil Procedure has included only "an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party." This limitation virtually to persons whose statements would stand as admissions is believed to be an unduly narrow concept of those who may safely be regarded as hostile without further demonstration. See, for example, Maryland Casualty Co. v. Kador, 225 F.2d 120 (5th Cir. 1955), and Degelos v. Fidelity and Casualty Co., 313 F.2d 809 (5th Cir. 1963), holding despite the language of Rule 43(b) that an insured fell within it, though not a party in an action under the Louisiana direct action statute. The phrase of the rule, "witness identified with" an adverse party, is designed to enlarge the category of persons thus callable.

Report of House Committee on the Judiciary

The third sentence of Rule 611(c) as submitted by the Court provided that:

> In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions.

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1. See McCormick on Evidence, §§ 24–26 (especially 24) (2d ed. 1972).

The Committee amended this Rule to permit leading questions to be used with respect to any hostile witness, not only an adverse party or person identified with such adverse party. The Committee also substituted the word "When" for the phrase "In civil cases" to reflect the possibility that in criminal cases a defendant may be entitled to call witnesses identified with the government, in which event the Committee believed the defendant should be permitted to inquire with leading questions.

Report of Senate Committee on the Judiciary

As submitted by the Supreme Court, the rule provided: "In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions."

The final sentence of subsection (c) was amended by the House for the purpose of clarifying the fact that a "hostile witness"—that is a witness who is hostile in fact—could be subject to interrogation by leading questions. The rule as submitted by the Supreme Court declared certain witnesses hostile as a matter of law and thus subject to interrogation by leading questions without any showing of hostility in fact. These were adverse parties or witnesses identified with adverse parties. However, the wording of the first sentence of subsection (c) while generally prohibiting the use of leading questions on direct examination, also provides "except as may be necessary to develop his testimony." Further, the first paragraph of the Advisory Committee note explaining the subsection makes clear that they intended that leading questions could be asked of a hostile witness or a witness who was unwilling or biased and even though that witness was not associated with an adverse party. Thus, we question whether the House amendment was necessary.

However, concluding that it was not intended to affect the meaning of the first sentence of the subsection and was intended solely to clarify the fact that leading questions are permissible in the interrogation of a witness, who is hostile in fact, the committee accepts that House amendment.

The final sentence of this subsection was also amended by the House to cover criminal as well as civil cases. The committee accepts this amendment, but notes that it may be difficult in criminal cases to determine when a witness is "identified with an adverse party," and thus the rule should be applied with caution.

Rule 612.

WRITING USED TO REFRESH MEMORY

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended by substituting "court" in place of "judge," with appropriate pronominal change, and in the first sentence, by substituting "the writing" in place of "it" before "produced," and by substituting the phrase "(1) while testifying, or (2) before testifying if the court in its discretion determines it is necessary in the interests of justice" in place of "before or while testifying." The reasons for the latter amendment are stated in the Report of the House Committee on the Judiciary, set forth below.

Advisory Committee's Note

The treatment of writings used to refresh recollection while on the stand is in accord with settled doctrine. McCormick § 9, p. 15. The bulk of the case law has, however, denied the existence of any right to access by the opponent when the writing is used prior to taking the stand, though the judge may have discretion in the matter. Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942); Needelman v. United States, 261 F.2d 802 (5th Cir. 1958), cert. dismissed 362 U.S. 600, 80 S.Ct. 960, 4 L.Ed.2d 980, rehearing denied 363 U.S. 858, 80 S.Ct. 1606, 4 L.Ed.2d 1739, Annot., 82 A.L.R.2d 473, 562 and 7 A.L.R.3d 181, 247. An increasing group of cases has repudiated the distinction, People v. Scott, 29 Ill.2d 97, 193 N.E.2d 814 (1963); State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957); State v. Hunt, 25 N.J. 514, 138 A.2d 1 (1958); State v. Deslovers, 40 R.I. 89, 100 A. 64 (1917), and this position is believed to be correct. As Wigmore put it, "the risk of imposition and the need of safeguard is just as great" in both situations. 3 Wigmore § 762, p. 111. To the same effect is McCormick § 9, p. 17.

The purpose of the phrase "for the purpose of testifying" is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.

The purpose of the rule is the same as that of the *Jencks* statute, 18 U.S.C. § 3500: to promote the search of credibility and memory. The same sensitivity to disclosure of government files may be involved; hence the rule is expressly made subject to the statute, subdivision (a) of which provides: "In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." Items falling within the purview of the statute are producible only as provided by its terms, Palermo v. United States, 360 U.S. 343, 351 (1959), and disclosure under the rule is limited similarly by the statutory conditions. With this limitation in mind, some differences of application may be noted. The *Jencks* statute applies only to statements of witnesses; the rule is not so limited. The statute applies only to criminal cases; the rule applies to all cases. The statute applies only to government witnesses; the rule applies to all witnesses. The statute contains no requirement that the statement be consulted for purposes of refreshment before or while testifying; the rule so requires. Since many writings would qualify under either statute or rule, a substantial overlap exists, but the identity of procedures makes this of no importance.

The consequences of nonproduction by the government in a criminal case are those of the *Jencks* statute, striking the testimony or in exceptional cases a mistrial. 18 U.S.C. § 3500(d). In other cases these alternatives are unduly limited, and such possibilities as contempt, dismissal, finding issues against the offender, and the like are available. See Rule 16(g) of the Federal Rules of Criminal Procedure and Rule 37(b) of the Federal Rules of Civil Procedure for appropriate sanctions.

Report of House Committee on the Judiciary

As submitted to Congress, Rule 612 provided that except as set forth in 18 U.S.C. 3500, if a witness uses a writing to refresh his memory for the purpose of testifying, "either before or while testifying," an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness on it, and to introduce in evidence those portions relating to the witness' testimony. The Committee amended the Rule so as still to require the production of writings used by a witness while testifying, but to render the production of writings used by a witness to refresh his memory before testifying discretionary with the court in the interests of justice, as is the case under existing federal law. See Goldman v. United States, 316 U.S. 129 (1942). The Committee considered that permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial.

The Committee intends that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory.

Rule 613.

PRIOR STATEMENTS OF WITNESSES

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended only by substituting "nor" in place of "or" in subdivision (a).

Advisory Committee's Note

Subdivision (a). The Queen's Case, 2 Br. & B. 284, 129 Eng.Rep. 976 (1820), laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness. Abolished by statute in the country of its origin, the requirement nevertheless gained currency in the United States. The rule abolishes this useless impediment, to cross-examination. Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 246–247 (1967); McCormick § 28; 4 Wigmore §§ 1259–1260. Both oral and written statements are included.

The provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 1002 relating to production of the original when the contents of a writing are sought to be proved. Nor does it defeat the application of Rule 26(b)(3) of the Rules of Civil Procedure, as revised, entitling a person on request to a copy of his own statement, though the operation of the latter may be suspended temporarily.

Subdivision (b). The familiar foundation requirement that an impeaching statement first be shown to the witness before it can be proved by extrinsic evidence is preserved but with some modifications. See Ladd, Some Observations on Credibility: Impeachment of

Witnesses, 52 Cornell L.Q. 239, 247 (1967). The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence. Under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement. See Comment to California Evidence Code § 770. Also, dangers of oversight are reduced. See McCormick § 37, p. 68.

In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the judge. Similar provisions are found in California Evidence Code § 770 and New Jersey Evidence Rule 22(b).

Under principles of *expression unius* the rule does not apply to impeachment by evidence of prior inconsistent conduct. The use of inconsistent statements to impeach a hearsay declaration is treated in Rule 806.

Rule 614.

CALLING AND INTERROGATION OF WITNESSES BY COURT

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended only by substituting "court" in place of "judge," with conforming pronominal changes.

Advisory Committee's Note

Subdivision (a). While exercised more frequently in criminal than in civil cases, the authority of the judge to call witnesses is well established. McCormick § 8, p. 14; Maguire, Weinstein, et al., Cases on Evidence 303–304 (5th ed. 1965); 9 Wigmore § 2484. One reason for the practice, the old rule against impeaching one's own witness, no longer exists by virtue of Rule 607, *supra*. Other reasons remain, however, to justify the continuation of the practice of calling court's witnesses. The right to cross-examine, with all it implies, is assured. The tendency of juries to associate a witness with the par-

ty calling him, regardless of technical aspects of vouching, is avoided. And the judge is not imprisoned within the case as made by the parties.

Subdivision (b). The authority of the judge to question witnesses is also well established. McCormick § 8, pp. 12–13; Maguire, Weinstein, et al., Cases on Evidence 737–739 (5th ed. 1965); 3 Wigmore § 784. The authority is, of course, abused when the judge abandons his proper role and assumes that of advocate, but the manner in which interrogation should be conducted and the proper extent of its exercise are not susceptible of formulation in a rule. The omission in no sense precludes courts of review from continuing to reverse for abuse.

Subdivision (c). The provision relating to objections is designed to relieve counsel of the embarrassment attendant upon objecting to questions by the judge in the presence of the jury, while at the same time assuring that objections are made in apt time to afford the opportunity to take possible corrective measures. Compare the "automatic" objection feature of Rule 605 when the judge is called as a witness.

Rule 615.

EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended only by substituting "court," in place of "judge," with conforming pronominal changes.

Advisory Committee's Note

The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. 6 Wigmore §§ 1837–1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.

Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 Wigmore § 1841. (2) As the equivalent of the right of a

natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness. United States v. Infanzon, 235 F.2d 318 (2d Cir. 1956); Portomene v. United States, 221 F.2d 582 (5th Cir. 1955); Powell v. United States, 208 F.2d 618 (6th Cir. 1953); Jones v. United States, 252 F.Supp. 781 (W.D.Okl.1966). Designation of the representative by the attorney rather than by the client may at first glance appear to be an inversion of the attorney-client relationship, but it may be assumed that the attorney will follow the wishes of the client, and the solution is simple and workable. See California Evidence Code § 777. (3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore § 1841, n. 4.

Report of Senate Committee on the Judiciary

Many district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent is or may be a witness. The practice is permitted as an exception to the rule of exclusion and compares with the situation defense counsel finds himself in—he always has the client with him to consult during the trial. The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some specialized subject matter. The agent, too, having lived with the case for a long time, may be able to assist in meeting trial surprises where the best-prepared counsel would otherwise have difficulty. Yet, it would not seem the Government could often meet the burden under rule 615 of showing that the agent's presence is essential. Furthermore, it could be dangerous to use the agent as a witness as early in the case as possible, so that he might then help counsel as a nonwitness, since the agent's testimony could be needed in rebuttal. Using another, nonwitness agent from the same investigative agency would not generally meet government counsel's needs.

This problem is solved if it is clear that investigative agents are within the group specified under the second exception made in the rule, for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." It is our understanding that this was the intention of the House committee. It is certainly this committee's construction of the rule.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witnesses.
Rule 702. Testimony by experts.
Rule 703. Bases of opinion testimony by experts.
Rule 704. Opinion on ultimate issue.
Rule 705. Disclosure of facts or data underlying expert opinion.
Rule 706. Court appointed experts:
(a) Appointment.
(b) Compensation.
(c) Disclosure of appointment.
(d) Parties' experts of own selection.

Rule 701.

OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of first-hand knowledge or observation.

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. McCormick § 11. Moreover, the practical impossibility of determining by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also. 7 Wigmore § 1919. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 415–417 (1952). If,

despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

The language of the rule is substantially that of Uniform Rule 56(1). Similar provisions are California Evidence Code § 800; Kansas Code of Civil Procedure § 60–456(a); New Jersey Evidence Rule 56(1).

Rule 702.

TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in nonopinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the expert to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952). When opinions are

excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore § 1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e. g. physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

Rule 703.

BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, The Basis of Medical Testimony, 15 Vand.L.Rev. 473, 489 (1962). Whether he must first relate his observations is treated in Rule 705. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with

the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Rheingold, *supra*, at 531; McCormick § 15. A similar provision is California Evidence Code § 801(b).

The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved. See Judge Feinberg's careful analysis in Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670 (S.D.N.Y.1963). See also Blum et al., The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Service, 24 U.Chi. L.Rev. 1 (1956); Bonynge, Trademark Surveys and Techniques and Their Use in Litigation, 48 A.B.A.J. 329 (1962); Zeisel, The Uniqueness of Survey Evidence, 45 Cornell L.Q. 322 (1960); Annot., 76 A.L.R.2d 919.

If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied. See Comment, Cal.Law Rev.Comm'n, Recommendation Proposing an Evidence Code 148–150 (1965).

Rule 704.

OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12.

The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 Wigmore § 1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of "might or could," rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. People v. Wilson, 25 Cal.2d 341, 153 P.2d 720 (1944), whether abortion necessary to save life of patient; Clifford-Jacobs Forging Co. v. Industrial Comm., 19 Ill.2d 236, 166 N.E.2d 582 (1960), medical causation; Dowling v. L. H. Shattuck, Inc., 91 N.H. 234, 17 A.2d 529 (1941), proper method of shoring ditch; Schweiger v. Solbeck, 191 Or. 454, 230 P.2d 195 (1951), cause of landslide. In each instance the opinion was allowed.

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. McCormick § 12.

For similar provisions see Uniform Rule 56(4); California Evidence Code § 805; Kansas Code of Civil Procedure § 60–456(d); New Jersey Evidence Rule 56(3).

Rule 705.

DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended only by substituting "court" in place of "judge."

Advisory Committee's Note

The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 426–427 (1952). While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at sceondhand or observed by him at firsthand.

The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support. In 1937 the Commissioners on Uniform State Laws incorporated a provision to this effect in their Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58. Rule 4515, N.Y. CPLR (McKinney 1963), provides:

"Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data . . .."

See also California Evidence Code § 802; Kansas Code of Civil Procedure §§ 60–456, 60–457; New Jersey Evidence Rules 57, 58.

If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L.Rev. 455 (1962).

These safeguards are reinforced by the discretionary power of the judge to require preliminary disclosure in any event.

Rule 706.

COURT APPOINTED EXPERTS

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why ex-

pert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended by substituting "court" in place of "judge," with conforming pronominal changes, and, in subdivision (b), by substituting the phrase "and civil actions and proceedings" in place of "and cases" before "involving" in the second sentence.

Advisory Committee's Note

The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled, Levy, Impartial Medical Testimony—Revisited, 34 Temple L.Q. 416 (1961), the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may

be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge *may* appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. Scott v. Spanjer Bros., Inc., 298 F.2d 928 (2d Cir. 1962); Danville Tobacco Assn. v. Bryant-Buckner Associates, Inc., 333 F.2d 202 (4th Cir. 1964); Sink, The Unused Power of a Federal Judge to Call His Own Expert Witnesses, 29 S. Cal.L.Rev. 195 (1956); 2 Wigmore § 563, 9 *id.* § 2484; Annot., 95 A. L.R.2d 383. Hence the problem becomes largely one of detail.

The New York plan is well known and is described in Report by Special Committee of the Association of the Bar of the City of New York: Impartial Medical Testimony (1956). On recommendation of the Section of Judicial Administration, local adoption of an impartial medical plan was endorsed by the American Bar Association. 82 A. B.A.Rep. 184–185 (1957). Descriptions and analyses of plans in effect in various parts of the country are found in Van Dusen, A United States District Judge's View of the Impartial Medical Expert System, 32 F.R.D. 498 (1963); Wick and Kightlinger, Impartial Medical Testimony Under the Federal Civil Rules: A Tale of Three Doctors, 34 Ins. Counsel J. 115 (1967); and numerous articles collected in Klein, Judicial Administration and the Legal Profession 393 (1963). Statutes and rules include California Evidence Code §§ 730–733; Illinois Supreme Court Rule 215(d), Ill.Rev.Stat.1969, c. 110A, § 215(d); Burns Indiana Stats.1956, § 9–1702; Wisconsin Stats.Annot.1958, § 957.27.

In the federal practice, a comprehensive scheme for court appointed experts was initiated with the adoption of Rule 28 of the Federal Rules of Criminal Procedure in 1946. The Judicial Conference of the United States in 1953 considered court appointed experts in civil cases, but only with respect to whether they should be compensated from public funds, a proposal which was rejected. Report of the Judicial Conference of the United States 23 (1953). The present rule expands the practice to include civil cases.

Subdivision (a) is based on Rule 28 of the Federal Rules of Criminal Procedure, with a few changes, mainly in the interest of clarity. Language has been added to provide specifically for the appointment either on motion of a party or on the judge's own motion. A provision subjecting the court appointed expert to deposition procedures has been incorporated. The rule has been revised to make definite the right of any party, including the party calling him, to cross-examine.

Subdivision (b) combines the present provision for compensation in criminal cases with what seems to be a fair and feasible handling of civil cases, originally found in the Model Act and carried from there into Uniform Rule 60. See also California Evidence Code §§ 730–731. The special provision for Fifth Amendment compensation cases is designed to guard against reducing constitutionally guaranteed just compensation by requiring the recipient to pay costs. See Rule 71A(*l*) of the Rules of Civil Procedure.

Subdivision (c) seems to be essential if the use of court appointed experts is to be fully effective. Uniform Rule 61 so provides.

Subdivision (d) is in essence the last sentence of Rule 28(a) of the Federal Rules of Criminal Procedure.

ARTICLE VIII. HEARSAY

Advisory Committee's Note

INTRODUCTORY NOTE: THE HEARSAY PROBLEM

The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L.Rev. 177 (1948), Selected Writings on Evidence and Trial 764, 765 (Fryer ed. 1957); Shientag, Cross-Examination—A Judge's Viewpoint, 3 Record 12 (1948); Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 485 (1937), Selected Writings, *supra*, 756, 757; Weinstein, Probative Force of Hearsay, 46 Iowa L.Rev. 331 (1961). Sometimes a fourth is added, sincerity, but in fact it seems merely to be an aspect of the three already mentioned.

In order to encourage the witness to do his best with respect to each of these factors, and to expose any inaccuracies which may enter in, the Anglo-American tradition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination.

(1) Standard procedure calls for the swearing of witnesses. While the practice is perhaps less effective than in an earlier time, no disposition to relax the requirement is apparent, other than to allow affirmation by persons with scruples against taking oaths.

(2) The demeanor of the witness traditionally has been believed to furnish trier and opponent with valuable clues. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 495–496, 71 S.Ct. 456, 95 L.Ed. 456 (1951); Sahm, Demeanor Evidence: Elusive and Intangible Imponderables, 47 A.B.A.J. 580 (1961), quoting numerous authorities. The witness himself will probably be impressed with the solemnity of the occasion and the possibility of public disgrace. Willingness to falsify may reasonably become more difficult in the presence of the person against whom directed. Rules 26 and 43(a) of the Federal Rules of Criminal and Civil Procedure, respectively, include the general requirement that testimony be taken orally in open court. The Sixth Amendment right of confrontation is a manifestation of these beliefs and attitudes.

(3) Emphasis on the basis of the hearsay rule today tends to center upon the condition of cross-examination. All may not agree with Wigmore that cross-examination is "beyond doubt the greatest legal engine ever invented for the discovery of truth," but all will agree with his statement that it has become a "vital feature" of the Anglo-American system. 5 Wigmore § 1367, p. 29. The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental. Morgan, Foreword to Model Code of Evidence 37 (1942).

The logic of the preceding discussion might suggest that no testimony be received unless in full compliance with the three ideal condi-

tions. No one advocates this position. Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without. The problem thus resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions.

The solution evolved by the common law has been a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness. Criticisms of this scheme are that it is bulky and complex, fails to screen good from bad hearsay realistically, and inhibits the growth of the law of evidence.

Since no one advocates excluding all hearsay, three possible solutions may be considered: (1) abolish the rule against hearsay and admit all hearsay; (2) admit hearsay possessing sufficient probative force, but with procedural safeguards; (3) revise the present system of class exceptions.

(1) Abolition of the hearsay rule would be the simplest solution. The effect would not be automatically to abolish the giving of testimony under ideal conditions. If the declarant were available, compliance with the ideal conditions would be optional with either party. Thus the proponent could call the declarant as a witness as a form of presentation more impressive than his hearsay statement. Or the opponent could call the declarant to be cross-examined upon his statement. This is the tenor of Uniform Rule 63(1), admitting the hearsay declaration of a person "who is present at the hearing and available for cross-examination." Compare the treatment of declarations of available declarants in Rule 801(d) (1) of the instant rules. If the declarant were unavailable, a rule of free admissibility would make no distinctions in terms of degrees of noncompliance with the ideal conditions and would exact no quid pro quo in the form of assurances of trustworthiness. Rule 503 of the Model Code did exactly that, providing for the admissibility of any hearsay declaration by an unavailable declarant, finding support in the Massachusetts act of 1898, enacted at the instance of Thayer, Mass.Gen.L.1932, c. 233 § 65, and in the English act of 1938, St.1938, c. 28, Evidence. Both are limited to civil cases. The draftsmen of the Uniform Rules chose a less advanced and more conventional position. Comment, Uniform Rule 63. The present Advisory Committee has been unconvinced of the wisdom of abandoning the traditional requirement of some particular assurance of credibility as a condition precedent to admitting the hearsay declaration of an unavailable declarant.

In criminal cases, the Sixth Amendment requirement of confrontation would no doubt move into a large part of the area presently occupied by the hearsay rule in the event of the abolition of the latter. The resultant split between civil and criminal evidence is regarded as an undesirable development.

(2) Abandonment of the system of class exceptions in favor of individual treatment in the setting of the particular case, accompanied by procedural safeguards, has been impressively advocated. Wein-

stein, The Probative Force of Hearsay, 46 Iowa L.Rev. 331 (1961). Admissibility would be determined by weighing the probative force of the evidence against the possibility of prejudice, waste of time, and the availability of more satisfactory evidence. The bases of the traditional hearsay exceptions would be helpful in assessing probative force. Ladd, The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof, 18 Minn.L.Rev. 506 (1934). Procedural safeguards would consist of notice of intention to use hearsay, free comment by the judge on the weight of the evidence, and a greater measure of authority in both trial and appellate judges to deal with evidence on the basis of weight. The Advisory Committee has rejected this approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases. The only way in which the probative force of hearsay differs from the probative force of other testimony is in the absence of oath, demeanor, and cross-examination as aids in determining credibility. For a judge to exclude evidence because he does not believe it has been described as "altogether atypical, extraordinary. . . ." Chadbourn, Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4) (c) of the Uniform Rules of Evidence, 75 Harv.L.Rev. 932, 947 (1962).

(3) The approach to hearsay in these rules is that of the common law, i. e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified exceptions "but having comparable [equivalent] circumstantial guarantees of trustworthiness." Rules 803(24) and 804(b)(6)[5]. This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.

Confrontation and Due Process

Until very recently, decisions invoking the confrontation clause of the Sixth Amendment were surprisingly few, a fact probably explainable by the former inapplicability of the clause to the states and by the hearsay rule's occupancy of much the same ground. The pattern which emerges from the earlier cases invoking the clause is substantially that of the hearsay rule, applied to criminal cases: an accused is entitled to have the witnesses against him testify under oath, in the presence of himself and trier, subject to cross-examination; yet considerations of public policy and necessity require the recognition of such exceptions as dying declarations and former testimony of unavailable witnesses. Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); Motes v. United States, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900); Delaney v. United States, 263 U.S. 586,

44 S.Ct. 206, 68 L.Ed. 462 (1924). Beginning with Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), the Court began to speak of confrontation as an aspect of procedural due process, thus extending its applicability to state cases and to federal cases other than criminal. The language of *Snyder* was that of an elastic concept of hearsay. The deportation case of Bridges v. Wixon, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945), may be read broadly as imposing a strictly construed right of confrontation in all kinds of cases or narrowly as the product of a failure of the Immigration and Naturalization Service to follow its own rules. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948), ruled that cross-examination was essential to due process in a state contempt proceeding, but in United States v. Nugent, 346 U.S. 1, 73 S.Ct. 991, 97 L.Ed. 1417 (1953), the court held that it was not an essential aspect of a "hearing" for a conscientious objector under the Selective Service Act. Stein v. New York, 346 U.S. 156, 196, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953), disclaimed any purpose to read the hearsay rule into the Fourteenth Amendment, but in Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), revocation of security clearance without confrontation and cross-examination was held unauthorized, and a similar result was reached in Willner v. Committee on Character, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963). Ascertaining the constitutional dimensions of the confrontation-hearsay aggregate against the background of these cases is a matter of some difficulty, yet the general pattern is at least not inconsistent with that of the hearsay rule.

In 1965 the confrontation clause was held applicable to the states. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Prosecution use of former testimony given at a preliminary hearing where petitioner was not represented by counsel was a violation of the clause. The same result would have followed under conventional hearsay doctrine read in the light of a constitutional right to counsel, and nothing in the opinion suggests any difference in essential outline between the hearsay rule and the right of confrontation. In the companion case of Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), however, the result reached by applying the confrontation clause is one reached less readily via the hearsay rule. A confession implicating petitioner was put before the jury by reading it to the witness in portions and asking if he made that statement. The witness refused to answer on grounds of self-incrimination. The result, said the Court, was to deny cross-examination, and hence confrontation. True, it could broadly be said that the confession was a hearsay statement which for all practical purposes was put in evidence. Yet a more easily accepted explanation of the opinion is that its real thrust was in the direction of curbing undesirable prosecutorial behavior, rather than merely applying rules of exclusion, and that the confrontation clause was the means selected to achieve this end. Comparable facts and a like result appeared in Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

The pattern suggested in *Douglas* was developed further and more distinctly in a pair of cases at the end of the 1966 term. United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178

(1967), hinged upon practices followed in identifying accused persons before trial. This pretrial identification was said to be so decisive an aspect of the case that accused was entitled to have counsel present; a pretrial identification made in the absence of counsel was not itself receivable in evidence and, in addition, might fatally infect a courtroom identification. The presence of counsel at the earlier identification was described as a necessary prerequisite for "a meaningful confrontation at trial." United States v. Wade, *supra*, 388 U.S. at p. 236, 87 S.Ct. at p. 1937. *Wade* involved no evidence of the fact of a prior identification and hence was not susceptible of being decided on hearsay grounds. In *Gilbert*, witnesses did testify to an earlier identification, readily classifiable as hearsay under a fairly strict view of what constitutes hearsay. The Court, however, carefully avoided basing the decision on the hearsay ground, choosing confrontation instead. 388 U.S. 263, 272, n. 3, 87 S.Ct. 1951. See also Parker v. Gladden, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966), holding that the right of confrontation was violated when the bailiff made prejudicial statements to jurors, and Note, 75 Yale L.J. 1434 (1966).

Under the earlier cases, the confrontation clause may have been little more than a constitutional embodiment of the hearsay rule, even including traditional exceptions but with some room for expanding them along similar lines. But under the recent cases the impact of the clause clearly extends beyond the confines of the hearsay rule. These considerations have led the Advisory Committee to conclude that a hearsay rule can function usefully as an adjunct to the confrontation right in constitutional areas and independently in nonconstitutional areas. In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility. See Uniform Rule 63(1) to (31) and California Evidence Code §§ 1200–1340.

ARTICLE VIII. HEARSAY

Rule 801. Definitions:
(a) Statement.
(b) Declarant.
(c) Hearsay.
(d) Statements which are not hearsay:
(1) Prior statement by witness.
(2) Admission by party-opponent.
Rule 802. Hearsay rule.
Rule 803. Hearsay exceptions; availability of declarant immaterial:
(1) Present sense impression.
(2) Excited utterance.
(3) Then existing mental, emotional, or physical condition.
(4) Statements for purposes of medical diagnosis or treatment.
(5) Recorded recollection.
(6) Records of regularly conducted activity.
(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).
(8) Public records and reports.
(9) Records of vital statistics.
(10) Absence of public record or entry.
(11) Records of religious organizations.
(12) Marriage, baptismal, and similar certificates.
(13) Family records.
(14) Records of documents affecting an interest in property.
(15) Statements in documents affecting an interest in property.
(16) Statements in ancient documents.
(17) Market reports, commercial publications.
(18) Learned treatises.
(19) Reputation concerning personal or family history.
(20) Reputation concerning boundaries or general history.
(21) Reputation as to character.
(22) Judgment of previous conviction.
(23) Judgment as to personal, family, or general history, or boundaries.
(24) Other exceptions.
Rule 804. Hearsay exceptions; declarant unavailable;
(a) Definition of unavailability.
(b) Hearsay exceptions:
(1) Former testimony.
(2) Statement under belief of impending death.
(3) Statement against interest.
(4) Statement of personal or family history.
(5) Other exceptions.
Rule 805. Hearsay within hearsay.
Rule 806. Attacking and supporting credibility of declarant.

Rule 801.

DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(As amended by adding subdivision (d)(1)(C) by P.L. 94–113, § 1, 89 Stat. 576, effective Oct. 31, 1975).

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, with two amendments to subdivision (d)(1). The first of these amendments inserted in item (A), after "testimony," the phrase "and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." The

other amendment consisted of the deletion of item (C), which dealt with prior statements of identification. The reasons for these amendments are stated in the Report of the House Committee on the Judiciary, the Report of the Senate Committee on the Judiciary, and the Conference Report, set forth below.

Advisory Committee's Note

Subdivision (a). The definition of "statement" assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.

It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of "statement." Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L. Rev. 177, 214, 217 (1948), and the elaboration in Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 Stan.L.Rev. 682 (1962). Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. Falknor, The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct, 33 Rocky Mt.L.Rev. 133 (1961). Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c).

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination in-

volves no greater difficulty than many other preliminary questions of fact. Maguire, The Hearsay System: Around and Through the Thicket, 14 Vand.L.Rev. 741, 765–767 (1961).

For similar approaches, see Uniform Rule 62(1); California Evidence Code §§ 225, 1200; Kansas Code of Civil Procedure § 60–459(a); New Jersey Evidence Rule 62(1).

Subdivision (c). The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted. McCormick § 225; 5 Wigmore § 1361, 6 *id.* § 1766. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. Emich Motors Corp. v. General Motors Corp., 181 F.2d 70 (7th Cir. 1950), rev'd on other grounds 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534, letters of complaint from customers offered as a reason for cancellation of dealer's franchise, to rebut contention that franchise was revoked for refusal to finance sales through affiliated finance company. The effect is to exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

The definition of hearsay must, of course, be read with reference to the definition of statement set forth in subdivision (a).

Testimony given by a witness in the course of court proceedings is excluded since there is compliance with all the ideal conditions for testifying.

Subdivision (d). Several types of statements which would otherwise literally fall within the definition are expressly excluded from it:

(1) *Prior statement by witness.* Considerable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth. The argument in favor of treating these latter statements as hearsay is based upon the ground that the conditions of oath, cross-examination, and demeanor observation did not prevail at the time the statement was made and cannot adequately be supplied by the later examination. The logic of the situation is troublesome. So far as concerns the oath, its mere presence has never been regarded as sufficient to remove a statement from the hearsay category, and it receives much less emphasis than cross-examination as a truth-compelling device. While strong expressions are found to the effect that no conviction can be had or important right taken away on the basis of statements not made under fear of prosecution for perjury, Bridges v. Wixon, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945), the fact is that, of the many common law exceptions to the hearsay rule, only that for reported testimony has required the statement to have been made under oath.

[It should be noted, however, that rule 801(d)(1)(A), as enacted by the Congress, requires that a prior inconsistent statement have been made under oath.] Nor is it satisfactorily explained why cross-examination cannot be conducted subsequently with success. The decisions contending most vigorously for its inadequacy in fact demonstrate quite thorough exploration of the weaknesses and doubts attending the earlier statement. State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939); Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967); People v. Johnson, 68 Cal.2d 646, 68 Cal.Rptr. 599, 441 P.2d 111 (1968). In respect to demeanor, as Judge Learned Hand observed in Di Carlo v. United States, 6 F.2d 364 (2d Cir. 1925), when the jury decides that the truth is not what the witness says now, but what he said before, they are still deciding from what they see and hear in court. The bulk of the case law nevertheless has been against allowing prior statements of witnesses to be used generally as substantive evidence. Most of the writers and Uniform Rule 63(1) have taken the opposite position.

The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence, but with a recognition that particular circumstances call for a contrary result. The judgment is one more of experience than of logic. The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates three situations in which the statement is excepted from the category of hearsay. Compare Uniform Rule 63(1) which allows any out-of-court statement of a declarant who is present at the trial and available for cross-examination.

(A) Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. As has been said by the California Law Revision Commission with respect to a similar provision:

"Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case." Comment, California Evidence Code § 1235. See also McCormick § 39. The Advisory Committee finds these views more convincing than those expressed in People v. Johnson, 68 Cal.2d 646, 68 Cal.Rptr. 599, 441 P.2d 111 (1968). The constitutionality of the Advisory Committee's view was upheld in California v. Green, 399 U.S. 149, 90 S.Ct. 1930,

26 L.Ed.2d 489 (1970). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.

[It should be noted that the rule as enacted by the Congress also requires that the prior inconsistent statement have been made under oath.]

Report of House Committee on the Judiciary

Present federal law, except in the Second Circuit, permits the use of prior inconsistent statements of a witness for impeachment only. Rule 801(d)(1) as proposed by the Court would have permitted all such statements to be admissible as substantive evidence, an approach followed by a small but growing number of State jurisdictions and recently held constitutional in California v. Green, 399 U.S. 149 (1970). Although there was some support expressed for the Court Rule, based largely on the need to counteract the effect of witness intimidation in criminal cases, the Committee decided to adopt a compromise version of the Rule similar to the position of the Second Circuit. The Rule as amended draws a distinction between types of prior inconsistent statements (other than statements of identification of a person made after perceiving him which are currently admissible, see United States v. Anderson, 406 F.2d 719, 720 (4th Cir.), cert. denied, 395 U.S. 967 (1969)) and allows only those made while the declarant was subject to cross-examination at a trail [trial] or hearing or in a deposition, to be admissible for their truth. Compare United States v. DeSisto, 329 F.2d 929 (2nd Cir.), cert. denied, 377 U.S. 979 (1964); United States v. Cunningham, 446 F.2d 194 (2nd Cir. 1971) (restricting the admissibility of prior inconsistent statements as substantive evidence to those made under oath in a formal proceeding, but not requiring that there have been an opportunity for cross-examination). The rationale for the Committee's decision is that (1) unlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding, an oath, and the opportunity for cross-examination provide firm additional assurances of the reliability of the prior statement.

Report of Senate Committee on the Judiciary

Rule 801 defines what is and what is not hearsay for the purpose of admitting a prior statement as substantive evidence. A prior statement of a witness at a trial or hearing which is inconsistent with his testimony is, of course, always admissible for the purpose of impeaching the witness' credibility.

As submitted by the Supreme Court, subdivision (d)(1)(A) made admissible as substantive evidence the prior statement of a witness inconsistent with his present testimony.

The House severely limited the admissibility of prior inconsistent statements by adding a requirement that the prior statement must have been subject to cross-examination, thus precluding even the use of grand jury statements. The requirement that the prior statement must have been subject to cross-examination appears unnecessary

since this rule comes into play only when the witness testifies in the present trial. At that time, he is on the stand and can explain an earlier position and be cross-examined as to both.

The requirement that the statement be under oath also appears unnecessary. Notwithstanding the absence of an oath contemporaneous with the statement, the witness, when on the stand, qualifying or denying the prior statement, is under oath. In any event, of all the many recognized exceptions to the hearsay rule, only one (former testimony) requires that the out-of-court statement have been made under oath. With respect to the lack of evidence of the demeanor of the witness at the time of the prior statement, it would be difficult to improve upon Judge Learned Hand's observation that when the jury decides that the truth is not what the witness says now but what he said before, they are still deciding from what they see and hear in court.[1]

The rule as submitted by the Court has positive advantages. The prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play. A realistic method is provided for dealing with the turncoat witness who changes his story on the stand.[2]

New Jersey, California, and Utah have adopted a rule similar to this one; and Nevada, New Mexico, and Wisconsin have adopted the identical Federal rule.

For all of these reasons, we think the House amendment should be rejected and the rule as submitted by the Supreme Court reinstated.[3]

Conference Report

The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and if the statement is inconsistent with his testimony and was given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition. The Senate amendment drops the requirement that the prior statement be given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition.

The Conference adopts the Senate amendment with an amendment, so that the rule now requires that the prior inconsistent statement be given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. The rule as adopted covers statements before a grand jury. Prior inconsistent statements may, of course, be used for impeaching the credibility of a witness. When the prior inconsistent statement is one made by a defendant in a criminal case, it is covered by Rule 801(d)(2).

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1. Di Carlo v. United States, 6 F.2d 364 (2d Cir. 1925).
2. See Comment, California Evidence Code § 1235; McCormick, Evidence, § 38 (2nd ed. 1972).
3. It would appear that some of the opposition to this Rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely as to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate.

Advisory Committee's Note

(B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

Report of Senate Committee on the Judiciary

As submitted by the Supreme Court and as passed by the House, subdivision (d)(1)(c)[C] of rule 801 made admissible the prior statement identifying a person made after perceiving him. The committee decided to delete this provision because of the concern that a person could be convicted solely upon evidence admissible under this subdivision.

Conference Report

The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and the statement is one of identification of a person made after perceiving him. The Senate amendment eliminated this provision.

The Conference adopts the Senate amendment.

Editorial Note

Subdivision (d)(1)(C) was included in the rule as prescribed by the Supreme Court but was deleted by the Congress in enacting the rules, as indicated in the Conference Report above. However, the subdivision was restored by Act effective Oct. 31, 1975. Therefore the Advisory Committee's Note to the subdivision is now reprinted below.

Advisory Committee's Note

(C) The admission of evidence of identification finds substantial support, although it falls beyond a doubt in the category of prior out-of-court statements. Illustrative are People v. Gould, 54 Cal.2d 621, 7 Cal.Rptr. 273, 354 P.2d 865 (1960); Judy v. State, 218 Md. 168, 146 A.2d 29 (1958); State v. Simmons, 63 Wash.2d 17, 385 P.2d 389 (1963); California Evidence Code § 1238; New Jersey Evidence Rule 63(1)(c); N.Y.Code of Criminal Procedure § 393–b. Further cases are found in 4 Wigmore § 1130. The basis is the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions. The Supreme Court considered the admissibility of evidence of prior identification in Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). Exclusion of lineup identification was held to be required because the accused did not then have the assistance of counsel. Significantly, the Court carefully refrained from placing its decision on the ground that testimony as to the making of a prior out-of-court identification ("That's the man") violated either the hearsay rule or

the right of confrontation because not made under oath, subject to immediate cross-examination, in the presence of the trier. Instead the Court observed:

"There is a split among the States concerning the admissibility of prior extra-judicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 A.L.R.2d 449. It has been held that the prior identification is heresay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at the trial. See 5 A.L.R. 2d Later Case Service 1225–1228. . . ." 388 U.S. at 272, n. 3, 87 S.Ct. at 1956.

(2) *Admissions.* Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 564 (1937); Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore § 1048. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

The rule specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against him:

(A) A party's own statement is the classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required; the statement need only be relevant to representative affairs. To the same effect is California Evidence Code § 1220. Compare Uniform Rule 63(7), requiring a statement to be made in a representative capacity to be admissible against a party in a representative capacity.

(B) Under established principles an admission may be made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: "X is a reliable person and knows what he is talking about." See McCormick § 246, p. 527, n. 15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that "anything you say may be used against you"; unusual oppor-

tunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases.

(C) No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party. However, the question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. The rule is phrased broadly so as to encompass both. While it may be argued that the agent authorized to make statements to his principal does not speak for him, Morgan, Basic Problems of Evidence 273 (1962), communication to an outsider has not generally been thought to be an essential characteristic of an admission. Thus a party's books or records are usable against him, without regard to any intent to disclose to third persons. 5 Wigmore § 1557. See also McCormick § 78, pp. 159–161. In accord is New Jersey Evidence Rule 63(8) (a). Cf. Uniform Rule 63(8) (a) and California Evidence Code § 1222 which limit status as an admission in this regard to statements authorized by the party to be made "for" him, which is perhaps an ambiguous limitation to statements to third persons. Falknor, Vicarious Admissions and the Uniform Rules, 14 Vand.L.Rev. 855, 860–861 (1961).

(D) The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment. Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958); Koninklijke Luchtvaart Maatschappij N. V. KLM Royal Dutch Airlines v. Tuller, 110 U.S.App.D.C. 282, 292 F.2d 775, 784 (1961); Martin v. Savage Truck Lines, Inc., 121 F.Supp. 417 (D.D.C.1954), and numerous state court decisions collected in 4 Wigmore, 1964 Supp., pp. 66–73, with comments by the editor that the statements should have been excluded as not within scope of agency. For the traditional view see Northern Oil Co. v. Socony Mobil Oil Co., 347 F.2d 81, 85 (2d Cir. 1965) and cases cited therein. Similar provisions are found in Uniform Rule 63(9) (a), Kansas Code of Civil Procedure § 60–460(i) (1), and New Jersey Evidence Rule 63(9) (a).

(E) The limitation upon the admissibility of statements of co-conspirators to those made "during the course and in furtherance of the conspiracy" is in the accepted pattern. While the broadened view of agency taken in item (iv) might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established. See Levie, Hearsay and Conspiracy, 52 Mich.L.Rev. 1159 (1954); Comment, 25 U.Chi.L.Rev. 530 (1958). The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949); Wong Sun v. United States, 371 U.S. 471, 490, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). For similarly limited provisions see California Evidence Code § 1223 and New Jersey Rule 63(9) (b). Cf. Uniform Rule 63(9) (b).

Report of Senate Committee on the Judiciary

The House approved the long-accepted rule that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay as it was submitted by the Supreme Court. While the rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged. United States v. Rinaldi, 393 F.2d 97, 99 (2d Cir.), cert. denied 393 U.S. 913 (1968); United States v. Spencer, 415 F.2d 1301, 1304 (7th Cir., 1969).

Rule 802.

HEARSAY RULE

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended by substituting "prescribed" in place of "adopted" and by inserting the phrase "pursuant to statutory authority."

Advisory Committee's Note

The provision excepting from the operation of the rule hearsay which is made admissible by other rules adopted by the Supreme Court or by Act of Congress continues the admissibility thereunder of hearsay which would not qualify under these Evidence Rules. The following examples illustrate the working of the exception:

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4(g): proof of service by affidavit.

Rule 32: admissibility of depositions.

Rule 43(e): affidavits when motion based on facts not appearing of record.

Rule 56: affidavits in summary judgment proceedings.

Rule 65(b): showing by affidavit for temporary restraining order.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 4(a): affidavits to show grounds for issuing warrants.

Rule 12(b) (4): affidavits to determine issues of fact in connection with motions.

ACTS OF CONGRESS

10 U.S.C. § 7730: affidavits of unavailable witnesses in actions for damages caused by vessel in naval service, or towage or salvage of same, when taking of testimony or bringing of action delayed or stayed on security grounds.

29 U.S.C. § 161(4): affidavit as proof of service in NLRB proceedings.

38 U.S.C. § 5206: affidavit as proof of posting notice of sale of unclaimed property by Veterans Administration.

Rule 803.

HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing 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.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or

adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or mar-

riages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting

to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a per-

son guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Note by Federal Judicial Center

The rule enacted by the Congress retains the 24 exceptions set forth in the rule prescribed by the Supreme Court. Three of the exceptions, numbered (6), (8), and (24) have been amended in respects that may fairly be described as substantial. Others, numbered (5), (7), (14), and (16), have been amended in lesser ways. The remaining 17 are unchanged. The amendments are, in numerical order, as follows.

Exception (5) as prescribed by the Supreme Court was amended by inserting after "made" the phrase "or adopted by the witness."

Exception (6) as prescribed by the Supreme Court was amended by substituting the phrase, "if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all," in place of "all in the course of a regularly conducted activity"; by substituting "source" in place of "sources"; by substituting the phrase, "the method or circumstances of preparation," in place of "other circumstances"; and by adding the second sentence.

Exception (7) as prescribed by the Supreme Court was amended by substituting the phrase, "kept in accordance with the provisions of paragraph (6)," in place of "of a regularly conducted activity." The exception prescribed by the Supreme Court included a comma after "memoranda," while the congressional enactment does not.

Exception (8) as prescribed by the Supreme Court was amended by inserting in item (B) after "law" the phrase, "as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel," and by substituting in item (C) the phrase "civil actions and proceedings," in place of "civil cases."

Exception (14) as prescribed by the Supreme Court was amended by substituting "authorizes" in place of "authorized."

Exception (16) as prescribed by the Supreme Court was amended by substituting the phrase, "the authenticity of which," in place of "whose authenticity."

Exception (24) as prescribed by the Supreme Court was amended by substituting "equivalent" in place of "comparable," and adding all that appears after "trustworthiness" in the exception as enacted by the Congress.

Advisory Committee's Note

The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. See Rule 602.

Exceptions (1) and (2). In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Exception (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. Morgan, Basic Problems of Evidence 340–341 (1962).

The theory of Exception (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling.

While the theory of Exception (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication, Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 Colum.L.Rev. 432 (1928), it finds support in cases without number. See cases in 6 Wigmore § 1750; Annot. 53 A.L.R.2d 1245 (statements as to cause of or responsibility for motor vehicle accident); Annot., 4 A.L.R.3d 149 (accusatory statements by homicide victims). Since unexciting events are less likely to evoke comment, decisions involving Exception (1) are far less numerouns. Illustrative are Tampa Elec. Co. v. Getrost, 151 Fla. 558, 10 So.2d 83 (1942); Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942); and cases cited in McCormick § 273, p. 585, n. 4.

With respect to the *time element*, Exception (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Exception (2) the standard of measurement is the duration of the state of excitement. "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, Spontaneous Statements and State of Mind, 46 Iowa L.Rev. 224, 243 (1961); McCormick § 272, p. 580.

Participation by the declarant is not required: a non-participant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Slough, *supra*; McCormick, *supra*; 6 Wigmore § 1755; Annot., 78 A.L.R.2d 300.

Whether *proof of the startling event* may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. For cases in which the evidence consists of the condition of the declarant (injuries, state of shock), see Insurance Co. v. Mosely, 75 U.S. (8 Wall.) 397, 19 L.Ed. 437 (1869); Wheeler v. United States, 93 U.S.App.D.C. 159, 211 F.2d 19 (1953), cert. denied 347 U.S. 1019, 74 S.Ct. 876, 98 L.Ed. 1140; Wetherbee v. Safety Casualty Co., 219 F.2d 274 (5th Cir. 1955); Lampe v. United States, 97 U.S.App.D.C. 160, 229 F.2d 43 (1956). Nevertheless, on occasion the only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as "increasing," Slough, *supra* at 246, and as the "prevailing practice," McCormick § 272, p. 579. Illustrative are Armour & Co. v. Industrial Commission, 78 Colo. 569, 243 P. 546 (1926); Young v. Stewart, 191 N.C. 297, 131 S.E. 735 (1926). Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. People v. Poland, 22 Ill.

2d 175, 174 N.E.2d 804 (1961). However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, Garrett v. Howden, 73 N.M. 307, 387 P. 2d 874 (1963); Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939), a result which would under appropriate circumstances be consistent with the rule.

Permissible *subject matter* of the statement is limited under Exception (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. In Exception (2), however, the statement need only "relate" to the startling event or condition, thus affording a broader scope of subject matter coverage. 6 Wigmore §§ 1750, 1754. See Sanitary Grocery Co. v. Snead, 67 App.D.C. 129, 90 F.2d 374 (1937), slip-and-fall case sustaining admissibility of clerk's statement, "That has been on the floor for a couple of hours," and Murphy Auto Parts Co., Inc. v. Ball, 101 U.S.App.D.C. 416, 249 F.2d 508 (1957), upholding admission, on issue of driver's agency, of his statement that he had to call on a customer and was in a hurry to get home. Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 Wayne L.Rev. 204, 206–209 (1960).

Similar provisions are found in Uniform Rule 63(4) (a) and (b); California Evidence Code § 1240 (as to Exception (2) only); Kansas Code of Civil Procedure § 60–460(d) (1) and (2); New Jersey Evidence Rule 63(4).

Exception (3) is essentially a specialized application of Exception (1), presented separately to enhance its usefulness and accessibility. See McCormick §§ 265, 268.

The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind. Shepard v. United States, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933); Maguire, The Hillmon Case—Thirty-three Years After, 38 Harv.L.Rev. 709, 719–731 (1925); Hinton, States of Mind and the Hearsay Rule, 1 U.Chi.L.Rev. 394, 421–423 (1934). The rule of Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892), allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed.

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. McCormick § 271, pp. 577–578; Annot., 34 A.L.R.2d 588, 62 A.L.R.2d 855. A similar recognition of the need for and practical value of this kind of evidence is found in California Evidence Code § 1260.

Report of House Committee on the Judiciary

Rule 803(3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed

to limit the doctrine of Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 295–300 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.

Advisory Committee's Note

Exception (4). Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. McCormick § 266, p. 563. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, Shell Oil Co. v. Industrial Commission, 2 Ill. 2d 590, 119 N.E.2d 224 (1954); McCormick § 266, p. 564; New Jersey Evidence Rule 63(12) (c). Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

Report of House Committee on the Judiciary

After giving particular attention to the question of physical examination made solely to enable a physician to testify, the Committee approved Rule 803(4) as submitted to Congress, with the understanding that it is not intended in any way to adversely affect present privilege rules or those subsequently adopted.

Report of Senate Committee on the Judiciary

The House approved this rule as it was submitted by the Supreme Court "with the understanding that it is not intended in any way to adversely affect present privilege rules." We also approve this rule, and we would point out with respect to the question of its relation to privileges, it must be read in conjunction with rule 35 of the Federal Rules of Civil Procedure which provides that whenever the physical or mental condition of a party (plaintiff or defendant) is in controversy, the court may require him to submit to an examination by a physician. It is these examinations which will normally be admitted under this exception.

Advisory Committee's Note

Exception (5). A hearsay exception for recorded recollection is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question." United States v. Kelly, 349 F. 2d 720, 770 (2d Cir. 1965), citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., 82 A.L.R.2d 473, 520. The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them. Owens v. State, 67 Md. 307, 316, 10 A. 210, 212 (1887).

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. McCormick § 277, p. 593; 3 Wigmore § 738, p. 76; Jordan v. People, 151 Colo. 133, 376 P.2d 699 (1962), cert. denied 373 U.S. 944, 83 S.Ct. 1553, 10 L.Ed.2d 699; Hall v. State, 223 Md. 158, 162 A.2d 751 (1960); State v. Bindhammer, 44 N.J. 372, 209 A.2d 124 (1965). Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. Hence the example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately." To the same effect are California Evidence Code § 1237 and New Jersey Rule 63(1) (b), and this has been the position of the federal courts. Vicksburg & Meridian R. R. v. O'Brien, 119 U.S. 99, 7 S.Ct. 118, 30 L.Ed. 299 (1886); Ahern v. Webb, 268 F. 2d 45 (10th Cir. 1959); and see N. L. R. B. v. Hudson Pulp and Paper Corp., 273 F.2d 660, 665 (5th Cir. 1960); N. L. R. B. v. Federal Dairy Co., 297 F.2d 487 (1st Cir. 1962). But cf. United States v. Adams, 385 F.2d 548 (2d Cir. 1967).

No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in Rathbun v. Brancatella, 93 N.J.L. 222, 107 A. 279 (1919), is entirely consistent with the exception.

Locating the exception at this place in the scheme of the rules is a matter of choice. There were two other possibilities. The first was to regard the statement as one of the group of prior statements of a testifying witness which are excluded entirely from the category of hearsay by Rule 801(d) (1). That category, however, requires that declarant be "subject to cross-examination," as to which the impaired memory aspect of the exception raises doubts. The other possibility was to include the exception among those covered by Rule 804. Since unavailability is required by that rule and lack of memory is listed as a species of unavailability by the definition of the term in Rule 804(a) (3), that treatment at first impression would seem appropriate. The fact is, however, that the unavailability requirement of

the exception is of a limited and peculiar nature. Accordingly, the exception is located at this point rather than in the context of a rule where unavailability is conceived of more broadly.

Report of House Committee on the Judiciary

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The Committee amended this Rule to add the words "or adopted by the witness" after the phrase "shown to have been made", a treatment consistent with the definition of "statement" in the Jencks Act, 18 U.S.C. 3500. Moreover, it is the Committee's understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. This last stated principle is deemed applicable to all the hearsay rules.

Report of Senate Committee on the Judiciary

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The House amended the rule to add the words "or adopted by the witness" after the phrase "shown to have been made," language parallel to the Jencks Act.[1]

The committee accepts the House amendment with the understanding and belief that it was not intended to narrow the scope of applicability of the rule. In fact, we understand it to clarify the rule's applicability to a memorandum adopted by the witness as well as one made by him. While the rule as submitted by the Court was silent on the question of who made the memorandum, we view the House amendment as a helpful clarification, noting, however, that the Advisory Committee's note to this rule suggests that the important thing is the accuracy of the memorandum rather than who made it.

The committee does not view the House amendment as precluding admissibility in situations in which multiple participants were involved.

When the verifying witness has not prepared the report, but merely examined it and found it accurate, he has adopted the report, and it is therefore admissible. The rule should also be interpreted to cover other situations involving multiple participants, e. g., employer dictating to secretary, secretary making memorandum at direction of employer, or information being passed along a chain of persons, as in Curtis v. Bradley.[2]

The committee also accepts the understanding of the House that a memorandum or report, although barred under this rule, would nonetheless be admissible if it came within another hearsay exception. We consider this principle to be applicable to all the hearsay rules.

1. 18 U.S.C. § 3500.
2. 65 Conn. 99, 31 Atl. 591 (1894). See also, Rathbun v. Brancatella, 93 N.J.L. 222, 107 Atl. 279 (1919); see also McCormick on Evidence, § 303 (2d ed. 1972).

Advisory Committee's Note

Exception (6) represents an area which has received much attention from those seeking to improve the law of evidence. The Commonwealth Fund Act was the result of a study completed in 1927 by a distinguished committee under the chairmanship of Professor Morgan. Morgan et al., The Law of Evidence: Some Proposals for its Reform 63 (1927). With changes too minor to mention, it was adopted by Congress in 1936 as the rule for federal courts. 28 U.S.C. § 1732. A number of states took similar action. The Commissioners on Uniform State Laws in 1936 promulgated the Uniform Business Records as Evidence Act, 9A U.L.A. 506, which has acquired a substantial following in the states. Model Code Rule 514 and Uniform Rule 63(13) also deal with the subject. Difference of varying degrees of importance exist among these various treatments.

These reform efforts were largely within the context of business and commercial records, as the kind usually encountered, and concentrated considerable attention upon relaxing the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type. In their areas of primary emphasis on witnesses to be called and the general admissibility of ordinary business and commercial records, the Commonwealth Fund Act and the Uniform Act appear to have worked well. The exception seeks to preserve their advantages.

On the subject of what witnesses must be called, the Commonwealth Fund Act eliminated the common law requirement of calling or accounting for all participants by failing to mention it. United States v. Mortimer, 118 F.2d 266 (2d Cir. 1941); La Porte v. United States, 300 F.2d 878 (9th Cir. 1962); McCormick § 290, p. 608. Model Code Rule 514 and Uniform Rule 63(13) did likewise. The Uniform Act, however, abolished the common law requirement in express terms, providing that the requisite foundation testimony might be furnished by "the custodian or other qualified witness." Uniform Business Records as Evidence Act, § 2; 9A U.L.A. 506. The exception follows the Uniform Act in this respect.

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. McCormick §§ 281, 286, 287; Laughlin, Business Entries and the Like, 46 Iowa L.Rev. 276 (1961). The model statutes and rules have sought to capture these factors and to extend their impact by employing the phrase "regular course of business," in conjunction with a definition of "business" far broader than its ordinarily accepted meaning. The result is a tendency unduly to emphasize a requirement of routineness and re-

petitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. * * *

Amplification of the kinds of activities producing admissible records has given rise to problems which conventional business records by their nature avoid. They are problems of the source of the recorded information, of entries in opinion form, of motivation, and of involvement as participant in the matters recorded.

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. Gencarella v. Fyfe, 171 F.2d 419 (1st Cir. 1948); Gordon v. Robinson, 210 F.2d 192 (3d Cir. 1954); Standard Oil Co. of California v. Moore, 251 F.2d 188, 214 (9th Cir. 1957), cert. denied 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148; Yates v. Bair Transport, Inc., 249 F.Supp. 681 (S.D.N.Y.1965); Annot., 69 A.L.R.2d 1148. Cf. Hawkins v. Gorea Motor Express, Inc., 360 F.2d 933 (2d Cir. 1966). *Contra*, 5 Wigmore § 1530a, n. 1, pp. 391–392. The point is not dealt with specifically in the Commonwealth Fund Act, the Uniform Act, or Uniform Rule 63(13). However, Model Code Rule 514 contains the requirement "that it was the regular course of that business for one with personal knowledge . . . to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record . . .." The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity.

Entries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas. The Commonwealth Fund Act provided only for records of an "act, transaction, occurrence, or event," while the Uniform Act, Model Code Rule 514, and Uniform Rule 63(13) merely added the ambiguous term "condition." The limited phrasing of the Commonwealth Fund Act, 28 U.S.C. § 1732, may account for the reluctance of some federal decisions to admit diagnostic entries. New York Life Ins. Co. v. Taylor, 79 U.S.App.D.C. 66, 147 F.2d 297 (1945); Lyles v. United States, 103 U.S.App.D.C. 22, 254 F.2d 725 (1957), cert. denied 356 U.S. 961, 78 S.Ct. 997, 2 L.Ed.2d 1067; England v. United States, 174 F.2d 466 (5th Cir. 1949); Skogen v. Dow Chemical Co., 375 F.2d 692 (8th Cir. 1967). Other federal decisions, however, experienced no difficulty in freely admitting diagnostic entries. Reed v. Order of United Commercial Travelers, 123 F.2d 252 (2d Cir. 1941); Buckminster's Estate v. Commissioner of Internal Revenue, 147 F.2d 331 (2d Cir. 1944); Medina v. Erickson, 226 F.2d 475 (9th Cir. 1955); Thomas v. Hogan, 308 F.2d 355 (4th Cir. 1962); Glawe v. Rulon, 284 F.2d 495 (8th Cir. 1960). In the state courts, the trend favors admissibility. Borucki v. MacKenzie Bros. Co., 125 Conn. 92, 3 A.2d 224 (1938); Allen v. St. Louis Public Service Co., 365 Mo. 677, 285 S.W.2d 663, 55 A.L.R.2d 1022 (1956); People v. Kohlmeyer, 284 N.Y. 366, 31 N.E.2d 490 (1940); Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947). In order to make clear its adherence to the latter position, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been a source of difficulty and disagreement. In Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate. The opinion of the Court of Appeals had gone beyond mere lack of motive to be accurate: the engineer's statement was "dripping with motivations to misrepresent." Hoffman v. Palmer, 129 F.2d 976, 991 (2d Cir. 1942). The direct introduction of motivation is a disturbing factor, since absence of motive to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion. Laughlin, Business Records and the Like, 46 Iowa L.Rev. 276, 285 (1961). As Judge Clark said in his dissent, "I submit that there is hardly a grocer's account book which could not be excluded on that basis." 129 F.2d at 1002. A physician's evaluation report of a personal injury litigant would appear to be in the routine of his business. If the report is offered by the party at whose instance it was made, however, it has been held inadmissible, Yates v. Bair Transport, Inc., 249 F.Supp. 681 (S.D.N.Y.1965), otherwise if offered by the opposite party, Korte v. New York, N. H. & H. R. Co., 191 F. 2d 86 (2d Cir. 1951), cert. denied 342 U.S. 868, 72 S.Ct. 108, 96 L.Ed. 652.

The decisions hinge on motivation and which party is entitled to be concerned about it. Professor McCormick believed that the doctor's report or the accident report were sufficiently routine to justify admissibility. McCormick § 287, p. 604. Yet hesitation must be experienced in admitting everything which is observed and recorded in the course of a regularly conducted activity. Efforts to set a limit are illustrated by Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954), error to admit worksheets made by since deceased deputy collector in preparation for the instant income tax evasion prosecution, and United States v. Ware, 247 F.2d 698 (7th Cir. 1957), error to admit narcot-

ics agents' records of purchases. See also Exception (8), *infra*, as to the public record aspects of records of this nature. Some decisions have been satisfied as to motivation of an accident report if made pursuant to statutory duty, United States v. New York Foreign Trade Zone Operators, 304 F.2d 792 (2d Cir. 1962); Taylor v. Baltimore & O. R. Co., 344 F.2d 281 (2d Cir. 1965), since the report was oriented in a direction other than the litigation which ensued. Cf. Matthews v. United States, 217 F.2d 409 (5th Cir. 1954). The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness."

Occasional decisions have reached for enhanced accuracy by requiring involvement as a participant in matters reported. Clainos v. United States, 82 U.S.App.D.C. 278, 163 F.2d 593 (1947), error to admit police records of convictions; Standard Oil Co. of California v. Moore, 251 F.2d 188 (9th Cir. 1957), cert. denied 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148, error to admit employees' records of observed business practices of others. The rule includes no requirement of this nature. Wholly acceptable records may involve matters merely observed, e. g. the weather.

The form which the "record" may assume under the rule is described broadly as a "memorandum, report, record, or data compilation, in any form." The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. The term is borrowed from revised Rule 34(a) of the Rules of Civil Procedure.

Report of House Committee on the Judiciary

Rule 803(6) as submitted by the Court permitted a record made "in the course of a regularly conducted activity" to be admissible in certain circumstances. The Committee believed there were insufficient guarantees of reliability in records made in the course of activities falling outside the scope of "business" activities as that term is broadly defined in 28 U.S.C. 1732. Moreover, the Committee concluded that the additional requirement of Section 1732 that it must have been the regular practice of a business to make the record is a necessary further assurance of its trustworthiness. The Committee accordingly amended the Rule to incorporate these limitations.

Report of Senate Committee on the Judiciary

Rule 803(6) as submitted by the Supreme Court permitted a record made in the course of a regularly conducted activity to be admissible in certain circumstances. This rule constituted a broadening of the traditional business records hearsay exception which has been long advocated by scholars and judges active in the law of evidence.

The House felt there were insufficient guarantees of reliability of records not within a broadly defined business records exception. We disagree. Even under the House definition of "business" including profession, occupation, and "calling of every kind," the records of many regularly conducted activities will, or may be, excluded from evidence. Under the principle of ejusdem generis, the intent of "calling of every kind" would seem to be related to work-related endeavors—e. g., butcher, baker, artist, etc.

Thus, it appears that the records of many institutions or groups might not be admissible under the House amendments. For example, schools, churches, and hospitals will not normally be considered businesses within the definition. Yet, these are groups which keep financial and other records on a regular basis in a manner similar to business enterprises. We believe these records are of equivalent trustworthiness and should be admitted into evidence.

Three states, which have recently codified their evidence rules, have adopted the Supreme Court version of rule 803(6), providing for admission of memoranda of a "regularly conducted activity." None adopted the words "business activity" used in the House amendment.[3]

Therefore, the committee deleted the word "business" as it appears before the word "activity". The last sentence then is unnecessary and was also deleted.

It is the understanding of the committee that the use of the phrase "person with knowledge" is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, e. g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of a computer printout, upon a report from the company's computer programmer or one who has knowledge of the particular record system. In short, the scope of the phrase "person with knowledge" is meant to be coterminous with the custodian of the evidence or other qualified witness. The committee believes this represents the desired rule in light of the complex nature of modern business organizations.

Conference Report

The House bill provides in subsection (6) that records of a regularly conducted "business" activity qualify for admission into evidence as an exception to the hearsay rule. "Business" is defined as including "business, profession, occupation and calling of every kind." The Senate amendment drops the requirement that the records be those

3. See Nev.Rev.Stats. § 15.135; N. Mex.Stats. (1973 Supp.) § 20–4–803 (6); West's Wis.Stats.Anno. (1973 Supp.) § 908.03(6).

of a "business" activity and eliminates the definition of "business." The Senate amendment provides that records are admissible if they are records of a regularly conducted "activity."

The Conference adopts the House provision that the records must be those of a regularly conducted "business" activity. The Conferees changed the definition of "business" contained in the House provision in order to make it clear that the records of institutions and associations like schools, churches and hospitals are admissible under this provision. The records of public schools and hospitals are also covered by Rule 803(8), which deals with public records and reports.

Advisory Committee's Note

Exception (7). Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in Rule 801, *supra*, decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. McCormick § 289, p. 609; Morgan, Basic Problems of Evidence 314 (1962); 5 Wigmore § 1531; Uniform Rule 63(14); California Evidence Code § 1272; Kansas Code of Civil Procedure § 60–460(n); New Jersey Evidence Rule 63(14).

Report of House Committee on the Judiciary

Rule 803(7) as submitted by the Court concerned the *absence* of entry in the records of a "regularly conducted activity." The Committee amended this Rule to conform with its action with respect to Rule 803(6).

Advisory Committee's Note

Exception (8). Public records are a recognized hearsay exception at common law and have been the subject of statutes without number. McCormick § 291. See, for example, 28 U.S.C. § 1733, the relative narrowness of which is illustrated by its nonapplicability to nonfederal public agencies, thus necessitating resort to the less appropriate business record exception to the hearsay rule. Kay v. United States, 255 F.2d 476 (4th Cir. 1958). The rule makes no distinction between federal and nonfederal offices and agencies.

Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. Wong Wing Foo v. McGrath, 196 F.2d 120 (9th Cir. 1952), and see Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919). As to items (A) and (B), further support is found in the reliability factors underlying records of regularly conducted activities generally. See Exception (6), supra.

(A) Cases illustrating the admissibility of records of the office's or agency's own activities are numerous. Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919), Treasury records of miscellaneous receipts and disbursements; Howard v. Perrin, 200 U.S. 71, 26 S.Ct. 195, 50 L.Ed. 374 (1906), General Land Office records; Ballew v. United States, 160 U.S. 187, 16 S.Ct. 263, 40 L.Ed. 388 (1895), Pension Office records.

(B) Cases sustaining admissibility of records of matters observed are also numerous. United States v. Van Hook, 284 F.2d 489 (7th

Cir. 1960), remanded for resentencing 365 U.S. 609, 81 S.Ct. 823, 5 L. Ed.2d 821, letter from induction officer to District Attorney, pursuant to army regulations, stating fact and circumstances of refusal to be inducted; T'Kach v. United States, 242 F.2d 937 (5th Cir. 1957), affidavit of White House personnel officer that search of records showed no employment of accused, charged with fraudulently representing himself as an envoy of the President; Minnehaha County v. Kelley, 150 F.2d 356 (8th Cir. 1945); Weather Bureau records of rainfall; United States v. Meyer, 113 F.2d 387 (7th Cir. 1940), cert. denied 311 U.S. 706, 61 S.Ct. 174, 85 L.Ed. 459, map prepared by government engineer from information furnished by men working under his supervision.

(C) The more controversial area of public records is that of the so-called "evaluative" report. The disagreement among the decisions has been due in part, no doubt, to the variety of situations encountered, as well as to differences in principle. Sustaining admissibility are such cases as United States v. Dumas, 149 U.S. 278, 13 S.Ct. 872, 37 L.Ed. 734 (1893), statement of account certified by Postmaster General in action against postmaster; McCarty v. United States, 185 F.2d 520 (5th Cir. 1950), reh. denied 187 F.2d 234, Certificate of Settlement of General Accounting Office showing indebtedness and letter from Army official stating Government had performed, in action on contract to purchase and remove waste food from Army camp; Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950), report of Bureau of Mines as to cause of gas tank explosion; Petition of W—, 164 F.Supp. 659 (E.D.Pa.1958), report by Immigration and Naturalization Service investigator that petitioner was known in community as wife of man to whom she was not married. To the opposite effect and denying admissibility are Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944), State Fire Marshal's report of cause of gas explosion; Lomax Transp. Co. v. United States, 183 F.2d 331 (9th Cir. 1950), Certificate of Settlement from General Accounting Office in action for naval supplies lost in warehouse fire; Yung Jin Teung v. Dulles, 229 F.2d 244 (2d Cir. 1956), "Status Reports" offered to justify delay in processing passport applications. * * * Various kinds of evaluative reports are admissible under federal statutes: 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 7 U.S.C. § 210(f), findings of Secretary of Agriculture prima facie evidence in action for damages against stockyard owner; 7 U.S.C. § 292, order by Secretary of Agriculture prima facie evidence in judicial enforcement proceedings against producers association monopoly; 7 U.S.C. § 1622(h), Department of Agriculture inspection certificates of products shipped in interstate commerce prima facie evidence; 8 U.S.C. § 1440(c), separation of alien from military service on conditions other than honorable provable by certificate from department in proceedings to revoke citizenship; 18 U.S.C. § 4245, certificate of Director of Prisons that convicted person has been examined and found probably incompetent at time of trial prima facie evidence in court hearing on competency; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations; 46 U.S.C. § 679, certificate of consul presumptive evidence of refusal of master to transport destitute sea-

men to United States. While these statutory exceptions to the hearsay rule are left undisturbed, Rule 802, the willingness of Congress to recognize a substantial measure of admissibility for evaluative reports is a helpful guide.

Factors which may be of assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, *id.*, (3) whether a hearing was held and the level at which conducted, Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944); (4) possible motivation problems suggested by Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Others no doubt could be added.

The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the rule with respect to evaluative reports under item (C) is very specific: they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.

Report of House Committee on the Judiciary

The Committee approved Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase "factual findings" be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.

CONGRESSIONAL RECORD—HOUSE

Feb. 6, 1974, pp. H563-565

Amendment offered by Ms. Holtzman

Ms. HOLTZMAN. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

> Amendment offered by Ms. Holtzman: On page 94, line 11, after the word "law" and before the comma, insert the following: "as to which matters there was a duty to report".

Ms. HOLTZMAN. Mr. Chairman, I will try to be very brief, because it is late in the day.

My amendment is offered to clarify and narrow a provision on the hearsay rule (Rule 803(8)(B)). This rule now provides that if any Government employee in the course of his duty observes something—in fact, anything—and makes a report of that observation, that report can be entered into evidence at a trial whether criminal or civil, without the opportunity to cross-examine the author of the report.

While I respect Government employees, I think we would all concede that they are fallible, exactly like every other human. We do

not provide such broad exceptions to the hearsay rule for ordinary mortals.

My amendment makes it crystal clear that random observations by a Government employee cannot be introduced as an exception to the hearsay rule and be insulated from cross-examination. My amendment would allow reports of "matters observed" by a public official only if he had a duty to report about such matters. One operating under such a duty is far more likely to observe and report accurately.

I urge adoption of this amendment in order to narrow and restrict the broad exception to the hearsay rule in the bill.

Mr. HUNGATE. Mr. Chairman, I rise in opposition to the amendment.

This is a matter that was considered in the subcommittee, and we decided to stay with the language as presented to the House here, which states as follows:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law. . . .

Mr. Chairman, this is where the point of disagreement occurred. We stayed with that version of the bill, and I would recommend that version to the Committee of the Whole House.

Mr. DANIELSON. Mr. Chairman, I rise in support of the amendment offered by the gentlewoman from New York (Ms. Holtzman).

I think if we leave this language in the proposed bill, we are opening the door to a host of problems, the like of which we have probably never seen in a trial court.

I think the proper approach, in order to eliminate this, is simply to adopt the gentlewoman's amendment, and eliminate this provision, simply because there is absolutely no restriction on the sort of material which could come in under the language as proposed.

I urge the adoption of the gentlewoman's amendment.

Mr. DENNIS. Mr. Chairman, I rise in support of the gentlewoman's amendment.

So that the committee will know what we are talking about here, this permits the introduction in evidence as an exception to the hearsay rule of public records and reports, statements, or data compilations in any form of matters observed pursuant to duty imposed by law. The gentlewoman would add "as to which matters there was a duty to report."

Again it is a matter of judgment, but the difference would be this: Supposing you had a divorce case and you tried to put in a report of a social worker, rather than putting the social worker on the stand; under the committee's language anything she said in the report which would be observed by her pursuant to her general duties would be admissible. Under the amendment, only those things as to which she had some duty to make a report would be admissible.

If the law required her to observe and report certain things about a condition in the home, that could come in, but if she put in a lot of

other stuff there, she could not put that in without calling her as a witness and giving the opposition a chance to cross examine her.

On the whole I think the amendment improves the bill, and I support it.

The CHAIRMAN. The question is on the amendment offered by the gentlewoman from New York (Ms. Holtzman).

The amendment was agreed to.

Amendment offered by Mr. Dennis

Mr. DENNIS. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. Dennis: On page 94, line 11 of the bill, after the word "law", insert the words "excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel".

Mr. DENNIS. Mr. Chairman, this goes to the same subject matter as the last amendment. It deals with official statements and reports.

What I am saying here is that in a criminal case, only, we should not be able to put in the police report to prove your case without calling the policeman. I think in a criminal case you ought to have to call the policeman on the beat and give the defendant the chance to cross examine him, rather than just reading the report into evidence. that is the purpose of this amendment.

Ms. HOLTZMAN. Mr. Chairman, I rise in support of the amendment.

I will be very brief again.

I commend my colleague for raising this point. Again his purpose is to restrict the possible abuse of hearsay evidence.

I think the gentleman's amendment is very valuable and reaffirms the right of cross examination to the accused. It also permits those engaged in civil trials the right of cross examination. Cross-examination guarantees of due process of law and a fair trial.

(Ms. HOLTZMAN asked and was given permission to revise and extend her remarks.)

Mr. SMITH of New York. Mr. Chairman, I rise in opposition to the amendment.

Mr. Chairman, in reading this amendment it seems to me that the effect of the gentleman's amendment is to treat police officers and other law enforcement officers as second-class citizens, because we have already agreed that we are going to allow in as exceptions to the hearsay rule matters observed pursuant to duty imposed by law. The gentleman from Indiana would exclude from that as follows: "Excluding however, in criminal cases, matters observed by police officers and other law enforcement personnel." This would be so even though they were matters observed pursuant to a duty imposed by law.

I just think we are treading in an area the impact of which will be very unfortunate and the effect of which is to make police officers

and law enforcement officers second-class citizens and persons less trustworthy than social workers or garbage collectors.

Mr. DENNIS. Mr. Chairman, will the gentleman yield?

Mr. SMITH of New York. I will be glad to yield to the gentleman from Indiana.

Mr. DENNIS. Mr. Chairman, I would like to say on that point that of course that is not my idea. I think the point is that we are dealing here with criminal cases, and in a criminal case the defendant should be confronted with the accuser to give him the chance to cross examine. This is not any reflection on the police officer, but in a criminal case that is the type of report with which, in fact, one is going to be concerned.

Mr. JOHNSON of Colorado. Mr. Chairman, will the gentleman yield?

Mr. SMITH of New York. I yield to the gentleman from Colorado.

Mr. JOHNSON of Colorado. Mr. Chairman, as an ex-prosecutor I cannot imagine that the gentleman would be advocating that a policeman's report could come in to help convict a man, and not have the policeman himself subject to cross-examination.

Is that what the gentleman is advocating?

Mr. SMITH of New York. That is what I am advocating in that the policeman's report, if he is not available, should be admissible when it is made pursuant to a duty imposed on that law enforcement officer by law. This is the amendment we have just adopted, and for other public officers these police reports ought to be admissible, whatever their probative value might be.

Mr. JOHNSON of Colorado. Mr. Chairman, if the gentleman will yield further, as I said, I was a prosecutor in a State court, and there were so many cases where good cross-examination indicated a lack of investigative ability on the part of the man who made the report that I became more and more convinced that good cross-examination was one of the principal elements in any criminal trial. If the officer who made the investigation is not available for cross-examination, then you cannot have a fair trial.

I cannot believe the gentleman would be saying that we should be able to convict people where the police officer's statement is not subject to cross-examination.

Mr. SMITH of New York. All I am saying to the gentleman from Colorado is that—and I will concede that the gentleman has probably had greater experience in this field than I have had—all I am saying is that it seems to me that it should be allowed for the jury to consider such a report, together with all of the other aspects of the case, if this report was made by a police officer pursuant to a duty imposed upon that police officer by law.

I will have to admit to the gentleman from Colorado that it is not the best evidence.

Mr. JOHNSON of Colorado. If the gentleman will yield still further, I will have to say that in my opinion the Supreme Court would have to ultimately declare that kind of a rule unconstitutional

if we did pass it, and that the present amendment is one that would have to be passed if we are going to preserve the rights and traditions of individuals that have been in existence since 1066—I think that is when it started.

Mr. BRASCO. Mr. Chairman, I move to strike the requisite number of words.

(Mr. BRASCO asked and was given permission to revise and extend his remarks.)

Mr. BRASCO. Mr. Chairman, I would like to ask the author of the amendment, the gentleman from Indiana (Mr. Dennis) a question. I am deeply disturbed and troubled about these rules that have been brought out today.

It seems to me that many critical areas have been overlooked.

One of the basic tenets of our law is that one should be confronted by one's accuser and be able to cross-examine the accuser.

There are many, many exceptions to the hearsay rule here.

As I understand it the gentleman from New York (Mr. Smith) is advocating, in opposition to the amendment offered by the gentleman from Indiana (Mr. Dennis) that if a police officer made a report that he saw Mr. X with a gun on such and such an occasion, and then thereafter that police officer is unavailable that that statement could be used in a criminal trial against Mr. X without the defense attorney having the opportunity to cross examine the officer with respect to his position with relation to Mr. X, the time of the day, whether he was under a light, or whether there was no light, how much time did he have in which to see the gun, and all other observations relevant to the case.

Mr. DENNIS. Mr. Chairman, I would say in answer to the question raised by the gentleman from New York (Mr. Brasco) that if the statements of the police officer in his report would, in the language of this bill, be "matters observed pursuant to a duty imposed by law, and as to which he was under a duty to make a report," and I rather think they might be, that then what the gentleman says is true, and would be true.

I am trying to remove that possibility, by saying that the rule will not apply in the case the gentleman is talking about.

Mr. BRASCO. I support the gentleman. I am just standing up talking, because I cannot believe that we would for one moment entertain any other rule. I would hope we would do it with all cases of hearsay.

Mr. HUNT. Mr. Chairman, will the gentleman yield?

Mr. BRASCO. I will be glad to yield to the gentleman from New Jersey if the gentleman wishes me to yield to him.

Mr. HUNT. I had no intention of getting into this argument, but when the gentleman brings in the word "investigator," then I have to get in.

Mr. BRASCO. I did not say it.

Mr. HUNT. I know the gentleman from New York did not, but it was discussed. The only time I can recall in my 34 years of law

enforcement that a report of an investigator was admissible in court was to test the credibility of an officer. We would never permit a report to come in unchallenged. We would never even think about bringing in a report in lieu of the officer being there to have that officer cross-examined; but reports were admitted as evidentiary fact for the purpose of testing the officer's credibility and perhaps to refresh his memory. That has always been the rule of law in the State of New Jersey, and I hope it will always remain that way—and even the Federal canons.

Mr. BRASCO. I do not think that the gentleman's amendment interferes with that at all. I think what he is talking about is that the prosecution could use this to prove its case in chief with the possibility of no other evidence being presented.

Mr. HUNT. He is talking about bringing the report in in lieu of an officer, and that certainly is not the case.

Mr. DENNIS. Mr. Chairman, will the gentleman yield?

Mr. BRASCO. I yield to the gentleman from Indiana.

Mr. DENNIS. I thank the gentleman for yielding. I certainly agree this amendment has nothing to do with what my friend, the gentleman from New Jersey, is talking about. This applies only to a hearsay exception, where it would be attempted to bring this report in instead of the officer to prove one's case in chief, which one could do if we do not pass this amendment; but we could still use the report to contradict him and cross-examine him.

Mr. HUNT. Certainly, but the gentleman is speaking of the best evidence available then in lieu of the direct evidence.

Mr. DENNIS. I say we should bring in the man who saw it and put him on the stand.

Mr. HUNT. Certainly, the gentleman is right.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Indiana (Mr. Dennis).

The amendment was agreed to.

Report of Senate Committee on the Judiciary

The House approved rule 803(8), as submitted by the Supreme Court, with one substantive change. It excluded from the hearsay exception reports containing matters observed by police officers and other law enforcement personnel in criminal cases. Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

The committee accepts the House's decision to exclude such recorded observations where the police officer is available to testify in court about his observation. However, where he is unavailable as unavailability is defined in rule 804(a)(4) and (a)(5), the report should be admitted as the best available evidence. Accordingly, the committee has amended rule 803(8) to refer to the provision of rule 804(b)(5), which allows the admission of such reports, records or

other statements where the police officer or other law enforcement officer is unavailable because of death, then existing physical or mental illness or infirmity, or not being successfully subject to legal process. [This version of rule 804(b)(5) was not included in the rules as enacted.]

The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

The Advisory Committee explains the factors to be considered:

* * * * * * * * * *

> Factors which may be assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, id.; (3) whether a hearing was held and the level at which conducted, Franklin v. Skelly Oil Co., 141 F.2d 568 (19th Cir. 1944); (4) possible motivation problems suggested by Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Others no doubt could be added.[4]

* * * * * * * * * *

The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish sufficient guidance on the admissibility of evaluative reports.

Conference Report

The Senate amendment adds language, not contained in the House bill, that refers to another rule that was added by the Senate in another amendment (Rule 804(b)(5)—Criminal law enforcement records and reports).

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4. Advisory Committee's notes, to rule 803(8)(c).

In view of its action on Rule 804(b)(5) (Criminal law enforcement records and reports), the Conference does not adopt the Senate amendment and restores the bill to the House version.

Advisory Committee's Note

Exception (9). Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence, Uniform Vital Statistics Act, 9C U.L.A. 350 (1957). The rule is in principle narrower than Uniform Rule 63(16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment Uniform Rule 63(16). The exception as drafted is in the pattern of California Evidence Code § 1281.

Exception (10). The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Exception (7) with respect to regularly conducted [business] activities, is here extended to public records of the kind mentioned in Exceptions (8) and (9). 5 Wigmore § 1633(6), p. 519. Some harmless duplication no doubt exists with Exception (7). For instances of federal statutes recognizing this method of proof, see 8 U.S.C. § 1284(b), proof of absence of alien crewman's name from outgoing manifest prima facie evidence of failure to detain or deport, and 42 U.S.C. § 405(c) (3), (4) (B), (4) (C), absence of HEW record prima facie evidence of no wages or self-employment income.

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry, e. g. People v. Love, 310 Ill. 558, 142 N.E. 204 (1923), certificate of Secretary of State admitted to show failure to file documents required by Securities Law, as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

The refusal of the common law to allow proof by certificate of the lack of a record or entry has no apparent justification, 5 Wigmore § 1678(7), p. 752. The rule takes the opposite position, as do Uniform Rule 63(17); California Evidence Code § 1284; Kansas Code of Civil Procedure § 60–460(*e*); New Jersey Evidence Rule 63(17). Congress has recognized certification as evidence of the lack of a record. 8 U.S.C. § 1360(d), certificate of Attorney General or other designated officer that no record of Immigration and Naturalization Service of specified nature or entry therein is found, admissible in alien cases.

Exception (11). Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore § 1523, p. 371, and Exception (6) would be applicable. However, both the business record doctrine and Exception (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as Daily v. Grand Lodge, 311 Ill. 184, 142 N.E. 478 (1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity. See California Evidence Code § 1315 and Comment.

Exception (12). The principle of proof by certification is recognized as to public officials in Exceptions (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. See 5 Wigmore § 1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see Rule 902, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, see Uniform Rule 63(18); California Evidence Code § 1316; Kansas Code of Civil Procedure § 60–460(p); New Jersey Evidence Rule 63(18).

Exception (13). Records of family history kept in family Bibles have by long tradition been received in evidence. 5 Wigmore §§ 1495, 1496, citing numerous statutes and decisions. See also Regulations, Social Security Administration, 20 C.F.R. § 404.703(c), recognizing family Bible entries as proof of age in the absence of public or church records. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings. Wigmore, *supra*. The rule is substantially identical in coverage with California Evidence Code § 1312.

Report of House Committee on the Judiciary

The Committee approved this Rule in the form submitted by the Court, intending that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in Rule 803(11).

Advisory Committee's Note

Exception (14). The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of first-hand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§ 1647–1651. Thus what may appear in the rule, at first glance, as endowing the record with an effect independently of local law and inviting difficulties of an *Erie* nature under Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 60

S.Ct. 201, 84 L.Ed. 196 (1939), is not present, since the local law in fact governs under the example.

Exception (15). Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one. See Uniform Rule 63(29), Comment.

Similar provisions are contained in Uniform Rule 63(29); California Evidence Code § 1330; Kansas Code of Civil Procedure § 60–460(aa); New Jersey Evidence Rule 63(29).

Exception (16). Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b) (8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. *Id.* § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 *id.* § 1573, p. 429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick § 298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. See Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961), upholding admissibility of 58-year-old newspaper story. Cf. Morgan, Basic Problems of Evidence 364 (1962), but see *id.* 254.

For a similar provision, but with the added requirement that "the statement has since generally been acted upon as true by persons having an interest in the matter," see California Evidence Code § 1331.

Exception (17). Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore § 1702, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. *Id.* §§ 1702–1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, see Uniform Rule 63(30); California Evidence Code § 1340; Kansas Code of Civil Procedure § 60–460(bb);

New Jersey Evidence Rule 63(30). Uniform Commercial Code § 2–724 provides for admissibility in evidence of "reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market."

Exception (18). The writers have generally favored the admissibility of learned treatises, McCormick § 296, p. 621; Morgan, Basic Problems of Evidence 366 (1962); 6 Wigmore § 1692, with the support of occasional decisions and rules, City of Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1939); Lewandowski v. Preferred Risk Mut. Ins. Co., 33 Wis.2d 69, 146 N.W.2d 505 (1966), 66 Mich.L.Rev. 183 (1967); Uniform Rule 63(31); Kansas Code of Civil Procedure § 60–460(cc), but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. 6 Wigmore § 1692. Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. Ross v. Gardner, 365 F.2d 554 (6th Cir. 1966); Sayers v. Gardner, 380 F.2d 940 (6th Cir. 1967); Colwell v. Gardner, 386 F.2d 56 (6th Cir. 1967); Glendenning v. Ribicoff, 213 F.Supp. 301 (W.D.Mo.1962); Cook v. Celebrezze, 217 F.Supp. 366 (W.D.Mo.1963); Sosna v. Celebrezze, 234 F.Supp. 289 (E.D.Pa.1964); and see McDaniel v. Celebrezze, 331 F.2d 426 (4th Cir. 1964). The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., 60 A.L.R.2d 77. The exception is hinged upon this last position, which is that of the Supreme Court, Reilly v. Pinkus, 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63 (1949), and of recent well considered state court decisions, City of St. Petersburg v. Ferguson, 193 So.2d 648 (Fla.App.1967), cert. denied Fla., 201 So.2d 556; Darling v. Charleston Memorial Community

Hospital, 33 Ill.2d 326, 211 N.E.2d 253 (1965); Dabroe v. Rhodes Co., 64 Wash.2d 431, 392 P.2d 317 (1964).

In Reilly v. Pinkus, *supra*, the Court pointed out that testing of professional knowledge was incomplete without exploration of the witness' knowledge of and attitude toward established treatises in the field. The process works equally well in reverse and furnishes the basis of the rule.

The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness. Dabroe v. Rhodes Co., *supra*. Moreover, the rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise. The parallel to the treatment of prior inconsistent statements will be apparent. See Rules 613(b) and 801(d) (1).

Exceptions (19), (20), and (21). Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore § 1580, p. 444, and see also § 1583. On this common foundation, reputation as to land boundaries, customs, general history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad exception, but tradition has in fact been much narrower and more particularized, and this is the pattern of these exceptions in the rule.

Exception (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore § 1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. *Id.* § 1605. All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. People v. Reeves, 360 Ill. 55, 195 N.E. 443 (1935); State v. Axilrod, 248 Minn. 204, 79 N.W.2d 677 (1956); Mass.Stat. 1947, c. 410, M.G.L.A. c. 233 § 21A; 5 Wigmore § 1616. The family has often served as the point of beginning for allowing community reputation. 5 Wigmore § 1488. For comparable provisions see Uniform Rule 63(26), (27) (c); California Evidence Code §§ 1313, 1314; Kansas Code of Civil Procedure § 60–460(x), (y) (3); New Jersey Evidence Rule 63(26), (27) (c).

The first portion of Exception (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick § 299, p. 625. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, *id.*, and is designed to facili-

tate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered. For similar provisions see Uniform Rule 63(27) (a), (b); California Evidence Code §§ 1320–1322; Kansas Code of Civil Procedure § 60–460(y), (1), (2); New Jersey Evidence Rule 63(27) (a), (b).

Exception (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick §§ 44, 158. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a). Similar provisions are contained in Uniform Rule 63(28); California Evidence Code § 1324; Kansas Code of Civil Procedure § 60–460(z); New Jersey Evidence Rule 63(28).

Exception (22). When the status of a former judgment is under consideration in subsequent litigation, three possibilities must be noted: (1) the former judgment is conclusive under the doctrine of res judicata, either as a bar or a collateral estoppel; or (2) it is admissible in evidence for what it is worth; or (3) it may be of no effect at all. The first situation does not involve any problem of evidence except in the way that principles of substantive law generally bear upon the relevancy and materiality of evidence. The rule does not deal with the substantive effect of the judgment as a bar or collateral estoppel. When, however, the doctrine of res judicata does not apply to make the judgment either a bar or a collateral estoppel, a choice is presented between the second and third alternatives. The rule adopts the second for judgments of criminal conviction of felony grade. This is the direction of the decisions, Annot., 18 A.L.R.2d 1287, 1299, which manifest an increasing reluctance to reject *in toto* the validity of the law's factfinding processes outside the confines of res judicata and collateral estoppel. While this may leave a jury with the evidence of conviction but without means to evaluate it, as suggested by Judge Hinton, Note 27 Ill.L.Rev. 195 (1932), it seems safe to assume that the jury will give it substantial effect unless defendant offers a satisfactory explanation, a possibility not foreclosed by the provision. But see North River Ins. Co. v. Militello, 104 Colo. 28, 88 P.2d 567 (1939), in which the jury found for plaintiff on a fire policy despite the introduction of his conviction for arson. For supporting federal decisions see Clark, J., in New York & Cuba Mail S. S. Co. v. Continental Cas. Co., 117 F.2d 404, 411 (2d Cir. 1941); Connecticut Fire Ins. Co. v. Farrara, 277 F.2d 388 (8th Cir. 1960).

Practical considerations require exclusion of convictions of minor offenses, not because the administration of justice in its lower echelons must be inferior, but because motivation to defend at this level is often minimal or nonexistent. Cope v. Goble, 39 Cal.App.2d 448, 103 P.2d 598 (1940); Jones v. Talbot, 87 Idaho 498, 394 P.2d 316 (1964); Warren v. Marsh, 215 Minn. 615, 11 N.W.2d 528 (1943); Annot., 18 A.L.R.2d 1287, 1295–1297; 16 Brooklyn L.Rev. 286 (1950); 50 Colum.L.Rev. 529 (1950); 35 Cornell L.Q. 872 (1950). Hence the

rule includes only convictions of felony grade, measured by federal standards.

Judgments of conviction based upon pleas of *nolo contendere* are not included. This position is consistent with the treatment of *nolo* pleas in Rule 410 and the authorities cited in the Advisory Committee's Note in support thereof.

While these rules do not in general purport to resolve constitutional issues, they have in general been drafted with a view to avoiding collision with constitutional principles. Consequently the exception does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation. Kirby v. United States, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899), error to convict of possessing stolen postage stamps with the only evidence of theft being the record of conviction of the thieves. The situation is to be distinguished from cases in which conviction of another person is an element of the crime, e. g. 15 U.S.C. § 902(d), interstate shipment of firearms to a known convicted felon, and, as specifically provided, from impeachment.

For comparable provisions see Uniform Rule 63(20); California Evidence Code § 1300; Kansas Code of Civil Procedure § 60–460(r); New Jersey Evidence Rule 63(20).

Exception (23). A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. See City of London v. Clerke, Carth. 181, 90 Eng.Rep. 710 (K.B. 1691); Neill v. Duke of Devonshire, 8 App.Cas. 135 (1882). The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and paragraph (23) goes no further, not even including character.

The leading case in the United States, Patterson v. Gaines, 47 U.S. (6 How.) 550, 599, 12 L.Ed. 553 (1847), follows in the pattern of the English decisions, mentioning as illustrative matters thus provable: manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigree. More recent recognition of the principle is found in Grant Bros. Construction Co. v. United States, 232 U.S. 647, 34 S.Ct. 452, 58 L.Ed. 776 (1914), in action for penalties under Alien Contract Labor Law, decision of board of inquiry of Immigration Service admissible to prove alienage of laborers, as a matter of pedigree; United States v. Mid-Continent Petroleum Corp., 67 F.2d 37 10th Cir. 1933), records of commission enrolling Indians admissible on pedigree; Jung Yen Loy v. Cahill, 81 F.2d 809 (9th Cir. 1936), board decisions as to citizenship of plaintiff's father admissible in proceeding for declaration of citizenship. *Contra*, In re Estate of Cunha, 49 Haw. 273, 414 P.2d 925 (1966).

Exception (24). The preceding 23 exceptions of Rule 803 and the first five [four] exceptions of Rule 804(b), *infra*, are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exception (24) and its companion provision in Rule 804(b)(6)[5] are accordingly included. They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102. See Dallas County v. Commercial Union Assur. Co., 286 F.2d 388 (5th Cir. 1961).

Report of House Committee on the Judiciary

The proposed Rules of Evidence submitted to Congress contained identical provisions in Rules 803 and 804 (which set forth the various hearsay exceptions), to the effect that the federal courts could admit any hearsay statement not specifically covered by any of the stated exceptions, if the hearsay statement was found to have "comparable circumstantial guarantees of trustworthiness."

The Committee deleted these provisions (proposed Rules 803(24) and 804(b)(6)) as injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial. It was noted that Rule 102 directs the courts to construe the Rules of Evidence so as to promote "growth and development." The Committee believed that if additional hearsay exceptions are to be created, they should be by amendments to the Rules, not on a case-by-case basis.

Report of Senate Committee on the Judiciary

The proposed Rules of Evidence submitted to Congress contained identical provisions in rules 803 and 804 (which set forth the various hearsay exceptions), admitting any hearsay statement not specifically covered by any of the stated exceptions, if the hearsay statement was found to have "comparable circumstantial guarantees of trustworthiness." The House deleted these provisions (proposed rules 803(24) and 804(b)(6)) as injecting "too much uncertainty" into the law of evidence and impairing the ability of practitioners to perpare for trial. The House felt that rule 102, which directs the courts to construe the Rules of Evidence so as to promote growth and development, would permit sufficient flexibility to admit hearsay evidence in appropriate cases under various factual situations that might arise.

We disagree with the total rejection of a residual hearsay exception. While we view rule 102 as being intended to provide for a broader construction and interpretation of these rules, we feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact.

The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of probativeness and necessity could properly be admissible.

The case of Dallas County v. Commercial Union Assoc. Co., Ltd., 286 F.2d 388 (5th Cir. 1961) illustrates the point. The issue in that case was whether the tower of the county courthouse collapsed because it was struck by lightning (covered by insurance) or because of structural weakness and deterioration of the structure (not covered). Investigation of the structure revealed the presence of charcoal and charred timbers. In order to show that lightning may not have been the cause of the charring, the insurer offered a copy of a local newspaper published over 50 years earlier containing an unsigned article describing a fire in the courthouse while it was under construction. The Court found that the newspaper did not qualify for admission as a business record or an ancient document and did not fit within any other recognized hearsay exception. The court concluded, however, that the article was trustworthy because it was inconceivable that a newspaper reporter in a small town would report a fire in the courthouse if none had occurred. See also United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y.1968).

Because exceptional cases like the *Dallas County* case may arise in the future, the committee has decided to reinstate a residual exception for rules 803 and 804(b).

The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.

Therefore, the committee has adopted a residual exception for rules 803 and 804(b) of much narrower scope and applicability than the Supreme Court version. In order to qualify for admission, a hearsay statement not falling within one of the recognized exceptions would have to satisfy at least four conditions. First, it must have "equivalent circumstantial guarantees of trustworthiness." Second, it must be offered as evidence of a material fact. Third, the court must determine that the statement "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." This requirement is intended to insure that only statements which have high probative value and necessity may qualify for admission under the residual exceptions. Fourth, the court must determine that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions

contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

In order to establish a well-defined jurisprudence, the special facts and circumstances which, in the court's judgment, indicates that the statement has a sufficiently high degree of trustworthiness and necessity to justify its admission should be stated on the record. It is expected that the court will give the opposing party a full and adequate opportunity to contest the admission of any statement sought to be introduced under these subsections.

Conference Report

The Senate amendment adds a new subsection, (24), which makes admissible a hearsay statement not specifically covered by any of the previous twenty-three subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement.

Rule 804.

HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE;

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the ac-

cused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Note by Federal Judicial Council

The rule prescribed by the Supreme Court was amended by the Congress in a number of respects as follows:

Subdivision (a). Paragraphs (1) and (2) were amended by substituting "court" in place of "judge," and paragraph (5) was amended by inserting "(or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony)".

Subdivision (b). Exception (1) was amended by inserting "the same or" after "course of," and by substituting the phrase "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" in place of "at the instance of or against a party with an opportunity to develop the testimony by direct, cross,

or redirect examination, with motive and interest similar to those of the party against whom now offered."

Exception (2) as prescribed by the Supreme Court, dealing with statements of recent perception, was deleted by the Congress. It is included in the Appendix hereto as an aid to interpretation. Exception (2) as enacted by the Congress is Exception (3) prescribed by the Supreme Court, amended by inserting at the beginning, "In a prosecution for homicide or in a civil action or proceeding".

Exception (3) as enacted by the Congress is Exception (4) prescribed by the Supreme Court, amended in the first sentence by deleting, after "another," the phrase "or to make him an object of hatred, ridicule, or disgrace," and amended in the second sentence by substituting, after "unless," the phrase, "corroborating circumstances clearly indicate the trustworthiness of the statement," in place of "corroborated."

Exception (4) as enacted by the Congress is Exception (5) prescribed by the Supreme Court without change.

Exception (5) as enacted by the Congress is Exception (6) prescribed by the Supreme Court, amended by substituting "equivalent" in place of "comparable" and by adding all after "trustworthiness."

Advisory Committee's Note

As to firsthand knowledge on the part of hearsay declarants, see the introductory portion of the Advisory Committee's Note to Rule 803.

Subdivision (a). The definition of unavailability implements the division of hearsay exceptions into two categories by Rules 803 and 804(b).

At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. For example, see the separate explications of unavailability in relation to former testimony, declarations against interest, and statements of pedigree, separately developed in McCormick §§ 234, 257, and 297. However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions. The treatment in the rule is therefore uniform although differences in the range of process for witnesses between civil and criminal cases will lead to a less exacting requirement under item (5). See Rule 45(e) of the Federal Rules of Civil Procedure and Rule 17(e) of the Federal Rules of Criminal Procedure.

Five instances of unavailability are specified:

(1) Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony). Wyatt v. State, 35 Ala.App. 147, 46 So.2d 837 (1950); State v. Stewart, 85 Kan. 404, 116 P. 489 (1911); Annot., 45 A.L.R.2d 1354; Uniform Rule 62(7)(a); California Evidence Code § 240(a)(1); Kansas Code of Civil Procedure § 60-459(g)(1). A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made.

(2) A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of

practicality. Johnson v. People, 152 Colo. 586, 384 P.2d 454 (1963); People v. Pickett, 339 Mich. 294, 63 N.W.2d 681, 45 A.L.R.2d 1341 (1954). *Contra*, Pleau v. State, 255 Wis. 362, 38 N.W.2d 496 (1949).

(3) The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. McCormick § 234, p. 494. If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

Report of House Committee on the Judiciary

Rule 804(a)(3) was approved in the form submitted by the Court. However, the Committee intends no change in existing federal law under which the court may choose to disbelieve the declarant's testimony as to his lack of memory. See United States v. Insana, 423 F.2d 1165, 1169–1170 (2nd Cir.), cert. denied, 400 U.S. 841 (1970).

Advisory Committee's Note

(4) Death and infirmity find general recognition as grounds. McCormick §§ 234, 257, 297; Uniform Rule 62(7) (c); California Evidence Code § 240(a) (3); Kansas Code of Civil Procedure § 60–459(g) (3); New Jersey Evidence Rule 62(6) (c). See also the provisions on use of depositions in Rule 32(a) (3) of the Federal Rules of Civil Procedure and Rule 15(e) of the Federal Rules of Criminal Procedure.

(5) Absence from the hearing coupled with inability to compel attendance by process or other reasonable means also satisfies the requirement. McCormick § 234; Uniform Rule 62(7) (d) and (e); California Evidence Code § 240(a) (4) and (5); Kansas Code of Civil Procedure § 60–459(g) (4) and (5); New Jersey Rule 62(6) (b) and (d). See the discussion of procuring attendance of witnesses who are nonresidents or in custody in Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. * * *

Report of House Committee on the Judiciary

Rule 804(a)(5) as submitted to the Congress provided, as one type of situation in which a declarant would be deemed "unavailable", that he be "absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means." The Committee amended the Rule to insert after the word "attendance" the parenthetical expression "(or, in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony)". The amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable. The Committee, however, recognized the propriety of an exception to this additional requirement when it is the declarant's former testimony that is sought to be admitted under subdivision (b)(1).

Report of Senate Committee on the Judiciary

Subdivision (a) of rule 804 as submitted by the Supreme Court defined the conditions under which a witness was considered to be unavailable. It was amended in the House.

The purpose of the amendment, according to the report of the House Committee on the Judiciary, is "primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being unavailable." [1]

Under the House amendment, before a witness is declared unavailable, a party must try to depose a witness (declarant) with respect to dying declarations, declarations against interest, and declarations of pedigree. None of these situations would seem to warrant this needless, impractical and highly restrictive complication. A good case can be made for eliminating the unavailability requirement entirely for declarations against interest cases.[2]

In dying declaration cases, the declarant will usually, though not necessarily, be deceased at the time of trial. Pedigree statements which are admittedly and necessarily based largely on word of mouth are not greatly fortified by a deposition requirement.

Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the amendment. No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule (a)(3) and Criminal Rule 15(e), a deposition, though taken, may not be admissible, and under Criminal Rule 15(a) substantial obstacles exist in the way of even taking a deposition.

For these reasons, the committee deleted the House amendment.

The committee understands that the rule as to unavailability, as explained by the Advisory Committee "contains no requirement that an attempt be made to take the deposition of a declarant." In reflecting the committee's judgment, the statement is accurate insofar as it goes. Where, however, the proponent of the statement, with knowledge of the existence of the statement, fails to confront the declarant with the statement at the taking of the deposition, then the proponent should not, in fairness, be permitted to treat the declarant as "unavailable" simply because the declarant was not amenable to process compelling his attendance at trial. The committee does not consider it necessary to amend the rule to this effect because such a situation abuses, not conforms to, the rule. Fairness would preclude a person from introducing a hearsay statement on a particular issue if the person taking the deposition was aware of the issue at the time of the deposition but failed to depose the unavailable witness on that issue.

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1. H.Rept. 93–650, at p. 15.

2. Uniform rule 63(10); Kan.Stat.Anno. 60–460(j); 2A N.J.Stats.Anno. 84–63(10).

Conference Report

Subsection (a) defines the term "unavailability as a witness". The House bill provides in subsection (a)(5) that the party who desires to use the statement must be unable to procure the declarant's attendance by process or other reasonable means. In the case of dying declarations, statements against interest and statements of personal or family history, the House bill requires that the proponent must also be unable to procure the declarant's *testimony* (such as by deposition or interrogatories) by process or other reasonable means. The Senate amendment eliminates this latter provision.

The Conference adopts the provision contained in the House bill.

Advisory Committee's Note

Subdivision (b). Rule 803, *supra*, is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant rule proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. The exceptions evolved at common law with respect to declarations of unavailable declarants furnish the basis for the exceptions enumerated in the proposal. The term "unavailable" is defined in subdivision (a).

Exception (1). Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of trier and opponent ("demeanor evidence"). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803, *supra*. However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Thus in cases under Rule 803 demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

Under the exception, the testimony may be offered (1) against the party *against* whom it was previously offered or (2) against the party *by* whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. (1) If the party against whom now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-

examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party against whom now offered is the one *by* whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, i. e. by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party, of litigants' ability to pick and choose witnesses, and of vouching for one's own witnesses. Cf. McCormick § 246, pp. 526–527; 4 Wigmore § 1075. A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. Falknor, Former Testimony and the Uniform Rules: A Comment, 38 N.Y.U.L.Rev. 651, n. 1 (1963); McCormick § 231, p. 483. See also 5 Wigmore § 1389. Allowable techniques for dealing with hostile, double-crossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. McCormick § 233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. *Id.* Testimony given at a preliminary hearing was held in California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), to satisfy confrontation requirements in this respect.

As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. Falknor, *supra*, at 652; McCormick § 232, pp. 487–488. The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered. * * *

Report of House Committee on the Judiciary

Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The

sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had on opportunity and similar motive to examine the witness. The Committee amended the Rule to reflect these policy determinations.

Advisory Committee's Note

Exception (3). The exception is the familiar dying declaration of the common law, expanded somewhat beyond its traditionally narrow limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. See 5 Wigmore § 1443 and the classic statement of Chief Baron Eyre in Rex v. Woodcock, 1 Leach 500, 502, 168 Eng.Rep. 352, 353 (K.B.1789).

The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecutions for other crimes, e. g. a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions, as in Colo.R.S. § 52–1–20, or has expanded the area of offenses to include abortions, 5 Wigmore § 1432, p. 224, n. 4. Kansas by decision extended the exception to civil cases. Thurston v. Fritz, 91 Kan. 468, 138 P. 625 (1914). While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases * * *. The same considerations suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. Unavailability is not limited to death. See subdivision (a) of this rule. Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of first-hand knowledge is assured by Rule 602.

Comparable provisions are found in Uniform Rule 63(5); California Evidence Code § 1242; Kansas Code of Civil Procedure § 60–460(e); New Jersey Evidence Rule 63(5).

Report of House Committee on the Judiciary

Rule 804(b)(3) as submitted by the Court (now Rule 804(b)(2) in the bill) proposed to expand the traditional scope of the dying declaration exception (i. e. a statement of the victim in a homicide case as to the cause or circumstances of his believed imminent death) to allow such statements in all criminal and civil cases. The Committee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the provision to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present. This is existing law. At the same time, the Committee approved the expansion to civil actions and proceedings where the stakes do not involve possible imprisonment, although noting that this could lead to forum shopping in some instances.

Advisory Committee's Note

Exception (4). The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. Hileman v. Northwest Engineering Co., 346 F.2d 668 (6th Cir. 1965). If the statement is that of a party, offered by his opponent, it comes in as an admission, Rule 803(d) (2), and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.

The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against-interest aspect. Higham v. Ridgway, 10 East 109, 103 Eng.Rep. 717 (K.B.1808); Reg. v. Overseers of Birmingham, 1 B. & S. 763, 121 Eng.Rep. 897 (Q.B.1861); McCormick, § 256, p. 551, nn. 2 and 3.

The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCormick, § 254, pp. 548–549. * * * And finally, exposure to criminal liability satisfies the against-interest requirement. The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in Donnelly v. United States, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. People v. Spriggs, 60 Cal.2d 868, 36 Cal. Rptr. 841, 389 P.2d 377 (1964); Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945); Band's Refuse Removal, Inc. v. Fairlawn Borough, 62 N.J.Super. 522, 163 A.2d 465 (1960); Newberry v. Commonwealth, 191 Va. 445, 61 S.E.2d 318 (1950); Annot., 162 A.L.R. 446. The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations. When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence, and hence the provision is cast in terms of a requirement preliminary to admissibility. Cf. Rule 406(a). The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.

Ordinarily the third-party confession is though of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements. Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), and Bruton v. United States, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), both involved confessions

by codefendants which implicated the accused. While the confession was not actually offered in evidence in *Douglas*, the procedure followed effectively put it before the jury, which the Court ruled to be error. Whether the confession might have been admissible as a declaration against penal interest was not considered or discussed. *Bruton* assumed the inadmissibility, as against the accused, of the implicating confession of his codefendant, and centered upon the question of the effectiveness of a limiting instruction. These decisions, however, by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in *Bruton*. On the other hand, the same words spoken under different circumstances, *e. g.*, to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation.

The balancing of self-serving against disserving aspects of a declaration is discussed in McCormick § 256.

For comparable provisions, see Uniform Rule 63(10); California Evidence Code § 1230; Kansas Code of Civil Procedure § 60–460(j); New Jersey Evidence Rule 63(10).

Report of House Committee on the Judiciary

Rule 804(b)(4) as submitted by the Court (now Rule 804(b)(3) in the bill) provided as follows:

> *Statement against interest.*—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to exculpate the accused is not admissible unless corroborated.

The Committee determined to retain the traditional hearsay exception for statements against pecuniary or proprietary interest. However, it deemed the Court's additional references to statements tending to subject a declarant to civil liability or to render invalid a claim by him against another to be redundant as included within the scope of the reference to statements against pecuniary or proprietary interest. See Gichner v. Antonio Triano Tile and Marble Co., 410 F.2d 238 (D.C.Cir.1968). Those additional references were accordingly deleted.

The Court's Rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to criminal liability and statements tending to make him an object of hatred, ridicule, or disgrace. The Committee eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. See United States v. Dovico, 380 F.2d 325, 327 nn.2, 4 (2nd Cir.), cert. denied, 389 U.S. 944 (1967). As for statements against penal interest, the Committee shared the view of the Court that some

such statements do possess adequate assurances of reliability and should be admissible. It believed, however, as did the Court, that statements of this type tending to exculpate the accused are more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness. The proposal in the Court Rule to add a requirement of simple corrobation was, however, deemed ineffective to accomplish this purpose since the accused's own testimony might suffice while not necessarily increasing the reliability of the hearsay statement. The Committee settled upon the language "unless corroborating circumstances clearly indicate the trustworthiness of the statement" as affording a proper standard and degree of discretion. It was contemplated that the result in such cases as Donnelly v. United States, 228 U.S. 243 (1912), where the circumstances plainly indicated reliability, would be changed. The Committee also added to the Rule the final sentence from the 1971 Advisory Committee draft, designed to codify the doctrine of Bruton v. United States, 391 U.S. 123 (1968). The Committee does not intend to affect the existing exception to the *Bruton* principle where the codefendant takes the stand and is subject to cross-examination, but believed there was no need to make specific provision for this situation in the Rule, since in that even the declarant would not be "unavailable".

Report of Senate Committee on the Judiciary

The rule defines those statements which are considered to be against interest and thus of sufficient trustworthiness to be admissible even though hearsay. With regard to the type of interest declared against, the version submitted by the Supreme Court included inter alia, statements tending to subject a declarant to civil liability or to invalidate a claim by him against another. The House struck these provisions as redundant. In view of the conflicting case law construing pecuniary or proprietary interests narrowly so as to exclude, e. g., tort cases, this deletion could be misconstrued.

Three States which have recently codified their rules of evidence have followed the Supreme Court's version of this rule, i. e., that a statement is against interest if it tends to subject a declarant to civil liability.[3]

The committee believes that the reference to statements tending to subject a person to civil liability constitutes a desirable clarification of the scope of the rule. Therefore, we have reinstated the Supreme Court language on this matter.

The Court rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to statements tending to make him an object of hatred, ridicule, or disgrace. The House eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. Although there is considerable support for the admissibility of such statements (all three of the State rules referred to supra, would admit such statements), we accept the deletion by the House.

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3. Nev.Rev.Stats. § 51.345; N.Mex. Stats. (1973 Supp.) § 20–4–804(4); West's Wis.Stats.Anno. (1973 Supp.) § 908.045(4).

The House amended this exception to add a sentence making inadmissible a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused. The sentence was added to codify the constitutional principle announced in Bruton v. United States, 391 U.S. 123 (1968). *Bruton* held that the admission of the extrajudicial hearsay statement of one codefendant inculpating a second codefendant violated the confrontation clause of the sixth amendment.

The committee decided to delete this provision because the basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the fifth amendment's right against self-incrimination and, here, the sixth amendment's right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise. Furthermore, the House provision does not appear to recognize the exceptions to the *Bruton* rule, e. g. where the codefendant takes the stand and is subject to cross examination; where the accused confessed, see United States v. Mancusi, 404 F.2d 296 (2d Cir. 1968), cert. denied 397 U.S. 942 (1907); where the accused was placed at the scene of the crime, see United States v. Zelker, 452 F.2d 1009 (2d Cir. 1971). For these reasons, the committee decided to delete this provision.

Conference Report

The Senate amendment to subsection (b)(3) provides that a statement is against interest and not excluded by the hearsay rule when the declarant is unavailable as a witness, if the statement tends to subject a person to civil or criminal liability or renders invalid a claim by him against another. The House bill did not refer specifically to civil liability and to rendering invalid a claim against another. The Senate amendment also deletes from the House bill the provision that subsection (b)(3) does not apply to a statement or confession, made by a codefendant or another, which implicates the accused and the person who made the statement, when that statement or confession is offered against the accused in a criminal case.

The Conference adopts the Senate amendment. The Conferees intend to include within the purview of this rule, statements subjecting a person to civil liability and statements rendering claims invalid. The Conferees agree to delete the provision regarding statements by a codefendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles.

Advisory Committee's Note

Exception (5). The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility. See 5 Wigmore § 1483. Item (i) specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. In some instances it is self-evident (marriage) and in others impossible and traditionally not required (date of birth). Item (ii) deals with declarations concerning the history of another person. As at common

law, declarant is qualified if related by blood or marriage. 5 Wigmore § 1489. In addition, and contrary to the common law, declarant qualifies by virtue of intimate association with the family. *Id.*, § 1487. The requirement sometimes encountered that when the subject of the statement is the relationship between two other persons the declarant must qualify as to both is omitted. Relationship is reciprocal. *Id.*, § 1491.

For comparable provisions, see Uniform Rule 63(23), (24), (25); California Evidence Code §§ 1310, 1311; Kansas Code of Civil Procedure § 60-460(u), (v), (w); New Jersey Evidence Rules 63(23), 63(24), 63(25).

Exception (6). In language and purpose, this exception is identical with Rule 803(24). See the Advisory Committee's Note to that provision.

Reports of House and Senate Committees on the Judiciary

[This exception and its companion exception in rule 803(24) are discussed together in the congressional committee reports. The reports are set forth under rule 803(24), supra.]

Conference Report

The Senate amendment adds a new subsection, (b)(6)[5], which makes admissible a hearsay statement not specifically covered by any of the five previous subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that renumbers this subsection and provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement.

Conference Report

Senate Provision Deleted

The Senate amendment adds a new hearsay exception [804(b)(5)], not contained in the House bill, which provides that certain law enforcement records are admissible if the officer-declarant is unavailable to testify or be present because of (1) death or physical or

mental illness or infirmity or (2) absence from the proceeding and the proponent of the statement has been unable to procure his attendance by process or other reasonable means.

The Conference does not adopt the Senate amendment, preferring instead to leave the bill in the House version, which contained no such provision.

Rule 805.

HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurances. Or, further to illustrate, a dying declaration may incorporate a declaration against interest by another declarant. See McCormick § 290, p. 611.

Rule 806.

ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to

deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended by inserting the phrase "or a statement defined in Rule 801(d)(2), (C), (D), or (E)."

Advisory Committee's Note

The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609. There are however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. See Rule 613(b).

The principal difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a *prior* statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a *subsequent* one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. McCormick § 37, p. 69; 3 Wigmore § 1033. The cases, however, are divided. Cases allowing the impeachment include People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946); People v. Rosoto, 58 Cal.2d 304, 23 Cal.Rptr. 779, 373 P.2d 867 (1962); Carver v. United States, 164 U.S. 694, 17 S.Ct. 228, 41 L.Ed. 602 (1897). *Contra*, Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); People v. Hines, 284 N.Y. 93, 29 N.E.2d 483 (1940). The force of *Mattox*, where the hearsay was the former testimony of a deceased witness and the denial of use of a subsequent inconsistent statement was upheld, is much diminished by *Carver*, where the hearsay was a dying declaration and denial of use of a subsequent inconsistent statement resulted in reversal. The difference in the particular brand of hearsay seems unimportant when the inconsistent statement is a *subsequent* one. True, the opponent is not totally deprived of cross-examination when the hearsay is former testimony or a deposition but he is deprived of cross-examining on the statement or along lines suggested by it. Mr. Justice Shiras, with two justices joining him, dissented vigorously in *Mattox*.

When the impeaching statement was made *prior* to the hearsay statement, differences in the kinds of hearsay appear which arguably may justify differences in treatment. If the hearsay consisted of a simple statement by the witness, e. g. a dying declaration or a declaration against interest, the feasibility of affording him an opportunity to deny or explain encounters the same practical impossibility as where the statement is a subsequent one, just discussed, although here the impossibility arises from the total absence of anything resembling a hearing at which the matter could be put to him. The courts by a large majority have ruled in favor of allowing the statement to be used under these circumstances. McCormick § 37, p. 69; 3 Wigmore § 1033. If, however, the hearsay consists of former testimony or a deposition, the possibility of calling the prior statement to the attention of the witness or deponent is not ruled out, since the opportunity to cross-examine was available. It might thus be concluded that with former testimony or depositions the conventional foundation should be insisted upon. Most of the cases involve depositions, and Wigmore describes them as divided. 3 Wigmore § 1031. Deposition procedures at best are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. Under the federal practice, there is no way of knowing with certainty at the time of taking a deposition whether it is merely for discovery or will ultimately end up in evidence. With respect to both former testimony and depositions the possibility exists that knowledge of the statement might not be acquired until after the time of the cross-examination. Moreover, the expanded admissibility of former testimony and depositions under Rule 804(b) (1) calls for a correspondingly expanded approach to impeachment. The rule dispenses with the requirement in all hearsay situations, which is readily administered and best calculated to lead to fair results.

Notice should be taken that Rule 26(f) of the Federal Rules of Civil Procedure, as originally submitted by the Advisory Committee, ended with the following:

". . . and, without having first called them to the deponent's attention, may show statements contradictory thereto made at any time by the deponent."

This language did not appear in the rule as promulgated in December, 1937. See 4 Moore's Federal Practice ¶¶ 26.01 [9], 26.35 (2d ed. 1967). In 1951, Nebraska adopted a provision strongly resembling the one stricken from the federal rule:

"Any party may impeach any adverse deponent by self-contradiction without having laid foundation for such impeachment at the time such deposition was taken." R.S.Neb. § 25-1267.07.

For similar provisions, see Uniform Rule 65; California Evidence Code § 1202; Kansas Code of Civil Procedure § 60-462; New Jersey Evidence Rule 65.

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination. A similar provision is found in California Evidence Code § 1203.

Report of Senate Committee on the Judiciary

Rule 906[806], as passed by the House and as proposed by the Supreme Court provides that whenever a hearsay statement is admitted, the credibility of the declarant of the statement may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Rule 801 defines what is a hearsay statement. While statements by a person authorized by a party-opponent to make a statement concerning the subject, by the party-opponent's agent or by a coconspirator of a party—see rule 801(d)(2)(c), (d) and (e)—are traditionally defined as exceptions to the hearsay rule, rule 801 defines such admission by a party-opponent as statements which are not hearsay. Consequently, rule 806 by referring exclusively to the admission of hearsay statements, does not appear to allow the credibility of the declarant to be attacked when the declarant is a coconspirator, agent or authorized spokesman. The committee is of the view that such statements should open the declarant to attacks on his credibility. Indeed, the reason such statements are excluded from the operation of rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, viz some statements, instead of being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay. The phrase "or a statement defined in rule 801(d)(2)(c), (d) and (e)" is added to the rule in order to subject the declarant of such statements, like the declarant of hearsay statements, to attacks on his credibility.[1]

Conference Report

The Senate amendment permits an attack upon the credibility of the declarant of a statement if the statement is one by a person authorized by a party-opponent to make a statement concerning the subject, only by an agent of a party-opponent, or one by a coconspirator of the party-opponent, as these statements are defined in Rules 801(d)(2)(C), (D) and (E). The House bill has no such provision.

The Conference adopts the Senate amendment. The Senate amendment conforms the rule to present practice.

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1. The committee considered it unnecessary to include statements contained in rule 801(d)(2)(A) and (B)—the statement by the party-opponent himself or the statement of which he has manifested his adoption—because the credibility of the party-opponent is always subject to an attack on his credibility.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of authentication or identification:
(a) General provision.
(b) Illustrations:
(1) Testimony of witness with knowledge.
(2) Nonexpert opinion on handwriting.
(3) Comparison by trier or expert witness.
(4) Distinctive characteristics and the like.
(5) Voice identification.
(6) Telephone conversations.
(7) Public records or reports.
(8) Ancient documents or data compilation.
(9) Process or system.
(10) Methods provided by statute or rule.
Rule 902. Self-authentication:
(1) Domestic public documents under seal.
(2) Domestic public documents not under seal.
(3) Foreign public documents.
(4) Certified copies of public records.
(5) Official publications.
(6) Newspapers and periodicals.
(7) Trade inscriptions and the like.
(8) Acknowledged documents.
(9) Commercial paper and related documents.
(10) Presumptions under Acts of Congress.
Rule 903. Subscribing witness' testimony unnecessary.

Rule 901.

REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended in subdivision (b)(10) by substituting "pre-

scribed" in place of "adopted," and by adding "pursuant to statutory authority."

Advisory Committee's Note

Subdivision (a). Authentication and identification represent a special aspect of relevancy. Michael and Adler, Real Proof, 5 Vand.L. Rev. 344, 362 (1952); McCormick §§ 179, 185; Morgan, Basic Problems of Evidence 378 (1962). Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as "an inherent logical necessity." 7 Wigmore § 2129, p. 564.

This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

The common law approach to authentication of documents has been criticized as an "attitude of agnosticism," McCormick, Cases on Evidence 388, n. 4 (3rd ed. 1956), as one which "departs sharply from men's customs in ordinary affairs," and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and expense devoted to proving genuine writings which correctly show their origin on their face, McCormick § 185, pp. 395, 396. Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification. Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least prima facie genuine items of the kind treated in Rule 902, *infra*. However, the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and cases of genuine controversy will still occur.

Subdivision (b). The treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision (a). The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.

The examples relate for the most part to documents, with some attention given to voice communications and computer print-outs. As Wigmore noted, no special rules have been developed for authenticating chattels. Wigmore, Code of Evidence § 2086 (3rd ed. 1942).

It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain.

Example (1) contemplates a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis. See California Evidence Code § 1413, eyewitness to signing.

Example (2) states conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the

handwriting of another person may be acquired by seeing him write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions. McCormick § 189. See also California Evidence Code § 1416. Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert under the example which follows.

Example (3). The history of common law restrictions upon the technique of proving or disproving the genuineness of a disputed specimen of handwriting through comparison with a genuine specimen, by either the testimony of expert witnesses or direct viewing by the triers themselves, is detailed in 7 Wigmore §§ 1991–1994. In breaking away, the English Common Law Procedure Act of 1854, 17 and 18 Vict., c. 125, § 27, cautiously allowed expert or trier to use exemplars "proved to the satisfaction of the judge to be genuine" for purposes of comparison. The language found its way into numerous statutes in this country, e. g., California Evidence Code §§ 1417, 1418. While explainable as a measure of prudence in the process of breaking with precedent in the handwriting situation, the reservation to the judge of the question of the genuineness of exemplars and the imposition of an unusually high standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. Rule 104(b). No similar attitude is found in other comparison situations, e. g., ballistics comparison by jury, as in Evans v. Commonwealth, 230 Ky. 411, 19 S.W.2d 1091 (1929), or by experts, Annot., 26 A.L.R.2d 892, and no reason appears for its continued existence in handwriting cases. Consequently Example (3) sets no higher standard for handwriting specimens and treats all comparison situations alike, to be governed by Rule 104(b). This approach is consistent with 28 U.S.C. § 1731: "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

Precedent supports the acceptance of visual comparison as sufficiently satisfying preliminary authentication requirements for admission in evidence. Brandon v. Collins, 267 F.2d 731 (2d Cir. 1959); Wausau Sulphate Fibre Co. v. Commissioner of Internal Revenue, 61 F.2d 879 (7th Cir. 1932); Desimone v. United States, 227 F.2d 864 (9th Cir. 1955).

Example (4). The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. Thus a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him; Globe Automatic Sprinkler Co. v. Braniff, 89 Okl. 105, 214 P. 127 (1923); California Evidence Code § 1421; similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one. McCormick § 192; California Evidence Code § 1420. Language patterns may indicate authenticity or its opposite. Magnuson v. State, 187 Wis. 122, 203 N.W. 749 (1925); Arens and Meadow, Psycholinguistics and the Confession Dilemma, 56 Colum.L. Rev. 19 (1956).

Example (5). Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either be-

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fore or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting. Cf. Example (2), *supra*, People v. Nichols, 378 Ill. 487, 38 N.E.2d 766 (1942); McGuire v. State, 200 Md. 601, 92 A.2d 582 (1952); State v. McGee, 336 Mo. 1082, 83 S. W.2d 98 (1935).

Example (6). The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements or the reply technique, under Example (4), *supra*, or voice identification under Example (5), may furnish the necessary foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity. The calling of a number assigned by the telephone company reasonably supports the assumption that the listing is correct and that the number is the one reached. If the number is that of a place of business, the mass of authority allows an ensuing conversation if it relates to business reasonably transacted over the telephone, on the theory that the maintenance of the telephone connection is an invitation to do businss without further identification. Matton v. Hoover Co., 350 Mo. 506, 166 S.W.2d 557 (1942); City of Pawhuska v. Crutchfield, 147 Okl. 4, 293 P. 1095 (1930); Zurich General Acc. & Liability Ins. Co. v. Baum, 159 Va. 404, 165 S.E. 518 (1932). Otherwise, some additional circumstance of identification of the speaker is required. The authorities divide on the question whether the self-identifying statement of the person answering suffices. Example (6) answers in the affirmative on the assumption that usual conduct respecting telephone calls furnish adequate assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact. In general, see McCormick § 193; 7 Wigmore § 2155; Annot., 71 A.L.R. 5, 105 id. 326.

Example (7). Public records are regularly authenticated by proof of custody, without more. McCormick § 191; 7 Wigmore §§ 2158, 2159. The example extends the principle to include data stored in computers and similar methods, of which increasing use in the public records area may be expected. See California Evidence Code §§ 1532, 1600.

Example (8). The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

Any time period selected is bound to be arbitrary. The common law period of 30 years is here reduced to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikeliness of a still viable fraud after the lapse of time. The shorter period is specified in the English Evidence Act of 1938, 1 & 2 Geo. 6, c. 28, and in Oregon R.S.1963, § 41 360(34). See also the numerous statutes prescribing periods of less than 30 years in the case of recorded documents. 7 Wigmore § 2143.

The application of Example (8) is not subject to any limitation to title documents or to any requirement that possession, in the case of a title document, has been consistent with the document. See McCormick § 190.

Example (9) is designed for situations in which the accuracy of a result is dependent upon a process or system which produces it. X rays afford a familiar instance. Among more recent developments is the computer, as to which see Transport Indemnity Co. v. Seib, 178 Neb. 253, 132 N.W.2d 871 (1965); State v. Veres, 7 Ariz.App. 117, 436 P.2d 629 (1968); Merrick v. United States Rubber Co., 7 Ariz.App. 433, 440 P.2d 314 (1968); Freed, Computer Print-Outs as Evidence, 16 Am.Jur. Proof of Facts 273; Symposium, Law and Computers in the Mid-Sixties, ALI–ABA (1966); 37 Albany L.Rev. 61 (1967). Example (9) does not, of course, foreclose taking judicial notice of the accuracy of the process or system.

Example (10). The example makes clear that methods of authentication provided by Act of Congress and by the Rules of Civil and Criminal Procedure or by Bankruptcy Rules are not intended to be superseded. Illustrative are the provisions for authentication of official records in Civil Procedure Rule 44 and Criminal Procedure Rule 27, for authentication of records of proceedings by court reporters in 28 U.S.C. § 753(b) and Civil Procedure Rule 80(c), and for authentication of depositions in Civil Procedure Rule 30(f).

Rule 902.

SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in his official capacity by a per-

son authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended as follows:

Paragraph (4) was amended by substituting "prescribed" in place of "adopted," and by adding "pursuant to statutory authority."

Paragraph (8) was amended by substituting "in the manner provided by law by" in place of "under the hand and seal of."

Advisory Committee's Note

Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity.

Paragraph (1). The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records, is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore § 2161, p. 638; California Evidence Code § 1452. More than 50 provisions for judicial notice of official seals are contained in the United States Code.

Paragraph (2). While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore § 2167; California Evidence Code § 1453, the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in paragraph (10).

Paragraph (3) provides a method for extending the presumption of authenticity to foreign official documents by a procedure of certification. It is derived from Rule 44(a) (2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records.

Paragraph (4). The common law and innumerable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with paragraph (1), (2), or (3). Rule 44(a) of the Rules of Civil Procedure and Rule 27 of the Rules of Criminal Procedure have provided authentication procedures of this nature for both domestic and foreign public records. It will be ob-

served that the certification procedure here provided extends only to public records, reports, and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under paragraphs (1), (2), or (3) may not be provable by certified copy under paragraph (4).

Paragraph (5). Dispensing with preliminary proof of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore § 1684. Paragraph (5), it will be noted, does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility. Rule 44(a) of the Rules of Civil Procedure has been to the same effect.

Paragraph (6). The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility for items therein contained. See 7 Wigmore § 2150. Cf. 39 U.S.C. § 4005(b), public advertisement prima facie evidence of agency of person named, in postal fraud order proceeding; Canadian Uniform Evidence Act, Draft of 1936, printed copy of newspaper prima facie evidence that notices or advertisements were authorized.

Paragraph (7). Several factors justify dispensing with preliminary proof of genuineness of commercial and mercantile labels and the like. The risk of forgery is minimal. Trademark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them. Hence the fairness of this treatment finds recognition in the cases. Curtiss Candy Co. v. Johnson, 163 Miss. 426, 141 So. 762 (1932), Baby Ruth candy bar; Doyle v. Continental Baking Co., 262 Mass. 516, 160 N.E. 325 (1928), loaf of bread; Weiner v. Mager & Throne, Inc., 167 Misc. 338, 3 N.Y.S.2d 918 (1938), same. And see W.Va.Code 1966, § 47–3–5, trade-mark on bottle prima facie evidence of ownership. *Contra*, Keegan v. Green Giant Co., 150 Me. 283, 110 A.2d 599 (1954); Murphy v. Campbell Soup Co., 62 F.2d 564 (1st Cir. 1933). Cattle brands have received similar acceptance in the western states. Rev.Code Mont.1947, § 46–606; State v. Wolfley, 75 Kan. 406, 89 P. 1046 (1907); Annot., 11 L.R.A.(N.S.) 87. Inscriptions on trains and vehicles are held to be prima facie evidence of ownership or control. Pittsburgh, Ft. W. & C. Ry. v. Callaghan, 157 Ill. 406, 41 N.E. 909 (1895); 9 Wigmore § 2510a. See also the provision of 19 U.S.C. § 1615(2) that marks, labels, brands, or stamps indicating foreign origin are prima facie evidence of foreign origin of merchandise.

Paragraph (8). In virtually every state, acknowledged title documents are receivable in evidence without further proof. Statutes are collected in 5 Wigmore § 1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved. Instances of broadly inclusive statutes are California

Evidence Code § 1451 and N.Y.CPLR 4538, McKinney's Consol.Laws 1963.

Report of House Committee on the Judiciary

Rule 902(8) as submitted by the Court referred to certificates of acknowledgment "under the hand and seal of" a notary public or other officer authorized by law to take acknowledgments. The Committee amended the Rule to eliminate the requirement, believed to be inconsistent with the law in some States, that a notary public must affix a seal to a document acknowledged before him. As amended the Rule merely requires that the document be executed in the manner prescribed by State law.

Advisory Committee's Note

Paragraph (9). Issues of the authenticity of commercial paper in federal courts will usually arise in diversity cases, will involve an element of a cause of action or defense, and with respect to presumptions and burden of proof will be controlled by Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Rule 302, *supra*. There may, however, be questions of authenticity involving lesser segments of a case or the case may be one governed by federal common law. Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943). Cf. United States v. Yazell, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). In these situations, resort to the useful authentication provisions of the Uniform Commercial Code is provided for. While the phrasing is in terms of "general commercial law," in order to avoid the potential complications inherent in borrowing local statutes, today one would have difficulty in determining the general commercial law without referring to the Code. See Williams v. Walker-Thomas Furniture Co., 121 U.S.App.D.C. 315, 350 F.2d 445 (1965). Pertinent Code provisions are sections 1–202, 3–307, and 3–510, dealing with third-party documents, signatures on negotiable instruments, protests, and statements of dishonor.

Report of House Committee on the Judiciary

The Committee approved Rule 902(9) as submitted by the Court. With respect to the meaning of the phrase "general commercial law", the Committee intends that the Uniform Commercial Code, which has been adopted in virtually every State, will be followed generally, but that federal commercial law will apply where federal commercial paper is involved. See Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). Further, in those instances in which the issues are governed by Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), State law will apply irrespective of whether it is the Uniform Commercial Code.

Advisory Committee's Note

Paragraph (10). The paragraph continues in effect dispensations with preliminary proof of genuineness provided in various Acts of Congress. See, for example, 10 U.S.C. § 936, signature, without seal, together with title, prima facie evidence of authenticity of acts of

certain military personnel who are given notarial powers; 15 U.S.C. § 77f(a), signature on SEC registration presumed genuine; 26 U.S.C. § 6064, signature to tax return prima facie genuine.

Rule 903.

SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

The common law required that attesting witnesses be produced or accounted for. Today the requirement has generally been abolished except with respect to documents which must be attested to be valid, e. g. wills in some states. McCormick § 188. Uniform Rule 71; California Evidence Code § 1411; Kansas Code of Civil Procedure § 60-468; New Jersey Evidence Rule 71; New York CPLR Rule 4537.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions:
(1) Writings and recordings.
(2) Photographs.
(3) Original.
(4) Duplicate.
Rule 1002. Requirement of original.
Rule 1003. Admissibility of duplicates.
Rule 1004. Admissibility of other evidence of contents:
(1) Originals lost or destroyed.
(2) Original not obtainable.
(3) Original in possession of opponent.
(4) Collateral matters.
Rule 1005. Public records.
Rule 1006. Summaries.
Rule 1007. Testimony or written admission of party.
Rule 1008. Functions of court and jury.

Rule 1001.

DEFINITIONS

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended in paragraph (2) by inserting "video tapes."

Advisory Committee's Note

In an earlier day, when discovery and other related procedures were strictly limited, the misleading named "best evidence rule" afforded substantial guarantees against inaccuracies and fraud by its insistence upon production of original documents. The great enlargement of the scope of discovery and related procedures in recent times has measurably reduced the need for the rule. Nevertheless important areas of usefulness persist: discovery of documents outside the jurisdiction may require substantial outlay of time and money; the unanticipated document may not practically be discoverable; criminal cases have built-in limitations on discovery. Cleary and Strong, The Best Evidence Rule: An Evaluation in Context, 51 Iowa L.Rev. 825 (1966).

Paragraph (1). Traditionally the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments.

Report of House Committee on the Judiciary

The Committee amended this Rule expressly to include "video tapes" in the definition of "photographs."

Advisory Committee's Note

Paragraph (3). In most instances, what is an original will be self-evident and further refinement will be unnecessary. However, in some instances particularized definition is required. A carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer. While strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage require that any print from the negative be regarded as an original. Similarly, practicality and usage confer the status of original upon any computer printout. Transport Indemnity Co. v. Seib, 178 Neb. 253, 132 N.W.2d 871 (1965).

Paragraph (4). The definition describes "copies" produced by methods possessing an accuracy which virtually eliminates the possibility of error. Copies thus produced are given the status of originals in large measure by Rule 1003, *infra*. Copies subsequently produced manually, whether handwritten or typed, are not within the definition. It should be noted that what is an original for some purposes may be a duplicate for others. Thus a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents are in controversy is a duplicate. This result is substantially consistent with 28 U.S.C. § 1732(b). Compare 26 U.S.C. § 7513(c), giving full status as originals to photographic reproductions of tax returns and other documents, made by authority of the Secretary of the Treasury, and 44 U.S.C. § 399(a), giving original status to photographic copies in the National Archives.

Rule 1002.

REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

The rule is the familiar one requiring production of the original of a document to prove its contents, expanded to include writings, recordings, and photographs, as defined in Rule 1001(1) and (2), *supra*.

Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. McCormick § 198; 4 Wigmore § 1245. Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary, the rule will seldom apply to ordinary photographs. In most instances a party *wishes* to introduce the item and the question raised is the propriety of receiving it in evidence. Cases in which an offer is made of the testimony of a witness as to what he saw in a photograph or motion picture, without producing the same, are most unusual. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable. Paradis, The Celluloid Witness, 37 U.Colo.L.Rev. 235, 249–251 (1965).

On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture falls in this category. Similarly as to situations in which the picture is offered as having independent probative value, e. g. automatic photograph of bank robber. See People v. Doggett, 83 Cal.App.2d 405, 188 P.2d 792 (1948), photograph of defendants engaged in indecent act; Mouser and Philbin, Photographic Evidence—Is There a Recognized Basis for Admissibility? 8 Hastings L.J. 310 (1957). The most commonly encountered of this latter group is of course, the X ray, with substantial authority calling for production of the original. Daniels v. Iowa City, 191 Iowa 811, 183 N.W. 415 (1921); Cellamare v. Third Ave. Transit Corp., 273 App.Div. 260, 77 N.Y.S.2d 91 (1948); Patrick & Tilman v. Matkin, 154 Okl. 232, 7 P.2d 414 (1932); Mendoza v. Rivera, 78 P.R.R. 569 (1955).

It should be noted, however, that Rule 703, supra, allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule.

The reference to Acts of Congress is made in view of such statutory provisions as 26 U.S.C. § 7513, photographic reproductions of tax returns and documents, made by authority of the Secretary of the Treasury, treated as originals, and 44 U.S.C. § 399(a), photographic copies in National Archives treated as originals.

Rule 1003.

ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in Rule 1001(4), *supra*, a "duplicate" possesses this character.

Therefore, if no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under the rule. This position finds support in the decisions, Myrick v. United States, 332 F.2d 279 (5th Cir. 1964), no error in admitting photostatic copies of checks instead of original microfilm in absence of suggestion to trial judge that photostats were incorrect; Johns v. United States, 323 F.2d 421 (5th Cir. 1963), not error to admit concededly accurate tape recording made from original wire recording; Sauget v. Johnston, 315 F.2d 816 (9th Cir. 1963), not error to admit copy of agreement when opponent had original and did not on appeal claim any discrepancy. Other reasons for requiring the original may be present when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party. United States v. Alexander, 326 F.2d 736 (4th Cir. 1964). And see Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd., 265 F. 2d 418, 76 A.L.R.2d 1344 (2d Cir. 1959).

Report of House Committee on the Judiciary

The Committee approved this Rule in the form submitted by the Court, with the expectation that the courts would be liberal in deciding that a "genuine question is raised as to the authenticity of the original."

Rule 1004.

ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

The rule recognizes no "degrees" of secondary evidence. While strict logic might call for extending the principle of preference beyond simply preferring the original, the formulation of a hierarchy of preferences and a procedure for making it effective is believed to involve unwarranted complexities. Most, if not all, that would be accomplished by an extended scheme of preferences will, in any event, be achieved through the normal motivation of a party to present the most convincing evidence possible and the arguments and procedures available to his opponent if he does not. Compare McCormick § 207.

Paragraph (1). Loss or destruction of the original, unless due to bad faith of the proponent, is a satisfactory explanation of nonproduction. McCormick § 201.

Report of House Committee on the Judiciary

The Committee approved Rule 1004(1) in the form submitted to Congress. However, the Committee intends that loss or destruction

of an original by another person at the instigation of the proponent should be considered as tantamount to loss or destruction in bad faith by the proponent himself.

Advisory Committee's Note

Paragraph (2). When the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is a sufficient explanation of nonproduction. Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction. No further showing is required. See McCormick § 202.

Paragraph (3). A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to be confused with orders to produce or other discovery procedures, as the purpose of the procedure under this rule is to afford the opposite party an opportunity to produce the original, not to compel him to do so. McCormick § 203.

Paragraph (4). While difficult to define with precision, situations arise in which no good purpose is served by production of the original. Examples are the newspaper in an action for the price of publishing defendant's advertisement, Foster-Holcomb Investment Co. v. Little Rock Publishing Co., 151 Ark. 449, 236 S.W. 597 (1922), and the streetcar transfer of plaintiff claiming status as a passenger, Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 68 N.E. 1087 (1903). Numerous cases are collected in McCormick § 200, p. 412, n. 1.

Rule 1005.

PUBLIC RECORDS

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

Public records call for somewhat different treatment. Removing them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian. As a consequence

judicial decisions and statutes commonly hold that no explanation need be given for failure to produce the original of a public record. McCormick § 204; 4 Wigmore §§ 1215–1228. This blanket dispensation from producing or accounting for the original would open the door to the introduction of every kind of secondary evidence of contents of public records were it not for the preference given certified or compared copies. Recognition of degrees of secondary evidence in this situation is an appropriate *quid pro quo* for not applying the requirement of producing the original.

The provisions of 28 U.S.C. § 1733(b) apply only to departments or agencies of the United States. The rule, however, applies to public records generally and is comparable in scope in this respect to Rule 44(a) of the Rules of Civil Procedure.

Rule 1006.

SUMMARIES

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury. The rule recognizes this practice, with appropriate safeguards. 4 Wigmore § 1230.

Rule 1007.

TESTIMONY OR WRITTEN ADMISSION OF PARTY

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

Advisory Committee's Note

While the parent case, Slatterie v. Pooley, 6 M. & W. 664, 151 Eng. Rep. 579 (Exch. 1840), allows proof of contents by evidence of an oral admission by the party against whom offered, without accounting for nonproduction of the original, the risk of inaccuracy is substantial and the decision is at odds with the purpose of the rule giving preference to the original. See 4 Wigmore § 1255. The instant rule follows Professor McCormick's suggestion of limiting this use of admissions to those made in the course of giving testimony or in writing. McCormick § 208, p. 424. The limitation, of course, does not call for excluding evidence of an oral admission when nonproduction of the original has been accounted for and secondary evidence generally has become admissible. Rule 1004, *supra*.

A similar provision is contained in New Jersey Evidence Rule 70 (1) (h).

Rule 1008.

FUNCTIONS OF COURT AND JURY

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended by substituting "court" in place of "judge," and by adding at the end of the first sentence the phrase "in accordance with the provisions of rule 104."

Advisory Committee's Note

Most preliminary questions of fact in connection with applying the rule preferring the original as evidence of contents are for the judge, under the general principles announced in Rule 104, *supra*. Thus, the question whether the loss of the originals has been established, or of the fulfillment of other conditions specified in Rule 1004, *supra*, is for the judge. However, questions may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue. Levin, Authentication and Content of Writings, 10 Rutgers L.Rev. 632, 644 (1956). The latter portion of the instant rule is designed to insure treatment of these situations as raising jury questions. The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations. See Rule 104(b), *supra*.

For similar provisions, see Uniform Rule 70(2); Kansas Code of Civil Procedure § 60–467(b); New Jersey Evidence Rule 70(2), (3).

ARTICLE XI. MISCELLANEOUS RULES

Rule 1101. Applicability of rules:
(a) Courts and magistrates.
(b) Proceedings generally.
(c) Rule of privilege.
(d) Rules inapplicable:
(1) Preliminary questions of fact.
(2) Grand jury.
(3) Miscellaneous proceedings.
(e) Rules applicable in part.
Rule 1102. Amendments.
Rule 1103. Title.

Rule 1101.

APPLICABILITY OF RULES

(a) Courts and magistrates. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the District of the Canal Zone, the United States courts of appeals, the Court of Claims, and to United States magistrates, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States magistrates, referees in bankruptcy, and commissioners of the Court of Claims.

(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under the Bankruptcy Act.

(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of minor and petty offenses by United States magistrates; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the Anti-Smuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and

Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court, amended as follows:

Subdivision (a) was amended in the first sentence by inserting "the Court of Claims" and by inserting "actions, cases, and." It was amended in the second sentence by substituting "terms" in place of "word," by inserting the phrase "and 'court'," and by adding "commissioners of the Court of Claims."

Subdivision (b) was amended by substituting "civil actions and proceedings" in place of "civil actions," and by substituting "criminal cases and proceedings" in place of "criminal proceedings."

Subdivision (c) was amended by substituting "rule" in place of "rules" and by changing the verb to the singular.

Subdivision (d) was amended by deleting "those" after "other than" and by substituting "Rule 104" in place of "Rule 104(a)."

Subdivision (e) was amended by substituting "prescribed" in place of "adopted" and by adding "pursuant to statutory authority." The form of the statutory citations was also changed.

Advisory Committee's Note

Subdivision (a). [This portion of the Advisory Committee's Note discussed the courts for which the various enabling acts granted the Supreme Court power to prescribe rules. Congressional enactment of the rules has rendered the discussion moot. The enabling acts did not include the Court of Claims.]

Report of House Committee on the Judiciary

Subdivision (a) as submitted to the Congress, in stating the courts and judges to which the Rules of Evidence apply, omitted the Court of Claims and commissioners of that Court. At the request of the Court of Claims, the Committee amended the Rule to include the Court and its commissioners within the purview of the Rules.

Advisory Committee's Note

Subdivision (b) is a combination of the language of the enabling acts, *supra*, with respect to the kinds of proceedings in which the making of rules is authorized. It is subject to the qualifications expressed in the subdivisions which follow.

Subdivision (c), singling out the rules of privilege for special treatment, is made necessary by the limited applicability of the remaining rules.

Subdivision (d). The rule is not intended as an expression as to when due process or other constitutional provisions may require an evidentiary hearing. Paragraph (1) restates, for convenience, the provisions of the second sentence of Rule 104(a), *supra*. See Advisory Committee's Note to that rule.

(2) While some states have statutory requirements that indictments be based on "legal evidence," and there is some case law to the effect that the rules of evidence apply to grand jury proceedings, 1 Wigmore § 4(5), the Supreme Court has not accepted this view. In Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1965), the Court refused to allow an indictment to be attacked, for either constitutional or policy reasons, on the ground that only hearsay evidence was presented.

"It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change." *Id.* at 364.

The rule as drafted does not deal with the evidence required to support an indictment.

(3) The rule exempts preliminary examinations in criminal cases. Authority as to the applicability of the rules of evidence to preliminary examinations has been meagre and conflicting. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1168, n. 53 (1960); Comment, Preliminary Hearings on Indictable Offenses in Philadelphia, 106 U. of Pa.L.Rev. 589, 592–593 (1958). Hearsay testimony is, however, customarily received in such examinations. Thus in a Dyer Act case, for example, an affidavit may properly be used in a preliminary examination to prove ownership of the stolen vehicle, thus saving the victim of the crime the hardship of having to travel twice to a distant district for the sole purpose of testifying as to ownership. It is believed that the extent of the applicability of the Rules of Evidence to preliminary examinations should be appropriately dealt with by the Federal Rules of Criminal Procedure which regulate those proceedings.

Extradition and rendition proceedings are governed in detail by statute. 18 U.S.C. §§ 3181–3195. They are essentially administrative in character. Traditionally the rules of evidence have not applied. 1 Wigmore § 4(6). Extradition proceedings are accepted from the operation of the Rules of Criminal Procedure. Rule 54(b) (5) of Federal Rules of Criminal Procedure.

The rules of evidence have not been regarded as applicable to sentencing or probation proceedings, where great reliance is placed upon

the presentence investigation and report. Rule 32(c) of the Federal Rules of Criminal Procedure requires a presentence investigation and report in every case unless the court otherwise directs. In Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), in which the judge overruled a jury recommendation of life imprisonment and imposed a death sentence, the Court said that due process does not require confrontation or cross-examination in sentencing or passing on probation, and that the judge has broad discretion as to the sources and types of information relied upon. Compare the recommendation that the substance of all derogatory information be disclosed to the defendant, in A.B.A. Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures § 4.4, Tentative Draft (1967, Sobeloff, Chm.). Williams was adhered to in Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), but not extended to a proceeding under the Colorado Sex Offenders Act, which was said to be a new charge leading in effect to punishment, more like the recidivist statutes where opportunity must be given to be heard on the habitual criminal issue.

Warrants for arrest, criminal summonses, and search warrants are issued upon complaint or affidavit showing probable cause. Rules 4(a) and 41(c) of the Federal Rules of Criminal Procedure. The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable.

Criminal contempts are punishable summarily if the judge certifies that he saw or heard the contempt and that it was committed in the presence of the court. Rule 42(a) of the Federal Rules of Criminal Procedure. The circumstances which preclude application of the rules of evidence in this situation are not present, however, in other cases of criminal contempt.

Proceedings with respect to release on bail or otherwise do not call for application of the rules of evidence. The governing statute specifically provides:

"Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law." 18 U.S.C.A. § 3146(f).

This provision is consistent with the type of inquiry contemplated in A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release, § 4.5(b), (c), p. 16 (1968). The references to the weight of the evidence against the accused, in Rule 46(a) (1), (c) of the Federal Rules of Criminal Procedure and in 18 U.S.C.A. § 3146(b), as a factor to be considered, clearly do not have in view evidence introduced at a hearing under the rules of evidence.

The rule does not exempt habeas corpus proceedings. The Supreme Court held in Walker v. Johnston, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830 (1941), that the practice of disposing of matters of fact on affidavit, which prevailed in some circuits, did not "satisfy the command of the statute that the judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments.'" This view accords with the emphasis in Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), upon trial-type proceedings, *id.* 311, 83 S.Ct. 745, with demeanor evidence as a significant factor, *id.* 322, 83 S.Ct.

745, in applications by state prisoners aggrieved by unconstitutional detentions. Hence subdivision (e) applies the rules to habeas corpus proceedings to the extent not inconsistent with the statute.

Subdivision (e). In a substantial number of special proceedings, *ad hoc* evaluation has resulted in the promulgation of particularized evidentiary provisions, by Act of Congress or by rule adopted by the Supreme Court. Well adapted to the particular proceedings, though not apt candidates for inclusion in a set of general rules, they are left undisturbed. Otherwise, however, the rules of evidence are applicable to the proceedings enumerated in the subdivision.

Report of House Committee on the Judiciary

Subdivision (b)[E] was amended merely to substitute positive law citations for those which were not.

Rule 1102.

AMENDMENTS

Amendments to the Federal Rules of Evidence may be made as provided in section 2076 of title 28 of the United States Code.

Note by Federal Judicial Center

This rule was not included among those prescribed by the Supreme Court. The rule prescribed by the Court as 1102 now appears as 1103.

Rule 1103.

TITLE

These rules may be known and cited as the Federal Rules of Evidence.

Note by Federal Judicial Center

The rule enacted by the Congress is the rule prescribed by the Supreme Court as Rule 1102 without change.

Sec. 2. (a) Title 28 of the United States Code is amended—

(1) by inserting immediately after section 2075 the following new section:

"§ 2076. Rules of evidence

"The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning

of a regular session of Congress but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so reported it shall not take effect. The effective date of any amendment so reported may be deferred by either House of Congress to a later date or until approved by Act of Congress. Any rule whether proposed or in force may be amended by Act of Congress. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect. Any such amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress"; and

(2) by adding at the end of the table of sections of chapter 131 the following new item:

"2076. Rules of evidence."

(b) Section 1732 of title 28 of the United States Code is amended by striking out subsection (a), and by striking out "(b)".

(c) Section 1733 of title 28 of the United States Code[3] is amended by adding at the end thereof the following new subsection:

"(c) This section does not apply to cases, actions, and proceedings to which the Federal Rules of Evidence apply."

Sec. 3. The Congress expressly approves the amendments to the Federal Rules of Civil Procedure, and the amendments to the Federal Rules of Criminal Procedure, which are embraced by the orders entered by the Supreme Court of the United States on November 20, 1972, and December 18, 1972, and such amendments shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act.

Approved Jan. 2, 1975.

*

APPENDIX

OF

DELETED AND SUPERSEDED MATERIALS

Rule 105.

SUMMING UP AND COMMENT BY JUDGE
[Not enacted.]

After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.

Note by Federal Judicial Center

The foregoing rule prescribed by the Supreme Court was deleted from the rules enacted by the Congress.

Advisory Committee's Note

The rule states the present rule in the federal courts. Capital Traction Co. v. Hof, 174 U.S. 1, 13–14, 19 S.Ct. 580, 43 L.Ed. 873 (1899). The judge must, of course, confine his remarks to what is disclosed by the evidence. He cannot convey to the jury his purely personal reaction to credibility or to the merits of the case; he can be neither argumentative nor an advocate. Quercia v. United States, 289 U.S. 466, 469, 53 S.Ct. 698, 77 L.Ed. 1321 (1933); Billeci v. United States, 87 U.S.App.D.C. 274, 184 F.2d 394, 402, 24 A.L.R.2d 881 (1950). For further discussion see the series of articles by Wright, The Invasion of Jury: Temperature of the War, 27 Temp.L.Q. 137 (1953), Instructions to the Jury: Summary Without Comment, 1954 Wash.U.L.Q. 177, Adequacy of Instructions to the Jury, 53 Mich.L.Rev. 505, 813 (1955); A.L.I. Model Code of Evidence, Comment to Rule 8; Maguire, Weinstein, et al., Cases and Materials on Evidence 737–740 (5th ed. 1965); Vanderbilt, Minimum Standards of Judicial Administration 224–229 (1949).

Report of the House Committee on the Judiciary

Rule 105 as submitted by the Supreme Court concerned the issue of summing up and comment by the judge. It provided that after the close of the evidence and the arguments of counsel, the presiding judge could fairly and impartially sum up the evidence and comment

to the jury upon its weight and the credibility of the witnesses, if he also instructed the jury that it was not bound thereby and must make its own determination of those matters. The Committee recognized that the Rule as submitted is consistent with long standing and current federal practice. However, the aspect of the Rule dealing with the authority of a judge to comment on the weight of the evidence and the credibility of witnesses—an authority not granted to judges in most State courts—was highly controversial. After much debate the Committee determined to delete the entire Rule, intending that its action be understood as reflecting no conclusion as to the merits of the proposed Rule and that the subject should be left for separate consideration at another time.

Report of Senate Committee on the Judiciary

This rule as submitted by the Supreme Court permitted the judge to sum up and comment on the evidence. The House struck the rule.

The committee accepts the House action with the understanding that the present Federal practice, taken from the common law, of the trial judge's discretionary authority to comment on and summarize the evidence is left undisturbed.

Rule 301.

PRESUMPTIONS IN GENERAL [As prescribed by Supreme Court]

In all cases not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Rule 301.

PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS [As passed by House of Representatives]

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with the evidence, and, even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of the facts.

Note by Federal Judicial Center

Neither of the above versions of Rule 301 was enacted.

Advisory Committee's Note

This rule governs presumptions generally. See Rule 302 for presumptions controlled by state law and Rule 303 for those against an accused in a criminal case.

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv.L.Rev. 909, 913 (1937); Morgan, Instructing the Jury upon Presumptions and Burden of Proof, 47 Harv.L.Rev. 59, 82 (1933); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan.L.Rev. 5 (1959).

The so-called "bursting bubble" theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too "slight and evanescent" an effect. Morgan and Maguire, *supra*, at p. 913.

In the opinion of the Advisory Committee, no constitutional infirmity attends this view of presumptions. In Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78 (1910), the Court upheld a Mississippi statute which provided that in actions against railroads proof of injury inflicted by the running of trains should be prima facie evidence of negligence by the railroad. The injury in the case had resulted from a derailment. The opinion made the points (1) that the only effect of the statute was to impose on the railroad the duty of producing some evidence to the contrary, (2) that an inference may be supplied by law if there is a rational connection between the fact proved and the fact presumed, as long as the opposite party is not precluded from presenting his evidence to the contrary, and (3) that considerations of public policy arising from the character of the business justified the application in question. Nineteen years later, in Western & Atlantic R. Co. v. Henderson, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884 (1929), the Court overturned a Georgia statute making railroads liable for damages done by trains, unless the railroad made it appear that reasonable care had been used, the presumption being against the railroad. The declaration alleged the death of plaintiff's husband from a grade crossing collision, due to specified acts of negligence by defendant. The jury were instructed that proof of the injury raised a presumption of negligence; the burden shifted to the railroad to prove ordinary care; and unless it did so, they should find for plaintiff. The instruction was held erroneous in an opinion stating (1) that there was no rational connection between the mere fact of collision and negligence on the part of anyone, and (2) that the statute was different from that in *Turnipseed* in imposing a burden upon the railroad. The reader is left in a state of some confusion. Is the

difference between a derailment and a grade crossing collision of no significance? Would the *Turnipseed* presumption have been bad if it had imposed a burden of persuasion on defendant, although that would in nowise have impaired its "rational connection"? If *Henderson* forbids imposing a burden of persuasion on defendants, what happens to affirmative defenses?

Two factors serve to explain *Henderson*. The first was that it was common ground that negligence was indispensable to liability. Plaintiff thought so, drafted her complaint accordingly, and relied upon the presumption. But how in logic could the same presumption establish her alternative grounds of negligence that the engineer was so blind he could not see decedent's truck and that he failed to stop after he saw it? Second, take away the basic assumption of no liability without fault, as *Turnipseed* intimated might be done ("considerations of public policy arising out of the character of the business"), and the structure of the decision in *Henderson* fails. No question of logic would have arisen if the statute had simply said: a prima facie case of liability is made by proof of injury by a train; lack of negligence is an affirmative defense, to be pleaded and proved as other affirmative defenses. The problem would be one of economic due process only. While it seems likely that the Supreme Court of 1929 would have voted that due process was denied, that result today would be unlikely. See, for example, the shift in the direction of absolute liability in the consumer cases. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).

Any doubt as to the constitutional permissibility of a presumption imposing a burden of persuasion of the nonexistence of the presumed fact in civil cases is laid at rest by Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). The Court unhesitatingly applied the North Dakota rule that the presumption against sucide imposed on defendant the burden of proving that the death of insured, under an accidental death clause, was due to suicide.

"Proof of coverage and of death by gunshot wound shifts the burden to the insurer to establish that the death of the insured was due to his suicide." 359 U.S. at 443, 79 S.Ct. at 925.

"In a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide." *Id.* at 446, 79 S.Ct. at 927.

The rational connection requirement survives in criminal cases, Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943), because the Court has been unwilling to extend into that area the greater-includes-the-lesser theory of Ferry v. Ramsey, 277 U.S. 88, 48 S.Ct. 443, 72 L.Ed. 796 (1928). In that case the Court sustained a Kansas statute under which bank directors were personally liable for deposits made with their assent and with knowledge of insolvency, and the fact of insolvency was prima facie evidence of assent and knowledge of insolvency. Mr. Justice Holmes pointed out that the state legislature could have made the directors personally liable to depositors in every case. Since the statute imposed a less stringent liability, "the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it." *Id.* at 94, 48 S.Ct. at 444. Mr. Justice Sutherland dissented: though the state

could have created an absolute liability, it did not purport to do so; a rational connection was necessary, but lacking, between the liability created and the prima facie evidence of it; the result might be different if the basis of the presumption were being open for business.

The Sutherland view has prevailed in criminal cases by virtue of the higher standard of notice there required. The fiction that everyone is presumed to know the law is applied to the substantive law of crimes as an alternative to complete unenforceability. But the need does not extend to criminal evidence and procedure, and the fiction does not encompass them. "Rational connection" is not fictional or artificial, and so it is reasonable to suppose that Gainey should have known that his presence at the site of an illicit still could convict him of being connected with (carrying on) the business, United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965), but not that Romano should have known that his presence at a still could convict him of possessing it, United States v. Romano, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965).

In his dissent in Gainey, Mr. Justice Black put it more artistically:

"It might be argued, although the Court does not so argue or hold, that Congress if it wished could make presence at a still a crime in itself, and so Congress should be free to create crimes which are called 'possession' and 'carrying on an illegal distillery business' but which are defined in such a way that unexplained presence is sufficient and indisputable evidence in all cases to support conviction for those offenses. See Ferry v. Ramsey, 277 U.S. 88, 48 S.Ct. 443, 72 L.Ed. 796. Assuming for the sake of argument that Congress could make unexplained presence a criminal act, and ignoring also the refusal of this Court in other cases to uphold a statutory presumption on such a theory, see Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772, there is no indication here that Congress intended to adopt such a misleading method of draftsmanship, nor in my judgment could the statutory provisions if so construed escape condemnation for vagueness, under the principles applied in Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888, and many other cases." 380 U.S. at 84, n. 12, 85 S.Ct. at 766.

And the majority opinion in *Romano* agreed with him:

"It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power. The crime remains possession, not presence, and with all due deference to the judgment of Congress, the former may not constitutionally be inferred from the latter." 382 U.S. at 144, 86 S.Ct. at 284.

The rule does not spell out the procedural aspects of its application. Questions as to when the evidence warrants submission of a presumption and what instructions are proper under varying states of fact are believed to present no particular difficulties.

Report of House Committee on the Judiciary

Rule 301 as submitted by the Supreme Court provided that in all cases a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is

more probable than its existence. The Committee limited the scope of Rule 301 to "civil actions and proceedings" to effectuate its decision not to deal with the question of presumptions in criminal cases. (See note on Rule 303 in discussion of Rules deleted). With respect to the weight to be given a presumption in a civil case, the Committee agreed with the judgment implicit in the Court's version that the so-called "bursting bubble" theory of presumptions, whereby a presumption vanishes upon the appearance of any contradicting evidence by the other party, gives to presumptions too slight an effect. On the other hand, the Committee believed that the Rule proposed by the Court, whereby a presumption permanently alters the burden of persuasion, no matter how much contradicting evidence is introduced—a view shared by only a few courts—lends too great a force to presumptions. Accordingly, the Committee amended the Rule to adopt an intermediate position under which a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion; instead it is merely deemed sufficient evidence of the fact presumed, to be considered by the jury or other finder of fact.

Rule 303.

PRESUMPTIONS IN CRIMINAL CASES
[Not enacted.]

(a) Scope. Except as otherwise provided by Act of Congress, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(b) Submission to jury. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

(c) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if

the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

Note by Federal Judicial Center

The foregoing rule prescribed by the Supreme Court was deleted from the rules enacted by the Congress.

Advisory Committee's Note

Subdivision (a). This rule is based largely upon A.L.I. Model Penal Code § 1.12(5) P.O.D. (1962) and United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965). While the rule, unlike the Model Penal Code provision, spells out the effect of common law presumptions as well as those created by statute, cases involving the latter are no doubt of more frequent occurrence. Congress has enacted numerous provisions to lessen the burden of the prosecution, principally though not exclusively in the fields of narcotics control and taxation of liquor. Occasionally, in the pattern of the usual common law treatment of such matters as insanity, they take the form of assigning to the defense the responsibility of raising specified matters as affirmative defenses, which are not within the scope of these rules. See Comment, A.L.I. Model Penal Code § 1.13, T.D. No. 4 (1955). In other instances they assume a variety of forms which are the concern of this rule. The provision may be that proof of a specified fact (possession or presence) is sufficient to authorize conviction. 26 U.S.C. § 4704(a), unlawful to buy or sell opium except from original stamped package—absence of stamps from package prima facie evidence of violation by person in possession; 26 U.S.C. § 4724(c), unlawful for person who has not registered and paid special tax to possess narcotics—possession presumptive evidence of violation. Sometimes the qualification is added, "unless the defendant explains the possession [presence] to the satisfaction of the jury." 18 U.S.C. § 545, possession of unlawfully imported goods sufficient for conviction of smuggling, unless explained; 21 U.S.C. § 174, possession sufficient for conviction of buying or selling narcotics known to have been imported unlawfully, unless explained. See also 26 U.S.C. § 5601(a) (1), (a) (4), (a) (8), (b) (1), (b) (2), (b) (4), relating to distilling operations. Another somewhat different pattern makes possession evidence of a particular element of the crime. 21 U.S.C. § 176b, crime to furnish unlawfully imported heroin to juveniles—possession sufficient proof of unlawful importation, unless explained; 50 U.S.C.A. App. § 462(b), unlawful to possess draft card not lawfully issued to holder, with intent to use for purposes of false identification—possession sufficient evidence of intent, unless explained. See also 15 U.S.C. § 902(f), (i).

Differences between the permissible operation of presumptions against the accused in criminal cases and in other situations prevent the formulation of a comprehensive definition of the term "presumption," and none is attempted. Nor do these rules purport to deal with problems of the validity of presumptions except insofar as they may be found reflected in the formulation of permissible procedures.

The presumption of innocence is outside the scope of the rule and unaffected by it.

Subdivisions (b) and (c). It is axiomatic that a verdict cannot be directed against the accused in a criminal case, 9 Wigmore § 2495, p. 312, with the corollary that the judge is without authority to direct the jury to find against the accused as to any element of the crime, A.L.I. Model Penal Code § 1.12(1) P.O.D. (1962). Although arguably the judge could direct the jury to find against the accused as to a lesser fact, the tradition is against it, and this rule makes no use of presumptions to remove any matters from final determination by the jury.

The only distinction made among presumptions under this rule is with respect to the measure of proof required in order to justify submission to the jury. If the effect of the presumption is to establish guilt or an element of the crime or to negative a defense, the measure of proof is the one widely accepted by the Courts of Appeals as the standard for measuring the sufficiency of the evidence in passing on motions for directed verdict (now judgment of acquittal): an acquittal should be directed when reasonable jurymen must have a reasonable doubt. Curley v. United States, 81 U.S.App.D.C. 389, 160 F. 2d 229 (1947), cert. denied 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850; United States v. Honeycutt, 311 F.2d 660 (4th Cir. 1962); Stephens v. United States, 354 F.2d 999 (5th Cir. 1965); Lambert v. United States, 261 F.2d 799 (5th Cir. 1958); United States v. Leggett, 292 F.2d 423 (6th Cir. 1961); Cape v. United States, 283 F.2d 430 (9th Cir. 1960); Cartwright v. United States, 335 F.2d 919 (10th Cir. 1964). Cf. United States v. Gonzales Castro, 228 F.2d 807 (2d Cir. 1956); United States v. Masiello, 235 F.2d 279 (2d Cir. 1956), cert. denied Stickel v. United States, 352 U.S. 882, 77 S.Ct. 100, 1 L.Ed.2d 79; United States v. Feinberg, 140 F.2d 592 (2d Cir. 1944). But cf. United States v. Arcuri, 282 F.Supp. 347 (E.D.N.Y.1968), aff'd. 405 F.2d 691, cert. denied 395 U.S. 913; United States v. Melillo, 275 F.Supp. 314 (E.D.N.Y.1968). If the presumption operates upon a lesser aspect of the case than the issue of guilt itself or an element of the crime or negativing a defense, the required measure of proof is the less stringent one of substantial evidence, consistently with the attitude usually taken with respect to particular items of evidence. 9 Wigmore § 2497, p. 324.

The treatment of presumptions in the rule is consistent with United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965), where the matter was considered in depth. After sustaining the validity of the provision of 26 U.S.C. § 5601(b) (2) that presence at the site is sufficient to convict of the offense of carrying on the business of distiller without giving bond, unless the presence is explained to the satisfaction of the jury, the Court turned to procedural considerations and reached several conclusions. The power of the judge to withdraw a case from the jury for insufficiency of evidence is left unimpaired; he may submit the case on the basis of presence alone, but he is not required to do so. Nor is he precluded from rendering judgment notwithstanding the verdict. It is proper to tell the jury about the "statutory inference," if they are told it is not conclusive. The jury may still acquit, even if it finds defendant present and his presence is unexplained. [Compare the mandatory character of the instruction condemned in Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1945).] To avoid any implication that the statutory language relative to explanation be taken as directing attention to failure of the accused to testify, the better practice, said the Court, would be to instruct the jury that they may draw the inference unless the evidence provides a satisfactory explanation of defendant's presence, omitting any explicit reference to the statute.

The Final Report of the National Commission on Reform of Federal Criminal Laws § 103(4) and (5) (1971) contains a careful formulation of the consequences of a statutory presumption with an alternative formulation set forth in the Comment thereto, and also of the effect of a prima facie case. In the criminal code there proposed, the terms "presumption" and "prima facie case" are used with precision and with reference to these meanings. In the federal criminal law as it stands today, these terms are not used with precision. Moreover, common law presumptions continue. Hence it is believed that the rule here proposed is better adapted to the present situation until such time as the Congress enacts legislation covering the subject, which the rule takes into account. If the subject of common law presumptions is not covered by legislation, the need for the rule in that regard will continue.

Report of House Committee on the Judiciary

Rule 303, as submitted by the Supreme Court was directed to the issues of when, in criminal cases, a court may submit a presumption to a jury and the type of instruction it should give. The Committee deleted this Rule since the subject of presumptions in criminal cases is addressed in detail in bills now pending before the Committee to revise the federal criminal code. The Committee determined to consider this question in the course of its study of these proposals.

Rule 406.

HABIT; ROUTINE PRACTICE
[Subdivision (b) not enacted.]

(b) Method of proof. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

Advisory Committee's Note

* * *

Subdivision (b). Permissible methods of proving habit or routine conduct include opinion and specific instances sufficient in number to warrant a finding that the habit or routine practice in fact existed. Opinion evidence must be "rationally based on the perception of the witness" and helpful, under the provisions of Rule 701. Proof by specific instances may be controlled by the overriding provisions of Rule 403 for exclusion on grounds of prejudice, confusion, misleading the jury, or waste of time. Thus the illustrations following A.L.I. Model Code of Evidence Rule 307 suggests the possibility of admitting testimony by W that on numerous occasions he had been with

X when X crossed a railroad track and that on each occasion X had first stopped and looked in both directions, but discretion to exclude offers of 10 witnesses, each testifying to a different occasion.

Similar provisions for proof by opinion or specific instances are found in Uniform Rule 50 and Kansas Code of Civil Procedure § 60–450. New Jersey Rule 50 provides for proof by specific instances but is silent as to opinion. The California Evidence Code is silent as to methods of proving habit, presumably proceeding on the theory that any method is relevant and all relevant evidence is admissible unless otherwise provided. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Rep., Rec. & Study, Cal. Law Rev. Comm'n, 620 (1964).

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[Reasons for deleting subdivision (b) are stated in the report, which is set forth in the main text under rule 406, supra.]

ARTICLE V. PRIVILEGES

Note by Federal Judicial Center

The 13 rules numbered 501–513 prescribed by the Supreme Court as Article V were replaced by a single rule 501 in the rules enacted by the Congress. The rules are included here for informational purposes only.

Rule 501.

PRIVILEGES RECOGNIZED ONLY AS PROVIDED
[Not enacted.]

Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Advisory Committee's Note

No attempt is made in these rules to incorporate the constitutional provisions which relate to the admission and exclusion of evidence, whether denominated as privileges or not. The grand design of these provisions does not readily lend itself to codification. The final reference must be the provisions themselves and the decisions construing them. Nor is formulating a rule an appropriate means of settling unresolved constitutional questions.

Similarly, privileges created by act of Congress are not within the scope of these rules. These privileges do not assume the form of broad principles; they are the product of resolving particular problems in particular terms. Among them are included such provisions as 13 U.S.C. § 9, generally prohibiting official disclosure of census information and conferring a privileged status on retained copies of census reports; 42 U.S.C. § 2000e–5(a), making inadmissible in evidence anything said or done during Equal Employment Opportunity conciliation proceeding; 42 U.S.C. § 2240, making required reports of incidents by nuclear facility licensees inadmissible in actions for damages; 45 U.S.C. §§ 33, 41, similarly as to reports of accidents by railroads; 49 U.S.C. § 1441(e), declaring C.A.B. accident investigation reports inadmissible in actions for damages. The rule leaves them undisturbed.

The reference to other rules adopted by the Supreme Court makes clear that provisions relating to privilege in those rules will continue in operation. See, for example, the "work product" immunity against discovery spelled out under the Rules of Civil Procedure in Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), now formalized in revised Rule 26(b) (3) of the Rules of Civil Procedure, and the secrecy of grand jury proceedings provided by Criminal Rule 6.

With respect to privileges created by state law, these rules in some instances grant them greater status than has heretofore been the case by according them recognition in federal criminal proceedings, bankruptcy, and federal question litigation. See Rules 502 and 510. There is, however, no provision generally adopting state-created privileges.

In federal criminal prosecutions the primacy of federal law as to both substance and procedure has been undoubted. See, for example, United States v. Krol, 374 F.2d 776 (7th Cir. 1967), sustaining the admission in a federal prosecution of evidence obtained by electronic eavesdropping, despite a state statute declaring the use of these devices unlawful and evidence obtained therefrom inadmissible. This primacy includes matters of privilege. As stated in 4 Barron, Federal Practice and Procedure § 2151, p. 175 (1951):

"The determination of the question whether a matter is privileged is governed by federal decisions and the state statutes or rules of evidence have no application."

In Funk v. United States, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369 (1933), the Court had considered the competency of a wife to testify for her husband and concluded that, absent congressional action or direction, the federal courts were to follow the common law as they saw it "in accordance with present day standards of wisdom and justice." And in Wolfle v. United States, 291 U.S. 7, 54 S.Ct. 279, 78 L. Ed. 617 (1934), the Court said with respect to the standard appropriate in determining a claim of privilege for an alleged confidential communication between spouses in a federal criminal prosecution:

"So our decision here, in the absence of Congressional legislation on the subject, is to be controlled by common law principles, not by local statute." *Id.*, 13, 54 S.Ct. at 280.

On the basis of *Funk* and *Wolfle*, the Advisory Committee on Rules of Criminal Procedure formulated Rule 26, which was adopted by the Court. The pertinent part of the rule provided:

"The . . . privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted . . . in the light of reason and experience."

As regards bankruptcy, section 21(a) of the Bankruptcy Act provides for examination of the bankrupt and his spouse concerning the acts, conduct, or property of the bankrupt. The Act limits examination of the spouse to business transacted by her or to which she is a party but provides "That the spouse may be so examined, any law of the United States or of any State to the contrary notwithstanding." 11 U.S.C. § 44(a). The effect of the quoted language is clearly to override any conflicting state rule of incompetency or privilege against spousal testimony. A fair reading would also indicate an overriding of any contrary state rule of privileged confidential spousal communications. Its validity has never been questioned and seems most unlikely to be. As to other privileges, the suggestion has been made that state law applies, though with little citation of authority, 2 Moore's Collier on Bankruptcy ¶ 21.13, p. 297 (14th ed. 1961). This position seems to be contrary to the expression of the Court in McCarthy v. Arndstein, 266 U.S. 34, 39, 45 S.Ct. 16, 69 L.Ed. 158 (1924), which speaks in the pattern of Rule 26 of the Federal Rules of Criminal Procedure:

"There is no provision [in the Bankruptcy Act] prescribing the rules by which the examination is to be governed. These are, impliedly, the general rules governing the admissibility of evidence and the competency and compellability of witnesses."

With respect to federal question litigation, the supremacy of federal law may be less clear, yet indications that state privileges are inapplicable preponderate in the circuits. In re Albert Lindley Lee Memorial Hospital, 209 F.2d 122 (2d Cir. 1953), cert. denied Cincotta v. United States, 347 U.S. 960, 74 S.Ct. 709, 98 L.Ed. 1104; Colton v. United States, 306 F.2d 633 (2d Cir. 1962); Falsone v. United States, 205 F.2d 734 (5th Cir. 1953); Fraser v. United States, 145 F.2d 139 (6th Cir. 1944), cert. denied 324 U.S. 849, 65 S.Ct. 684, 89 L.Ed. 1409; United States v. Brunner, 200 F.2d 276 (6th Cir. 1952). *Contra*, Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960). Additional decisions of district courts are collected in Annot., 95 A.L.R.2d 320, 336. While a number of the cases arise from administrative income tax investigations, they nevertheless support the broad proposition of the inapplicability of state privileges in federal proceedings.

In view of these considerations, it is apparent that, to the extent that they accord state privileges standing in federal criminal cases, bankruptcy, and federal question cases, the rules go beyond what previously has been thought necessary or proper.

On the other hand, in diversity cases, or perhaps more accurately cases in which state law furnishes the rule of decision, the rules avoid giving state privileges the effect which substantial authority has thought necessary and proper. Regardless of what might once have been thought to be the command of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), as to observance of state created privileges in diversity cases, Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), is believed to locate the

problem in the area of choice rather than necessity. Wright, Procedural Reform: Its Limitations and Its Future, 1 Ga.L.Rev. 563, 572–573 (1967). Contra, Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555, n. 2 (2d Cir. 1967), and see authorities there cited. Hence all significant policy factors need to be considered in order that the choice may be a wise one.

The arguments advanced in favor of recognizing state privileges are: a state privilege is an essential characteristic of a relationship or status created by state law and thus is substantive in the *Erie* sense; state policy ought not to be frustrated by the accident of diversity; the allowance or denial of a privilege is so likely to affect the outcome of litigation as to encourage forum selection on that basis, not a proper function of diversity jurisdiction. There are persuasive answers to these arguments.

(1) As to the question of "substance," it is true that a privilege commonly represents an aspect of a relationship created and defined by a State. For example, a confidential communications privilege is often an incident of marriage. However, in litigation involving the relationship itself, the privilege is not ordinarily one of the issues. In fact, statutes frequently make the communication privilege inapplicable in cases of divorce. McCormick § 88, p. 177. The same is true with respect to the attorney-client privilege when the parties to the relationship have a falling out. The reality of the matter is that privilege is called into operation, not when the relation giving rise to the privilege is being litigated, but when the litigation involves something substantively devoid of relation to the privilege. The appearance of privilege in the case is quite by accident, and its effect is to block off the tribunal from a source of information. Thus its real impact is on the method of proof in the case, and in comparison any substantive aspect appears tenuous.

(2) By most standards, criminal prosecutions are attended by more serious consequences than civil litigation, and it must be evident that the criminal area has the greatest sensitivity where privilege is concerned. Nevertheless, as previously noted, state privileges traditionally have given way in federal criminal prosecutions. If a privilege is denied in the area of greatest sensitivity, it tends to become illusory as a significant aspect of the relationship out of which it arises. For example, in a state having by statute an accountant's privilege, only the most imperceptible added force would be given the privilege by putting the accountant in a position to assure his client that, while he could not block disclosure in a federal criminal prosecution, he could do so in diversity cases as well as in state court proceedings. Thus viewed, state interest in privilege appears less substantial than at first glance might seem to be the case.

Moreover, federal interest is not lacking. It can scarcely be contended that once diversity is invoked the federal government no longer has a legitimate concern in the quality of judicial administration conducted under its aegis. The demise of conformity and the adoption of the Federal Rules of Civil Procedure stand as witness to the contrary.

(3) A large measure of forum shopping is recognized as legitimate in the American judicial system. Subject to the limitations of jurisdic-

tion and the relatively modest controls imposed by venue provisions and the doctrine of forum non conveniens, plaintiffs are allowed in general a free choice of forum. Diversity jurisdiction has as its basic purpose the giving of a choice, not only to plaintiffs but, in removal situations, also to defendants. In principle, the basis of the choice is the supposed need to escape from local prejudice. If the choice were tightly confined to that basis, then complete conformity to local procedure as well as substantive law would be required. This, of course, is not the case, and the choice may in fact be influenced by a wide range of factors. As Dean Ladd has pointed out, a litigant may select the federal court "because of the federal procedural rules, the liberal discovery provisions, the quality of jurors expected in the federal court, the respect held for federal judges, the control of federal judges over a trial, the summation and comment upon the weight of evidence by the judge, or the authority to grant a new trial if the judge regards the verdict against the weight of the evidence." Ladd, Privileges, 1969 Ariz.St.L.J. 555, 564. Present Rule 43(a) of the Civil Rules specifies a broader range of admissibility in federal than in state courts and makes no exception for diversity cases. Note should also be taken that Rule 26(b) (2) of the Rules of Civil Procedure, as revised, allows discovery to be had of liability insurance, without regard to local state law upon the subject.

When attention is directed to the practical dimensions of the problem, they are found not to be great. The privileges affected are few in number. Most states provide a physician-patient privilege; the proposed rules limit the privilege to a psychotherapist-patient relationship. See Advisory Committee's Note to Rule 504. The area of marital privilege under the proposed rules is narrower than in most states. See Rule 505. Some states recognize privileges for journalists and accountants; the proposed rules do not.

Physician-patient is the most widely recognized privilege not found in the proposed rules. As a practical matter it was largely eliminated in diversity cases when Rule 35 of the Rules of Civil Procedure became effective in 1938. Under that rule, a party physically examined pursuant to court order, by requesting and obtaining a copy of the report or by taking the deposition of the examiner, waives any privilege regarding the testimony of every other person who has examined him in respect of the same condition. While waiver may be avoided by neither requesting the report nor taking the examiner's deposition, the price is one which most litigant-patients are probably not prepared to pay.

Rule 502.

REQUIRED REPORTS PRIVILEGED BY STATUTE
[Not enacted.]

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or

report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

Advisory Committee's Note

Statutes which require the making of returns or reports sometimes confer on the reporting party a privilege against disclosure, commonly coupled with a prohibition against disclosure by the officer to whom the report is made. Some of the federal statutes of this kind are mentioned in the Advisory Committee's Note to Rule 501, *supra*. See also the Note to Rule 402, *supra*. A provision against disclosure may be included in a statute for a variety of reasons, the chief of which are probably assuring the validity of the statute against claims of self-incrimination, honoring the privilege against self-incrimination, and encouraging the furnishing of the required information by assuring privacy.

These statutes, both state and federal, may generally be assumed to embody policies of significant dimension. Rule 501 insulates the federal provisions against disturbance by these rules; the present rule reiterates a result commonly specified in federal statutes and extends its application to state statutes of similar character. Illustrations of the kinds of returns and reports contemplated by the rule appear in the cases, in which a reluctance to compel disclosure is manifested. In re Reid, 155 F. 933 (E.D.Mich.1906), assessor not compelled to produce bankrupt's property tax return in view of statute forbidding disclosure; In re Valecia Condensed Milk Co., 240 F. 310 (7th Cir. 1917), secretary of state tax commission not compelled to produce bankrupt's income tax returns in violation of statute; Herman Bros. Pet Supply, Inc. v. N. L. R. B., 360 F.2d 176 (6th Cir. 1966), subpoena denied for production of reports to state employment security commission prohibited by statute, in proceeding for back wages. And see the discussion of motor vehicle accident reports in Krizak v. W. C. Brooks & Sons, Inc., 320 F.2d 37, 42–43 (4th Cir. 1963). Cf. In re Hines, 69 F.2d 52 (2d Cir. 1934).

Rule 503.

LAWYER-CLIENT PRIVILEGE
[Not enacted.]

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transaction; or

(3) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or

(4) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness: or

(5) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Advisory Committee's Note

Subdivision (a). (1) The definition of "client" includes governmental bodies, Connecticut Mutual Life Ins. Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y.1955); People ex rel. Department of Public Works v. Glen Arms Estate, Inc., 230 Cal.App.2d 841, 41 Cal.Rptr. 303 (1965); Rowley v. Ferguson, 48 N.E.2d 243 (Ohio App.1942); and corporations, Radiant Burners, Inc. v. American Gas Assn., 320 F.2d 314 (7th Cir. 1963). *Contra*, Gardner, A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy, 40 U.Det.L.J. 299, 323, 376 (1963). The definition also extends the status of client to one consulting a lawyer preliminarily with a view to retaining him, even though actual employment does not result. McCormick, § 92, p. 184. The client need not be involved in litigation; the rendition of legal service or advice under any circumstances suffices. 8 Wigmore § 2294 (McNaughton Rev.1961). The services must be professional legal services; purely business or personal matters do not qualify. McCormick § 92, p. 184.

The rule contains no definition of "representative of the client." In the opinion of the Advisory Committee, the matter is better left to resolution by decision on a case-by-case basis. The most restricted position is the "control group" test, limiting the category to persons with authority to seek and act upon legal advice for the client. See, *e. g.*, City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D.Pa.1962), mandamus and prohibition denied *sub nom.* General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir.), cert. denied 372 U.S. 943; Garrison v. General Motors Corp., 213 F.Supp. 515 (S.D.Cal.1963); Hogan v. Zletz, 43 F.R.D. 308 (N.D.Okla.1967), aff'd *sub nom.* Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); Day v. Illinois Power Co., 50 Ill.App.2d 52, 199 N.E.2d 802 (1964). Broader formulations are found in other decisions. See, *e. g.*, United States v. United Shoe Machinery Corp., 89 F.Supp. 357 (D.Mass.1950); Zenith Radio Corp. v. Radio Corp. of America, 121 F.Supp. 792 (D.Del.1954); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd without opinion by equally divided court 400 U.S. 955 (1971), reh. denied 401 U.S. 950; D. I. Chadbourne, Inc. v. Superior Court, 60 Cal.2d 723, 36 Cal.Rptr. 468, 388 P.2d 700 (1964). Cf. Rucker v. Wabash R. Co., 418 F.2d 146 (7th Cir. 1969). See generally, Simon, The Attorney-Client Privilege as Applied to Corporations, 65 Yale L.J. 953, 956–966 (1956); Note, Attorney-Client Privilege for Corporate Clients: The Control Group Test, 84 Harv.L.Rev. 424 (1970).

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The status of employees who are used in the process of communicating, as distinguished from those who are parties to the communication, is treated in paragraph (4) of subdivision (a) of the rule.

(2) A "lawyer" is a person licensed to practice law in any state or nation. There is no requirement that the licensing state or nation recognize the attorney-client privilege, thus avoiding excursions into conflict of laws questions. "Lawyer" also includes a person reasonably believed to be a lawyer. For similar provisions, see California Evidence Code § 950.

(3) The definition of "representative of the lawyer" recognizes that the lawyer may, in rendering legal services, utilize the services of assistants in addition to those employed in the process of communicating. Thus the definition includes an expert employed to assist in rendering legal advice. United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) (accountant). Cf. Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949). It also includes an expert employed to assist in the planning and conduct of litigation, though not one employed to testify as a witness. Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 F. 563 (S.D.N.Y.1898), and see revised Civil Rule 26(b) (4). The definition does not, however, limit "representative of the lawyer" to experts. Whether his compensation is derived immediately from the lawyer or the client is not material.

(4) The requisite confidentiality of communication is defined in terms of intent. A communication made in public or meant to be relayed to outsiders or which is divulged by the client to third persons can scarcely be considered confidential. McCormick § 95. The intent is inferable from the circumstances. Unless intent to disclose is apparent, the attorney-client communication is confidential. Taking or failing to take precautions may be considered as bearing on intent.

Practicality requires that some disclosure be allowed beyond the immediate circle of lawyer-client and their representatives without impairing confidentiality. Hence the definition allows disclosure to persons "to whom disclosure is in furtherance of the rendition of professional legal services to the client," contemplating those in such relation to the client as "spouse, parent, business associate, or joint client." Comment, California Evidence Code § 952.

Disclosure may also be made to persons "reasonably necessary for the transmission of the communication," without loss of confidentiality.

Subdivision (b) sets forth the privilege, using the previously defined terms: client, lawyer, representative of the lawyer, and confidential communication.

Substantial authority has in the past allowed the eavesdropper to testify to overheard privileged conversations and has admitted intercepted privileged letters. Today, the evolution of more sophisticated techniques of eavesdropping and interception calls for abandonment of this position. The rule accordingly adopts a policy of protection against these kinds of invasion of the privilege.

The privilege extends to communications (1) between client or his representative and lawyer or his representative, (2) between lawyer

and lawyer's representative, (3) by client or his lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or the client and a representative of the client, and (5) between lawyers representing the client. All these communications must be specifically for the purpose of obtaining legal services for the client; otherwise the privilege does not attach.

The third type of communication occurs in the "joint defense" or "pooled information" situation, where different lawyers represent clients who have some interests in common. In Chahoon v. Commonwealth, 62 Va. 822 (1871), the court said that the various clients might have retained one attorney to represent all; hence everything said at a joint conference was privileged, and one of the clients could prevent another from disclosing what the other had himself said. The result seems to be incorrect in overlooking a frequent reason for retaining different attorneys by the various clients, namely actually or potentially conflicting interests in addition to the common interest which brings them together. The needs of these cases seem better to be met by allowing each client a privilege as to his own statements. Thus if all resist disclosure, none will occur. Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964). But, if for reasons of his own, a client wishes to disclose his own statements made at the joint conference, he should be permitted to do so, and the rule is to that effect. The rule does not apply to situations where there is no common interest to be promoted by a joint consultation, and the parties meet on a purely adversary basis. Vance v. State, 190 Tenn. 521, 230 S.W.2d 987 (1950), cert. denied 339 U.S. 988, 70 S.Ct. 1010, 94 L.Ed. 1389. Cf. Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965).

Subdivision (c). The privilege is, of course, that of the client, to be claimed by him or by his personal representative. The successor of a dissolved corporate client may claim the privilege. California Evidence Code § 953; New Jersey Evidence Rule 26(1). *Contra*, Uniform Rule 26(1).

The lawyer may not claim the privilege on his own behalf. However, he may claim it on behalf of the client. It is assumed that the ethics of the profession will require him to do so except under most unusual circumstances. American Bar Association, Canons of Professional Ethics, Canon 37. His authority to make the claim is presumed unless there is evidence to the contrary, as would be the case if the client were now a party to litigation in which the question arose and were represented by other counsel. Ex parte Lipscomb, 111 Tex. 409, 239 S.W. 1101 (1922).

Subdivision (d) in general incorporates well established exceptions.

(1) The privilege does not extend to advice in aid of future wrongdoing. 8 Wigmore § 2298 (McNaughton Rev.1961). The wrongdoing need not be that of the client. The provision that the client knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is erroneously advised that a proposed action is within the law. No preliminary finding that sufficient evidence aside from the communication has been introduced to warrant a finding that the services were sought to enable the commission of a wrong is required. Cf. Clark v. Unit-

ed States, 289 U.S. 1, 15–16, 53 S.Ct. 465, 77 L.Ed. 993 (1933); Uniform Rule 26(2) (a). While any general exploration of what transpired between attorney and client would, of course, be inappropriate, it is wholly feasible, either at the discovery stage or during trial, so to focus the inquiry by specific questions as to avoid any broad inquiry into attorney-client communications. Numerous cases reflect this approach.

(2) Normally the privilege survives the death of the client and may be asserted by his representative. Subdivision (c), *supra*. When, however, the identity of the person who steps into the client's shoes is in issue, as in a will contest, the identity of the person entitled to claim the privilege remains undetermined until the conclusion of the litigation. The choice is thus between allowing both sides or neither to assert the privilege, with authority and reason favoring the latter view. McCormick § 98; Uniform Rule 26(2) (b); California Evidence Code § 957; Kansas Code of Civil Procedure § 60–426(b) (2); New Jersey Evidence Rule 26(2) (b).

(3) The exception is required by considerations of fairness and policy when questions arise out of dealings between attorney and client, as in cases of controversy over attorney's fees, claims of inadequacy of representation, or charges of professional misconduct. McCormick § 95; Uniform Rule 26(2) (c); California Evidence Code § 958; Kansas Code of Civil Procedure § 60–426(b) (3); New Jersey Evidence Rule 26(2) (c).

(4) When the lawyer acts as attesting witness, the approval of the client to his so doing may safely be assumed, and waiver of the privilege as to any relevant lawyer-client communications is a proper result. McCormick § 92, p. 184; Uniform Rule 26(2) (d); California Evidence Code § 959; Kansas Code of Civil Procedure § 60–426(b) (d) [*sic*].

(5) The subdivision states existing law. McCormick § 95, pp. 192–193. For similar provisions, see Uniform Rule 26(2) (e); California Evidence Code § 962; Kansas Code of Civil Procedure § 60–426(b) (4); New Jersey Evidence Rule 26(2). The situation with which this provision deals is to be distinguished from the case of clients with a common interest who retain different lawyers. See subdivision (b) (3) of this rule, *supra*.

Rule 504.

PSYCHOTHERAPIST-PATIENT PRIVILEGE
[Not enacted]

(a) Definitions.

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of

a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by order of judge. If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

Advisory Committee's Note

The rules contain no provision for a general physician-patient privilege. While many states have by statute created the privilege, the exceptions which have been found necessary in order to obtain information required by the public interest or to avoid fraud are so numerous as to leave little if any basis for the privilege. Among the exclusions from the statutory privilege, the following may be enumerated; communications not made for purposes of diagnosis and treatment; commitment and restoration proceedings; issues as to wills or otherwise between parties claiming by succession from the patient; actions on insurance policies; required reports (venereal diseases, gunshot wounds, child abuse); communications in furtherance of crime or fraud; mental or physical condition put in issue by patient (personal injury cases); malpractice actions; and some or all criminal prosecutions. California, for example, excepts cases in which the patient puts his condition in issue, all criminal proceedings, will and similar contests, malpractice cases, and disciplinary proceedings, as well as certain other situations, thus leaving virtually nothing covered by the privilege. California Evidence Code §§ 990–1007. For other illustrative statutes see Ill.Rev.Stat.1967, c. 51, § 5.1; N.Y.C.P.L.R. § 4504; N.C.Gen.Stat.1953, § 8–53. Moreover, the possibility of compelling gratuitous disclosure by the physician is foreclosed by his standing to raise the question of relevancy. See Note on "Official Information" Privilege following Rule 509, *infra*.

The doubts attendant upon the general physician-patient privilege are not present when the relationship is that of psychotherapist and patient. While the common law recognized no general physician-patient privilege, it had indicated a disposition to recognize a psychotherapist-patient privilege, Note, Confidential Communications to a Psychotherapist: A New Testimonial Privilege, 47 Nw.U.L.Rev. 384 (1952), when legislatures began moving into the field.

The case for the privilege is convincingly stated in Report No. 45, Group for the Advancement of Psychiatry 92 (1960):

"Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . ., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment."

A much more extended exposition of the case for the privilege is made in Slovenko, Psychiatry and a Second Look at the Medical Privilege, 6 Wayne L.Rev. 175, 184 (1960), quoted extensively in the careful Tentative Recommendation and Study Relating to the Uniform Rules of Evidence (Article V. Privileges), Cal.Law Rev. Comm'n, 417 (1964). The conclusion is reached that Wigmore's four conditions needed to justify the existence of a privilege are amply satisfied.

Illustrative statutes are Cal.Evidence Code §§ 1010–1026; Ga.Code § 38–418 (1961 Supp.); Conn.Gen.Stat., § 52–146a (1966 Supp.); Ill. Rev.Stat.1967, c. 51, § 5.2.

While many of the statutes simply place the communications on the same basis as those between attorney and client, 8 Wigmore § 2286, n. 23 (McNaughton Rev.1961), basic differences between the two relationships forbid resorting to attorney-client save as a helpful point of departure. Goldstein and Katz, Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute, 36 Conn. B.J. 175, 182 (1962).

Subdivision (a). (1) The definition of patient does not include a person submitting to examination for scientific purposes. Cf. Cal. Evidence Code § 1101. Attention is directed to 42 U.S.C. 242(a) (2), as amended by the Drug Abuse and Control Act of 1970, P.L. 91–513, authorizing the Secretary of Health, Education, and Welfare to withhold the identity of persons who are the subjects of research on the use and effect of drugs. The rule would leave this provision in full force. See Rule 501.

(2) The definition of psychotherapist embraces a medical doctor while engaged in the diagnosis or treatment of mental or emotional conditions, including drug addiction, in order not to exclude the general practitioner and to avoid the making of needless refined distinctions concerning what is and what is not the practice of psychiatry. The requirement that the psychologist be in fact licensed, and not merely be believed to be so, is believed to be justified by the number of persons, other than psychiatrists, purporting to render psychotherapeutic aid and the variety of their theories. Cal.Law Rev. Comm'n, *supra*, at pp. 434–437.

The clarification of mental or emotional condition as including drug addiction is consistent with current approaches to drug abuse problems. See, *e. g.*, the definition of "drug dependent person" in 42 U.S.C. 201(q), added by the Drug Abuse Prevention and Control Act of 1970, P.L. 91–513.

(3) Confidential communication is defined in terms conformable with those of the lawyer-client privilege, Rule 503(a) (4), *supra*, with changes appropriate to the difference in circumstance.

Subdivisions (b) and (c). The lawyer-client rule is drawn upon for the phrasing of the general rule of privilege and the determination of those who may claim it. See Rule 503(b) and (c).

The specific inclusion of communications made for the diagnosis and treatment of drug addiction recognizes the continuing contemporary concern with rehabilitation of drug dependent persons and is designed to implement that policy by encouraging persons in need thereof to seek assistance. The provision is in harmony with Congressional actions in this area. See 42 U.S.C. § 260, providing for voluntary hospitalization of addicts or persons with drug dependence problems and prohibiting use of evidence of admission or treatment in any proceeding against him, and 42 U.S.C. § 3419 providing that in voluntary or involuntary commitment of addicts the

results of any hearing, examination, test, or procedure used to determine addiction shall not be used against the patient in any criminal proceeding.

Subdivision (d). The exceptions differ substantially from those of the attorney-client privilege, as a result of the basic differences in the relationships. While it has been argued convincingly that the nature of the psychotherapist-patient relationship demands complete security against legally coerced disclosure in all circumstances, Louisell, The Psychologist in Today's Legal World: Part II, 41 Minn. L.Rev. 731, 746 (1957), the committee of psychiatrists and lawyers who drafted the Connecticut statute concluded that in three instances the need for disclosure was sufficiently great to justify the risk of possible impairment of the relationship. Goldstein and Katz, Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute, 36 Conn.B.J. 175 (1962). These three exceptions are incorporated in the present rule.

(1) The interests of both patient and public call for a departure from confidentiality in commitment proceedings. Since disclosure is authorized only when the psychotherapist determines that hospitalization is needed, control over disclosure is placed largely in the hands of a person in whom the patient has already manifested confidence. Hence damage to the relationship is unlikely.

(2) In a court ordered examination, the relationship is likely to be an arm's length one, though not necessarily so. In any event, an exception is necessary for the effective utilization of this important and growing procedure. The exception, it will be observed, deals with a court ordered examination rather than with a court appointed psychotherapist. Also, the exception is effective only with respect to the particular purpose for which the examination is ordered. The rule thus conforms with the provisions of 18 U.S.C. § 4244 that no statement made by the accused in the course of an examination into competency to stand trial is admissible on the issue of guilt and of 42 U.S.C. § 3420 that a physician conducting an examination in a drug addiction commitment proceeding is a competent and compellable witness.

(3) By injecting his condition into litigation, the patient must be said to waive the privilege, in fairness and to avoid abuses. Similar considerations prevail after the patient's death.

Rule 505.

HUSBAND-WIFE PRIVILEGE
[Not enacted.]

(a) General rule of privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

(b) Who may claim the privilege. The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.

(c) Exceptions. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328, with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421–2424, or with violation of other similar statutes.

Advisory Committee's Note

Subdivision (a). Rules of evidence have evolved around the marriage relationship in four respects: (1) incompetency of one spouse to testify for the other; (2) privilege of one spouse not to testify against the other; (3) privilege of one spouse not to have the other testify against him; and (4) privilege against disclosure of confidential communications between spouses, sometimes extended to information learned by virtue of the existence of the relationship. Today these matters are largely governed by statutes.

With the disappearance of the disqualification of parties and interested persons, the basis for spousal incompetency no longer existed, and it, too, virtually disappeared in both civil and criminal actions. Usually reached by statute, this result was reached for federal courts by the process of decision. Funk v. United States, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369 (1933). These rules contain no recognition of incompetency of one spouse to testify for the other.

While some 10 jurisdictions recognize a privilege not to testify against one's spouse in a criminal case, and a much smaller number do so in civil cases, the great majority recognizes no privilege on the part of the testifying spouse, and this is the position taken by the rule. Compare Wyatt v. United States, 362 U.S. 525, 80 S.Ct. 901, 4 L.Ed.2d 931 (1960), a Mann Act prosecution in which the wife was the victim. The majority opinion held that she could not claim privilege and was compellable to testify. The holding was narrowly based: The Mann Act presupposed that the women with whom it dealt had no independent wills of their own, and this legislative judgment precluded allowing a victim-wife an option whether to testify, lest the policy of the statute be defeated. A vigorous dissent took the view that nothing in the Mann Act required departure from usual doctrine, which was conceived to be one of allowing the injured party to claim or waive privilege.

About 30 jurisdictions recognize a privilege of an accused in a criminal case to prevent his or her spouse from testifying. It is believed to represent the one aspect of marital privilege the continuation of which is warranted. In Hawkins v. United States, 358 U.S.

74, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958) it was sustained. Cf. McCormick § 66; 8 Wigmore § 2228 (McNaughton Rev.1961): Comment, Uniform Rule 23(2).

The rule recognizes no privilege for confidential communications. The traditional justifications for privileges not to testify against a spouse and not to be testified against by one's spouse have been the prevention of marital dissension and the repugnancy of requiring a person to condemn or be condemned by his spouse. 8 Wigmore §§ 2228, 2241 (McNaughton Rev.1961). These considerations bear no relevancy to marital communications. Nor can it be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware. The other communication privileges, by way of contrast, have as one party a professional person who can be expected to inform the other of the existence of the privilege. Moreover, the relationships from which those privileges arise are essentially and almost exclusively verbal in nature, quite unlike marriage. See Hutchins and Slesinger, Some Observations on the Law of Evidence: Family Relations, 13 Minn.L.Rev. 675 (1929). Cf. McCormick § 90; 8 Wigmore § 2337 (McNaughton Rev. 1961).

The parties are not spouses if the marriage was a sham, Lutwak v. United States, 344 U.S. 604 (1953), or they have been divorced, Barsky v. United States, 339 F.2d 180 (9th Cir. 1964), and therefore the privilege is not applicable.

Subdivision (b). This provision is a counterpart of Rules 503(c), 504(c), and 506(c). Its purpose is to provide a procedure for preventing the taking of the spouse's testimony notably in grand jury proceedings, when the accused is absent and does not know that a situation appropriate for a claim of privilege is presented. If the privilege is not claimed by the spouse, the protection of Rule 512 is available.

Subdivision (c) contains three exceptions to the privilege against spousal testimony in criminal cases.

(1) The need of limitation upon the privilege in order to avoid grave injustice in cases of offenses against the other spouse or a child of either can scarcely be denied. 8 Wigmore § 2239 (McNaughton Rev.1961). The rule therefore disallows any privilege against spousal testimony in these cases and in this respect is in accord with the result reached in Wyatt v. United States, 362 U.S. 525, 80 S.Ct. 901, 4 L.Ed.2d 931 (1960), a Mann Act prosecution, denying the accused the privilege of excluding his wife's testimony, since she was the woman who was transported for immoral purposes.

(2) The second exception renders the privilege inapplicable as to matters occurring prior to the marriage. This provision eliminates the possibility of suppressing testimony by marrying the witness.

(3) The third exception continues and expands established Congressional policy. In prosecutions for importing aliens for immoral purposes, Congress has specifically denied the accused any privilege not to have his spouse testify against him. 8 U.S.C. § 1328. No provision of this nature is included in the Mann Act, and in Hawkins v. United States, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958), the con-

clusion was reached that the common law privilege continued. Consistency requires similar results in the two situations. The rule adopts the Congressional approach, as based upon a more realistic appraisal of the marriage relationship in cases of this kind, in preference to the specific result in *Hawkins*. Note the common law treatment of pimping and sexual offenses with third persons as exceptions to marital privilege. 8 Wigmore § 2239 (McNaughton Rev. 1961).

With respect to bankruptcy proceedings, the smallness of the area of spousal privilege under the rule and the general inapplicability of privileges created by state law render unnecessary any special provision for examination of the spouse of the bankrupt, such as that now contained in section 21(a) of the Bankruptcy Act. 11 U.S.C. § 44(a).

For recent statutes and rules dealing with husband-wife privileges, see California Evidence Code §§ 970–973, 980–987; Kansas Code of Civil Procedure §§ 60–423(b), 60–428; New Jersey Evidence Rules 23(2), 28.

Rule 506.

COMMUNICATIONS TO CLERGYMEN
[Not enacted.]

(a) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

Advisory Committee's Note

The considerations which dictate the recognition of privileges generally seem strongly to favor a privilege for confidential communications to clergymen. During the period when most of the common law privileges were taking shape, no clear-cut privilege for communications between priest and penitent emerged. 8 Wigmore § 2394 (Mc-

Naughton Rev.1961). The English political climate of the time may well furnish the explanation. In this country, however, the privilege has been recognized by statute in about two-thirds of the states and occasionally by the common law process of decision. *Id.*, § 2395; Mullen v. United States, 105 U.S.App.D.C. 25, 263 F.2d 275 (1959).

Subdivision (a). Paragraph (1) defines a clergyman as a "minister, priest, rabbi, or other similar functionary of a religious organization." The concept is necessarily broader than that inherent in the ministerial exemption for purposes of Selective Service. See United States v. Jackson, 369 F.2d 936 (4th Cir. 1966). However, it is not so broad as to include all self-denominated "ministers." A fair construction of the language requires that the person to whom the status is sought to be attached be regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis. No further specification seems possible in view of the lack of licensing and certification procedures for clergymen. However, this lack seems to have occasioned no particular difficulties in connection with the solemnization of marriages, which suggests that none may be anticipated here. For similar definitions of "clergyman" see California Evidence Code § 1030; New Jersey Evidence Rule 29.

The "reasonable belief" provision finds support in similar provisions for lawyer-client in Rule 503 and for psychotherapist-patient in Rule 504. A parallel is also found in the recognition of the validity of marriages performed by unauthorized persons if the parties reasonably believed them legally qualified. Harper and Skolnick, Problems of the Family 153 (Rev.Ed.1962).

(2) The definition of "confidential" communication is consistent with the use of the term in Rule 503(a) (5) for lawyer-client and in Rule 504(a) (3) for psychotherapist-patient, suitably adapted to communications to clergymen.

Subdivision (b). The choice between a privilege narrowly restricted to doctrinally required confessions and a privilege broadly applicable to all confidential communications with a clergyman in his professional character as spiritual adviser has been exercised in favor of the latter. Many clergymen now receive training in marriage counseling and the handling of personality problems. Matters of this kind fall readily into the realm of the spirit. The same considerations which underlie the psychotherapist-patient privilege of Rule 504 suggest a broad application of the privilege for communications to clergymen.

State statutes and rules fall in both the narrow and the broad categories. A typical narrow statute proscribes disclosure of "a confession . . . made . . . in the course of discipline enjoined by the church to which he belongs." Ariz.Rev.Stats.Ann.1956, § 12-2233. See also California Evidence Code § 1032; Uniform Rule 29. Illustrative of the broader privilege are statutes applying to "information communicated to him in a confidential manner, properly entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communi-

cating . . . is seeking spiritual counsel and advice," Fla.Stats.Ann.1960, § 90.241, or to any "confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline," Iowa Code Ann. 1950, § 622.10. See also Ill.Rev.Stats.1967, c. 51, § 48.1; Minn.Stats.Ann.1945, § 595.02(3); New Jersey Evidence Rue 29.

Under the privilege as phrased, the communicating person is entitled to prevent disclosure not only by himself but also by the clergyman and by eavesdroppers. For discussion see Advisory Committee's Note under lawyer-client privilege, Rule 503(b).

The nature of what may reasonably be considered spiritual advice makes it unnecessary to include in the rule a specific exception for communications in furtherance of crime or fraud, as in Rule 503 (d) (1).

Subdivision (c) makes clear that the privilege belongs to the communicating person. However, a prima facie authority on the part of the clergyman to claim the privilege on behalf of the person is recognized. The discipline of the particular church and the discreetness of the clergyman are believed to constitute sufficient safeguards for the absent communicating person. See Advisory Committee's Note to the similar provision with respect to attorney-client in Rule 503(c).

Rule 507.

POLITICAL VOTE
[Not enacted.]

Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

Advisory Committee's Note

Secrecy in voting is an essential aspect of effective democratic government, insuring free exercise of the franchise and fairness in elections. Secrecy after the ballot has been cast is as essential as secrecy in the act of voting. Nutting, Freedom of Silence: Constitutional Protection Against Governmental Intrusion in Political Affairs, 47 Mich.L.Rev. 181, 191 (1948). Consequently a privilege has long been recognized on the part of a voter to decline to disclose how he voted. Required disclosure would be the exercise of "a kind of inquisitorial power unknown to the principles of our government and constitution, and might be highly injurious to the suffrages of a free people, as well as tending to create cabals and disturbances between contending parties in popular elections." Johnston v. Charleston, 1 Bay 441, 442 (S.C.1795).

The exception for illegally cast votes is a common one under both statutes and case law, Nutting, *supra*, at p. 192; 8 Wigmore § 2214, p. 163 (McNaughton Rev.1961). The policy considerations which underlie the privilege are not applicable to the illegal voter. However,

nothing in the exception purports to foreclose an illegal voter from invoking the privilege against self-incrimination under appropriate circumstances.

For similar provisions, see Uniform Rule 31; California Evidence Code § 1050; Kansas Code of Civil Procedure § 60–431; New Jersey Evidence Rule 31.

Rule 508.

TRADE SECRETS
[Not enacted.]

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

Advisory Committee's Note

While sometimes said not to be a true privilege, a qualified right to protection against disclosure of trade secrets has found ample recognition, and, indeed, a denial of it would be difficult to defend. 8 Wigmore § 2212(3) (McNaughton Rev.1961). And see 4 Moore's Federal Practice ¶¶ 30.12 and 34.15 (2nd ed. 1963 and Supp.1965) and 2A Barron and Holtzoff, Federal Practice and Procedure § 715.1 (Wright ed. 1961). Congressional policy is reflected in the Securities Exchange Act of 1934, 15 U.S.C. § 78x, and the Public Utility Holding Company Act of 1933, *id.* § 79v, which deny the Securities and Exchange Commission authority to require disclosure of trade secrets or processes in applications and reports. See also Rule 26(c) (7) of the Rules of Civil Procedure, as revised, mentioned further hereinafter.

Illustrative cases raising trade-secret problems are: E. I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 37 S.Ct. 575, 61 L. Ed. 1016 (1917), suit to enjoin former employee from using plaintiff's secret processes, countered by defense that many of the processes were well known to the trade; Segal Lock & Hardware Co. v. FTC, 143 F.2d 935 (2d Cir. 1944), question whether expert locksmiths employed by FTC should be required to disclose methods used by them in picking petitioner's "pick-proof" locks; Dobson v. Graham, 49 F. 17 (E.D.Pa.1889), patent infringement suit in which plaintiff sought to elicit from former employees now in the hire of defendant the respects in which defendant's machinery differed from plaintiff's patented machinery; Putney v. Du Bois Co., 240 Mo.App. 1075, 226 S. W.2d 737 (1950), action for injuries allegedly sustained from using defendant's secret formula dishwashing compound. See 8 Wigmore § 2212(3) (McNaughton Rev.1961); Annot., 17 A.L.R.2d 383; 49 Mich.L. Rev. 133 (1950). The need for accommodation between protecting

trade secrets, on the one hand, and eliciting facts required for full and fair presentation of a case, on the other hand, is apparent. Whether disclosure should be required depends upon a weighing of the competing interests involved against the background of the total situation, including consideration of such factors as the dangers of abuse, good faith, adequacy of protective measures, and the availability of other means of proof.

The cases furnish examples of the bringing of judicial ingenuity to bear upon the problem of evolving protective measures which achieve a degree of control over disclosure. Perhaps the most common is simply to take testimony *in camera*. Annot., 62 A.L.R.2d 509. Other possibilities include making disclosure to opposing counsel but not to his client, E. I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 37 S.Ct. 575, 61 L.Ed. 1016 (1917); making disclosure only to the judge (hearing examiner), Segal Lock & Hardware Co. v. FTC, 143 F.2d 935 (2d Cir. 1944); and placing those present under oath not to make disclosure, Paul v. Sinnott, 217 F.Supp. 84 (W.D.Pa.1963).

Rule 26(c) of the Rules of Civil Procedure, as revised, provides that the judge may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way . . ." While the instant evidence rule extends this underlying policy into the trial, the difference in circumstances between discovery stage and trial may well be such as to require a different ruling at the trial.

For other rules recognizing privilege for trade secrets, see Uniform Rule 32; California Evidence Code § 1060; Kansas Code of Civil Procedure § 60–432; New Jersey Evidence Rule 32.

Rule 509.

SECRETS OF STATE AND OTHER OFFICIAL INFORMATION
[Not enacted.]

(a) Definitions.

(1) Secret of state. A "secret of state" is a governmental secret relating to the national defense or the international relations of the United States.

(2) Official information. "Official information" is information within the custody or control of a department or agency of the government the disclosure of which is shown to be contrary to the public interest and which consists of: (A) intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions, or (B) subject to the provisions of 18 U.S.C. § 3500, investigatory files

compiled for law enforcement purposes and not otherwise available, or (C) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to 5 U.S.C. § 552.

(b) General rule of privilege. The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.

(c) Procedures. The privilege for secrets of state may be claimed only by the chief officer of the government agency or department administering the subject matter which the secret information sought concerns, but the privilege for official information may be asserted by any attorney representing the government. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of secrets of state, the judge upon motion of the government, may permit the government to make the required showing in the above form *in camera*. If the judge sustains the privilege upon a showing *in camera*, the entire text of the government's statements shall be sealed and preserved in the court's records in the event of appeal. In the case of privilege claimed for official information the court may require examination *in camera* of the information itself. The judge may take any protective measure which the interests of the government and the furtherance of justice may require.

(d) Notice to government. If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

(e) Effect of sustaining claim. If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon

an issue as to which the evidence is relevant, or dismissing the action.

Advisory Committee's Note

Subdivision (a). (1) The rule embodies the privilege protecting military and state secrets described as "well established in the law of evidence," United States v. Reynolds, 345 U.S. 1, 6, 73 S.Ct. 528, 97 L.Ed. 727 (1953), and as one "the existence of which has never been doubted," 8 Wigmore § 2378, p. 794 (McNaughton Rev.1961).

The use of the term "national defense," without attempt at further elucidation, finds support in the similar usage in statutory provisions relating to the crimes of gathering, transmitting, or losing defense information, and gathering or delivering defense information to aid a foreign government. 18 U.S.C. §§ 793, 794. See also 5 U.S.C. § 1002; 50 U.S.C. App. § 2152(d). In determining whether military or state secrets are involved, due regard will, of course, be given to classification pursuant to executive order.

(2) The rule also recognizes a privilege for specified types of official information and in this respect is designed primarily to resolve questions of the availability to litigants of data in the files of governmental departments and agencies. In view of the lesser danger to the public interest than in cases of military and state secrets, the official information privilege is subject to a generally overriding requirement that disclosure would be contrary to the public interest. It is applicable to three categories of information.

(A) Intergovernmental opinions or recommendations submitted for consideration in the performance of decisional or policy making functions. The policy basis of this aspect of the privilege is found in the desirability of encouraging candor in the exchange of views within the government. Kaiser Aluminum & Chemical Corp. v. United States, 141 Ct.Cl. 38, 157 F.Supp. 939 (1958); Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600 (5th Cir. 1966); Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969). A privilege of this character is consistent with the Freedom of Information Act, 5 U.S.C. § 552(b) (5), and with the standing of the agency to raise questions of relevancy, though not a party, recognized in such decisions as Boeing Airplane Co. v. Coggeshall, 108 U.S.App.D.C. 106, 280 F.2d 654, 659 (1960) (Renegotiation Board) and Freeman v. Seligson, 132 U.S.App.D.C. 56, 405 F.2d 1326, 1334 (1968) (Secretary of Agriculture).

(B) Investigatory files compiled for law enforcement purposes. This category is expressly made subject to the provisions of the Jencks Act, 18 U.S.C. § 3500, which insulates prior statements or reports of government witnesses in criminal cases against subpoena, discovery, or inspection until the witness has testified on direct examination at the trial but then entitles the defense to its production. Rarely will documents of this nature be relevant until the author has testified and thus placed his credibility in issue. Further protection against discovery of government files in criminal cases is found in Criminal Procedure Rule 16(a) and (b). The breadth of discovery in civil cases, however, goes beyond ordinary bounds of relevancy and raises problems calling for the exercise of judicial control, and

in making provision for it the rule implements the Freedom of Information Act, 18 U.S.C. § 552(b) (7).

(C) Information exempted from disclosure under the Freedom of Information Act, 5 U.S.C. § 552. In 1958 the old "housekeeping" statute which had been relied upon as a foundation for departmental regulations curtailing disclosure was amended by adding a provision that it did not authorize withholding information from the public. In 1966 the Congress enacted the Freedom of Information Act for the purpose of making information in the files of departments and agencies, subject to certain specified exceptions, available to the mass media and to the public generally. 5 U.S.C. § 552. These enactments are significant expressions of Congressional policy. The exceptions in the Act are not framed in terms of evidentiary privilege, thus recognizing by clear implication that the needs of litigants may stand on somewhat different footing from those of the public generally. Nevertheless, the exceptions are based on values obviously entitled to weighty consideration in formulating rules of evidentiary privilege. In some instances in these rules, exceptions in the Act have been made the subject of specific privileges, *e. g.*, military and state secrets in the present rule and trade secrets in Rule 508. The purpose of the present provision is to incorporate the remaining exceptions of the Act into the qualified privilege here created, thus subjecting disclosure of the information to judicial determination with respect to the effect of disclosure on the public interest. This approach appears to afford a satisfactory resolution of the problems which may arise.

Subdivision (b). The rule vests the privileges in the government where they properly belong rather than a party or witness. See United States v. Reynolds, *supra*, p. 7, 73 S.Ct. 528. The showing required as a condition precedent to claiming the privilege represents a compromise between complete judicial control and accepting as final the decision of a departmental officer. See Machin v. Zuckert, 114 U.S.App.D.C. 335, 316 F.2d 336 (1963), rejecting in part a claim of privilege by the Secretary of the Air Force and ordering the furnishing of information for use in private litigation. This approach is consistent with *Reynolds*.

Subdivision (c). In requiring the claim of privilege for state secrets to be made by the chief departmental officer, the rule again follows *Reynolds*, insuring consideration by a high-level officer. This provision is justified by the lesser participation by the judge in cases of state secrets. The full participation by the judge in official information cases, on the contrary, warrants allowing the claim of privilege to be made by a government attorney.

Subdivision (d) spells out and emphasizes a power and responsibility on the part of the trial judge. An analogous provision is found in the requirement that the court certify to the Attorney General when the constitutionality of an act of Congress is in question in an action to which the government is not a party. 28 U.S.C. § 2403.

Subdivision (e). If privilege is successfully claimed by the government in litigation to which it is not a party, the effect is simply to make the evidence unavailable, as though a witness had died or claimed the privilege against self-incrimination, and no specification

of the consequences is necessary. The rule therefore deals only with the effect of a successful claim of privilege by the government in proceedings to which it is a party. Reference to other types of cases serves to illustrate the variety of situations which may arise and the impossibility of evolving a single formula to be applied automatically to all of them. The privileged materials may be the statement of government witness, as under the *Jencks* statute, which provides that, if the government elects not to produce the statement, the judge is to strike the testimony of the witness, or that he may declare a mistrial if the interests of justice so require. 18 U.S.C. § 3500(d). Or the privileged materials may disclose a possible basis for applying pressure upon witnesses. United States v. Beekman, 155 F.2d 580 (2d Cir. 1946). Or they may bear directly upon a substantive element of a criminal case, requiring dismissal in the event of a successful claim of privilege. United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944); and see United States v. Reynolds, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953). Or they may relate to an element of a plaintiff's claim against the government, with the decisions indicating unwillingness to allow the government's claim of privilege for secrets of state to be used as an offensive weapon against it. United States v. Reynolds, *supra*; Republic of China v. National Union Fire Ins. Co., 142 F.Supp. 551 (D.Md.1956).

Rule 510.

IDENTITY OF INFORMER
[Not enacted.]

(a) Rule of privilege. The government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who may claim. The privilege may be claimed by an appropriate representative of the government, regardless of whether the information was furnished to an officer of the government or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof, except that in criminal cases the privilege shall not be allowed if the government objects.

(c) Exceptions.

(1) Voluntary disclosure; informer a witness. No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a

holder of the privilege or by the informer's own action, or if the informer appears as a witness for the government.

(2) Testimony on merits. If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the government elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on his own motion. In civil cases, he may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing *in camera,* at which no counsel or party shall be permitted to be present.

(3) Legality of obtaining evidence. If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed. The judge shall, on request of the government, direct that the disclosure be made *in camera.* All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure *in camera,* at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made *in camera,* the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

Advisory Committee's Note

The rule recognizes the use of informers as an important aspect of law enforcement, whether the informer is a citizen who steps forward with information or a paid undercover agent. In either event, the basic importance of anonymity in the effective use of informers is apparent, Bocchicchio v. Curtis Publishing Co., 203 F.Supp. 403 (E.D.Pa.1962), and the privilege of withholding their identity was well established at common law. Roviaro v. United States, 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); McCormick § 148; 8 Wigmore § 2374 (McNaughton Rev. 1961).

Subdivision (a). The public interest in law enforcement requires that the privilege be that of the government, state, or political subdivision, rather than that of the witness. The rule blankets in as an informer anyone who tells a law enforcement officer about a violation of law without regard to whether the officer is one charged with enforcing the particular law. The rule also applies to disclosures to legislative investigating committees and their staffs, and is sufficiently broad to include continuing investigations.

Although the tradition of protecting the identity of informers has evolved in an essentially criminal setting, noncriminal law enforcement situations involving possibilities of reprisal against informers fall within the purview of the considerations out of which the privilege originated. In Mitchell v. Roma, 265 F.2d 633 (3d Cir. 1959), the privilege was given effect with respect to persons informing as to violations of the Fair Labor Standards Act, and in Wirtz v. Continental Finance & Loan Co., 326 F.2d 561 (5th Cir. 1964), a similar case, the privilege was recognized, although the basis of decision was lack of relevancy to the issues in the case.

Only identity is privileged; communications are not included except to the extent that disclosure would operate also to disclose the informer's identity. The common law was to the same effect. 8 Wigmore § 2374, at p. 765 (McNaughton Rev.1961). See also Roviaro v. United States, supra, 353 U.S. at p. 60, 77 S.Ct. 623; Bowman Dairy Co. v. United States, 341 U.S. 214, 221, 71 S.Ct. 675, 95 L.Ed. 879 (1951).

The rule does not deal with the question whether presentence reports made under Criminal Procedure Rule 32(c) should be made available to an accused.

Subdivision (b). Normally the "appropriate representative" to make the claim will be counsel. However, it is possible that disclosure of the informer's identity will be sought in proceedings to which the government, state, or subdivision, as the case may be, is not a party. Under these circumstances effective implementation of the privilege requires that other representatives be considered "appropriate." See, for example, Bocchicchio v. Curtis Publishing Co., 203 F. Supp. 403 (E.D.Pa.1962), a civil action for libel, in which a local police officer not represented by counsel successfully claimed the informer privilege.

The privilege may be claimed by a state or subdivision of a state if the information was given to its officer, except that in criminal cases it may not be allowed if the government objects.

Subdivison (c) deals with situations in which the informer privilege either does not apply or is curtailed.

(1) If the identity of the informer is disclosed, nothing further is to be gained from efforts to suppress it. Disclosure may be direct,

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or the same practical effect may result from action revealing the informer's interest in the subject matter. See, for example, Westinghouse Electric Corp. v. City of Burlington, 122 U.S.App.D.C. 65, 351 F.2d 762 (1965), on remand City of Burlington v. Westinghouse Electric Corp., 246 F.Supp. 839 (D.D.C.1965), which held that the filing of civil antitrust actions destroyed as to plaintiffs the informer privilege claimed by the Attorney General with respect to complaints of criminal antitrust violations. While allowing the privilege in effect to be waived by one not its holder, *i. e.* the informer himself, is something of a novelty in the law of privilege, if the informer chooses to reveal his identity, further efforts to suppress it are scarcely feasible.

The exception is limited to disclosure to "those who would have cause to resent the communication," in the language of Roviaro v. United States, 353 U.S. 53, 60, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), since disclosure otherwise, *e. g.* to another law enforcing agency, is not calculated to undercut the objects of the privilege.

If the informer becomes a witness for the government, the interests of justice in disclosing his status as a source of bias or possible support are believed to outweigh any remnant of interest in nondisclosure which then remains. See Harris v. United States, 371 F.2d 365 (9th Cir. 1967), in which the trial judge permitted detailed inquiry into the relationship between the witness and the government. Cf. Attorney General v. Briant, 15 M. & W. 169, 153 Eng.Rep. 808 (Exch. 1846). The purpose of the limitation to witnesses for the government is to avoid the possibility of calling persons as witnesses as a means of discovery whether they are informers.

(2) The informer privilege, it was held by the leading case, may not be used in a criminal prosecution to suppress the identity of a witness when the public interest in protecting the flow of information is outweighed by the individual's right to prepare his defense. Roviaro v. United States, *supra*. The rule extends this balancing to include civil as well as criminal cases and phrases it in terms of "a reasonable probability that the informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case." Once the privilege is invoked a procedure is provided for determining whether the informer can in fact supply testimony of such nature as to require disclosure of his identity, thus avoiding a "judicial guessing game" on the question. United States v. Day, 384 F. 2d 464, 470 (3d Cir. 1967). An investigation *in camera* is calculated to accommodate the conflicting interests involved. The rule also spells out specifically the consequences of a successful claim of the privilege in a criminal case; the wider range of possibilities in civil cases demands more flexibility in treatment. See Advisory Committee's Note to Rule 509(e), *supra*.

(3) One of the acute conflicts between the interest of the public in nondisclosure and the avoidance of unfairness to the accused as a result of nondisclosure arises when information from an informer is relied upon to legitimate a search and seizure by furnishing probable cause for an arrest without a warrant or for the issuance of a warrant for arrest or search. McCray v. Illinois, 386 U.S. 300, 87 S.Ct.

1056, 18 L.Ed.2d 62 (1967), rehearing denied 386 U.S. 1042. A hearing *in camera* provides an accommodation of these conflicting interests. United States v. Jackson, 384 F.2d 825 (3d Cir. 1967). The limited disclosure to the judge avoids any significant impairment of secrecy, while affording the accused a substantial measure of protection against arbitrary police action. The procedure is consistent with McCray and the decisions there discussed.

Rule 511.

WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

[Not enacted.]

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

Advisory Committee's Note

The central purpose of most privileges is the promotion of some interest or relationship by endowing it with a supporting secrecy or confidentiality. It is evident that the privilege should terminate when the holder by his own act destroys this confidentiality. McCormick §§ 87, 97, 106; 8 Wigmore §§ 2242, 2327–2329, 2374, 2389–2390 (McNaughton Rev.1961).

The rule is designed to be read with a view to what it is that the particular privilege protects. For example, the lawyer-client privilege covers only communications, and the fact that a client has discussed a matter with his lawyer does not insulate the client against disclosure of the subject matter discussed, although he is privileged not to disclose the discussion itself. See McCormick § 93. The waiver here provided for is similarly restricted. Therefore a client, merely by disclosing a subject which he had discussed with his attorney, would not waive the applicable privilege; he would have to make disclosure of the communication itself in order to effect a waiver.

By traditional doctrine, waiver is the intentional relinquishment of a known right. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). However, in the confidential privilege situations, once confidentiality is destroyed through voluntary disclosure, no subsequent claim of privilege can restore it, and knowledge or lack of knowledge of the existence of the privilege appears to be irrelevant. California Evidence Code § 912; 8 Wigmore § 2327 (McNaughton Rev.1961).

Rule 512.

PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE
[Not enacted.]

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

Advisory Committee's Note

Ordinarily a privilege is invoked in order to forestall disclosure. However, under some circumstances consideration must be given to the status and effect of a disclosure already made. Rule 511, immediately preceding, gives voluntary disclosure the effect of a waiver, while the present rule covers the effect of disclosure made under compulsion or without opportunity to claim the privilege.

Confidentiality, once destroyed, is not susceptible of restoration, yet some measure of repair may be accomplished by preventing use of the evidence against the holder of the privilege. The remedy of exclusion is therefore made available when the earlier disclosure was compelled erroneously or without opportunity to claim the privilege.

With respect to erroneously compelled disclosure, the argument may be made that the holder should be required in the first instance to assert the privilege, stand his ground, refuse to answer, perhaps incur a judgment of contempt, and exhaust all legal recourse, in order to sustain his privilege. See Fraser v. United States, 145 F.2d 139 (6th Cir. 1944), cert. denied 324 U.S. 849, 65 S.Ct. 684, 89 L.Ed. 1409; United States v. Johnson, 76 F.Supp. 538 (M.D.Pa.1947), aff'd 165 F.2d 42 (3d Cir. 1947), cert. denied 332 U.S. 852, 68 S.Ct. 355, 92 L.Ed. 422, reh. denied 333 U.S. 834, 68 S.Ct. 457, 92 L.Ed. 1118. However, this exacts of the holder greater fortitude in the face of authority than ordinary individuals are likely to possess, and assumes unrealistically that a judicial remedy is always available. In self-incrimination cases, the writers agree that erroneously compelled disclosures are inadmissible in a subsequent criminal prosecution of the holder, Maguire, Evidence of Guilt 66 (1959); McCormick § 127; 8 Wigmore § 2270 (McNaughton Rev.1961), and the principle is equally sound when applied to other privileges. The modest departure from usual principles of res judicata which occurs when the compulsion is judicial is justified by the advantage of having one simple rule, assuring at least one opportunity for judicial supervision in every case.

The second circumstance stated as a basis for exclusion is disclosure made without opportunity to the holder to assert his privilege. Illustrative possibilities are disclosure by an eavesdropper, by a person used in the transmission of a privileged communication, by a family member participating in psychotherapy, or privileged data improperly made available from a computer bank.

Rule 513.

COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION
[Not enacted.]

(a) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

Advisory Committee's Note

Subdivision (a). In Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965), the Court pointed out that allowing comment upon the claim of a privilege "cuts down on the privilege by making its assertion costly." Consequently it was held that comment upon the election of the accused not to take the stand infringed upon his privilege against self-incrimination so substantially as to constitute a constitutional violation. While the privileges governed by these rules are not constitutionally based, they are nevertheless founded upon important policies and are entitled to maximum effect. Hence the present subdivision forbids comment upon the exercise of a privilege, in accord with the weight of authority. Courtney v. United States, 390 F.2d 521 (9th Cir. 1968); 8 Wigmore §§ 2243, 2322, 2386; Barnhart, Privilege in the Uniform Rules of Evidence, 24 Ohio St.L.J. 131, 137–138 (1963). Cf. McCormick § 80.

Subdivision (b). The value of a privilege may be greatly depreciated by means other than expressly commenting to a jury upon the fact that it was exercised. Thus, the calling of a witness in the presence of the jury and subsequently excusing him after a sidebar conference may effectively convey to the jury the fact that a privilege has been claimed, even though the actual claim has not been made in their hearing. Whether a privilege will be claimed is usually ascertainable in advance and the handling of the entire matter outside the presence of the jury is feasible. Destruction of the privilege by innuendo can and should be avoided. Tallo v. United States, 344 F.2d 467 (1st Cir. 1965); United States v. Tomaiolo, 249 F.2d 683 (2d Cir. 1957); San Fratello v. United States, 343 F.2d 711 (5th Cir. 1965); Courtney v. United States, 390 F.2d 521 (9th Cir. 1968); 6 Wigmore § 1808, pp. 275–276; 6 U.C.L.A.L.Rev. 455 (1959).

This position is in accord with the general agreement of the authorities that an accused cannot be forced to make his election not to testify in the presence of the jury. 8 Wigmore § 2268, p. 407 (McNaughton Rev.1961).

Unanticipated situations are, of course, bound to arise, and much must be left to the discretion of the judge and the professional responsibility of counsel.

Subdivision (c). Opinions will differ as to the effectiveness of a jury instruction not to draw an adverse inference from the making of a claim of privilege. See Bruton v. United States, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968). Whether an instruction shall be given is left to the sound judgment of counsel for the party against whom the adverse inference may be drawn. The instruction is a matter of right, if requested. This is the result reached in Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257 (1939), holding that an accused is entitled to an instruction under the statute (now 18 U.S.C. § 3481) providing that his failure to testify creates no presumption against him.

The right to the instruction is not impaired by the fact that the claim of privilege is by a witness, rather than by a party, provided an adverse inference against the party may result.

Rule 804.

HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE
[Subdivision (b)(2) not enacted.]

* * *

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(2) *Statement of recent perception.* A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

Note by Federal Judicial Center

Hearsay exception (b)(2) is set forth above as prescribed by the Supreme Court. It was not included in the rules enacted by the Congress but is reproduced here for such value as it may have for purposes of interpretation.

Advisory Committee's Note

Exception (2). The rule finds support in several directions. The well known Massachusetts Act of 1898 allows in evidence the declara-

tion of any deceased person made in good faith before the commencement of the action and upon personal knowledge. Mass.G.L., c. 233, § 65. To the same effect is R.I.G.L. § 9–19–11. Under other statutes, a decedent's statement is admissible on behalf of his estate in actions against it, to offset the presumed inequality resulting from allowing a surviving opponent to testify. California Evidence Code § 1261; Conn.G.S., § 52–172; and statutes collected in 5 Wigmore § 1576. See also Va.Code § 8–286, allowing statements made when capable by a party now incapable of testifying.

In 1938 the Committee on Improvements in the Law of Evidence of the American Bar Association recommended adoption of a statute similar to that of Massachusetts but with the concept of unavailability expanded to include, in addition to death, cases of insanity or inability to produce a witness or take his deposition. 63 A.B.A. Reports 570, 584, 600 (1938). The same year saw enactment of the English Evidence Act of 1938, allowing written statements made on personal knowledge, if declarant is deceased or otherwise unavailable or if the court is satisfied that undue delay or expense would otherwise be caused, unless declarant was an interested person in pending or anticipated relevant proceedings. Evidence Act of 1938, 1 & 2 Geo. 6, c. 28; Cross on Evidence 482 (3rd ed. 1967).

Model Code Rule 503(a) provided broadly for admission of any hearsay declaration of an unavailable declarant. No circumstantial guarantees of trustworthiness were required. Debate upon the floor of the American Law Institute did not seriously question the propriety of the rule but centered upon what should constitute unavailability. 18 A.L.I. Proceedings 90–134 (1941).

The Uniform Rules draftsman took a less advanced position, more in the pattern of the Massachusetts statute, and invoked several assurances of accuracy: recency of perception, clarity of recollection, good faith, and antecedence to the commencement of the action. Uniform Rule 63(4) (c).

Opposition developed to the Uniform Rule because of its countenancing of the use of statements carefully prepared under the tutelage of lawyers, claim adjusters, or investigators with a view to pending or prospective litigation. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VIII. Hearsay Evidence), Cal.Law Rev.Comm'n, 318 (1962); Quick, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 Wayne L.Rev. 204, 219–224 (1960). To meet this objection, the rule excludes statements made at the instigation of a person engaged in investigating, litigating, or setting a claim. It also incorporates as safeguards the good faith and clarity of recollection required by the Uniform Rule and the exclusion of a statement by a person interested in the litigation provided by the English act.

With respect to the question whether the introduction of a statement under this exception against the accused in a criminal case would violate his right of confrontation, reference is made to the last paragraph of the Advisory Committee's Note under Exception (1), *supra*.

Rule 804 DELETED AND SUPERSEDED MATERIALS

Report of House Committee on the Judiciary

Rule 804(b)(2), a hearsay exception submitted by the Court, titled "Statement of recent perception", read as follows:

> A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

The Committee eliminated this Rule as creating a new and unwarranted hearsay exception of great potential breadth. The Committee did not believe that statements of the type referred to bore sufficient guarantees of trustworthiness to justify admissibility.

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UNIFORM RULES OF EVIDENCE

Historical Note

The new Uniform Rules of Evidence were approved by the National Conference of Commissioners on Uniform State Laws in August 1974. They supersede the Uniform Rules of Evidence previously approved by the National Conference and the American Bar Association in 1953.

The 1953 enactment of the Rules of Evidence was adopted by California, New Jersey, Kansas, Panama Canal Zone, and the Virgin Islands. As of January 1, 1975, the 1974 Uniform Rules of Evidence had not been adopted in any jurisdiction.

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Commissioners' Prefatory Note

Much time has been spent by the sages and votaries of the Law of Evidence in an effort to clarify it and to supply us with the reasons for and the logic of the Rules of Evidence. Wigmore, in his Preface to the first edition of his monumental work on the subject, said:

> "If we are to save the law for a living future, if it is to remain managable amidst the sprawling mass of rulings and statutes which stand increasingly to clog its simplicity, we must rescue these reasonings from forgetfulness." [1]

1. Wigmore, *Evidence*, Introduction (Vol. 1, 3rd ed. pg. XIV).

Wigmore acknowledges, however, that Sir James Stevens had another solution. He said:

> "My evidence bill would be a very short one; it would consist of a rule, to this affect: 'All Rules of Evidence are hereby abolished.'" [2]

In 1923, the American Law Institute carefully considered the possibility of restating the Law of Evidence. It was, however, the unanimous decision of the council of the Institute that such a restatement should not be undertaken. There was a realization that conflicts in the case law of the several states and the frequent confusion of decisions in a state tended to make a restatement of the dominant law of the United States very difficult if not impossible. However, we are told that the principle reason for the council abandoning the idea of the restatement of the Law of Evidence was that the Rules of Evidence, themselves, in numerous and important instances were so defective that instead of being a means of developing truth they tended to suppress it.[3]

The Federal Rules of Civil Procedure became effective September 16, 1938.[4] Twenty-one of these rules as the rules were promulgated dealt with evidentiary matters. They are still in effect. It was in 1938 that Attorney General Mitchell suggested the formulation of Rules of Evidence by some other advisory agency "and then promulgation of the rules by the Supreme Court." [5]

In 1939, under a grant of the Carnegie Foundation, work commenced on the Model Code of Evidence by the American Law Institute. Edmund P. Morgan of the Harvard Law School was named reporter and John Henry Wigmore was Chief Consultant. The active consultants included judges, litigation lawyers, and teachers. The Model Code of Evidence was promulgated by the American Law Institute in 1942.[6]

In 1948 the Committee on Scope and Program of the National Conference of Commissioners on Uniform State Laws (NCCUSL) determined that the Law of Evidence is a proper field for uniform act. In 1949, the American Law Institute referred its Model Code of Evidence to the conference for "study and, if appropriate, redrafting." In 1953, NCCUSL promulgated the Uniform Rules of Evidence. While the Model Code of Evidence was the basic document upon which the

2. Ibid.

3. A.L.I., *Model Code of Evidence*, 308 U.S. 645; Cong.Rec., vol. 83 pt. 1, pg. 13, Exec.Comm. 905; H.Doc. 460, 75th Cong.

4. A.L.I., *Model Code of Evidence*, Introduction, VII–VIII (1942).

5. "A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts" by Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (1962). Hereafter cited as Feasibility Study.

6. A.L.I., *Model Code of Evidence*, Introduction VIII (1942).

rules were based, in those instances where it seemed that the departure from traditional and generally prevailing common law and statutory rules of evidence were too far reaching and drastic for acceptance by the Bar, modifications were made by the Uniform Rules.[7]

Nevertheless, the general policy of the draftsmen for both works carried the subjects in the form of rather broad general rules in preference to Wigmore's policy of voluminous detail. Both of these compilations had foundations of careful research by the best students of the Law of Evidence prior to official promulgation. Both the Model Code and the Uniform Rules had been examined, criticized, and tested by the litigation bar.

Some progress was made. Kansas adopted the Uniform Rules verbatim. In some states, portions of the Uniform Rules were adopted by statute and in others by judicial decision, but the result was not satisfactory.

In 1956 the Law Revision Committee of the state of California commenced a detailed study of the Uniform Rules of Evidence. Nine pamphlets with recommendations were distributed to the California lawyers between 1962 to 1964. In 1965 the California Evidence Code was adopted by that state.[8]

Substantially the same thing occurred in New Jersey. In 1967 the Uniform Rules of Evidence with modifications were adopted by the Supreme Court of New Jersey.[9] In the New Jersey compilation, the numbering of the New Jersey rules follow, except where otherwise noted, the numbers of the Uniform Rules.

The Judicial Conference of the United States in 1961 approved a committee proposal to establish an Advisory Committee on Rules of Evidence. The Judicial Conference expressed the view that the objective of developing uniform rules was meritorious and decided that the proposal deserved "serious study as to its advisability and feasibility" and that, "If resolved favorably, Uniform Rules of Evidence for Federal Court should, in due course, be promulgated." This resulted in the publication in February of 1962 of what has been called the "Feasibility Study" of the special committee. The committee concluded that the formulation of Uniform Rules of Evidence for Federal Courts was both "feasible and desirable." [10]

As a result of the Feasibility Study, a distinguished committee was appointed by the Judicial Conference to draft Rules of Evidence for the Federal Courts, and Professor Edward W. Cleary, of Arizona State University, was named reporter. The committee published its final draft in January of 1969. Revisions were made and in due course the rules were sent to the Supreme Court. On November 20, 1972, an

7. *Uniform Rules of Evidence*, Prefatory Note, pg. 161.

8. Stat. of California, ch. 299 (1965).

9. Order Supreme Court of New Jersey, June 6, 1967.

10. Feasibility Study.

order was entered authorizing the Chief Justice to transmit the same to Congress as provided by law.[11] Justice Douglas dissented.

Several members of Congress objected to portions of the draft submitted by the Court. Accordingly, Congress suspended the effective date of the Rules and after extensive hearings held in both houses, P.L. 93–595 was enacted. This contains, for the most part, the Supreme Court draft, but with changes, the most significant of which was the deletion of the substantive provisions of Article V from the Federal Rules.

It became clear that work on the Federal Rules of Evidence, the California and New Jersey studies rekindled a national interest in the subject. NCCUSL appointed a special committee on Rules of Evidence and the committee was charged with responsibility of conforming so far as practicable the Uniform Rules with the Federal Rules of Evidence when these were finally adopted for use in Federal Courts.

We believe uniformity in the Law of Evidence is desirable. To conform state and federal practice is to require a lawyer to learn one set of rules instead of two. The lawyer will better serve the public in whichever of these forums he may be litigating. Uniformity also discourages forum shopping. It is difficult for a litigant to understand that his cause may be won or lost depending on the court or the state in which the action may be tried. Finally, it seems, that to get genuine reform in the Law of Evidence it is necessary that attention be focused on special areas and special problems. We have seen that the case by case approach produces confusion.

The Uniform Rules of Evidence (1974) reflect as closely as possible P.L. 93–595. The section numbers conform to their federal counterparts, and the division of subjects into 11 articles is likewise the same. These mechanical aids are most important as they make readily accessible the thorough and careful notes of the Federal Rules Committee as well as the congressional reports.[12] Future annotations will also be easily located. The rules are thus arranged to facilitate use by courts and litigating lawyers.

One final word, adopting jurisdictions that have rules of procedure patterned after the Federal Rules of Civil Procedure will need to make adjustments in those rules of procedure insofar as they deal with evidentiary matters. See, for example, Federal Rules of Civil Procedure 30(c), 32(c), 43(b)(c) 44.1.

11. Title 18 U.S.C.A. § 3771 and Title 18 U.S.C.A. §§ 2072, 2075.

12. The House Report No. 93-650, November 15, 1973 (To accompany H.R. 5463).

Senate Report (Judiciary Committee) No. 93–1277, October 11, 1974 (To accompany H.R. 5463).

House Conference Report No. 93–1597, December 14, 1974 (To accompany H.R. 5463).

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ARTICLE I

GENERAL PROVISIONS

Rule 101. [Scope]

These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101.

Rule 102. [Purpose and Construction]

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined.

Rule 103. [Rulings on Evidence]

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Errors affecting substantial rights. Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court.

Rule 104. [Preliminary Questions]

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. Whenever the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions in criminal cases shall be conducted out of the hearing of the jury. Hearings on other preliminary matters in all cases, shall be so conducted whenever the interests of justice require or, in criminal cases, whenever an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 105. [Limited Admissibility]

Whenever evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 106. [Remainder of or Related Writings or Recorded Statements]

Whenever a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.

ARTICLE II

JUDICIAL NOTICE

Rule 201. [Judicial Notice of Adjudicative Facts]

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

ARTICLE III

PRESUMPTIONS

Rule 301. [Presumptions in General in Civil Actions and Proceedings]

(a) Effect. In all actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

(b) Inconsistent Presumptions. If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies.

Rule 302. [Applicability of Federal Law in Civil Actions and Proceedings]

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

Rule 303. [Presumptions in Criminal Cases]

(a) Scope. Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(b) Submission to jury. The court is not authorized to direct the jury to find a presumed fact against the accused. If a presumed fact establishes guilt or is an element of the offense or negatives a defense, the court may submit the question of guilt or of the existence of the presumed fact to the jury, but only if a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. If the presumed fact has a lesser effect, the question of its existence may be submitted to the jury provided the basic facts are supported by substantial evidence or are otherwise established, unless the court determines that a

reasonable juror on the evidence as a whole could not find the existence of the presumed fact.

(c) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the court shall instruct the jury that it may regard the basic facts as sufficient evidence of the presumed fact but is not required to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the court shall instruct the jury that its existence, on all the evidence, must be proved beyond a reasonable doubt.

ARTICLE IV

RELEVANCY AND ITS LIMITS

Rule 401. [Definition of "Relevant Evidence"]

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. [Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible]

All relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.

Rule 403. [Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time]

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. [Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes]

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of a victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the

prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608 and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 405. [Methods of Proving Character]

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

Rule 406. [Habit: Routine Practice]

(a) Admissibility. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(b) Method of proof. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

Rule 407. [Subsequent Remedial Measures]

Whenever, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This

rule does not require the exclusion of evidence of subsequent measures if offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Rule 408. [Compromise and Offers to Compromise]

Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. [Payment of Medical and Similar Expenses]

Evidence of furnishing, offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 410. [Withdrawn Pleas and Offers]

Evidence of a plea later withdrawn, of guilty, or admission of the charge, or nolo contendere, or of an offer so to plead to the crime charged or any other crime, or of statements made in connection with any of the foregoing withdrawn pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer.

Rule 411. [Liability Insurance]

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

ARTICLE V

PRIVILEGES

Rule 501. [Privileges Recognized Only as Provided]

Except as otherwise provided by constitution or statute or by these or other rules promulgated by [the Supreme Court of this State], no person has a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

Rule 502. [Lawyer-Client Privilege]

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A representative of the client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) be-

tween himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients or

(6) Public officer or agency. As to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously

impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

Rule 503. [Physician and Psychotherapist-Patient Privilege]

(a) Definitions. As used in this rule:

(1) A "patient" is a person who consults or is examined or interviewed by a [physician or] psychotherapist.

[(2) A "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.]

(3) A "psychotherapist" is (i) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or, (ii) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(4) A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the [physician or] psychotherapist, including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his [physical,] mental or emotional condition, including alcohol or drug addiction, among himself, his [physician or] psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the [physician or] psychotherapist, including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the [physician or] psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by order of court. If the court orders an examination of the [physical,] mental [s] or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to a communication relevant to an issue of the [physical,] mental [s] or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

Rule 504. [Husband-Wife Privilege]

(a) Definition. A communication is confidential if it is made privately by any person to his or her spouse and is not intended for disclosure to any other person.

(b) General rule of privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse.

(c) Who may claim the privilege. The privilege may be claimed by the accused or by the spouse on behalf of the accused. The authority of the spouse to do so is presumed.

(d) Exceptions. There is no privilege under this rule in a proceeding in which one spouse is charged with a crime against the person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either, or (4) a third person committed in the course of committing a crime against any of them.

Rule 505. [Religious Privilege]

(a) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary

of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

Rule 506. [Political Vote]

(a) General rule of privilege. Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot.

(b) Exceptions. This privilege does not apply if the court finds that the vote was cast illegally or determines that the disclosure should be compelled pursuant to the [election laws of the state].

Rule 507. [Trade Secrets]

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require.

Rule 508. [Secrets of State and Other Official Information; Governmental Privileges]

(a) If the law of the United States creates a governmental privilege that the courts of this State must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

(b) No other governmental privilege is recognized except as created by the Constitution or statutes of this State.

(c) Effect of sustaining claim. If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action.

Rule 509. [Identity of Informer]

(a) Rule of privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who may claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

(c) Exceptions:

(1) Voluntary disclosure; informer a witness. No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the government.

(2) Testimony on relevant issue. If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the informed public entity invokes the privilege, the court shall give the public entity an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose his identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one

or more of the following: requiring the prosecuting attorney to comply, granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required of him, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under this subdivision except a showing *in camera* at which no counsel or party shall be permitted to be present.

Rule 510. [Waiver of Privilege by Voluntary Disclosure]

A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

Rule 511. [Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege]

A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

Rule 512. [Comment Upon or Inference from Claim of Privilege; Instruction]

(a) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

ARTICLE VI

WITNESSES

Rule 601. [General Rule of Competency]

Every person is competent to be a witness except as otherwise provided in these rules.

Rule 602. [Lack of Personal Knowledge]

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Rule 603. [Oath or Affirmation]

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

Rule 604. [Interpreters]

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

Rule 605. [Competency of Judge as Witness]

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Rule 606. [Competency of Juror as Witness]

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Rule 607. [Who May Impeach]

The credibility of a witness may be attacked by any party, including the party calling him.

Rule 608. [Evidence of Character and Conduct of Witness]

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 609. [Impeachment by Evidence of Conviction of Crime]

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or the witness, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. Except as otherwise provided by statute, however, the court may in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Rule 610. [Religious Beliefs or Opinions]

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

Rule 611. [Mode and Order of Interrogation and Presentation]

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 612. [Writing or Object Used to Refresh Memory]

(a) While testifying. If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) Before testifying. If, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) Terms and conditions of production and use. A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony, the court shall examine the writing or

object *in camera*, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Rule 613. [Prior Statements of Witness]

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Rule 614. [Calling and Interrogation of Witnesses by Court]

(a) Calling by Court. The court, at the suggestion of a party or on its own motion, may call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Rule 615. [Exclusion of Witnesses]

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witness-

es, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

ARTICLE VII

OPINIONS AND EXPERT TESTIMONY

Rule 701. [Opinion Testimony by Lay Witnesses]

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rule 702. [Testimony by Experts]

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703. [Basis of Opinion Testimony by Experts]

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704. [Opinion on Ultimate Issue]

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. [Disclosure of Facts or Data Underlying Expert Opinion]

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. [Court Appointed Experts]

(a) Appointment. The court, on motion of any party or its own motion, may enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

ARTICLE VIII

HEARSAY

Rule 801. [Definitions]

The following definitions apply under this Article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and, if offered in a criminal proceeding was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive; or

(2) Admission by party-opponent. The statement is offered against a party and is (i) his own statement, in either his individual or a representative capacity, (ii) a statement of which he has manifested his adoption or belief in its truth, (iii) a statement by a person authorized by him to make a statement concerning the subject, (iv) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Rule 802. [Hearsay Rule]

Hearsay is not admissible except as provided by law or by these rules.

Rule 803. [Hearsay Exceptions; Availability of Declarant Immaterial]

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by

the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. To the text not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the government in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public of-

fice or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, death, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published

compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, [entered after a trial or upon a plea of guilty,] adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equiva-

lent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804. [Hearsay Exceptions: Declarant Unavailable]

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement;

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of his statement;

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in

a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception.

(4) Statement of personal or family history. (i) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (ii) a statement concerning the foregoing matters and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

[(5) Statement of recent perception. In a civil action or proceeding, a statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litiga-

tion in which he was interested, and while his recollection was clear.]

(6) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 805. [Hearsay Within Hearsay]

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806. [Attacking and Supporting Credibility of Declarant]

If a hearsay statement, or a statement defined in Rule 801(2), (iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

ARTICLE IX

AUTHENTICATION AND IDENTIFICATION

Rule 901. [Requirement of Authentication or Identification]

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony of a witness with knowledge that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact record-

ed or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method or authentication or identification provided by [the Supreme Court of this State or by] a statute or as provided in the Constitution of this State.

Rule 902. [Self-authentication]

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1), having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the executing or attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation

or is in a chain of certificate of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may for good cause shown order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.

(5) Official publications. Books, pamphlets, or other publications issued by public authority.

(6) Newspapers and periodicals. Printed material purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions created by law. Any signature, document, or other matter declared by any law of the United States or of this State, to be presumptively or prima facie genuine or authentic.

Rule 903. [Subscribing Witness' Testimony Unnecessary]

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

ARTICLE X

CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. [Definitions]

For purposes of this Article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Rule 1002. [Requirement of Original]

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by [rules adopted by the Supreme Court of this State or by] statute.

Rule 1003. [Admissibility of Duplicates]

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. [Admissibility of Other Evidence of Contents]

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure;

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; and he does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording or photograph is not closely related to a controlling issue.

Rule 1005. [Public Records]

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy complying with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be admitted.

Rule 1006. [Summaries]

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Rule 1007. [Testimony or Written Admission of Party]

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

Rule 1008. [Functions of Court and Jury]

Whenever the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised whether (1) the asserted writing ever existed, or (2) another writing, recording, or photograph produced at the trial is the original, or (3) other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

ARTICLE XI

MISCELLANEOUS RULES

Rule 1101. [Rules Applicable]

(a) Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the [courts of this State].

(b) Rules inapplicable. The rules other than those with respect to privileges do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; [preliminary examination] detention hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Contempt proceedings in which the court may act summarily.

Rule 1102. [Title]

These rules shall be known and may be cited as Uniform Rules of Evidence.

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* Generally speaking, the 1975 Federal Rules of Evidence for United States Courts and Magistrates are substantially the same as the Uniform Rules of Evidence of 1974. In this pamphlet the numbering of the 1975 Federal Rules beginning on page 1 is virtually identical to the 1974 Uniform Rules beginning on page 253. The references to the 1953 Uniform Rules of Evidence appear in the Advisory Committee's Notes under the federal rule.

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Reforming Evidence Law in Oregon

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Reforming Evidence Law in Oregon

WHEN Oregon adopted the Field Code of Evidence in 1862,[1] it became one of the first states in the nation to codify its rules of evidence.[2] Since that date, Oregon's evidence code has received no comprehensive legislative review or modification. It now ranks among the oldest of all state evidence codes.[3]

The law of evidence, in Oregon and elsewhere, has proved particularly resistant to change. As long ago as 1904, Dean Wigmore called for efforts to rescue evidence law from the "spawning mass of rulings and statutes which tend increasingly to clog" trial machinery.[4] However, reform efforts were generally unsuccessful,[5] and a half century later it was still true, as Dean McCormick observed, that "evidence law has not responded . . . to the need for simplification and rationalization as rapidly as other parts of procedural law."[6]

In the last two decades, however, there has been a significant national movement towards codifying or recodifying state evidence rules. An initial impetus for this movement was the 1953 promulgation of the

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[1] Act of Oct. 11, 1862, chs. 8–10, 1862 Or. Gen. Laws 139 (codified at ORS chapters 41–45 (1979)).

[2] Oregon's evidence code was taken almost verbatim from the evidence code that David Field proposed for New York. New York, however, did not enact Field's proposed evidence code. *See* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5005 (1977); Brown, *The Sources of the Alaska and Oregon Codes*, 2 U.C.L.A.-ALASKA L. REV. 15, 23–24 (1972); Letter from Donald H. Burnett to the *Oregon Law Review*, 43 OR. L. REV. 86 (1963). For an excellent overview of the early movement towards codification of evidence law, see 21 C. WRIGHT & K. GRAHAM, *supra*.

[3] *See* 21 C. WRIGHT & K. GRAHAM, *supra* note 2.

[4] 1 J. WIGMORE, EVIDENCE viii (1st ed. 1904).

[5] The chief reform effort in the first half of the twentieth century was the publication of the Model Code of Evidence by the American Law Institute in 1942. Although this code spurred discussion of evidentiary reform and laid the groundwork for later efforts, it was never adopted by any state. *See* 21 C. WRIGHT & K. GRAHAM, *supra* note 2.

[6] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE XI (1st ed. 1954).

Uniform Rules of Evidence by the Commissioners on Uniform State Laws.[7] Several states adopted new evidence codes based in part on the Uniform Rules of Evidence.[8] The most significant factor encouraging reform, however, was the adoption of the Federal Rules of Evidence in 1975.[9] To date, one-third of the states have adopted new evidence codes modeled after either the original or final versions of the Federal Rules,[10] and several other states are considering doing the same.[11] A comprehensive new evidence code for Oregon, based to a significant extent on the Federal Rules of Evidence, will be presented to the 1981 legislature.

Oregon's present evidence code has drawn increasing criticism from both courts[12] and commentators.[13] A number of statutes are outdated.[14]

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[7] UNIFORM RULES OF EVIDENCE (1953 version).

[8] *See* CAL. EVID. CODE § 1–1605 (West 1966); KAN. STAT. ANN. §§ 60–401 to –470 (1976); N.J. STAT. ANN §§ 2A:84A–1 to –49 (West 1976).

[9] Act of Jan. 2, 1975, Pub. L. No. 93–595, 88 Stat. 1926.

[10] *See* ARK. STAT. ANN. § 28–1001 (1977); FLA. STAT. ANN. §§ 90.101–.958 (West Supp. 1979); NEB. REV. STAT. §§ 27–101 to –1103 (1975); NEV. REV. STAT. §§47.020–56.020 (1973); N.M. STAT. ANN. §§ 20–4–101 to –1102 (1975); OKLA. STAT. ANN. tit. 12, §§ 2101–3103 (West 1980); S.D. COMP. LAWS ANN. §§ 19–9 to –18 (1979); ALASKA R. EVID. 101–1101; ARIZ. R. EVID. 101–1103; COLO. R. EVID. 101–1102; ME. R. EVID. 101–1102; MICH. R. EVID. 101–1102; MINN. R. EVID. 101–1101; MONT. R. EVID. 101–1008; N.D. R. EVID. 101–1103; WASH. CT. R. 101–1101; WIS. R. EVID. 901.01–911.02; WYO. R. EVID. 101–1102.

[11] *See* FED. RULES OF EVID. NEWS 79–75 (July 1979).

[12] *See, e.g.,* Cook v. Michael, 214 Or. 513, 525, 330 P.2d 1026, 1032 (1958) (criticizing ORS 41.110 as "carelessly-drawn" and urging its repeal); Smith v. Durant, 271 Or. 643, 661–62, 534 P.2d 955, 964 (1975) (criticizing ORS 45.600); First Nat'l Bank v. Malady, 242 Or. 353, 361–67, 408 P.2d 724, 728–30 (1966) (Perry, J., dissenting) (criticizing ORS 41.210); State v. Nodine, 198 Or. 679, 690–96, 259 P.2d 1056, 1061–63 (1953) (stating that ORS 41.350(1) "cannot be literally followed, without coming in conflict with well-established principles of criminal law and endangering rights secured to the accused").

Although sometimes the Oregon Supreme Court has been willing to update evidence law on its own initiative, *see, e.g.,* Timber Access Indus. Co. v. U.S. Plywood–Champion Papers, Inc., 263 Or. 509, 503 P.2d 482 (1972) (creating a new hearsay exception for reliable statements that do not fall within a traditional exception), on other occasions it has viewed its role narrowly, stating that change in the rules of evidence, even if acknowledged to be desirable, must come from the legislature. *See, e.g.,* State v. Harris, 288 Or. 703, 609 P.2d 798 (1980) (suggesting that, in the absence of a statute, it could not recognize a hearsay exception for a certificate by a public records custodian that a particular record does not exist).

[13] *See, e.g.,* Gard, *Why Oregon Lawyers Should Be Interested in the Uniform Rules of Evidence,* 37 OR. L. REV. 287 (1958). For a comparative analysis, see Joseph, *How the Adoption of the Uniform Rules of Evidence Would Affect the Law of Evidence in Oregon: Rules 1–16,* 41 OR. L. REV. 275 (1962); Hutchens, *How the Adoption of the Uniform Rules of Evidence Would Affect the Law of Evidence in Oregon: Rules 17–55,* 41 OR. L. REV. 306 (1962); Butler, *How the Adoption of the Uniform Rules of Evidence Would Affect the Law of Evidence in Oregon: Rules 56–61,* 42 OR. L. REV. 181 (1963); Swearingen, *How the Adoption of the Uniform Rules of Evidence Would Affect the Law of Evidence in*

Others impose hypertechnical and burdensome requirements that unnecessarily increase the cost of litigation.[15] Still others are unduly restrictive,[16] unsound as a matter of policy,[17] and even unconstitutional.[18]

Oregon: Rules 62–66, 42 OR. L. REV. 200 (1963); Butler, *How the Adoption of the Uniform Rules of Evidence Would Affect the Law of Evidence in Oregon: Rules 67–72,* 42 OR. L. REV. 251 (1963); Ingerman, *Hearsay: A Comparison of Oregon Law and the Federal Rules of Evidence,* 12 WILLAMETTE L. J. 95 (1975).

[14] *See, e.g.,* ORS 41.640 (1979), which imposes a general requirement that the original writing be produced when the contents of the writing are in issue. This requirement fails to recognize the now widespread availability of accurate photocopying methods. The Federal Rules of Evidence and recent state codifications generally allow a photocopy to be admitted in lieu of the original writing. *See* FED. R. EVID. 1003; *see, e.g.,* FLA. STAT. ANN. § 92.29 (West Supp. 1979); GA. CODE ANN. § 38–701 (1974); KY. REV. STAT. § 422.105 (1972); MASS. ANN. LAWS ch. 233, §§ 79A, 79D (Michie/Law. Co-op 1973). *See also* text accompanying notes 378–87 *infra.*

[15] ORS chapter 43 (1979) unnecessarily limits the kinds of documents that can be self-authenticated; it requires that witnesses be called to lay a foundation for documents that would be routinely admitted without testimony in many other jurisdictions. *See, e.g.,* FED. R. EVID. 902; MD. CTS. & JUD. PROC. CODE ANN. § 10–101 (1980); VA. CODE § 8.01–390 (1978); WIS. R. EVID. 909.02. *See also* notes 371–72 and accompanying text *infra.*

Additionally, the current code has no hearsay exception comparable to the provision in the federal rules that allows a custodian of public records to certify the nonexistence of a record or entry. FED. R. EVID. 803(10). Instead, it is usually necessary to call the custodian as a witness merely to establish that the record or entry is not on file. *See* notes 338–39 and accompanying text *infra.*

[16] *See, e.g.,* ORS 45.580 (1979), which requires that writings used to refresh a witness's memory must have been written by or under the direction of the witness, at a time when the event was fresh in his memory and the witness knew the writing to be accurate. This restriction is unreasonable, unjustifiable, and contrary to the common law. The statute confuses the requirements for refreshing recollection with those for the past recollection recorded exception to the hearsay rule. Oregon courts have refused to limit the writings that can be used to refresh recollection to those authorized by this statute. *See, e.g.,* Waterways Terminals Co. v. P. S. Lord Mechanical Contractors, 242 Or. 1, 57–61, 406 P.2d 556, 581–83 (1965). *See also* notes 263–66 and accompanying text *infra.*

[17] *See, e.g.,* ORS 44.050 (1979) (allowing judges and jurors to appear as witnesses in cases in which they are sitting); ORS 45.600 (1979) (allowing a witness's veracity to be impeached by evidence of any prior criminal conviction, no matter how prejudicial, remote, or unrelated to veracity). *See also* notes 237–40 and accompanying text *infra.*

[18] The conclusive presumptions in ORS 41.350 (1979) would be unconstitutional in criminal cases. Sandstrom v. Montana, 442 U.S. 510, 522–23 (1979). The statute governing rebuttable presumptions, ORS 41.360 (1979), would be unconstitutional to the extent it could be interpreted to shift the burden of persuasion to a criminal defendant. 442 U.S. at 524. It might also be unconstitutional to the extent it requires a jury in a criminal case to find according to a presumption unless it is overcome by rebutting evidence. *See id.* at 516 n.5. *See also* note 82 and text accompanying notes 78–82 *infra.*

The existing code is incomplete, often making it difficult for lawyers and judges to determine the applicable law on particular evidentiary issues.[19] Finally, because Oregon evidence law is not consolidated in one place, it is not possible to have instant access to it during the course of a trial.[20]

The proposed code was drafted by the Oregon Advisory Committee on Evidence Law Revision.[21] Although the proposal is patterned after the Federal Rules of Evidence, both in format[22] and content, there are

[19] The code leaves major areas of evidence law, such as many aspects of the law of hearsay, to be defined by case law. Because the body of appellate law in a state the size of Oregon is limited, many evidentiary issues remain unresolved. For example, it is unclear how many exceptions to the hearsay rule exist in Oregon because Oregon appellate courts have not had occasion to rule on all the exceptions recognized elsewhere. Although in the absence of a statute it is usually assumed that the common law applies, there is no clearly prevailing common-law rule on many evidentiary issues. As a result, litigants are forced to speculate about which of several competing views will ultimately prevail in Oregon. The gaps in the existing code invite inconsistent rulings by trial courts and the needless litigation of issues that could easily be resolved by legislative rule.

[20] In few, if any, areas of the law is there as great a need for immediate and accurate information as there is in the law of evidence. On most legal questions, the judge or lawyer has time to research the law before it is applied. But questions involving the admissibility of evidence arise suddenly during trial. Proper objections—stating the correct grounds—must be made immediately or the lawyer may find that his objection has been waived. The judge must rule immediately in order that the trial may progress in an orderly fashion. Frequently, evidence questions cannot be anticipated and, hence, necessary research often cannot be done beforehand.

There is, therefore, an acute need for a systematic, comprehensive, and authoritative statement of the law of evidence that is easy to use and convenient for immediate reference.

CAL. LAW REVISION COMM'N, RECOMMENDATION PROPOSING AN EVIDENCE CODE (1965), *reprinted in* CAL. EVID. CODE XXIII (West 1966).

[21] The Advisory Committee was appointed by the Law Improvement Committee. The Law Improvement Committee was a legislatively created body, Act of May 15, 1963, ch. 292, 1963 Or. Laws 440 (repealed 1979) (formerly codified at ORS 173.310–.340 (1977)), charged with examining "the . . . statutes and common law of the state for the purpose of discovering defects and anachronisms . . . and recommending needed reforms." ORS 173.320(1) (1977).

Fifteen distinguished attorneys and judges from throughout the state served on the Advisory Committee: James M. Brown, John D. Burns, William V. Deatherage, Chief Justice Arno H. Denecke, Burl L. Green, Wendell E. Gronso, Judge Robert E. Jones, Roy Kilpatrick, Professor Ronald B. Lansing, Asa L. Lewelling, Gordon H. Moore, J. Michael Starr, Manley B. Strayer, Roger B. Todd, and Judge Richard L. Unis. Letter to the *Oregon Law Review* from Joan Robinson, Legal Counsel to the Joint Committee on the Judiciary of the Oregon Legislature (July 8, 1980) (on file at the Oregon Law Review).

[22] As a convenience to lawyers, the numbering of the rules in the proposed code is almost identical to the numbering of the Federal Rules of Evidence. *See* Or. Advisory Committee on Evidence Law Revision, Proposed Evidence Code (1979) [proposed rules hereinafter cited as Proposed Or. R. Evid.].

significant deviations. The drafters retained a number of existing statutes that they viewed as superior to the federal rules.[23] The drafters also developed new or modified rules in areas in which both the federal rules and existing law were deemed inadequate.[24]

This Article examines each of the ten substantive articles of the code in turn, focusing on the rules that would change existing practice.[25] It also proposes amendments to correct technical defects, to add greater clarity or specificity to particular rules, and to raise policy questions for legislative consideration.[26] The Article concludes that the proposed code is a major advance over existing Oregon evidence law and, subject to minor legislative modification,[27] recommends its adoption.

I

General Provisions

Article I defines the scope of the proposed rules, provides guidelines for their interpretation, and specifies procedures for handling various evidentiary matters.

A. Scope of the Code

Rule 101 provides that the proposed code would apply in all courts in the state, other than small claims courts.[28] The rules of evidence

[23] *See, e.g.*, text accompanying notes 249–58 *infra*.

[24] *See, e.g.*, text accompanying notes 212–14 & 233–36 *infra*.

[25] Because of space limitations, this Article will not attempt to discuss every proposed rule or to analyze any proposed rule exhaustively. The proposed code with accompanying commentary is 432 pages long.

[26] Now that the Federal Rules of Evidence have been in effect for five years, it is possible to identify ambiguities, technical errors, and unwise policy choices that could be avoided in Oregon by amending particular rules. Additionally, because so many other states have already completed their codifications based on the federal rules, it is possible for Oregon to benefit from their improvements on the federal rules, as well as to attempt to avoid their mistakes. A particularly thoughtful recent state codification is that of Alaska. The reporter for the commission that drafted the Alaska code was Professor Stephen A. Saltzburg of the University of Virginia, one of the nation's leading evidence scholars.

[27] The Article discusses the code as it was submitted by the Advisory Committee. The Evidence Law Subcommittee of the Joint Interim Judiciary Committee of the Oregon Legislature has been reviewing the proposed code since October 1979 and has voted to recommend various amendments to the code. The significant amendments recommended by the subcommittee before June 1980 are noted in the Article.

[28] The Oregon Evidence Code applies to all courts in this state in all actions, suits and proceedings, except for:

(1) The small claims division of the Tax Court as provided by ORS 305.545;

(2) The small claims division of a district court as provided by ORS 46.415;

(3) The small claims department of a justice's court as provided by

would govern all civil and criminal proceedings except the following: summary contempt proceedings; the determination of questions of fact upon which the admissibility of evidence depends; grand jury proceedings; extradition proceedings; sentencing hearings, including the dispositional phase of juvenile proceedings;[29] probation grants or revocations; issuance of warrants; and hearings on the conditions of release.[30]

The most important change from existing law is that preliminary hearings in criminal cases would become subject to the rules of evidence.[31] This change may be unwise. Strict application of the rules of evidence to preliminary hearings may impose significant burdens on the state with little concomitant increase in protection for defendants. In fact, it probably would make prosecutors more inclined to avoid preliminary hearings by returning indictments before the date scheduled for the hearing. Federal Rule 1101(d)(3) exempts preliminary examinations from the rules of evidence, as do the majority of state evidence codes patterned after the federal rules.[32] The legislature should add preliminary hearings to the list of proceedings exempted from the proposed code.

B. Harmless Error

Rule 103 adopts the commonsense view that in order to warrant

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ORS 555.080; and

(4) The juvenile departments of county and circuit courts as provided by ORS 419.500.

Proposed Or. R. Evid. 101(a). Although rule 101(a)(4) appears to exempt juvenile courts from the proposed code, it qualifies this exemption with the language "as provided by ORS 419.500." That statute provides that the rules of evidence do not apply to the dispositional phase of juvenile proceedings, ORS 419.500(2) (1979), but that the jurisdictional facts in juvenile proceedings "must be established by . . . competent evidence." ORS 419.500(1) (1979). Presumably, then, rule 101(a)(4) is intended to exempt only the dispositional phase of juvenile proceedings, not juvenile courts themselves, from the coverage of the proposed code. To avoid misunderstanding, this exemption should be stated more clearly.

The Advisory Committee states that rule 101 would not affect ORS 183.450 (1979), which makes the rules of evidence inapplicable in administrative hearings. Proposed Or. R. Evid. 101 commentary.

[29] *See* note 28 *supra.*

[30] Proposed Or. R. Evid. 101(b), (d)(1)–(7). Rule 101 would fill a void in existing law. Except for a few scattered statutes, *e.g.*, ORS 419.500(2) (1979) (dispositional phase of juvenile proceedings), *see* note 28 *supra*; ORS 132.320 (1979) (grand jury proceedings), *construed in* State v. McDonald, 231 Or. 24, 361 P.2d 1001 (1961); ORS 421.190 (1979) (inmate disciplinary hearings); ORS 183.450 (1979) (administrative hearings), existing law fails to specify which proceedings are exempt from the rules of evidence.

[31] Although no statute requires the rules of evidence to be followed at preliminary hearings, the Advisory Committee states that they are frequently followed as a matter of practice. *See* Proposed Or. R. Evid. 101 commentary.

[32] 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 1101–8 (2d ed. 1979). [hereinafter cited as WEINSTEIN].

reversal, the erroneous admission or exclusion of evidence must affect a substantial right of the appellant.[33] The current rule in civil appeals is that evidentiary error is presumed to be prejudicial unless the contrary is affirmatively shown.[34] According to the Advisory Committee, rule 103 would not affect this rule of presumed prejudice.[35] Although it is questionable whether the committee is correct, the legislature should amend rule 103 to make certain that the current rule is abolished. Court time is too limited and costly to spend retrying cases in which the appellant is unable to show any likelihood of prejudice from an erroneous ruling.[36]

C. Effect of Introducing Part of a Writing

Although article I adopts most provisions of article I of the Federal Rules of Evidence, Federal Rule 106 was deleted. This rule provides that when a party introduces a writing or part of a writing, an adverse party may require the proponent to introduce "at that time" any other part or other writing that "ought in fairness to be considered contem-

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[33] (a) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

(1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Proposed Or. R. Evid. 103.

[34] *See* Elam v. Soares, 282 Or. 93, 577 P.2d 1336 (1978).

[35] Proposed Or. R. Evid. 103 commentary.

[36] In a concurring opinion in Elam v. Soares, 282 Or. 93, 577 P.2d 1336 (1978), Justices Howell and Lent stated:

> I acknowledge that this court on several occasions has stated that error occurring during the trial is "presumed" or "deemed" to be prejudicial upon appeal. I believe that such error should not be presumed to be either prejudicial or harmless. Our function should be to determine (1) whether error was committed and (2) if so, does the error require reversal. That decision should be made without any presumptions.

Id. at 106, 577 P.2d at 1343.

poraneously with it." Instead, the Advisory Committee retained ORS 41.880,[37] which allows an opponent to introduce the remainder of "an act, declaration, conversation, or writing" only as part of the opponent's case-in-chief or rebuttal and not contemporaneously.

The legislature should reconsider the Advisory Committee's rejection of Federal Rule 106. This rule is designed to prevent the jury from being misled by part of a writing taken out of context.[38] Under current Oregon law, a misleading first impression may be difficult to erase. Oregon law already recognizes the right to offer contemporaneously material omitted from depositions. ORS 45.260[39] provides that if part of a deposition is offered, the opponent may require any other relevant part to be offered at the same time. The legislature should consider adopting such a rule for all writings.

II

JUDICIAL NOTICE

A. Facts That May Be Judicially Noticed

Under the present Oregon statute, judicial notice is limited to specific categories of facts.[40] These categories are rigid and underinclusive.[41] Proposed rule 201(b) offers a more flexible standard than the current statute; it authorizes judicial notice of facts that are "not subject to reasonable dispute" in that they are "(a) generally known within the territorial jurisdiction of the trial court; or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." This new approach would allow judicial notice of facts that do not fall within any of the existing statutory categories.

The rule could be made even more flexible. Sometimes it may be desirable to supplement rule 201(b) with a statute authorizing a particular fact to be judicially noticed, even though the fact may not satisfy the general criteria set forth in the rule.[42] To make clear that rule 201(b)

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[37] When part of an act, declaration, conversation or writing is given in evidence by one party, the whole, on the same subject, may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.
ORS 41.880 (1979).

[38] *See* FED. R. EVID. 106 (Advisory Committee Note).

[39] (1979).

[40] *See* ORS 41.410 (1979).

[41] The Oregon Supreme Court has not always limited judicial notice to these statutory categories. *See, e.g.,* Meier v. Bray, 256 Or. 613, 475 P.2d 587 (1970).

[42] For example, it is not entirely clear that rule 201(b) would permit judicial notice of official seals, which is currently authorized under ORS 41.410(4)–(8)

allows judicial notice whenever authorized by current or future statutes, the definition of "judicially noticed fact" should be amended to include facts for which "notice is provided . . . by statute."[43]

In addition to framing a useful general definition of facts subject to judicial notice, the drafters of article II adopted an important distinction between adjudicative and legislative facts. Rule 201(a) states that article II covers only judicial notice of adjudicative facts. Adjudicative facts are usually defined as those necessary to the proof in a particular case, while legislative facts are those the court considers when it makes policy determinations, interprets legislation, rules on constitutionality, and performs other judicial functions.[44] Legislative facts were excluded from article II, not to prevent them from being judicially noticed, but because the drafters did not wish to place limits on the power of courts to take such notice.[45]

B. Judicial Notice of Law

Unlike the Federal Rules of Evidence, article II governs judicial notice of law as well as facts. Rule 202 lists the types of laws that may be judicially noticed. It extends the current scope[46] of judicial notice

(1979). This statute would be repealed by the proposed code. Or. Advisory Committee on Evidence Law Revision, Proposed Evidence Code, § 98 (1979). It would be desirable, however, to retain some form of statutory authorization for judicial notice of official seals.

[43] N.M. R. EVID. 201(b).

[44] *See generally* Davis, *An Approach to Problems of Evidence in the Administrative Process,* 55 HARV. L. REV. 364 (1942).

[45] Proposed Or. R. Evid. 201(a) commentary. To avoid misunderstanding, the legislature should add a definition of "adjudicative facts" to rule 201(a) and a statement that nothing in article II is intended to limit the power of the courts to take judicial notice of legislative facts. It might also be useful to define "judicial notice." In adopting Federal Rule 201(a), Alaska added the following provision: "Judicial notice of a fact as used in this Rule means a court's on-the-record declaration of the existence of a fact normally decided by the trier of fact, without requiring proof of that fact." ALASKA R. EVID. 201(a).

[46] Under present statutes, judicial notice may be taken of constitutions, common law, civil law, and statutes of states, territories, and other jurisdictions of the United States, ORS 41.420 (1979); public and private official acts of the legislative, executive, and judicial departments of Oregon and the United States, ORS 41.410(3) (1979); charters of incorporated cities in Oregon, when filed with the librarian of the Oregon Supreme Court library, ORS 221.710(1) (1979); ordinances, comprehensive plans, and enactments of counties and incorporated cities in all states, OR. R. CIV. P. 20D.(2); county charters and amendments, revisions, and repeals, ORS 203.770 (1979); administrative rules and executive orders filed with the Secretary of State, ORS 183.360(4) (1979); the organization and boundaries of irrigation districts in Oregon, ORS 545.070(2) (1979); and the construction of workers' compensation laws of other jurisdictions, ORS 656.126(4) (1979).

of law to include, for example, official acts of the legislative, executive, and judicial departments of any sister state, territory, or possession of the United States; records and rules of any Oregon court, or any court of record of the United States or of any state, territory, or possession; and laws of foreign nations.[47]

In one respect, rule 202 is too restrictive. A municipal ordinance may not be judicially noticed unless it is "pleaded and referred to by its title . . . and the date of its passage or . . . approval."[48] This pleading requirement is a survival of the common-law rule that municipal ordinances could not be noticed and must be pleaded and proved as facts.[49] Since municipal ordinances no longer have to be proved, the pleading requirement has outlived its usefulness.[50]

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[47] Law judicially noticed is defined as:

> (a) The decisional, constitutional and public statutory law of Oregon, the United States and any state, territory or other jurisdiction of the United States.
>
> (b) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, and any other state, territory or other jurisdiction of the United States.
>
> (c) Rules of professional conduct for members of the Oregon State Bar.
>
> (d) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States or any public entity of the United States.
>
> (e) Records and rules of court of any court of this state or any court of record of the United States or of any state, territory or other jurisdiction of the United States.
>
> (f) The law of an organization of nations and of foreign nations and public entities in foreign nations.
>
> (g) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom, when pleaded and referred to by its title, if any, or by its commonly accepted name, and the date of its passage or the date of its approval when approval is necessary to render it effective. As used in this subsection, "comprehensive plan" has the meaning given that term by ORS 197.-015.

Proposed Or. Evid. 202.

[48] Proposed Or. R. Evid. 202(g). The drafters adopted this pleading requirement in order to make rule 202 consistent with Oregon Rule of Civil Procedure 20D.(2). *Id.* commentary. The civil procedure rule, however, merely provides that a court must take judicial notice of an ordinance that is properly pleaded. OR. R. CIV. P. 20D.(2). No inconsistency is created by also allowing courts to take judicial notice of ordinances that are not pleaded.

[49] *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 335 (2d Cleary ed. 1972) [hereinafter cited as MCCORMICK].

[50] Arguably, this requirement has some continued validity as an aid to the court in finding the ordinance. But if the court finds the ordinance on its own or is "supplied with the necessary information" in accordance with rules 201(c) and (d), there is no justification for precluding judicial notice merely because the required allegation is omitted from the pleadings.

C. Procedure for Taking Judicial Notice

Article II would fill a void in existing law by specifying the procedure for taking judicial notice. Rules 201(c) and (d) state that a court may take judicial notice on its own motion and must do so if requested by a party and "supplied with the necessary information." A party is entitled "upon timely request" to a hearing on the propriety of taking judicial notice.[51] Rule 201(f) provides that judicial notice may be taken at "any stage in the proceeding."[52] This provision would resolve the uncertainty in the case law over whether judicial notice may be taken for the first time on appeal.[53]

D. Effect of Judicial Notice

Rule 201(g) provides that in civil cases, a fact judicially noticed is binding on the jury.[54] In criminal cases, however, contrary to current law,[55] the jury need not accept as conclusive any fact judicially noticed.[56] Under the proposed rule, judicial notice in criminal cases would thus become comparable to a permissive inference. By eliminating the binding effect of judicial notice in criminal cases, rule 201(g) would remove a possible constitutional defect in current law. To require a jury to find an element of the offense against a criminal defendant may infringe on the defendant's right to a jury trial.[57] Rule 201(g) goes too far, how-

[51] "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken." Proposed Or. R. Evid. 201(e).

[52] Proposed Or. R. Evid. 201(f).

[53] *See* Kepl v. Manzanita Corp., 246 Or. 170, 424 P.2d 674 (1967) (court took judicial notice of a fact not judicially noticed by the trial court). *But see* State v. Jones, 240 Or. 129, 400 P.2d 524 (1965) (trial court's error in not taking judicial notice of facts establishing venue cannot be cured through judicial notice on appeal); *cf.* Stites v. Morgan, 229 Or. 116, 366 P.2d 324 (1961) (court refused to take judicial notice of a fact not brought to the attention of the trial court).

[54] "In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact or law judicially noticed." Proposed Or. R. Evid. 201(g)(a).

[55] ORS 136.310 (1979), which make judicial notice conclusive, draws no distinction between civil and criminal cases.

[56] "In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Proposed Or. R. Evid. 201(g)(b).

[57] Although the United States Supreme Court has never directly addressed the constitutionality of mandatory judicial notice in criminal cases, it has noted that "verdicts may not be directed against defendants in criminal cases." Sandstrom v. Montana, 442 U.S. 510, 516 n.5 (1979) (dictum); *accord,* Sparf v. United States, 156 U.S. 51, 105 (1894) (dictum).

The House Judiciary Committee has stated concerning a draft version of Federal Rule 201(g):

> Being of the view that mandatory instruction to a jury in a criminal

ever. Because there is no constitutional impediment to judicial notice in favor of a criminal defendant, the restriction on the effect of judicial notice in criminal cases should be limited to judicial notice in favor of the prosecution.

III

PRESUMPTIONS

A. Kinds of Presumptions Allowed

Article III would make a number of changes in the Oregon law governing presumptions.[58] The existing conclusive presumptions would be either repealed or removed from the evidence code to other chapters of

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> case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial, the Committee adopted the 1969 Advisory Committee draft of this subsection, allowing a mandatory instruction in civil actions and proceedings and a discretionary instruction in criminal cases.

H.R. Rep. No. 650, 93d Cong., 1st Sess. 6-7, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7080. *See generally* 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 60 (1977). *See also* State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951).

[58] Article III governs burdens of proof as well as presumptions. It would make one significant change in the allocation of the burdens of production and persuasion in civil cases. Under rules 305 and 307, these burdens would no longer be allocated on the basis of the pleadings, but rather on the basis of the substantive law. "A party has the burden of persuasion as to each fact the existence or non-existence of which the law declares essential to the claim for relief or defense." Proposed Or. R. Evid. 305.

> (a) The burden of producing evidence as to a particular issue is on the party against whom a finding on the issue would be required in the absence of further evidence.
>
> (b) The burden of producing evidence as to a particular issue is initially on the party with the burden of persuasion as to that issue.

Proposed Or. R. Evid. 307.

The deficiency in existing law is that it may allow the burdens of production and persuasion to be determined merely by the manner in which a particular pleading is drafted. *See* ORS 41.210 (1979): "The party having the affirmative of the issue shall produce the evidence to prove it. Therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side." ORS 41.240 (1979) provides:

> Each party shall prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when the negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even then if the allegation is the denial of the existence of a document, the custody of which belongs to an adverse party.

The standard of ORS 41.210 (1979) has been criticized as "a play on words, since practically any proposition may be stated in either affirmative or negative form." Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L.

the Oregon Revised Statutes.[59] The drafters wisely recognized that conclusive presumptions are not evidentiary presumptions at all, but rather rules of substantive law.[60]

The drafters also propose to repeal several of the more questionable rebuttable presumptions and to consolidate others in rule 311.[61] The

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REV. 5, 11 (1959). The Advisory Committee concluded that allocation of burdens on the basis of pleadings was unduly mechanical. Proposed Or. R. Evid. 305 commentary.

[59] ORS 41.350(3) (1979) (conclusive presumption of "the truth of the facts [other than consideration] recited... in a written instrument") and ORS 41.350(5) (1979) ("A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relationship.") would be recodified in ORS chapters 42 and 91 respectively. Or. Advisory Committee on Evidence Law Revision, Proposed Evidence Code §§82–85 (1979). The remaining conclusive presumptions in ORS 41.350 (1979) would be repealed. *Id.* § 98.

[60] Proposed Or. R. Evid. 311 commentary.

[61] Rule 311 retains all the presumptions currently listed in ORS 41.360 (1979), except those specified in subsections (2), (6), (10), (11), (17), (18), (27), (28), (34), (35), (36), and (39). Proposed Or. R. Evid. 311. The presumptions in ORS 41.360(34) (1979) (presumption that an ancient document is genuine) and ORS 41.360 (35) (1979) ("A printed and published book purporting to be printed and published by public authority was so printed or published.") are recodified in article IX (on authentication and identification) as rules 901(8) and 902(5) respectively.

Although the commentary to rule 311 states that ORS 41.360(36) (1979) ("A printed or published book purporting to contain reports of cases determined in the tribunals of the state or country where the book is published contains correct reports of such cases.") is also recodified in article IX, Proposed Or. R. Evid. 311 commentary, it is not clear that rule 902(5), which authenticates only publications "issued by public authority," would cover unofficial reporters. Similarly, the commentary states that ORS 41.360(39) (1979) (presumption that a sale of personal property not accompanied by immediate delivery and change in possession is a fraudulent conveyance) "has been rewritten and placed in the Uniform Commercial Code." Proposed Or. R. Evid. 311 commentary. However, the article XI miscellaneous provisions make no reference to fraudulent conveyances. Presumably, this is an oversight by the drafters.

In addition to the rebuttable presumptions in ORS 41.360 (1979), there are a number of other presumptions scattered throughout the Oregon Revised Statutes, *see, e.g.,* ORS 30.910 (1979) (rebuttable presumption "that a product as manufactured and sold or leased is not unreasonably dangerous for its intended use"), as well as a number of judicial presumptions, *see, e.g.,* United States Nat'l Bank v. Underwriters at Lloyd's, 239 Or. 298, 318–21, 396 P.2d 765, 770–71 (1964) (rebuttable presumption against suicide). Rule 311 does not purport to be exclusive. Proposed Or. R. Evid. 311 commentary. It would be helpful if rule 311 contained a cross-reference to all other statutory or judicial presumptions.

A number of statutes provide that certain facts are "prima facie" or "primary" evidence of other facts. *See, e.g.,* ORS 377.635(2) (1979) (junk on a highway right-of-way near a junkyard is "prima facie evidence that it has been placed there by the owner or the operator of the junkyard"). It is unclear whether these statutes create rebuttable presumptions subject to proposed article III. This problem could be resolved by adding the following provision to rule 311: "A statute

Advisory Committee is to be commended for reexamining the current list of rebuttable presumptions, some of which are redundant,[62] empirically unsupportable,[63] and even arguably unconstitutional.[64] But the legislature should review rule 311 for even further deletions. Some of the remaining rebuttable presumptions have doubtful probative value.[65] Others are not true evidentiary presumptions, but rather statements of policy. For example, the presumption of innocence[66] is not a true rebuttable presumption because there is no presumed fact following from a basic fact.[67] This "presumption" is merely a way of emphasizing to the jury the prosecutor's burden of proof. While an instruction on the presumption of innocence should certainly be given, it has no place in a list of rebuttable presumptions.[68]

B. Presumptions in Civil Cases

The most significant change from existing law is rule 308, which places the burden of persuasion on the party opposing a presumption.[69] Under current law, a presumption imposes a burden on the opponent to produce evidence rebutting the presumed fact or risk a directed verdict on the issue.[70] However, if rebutting evidence is offered, the party

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providing that a fact or group of facts is prima facie evidence of another fact establishes a presumption within the meaning of this rule." ALASKA R. EVID. 301(b).

[62] *Compare* ORS 41.360(6) (1979) (presumption that "[h]igher evidence would be adverse from inferior being produced") *with* ORS 17.250(7) (1979) (court to instruct jury "that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust").

[63] *See, e.g.,* ORS 41.360(11) (1979) (presumption that "things in the possession of a person are owned by him"). As the Advisory Committee noted, "the inference of ownership based upon possession is not sufficiently strong to warrant treatment as a presumption." Proposed Or. R. Evid. 311 commentary. This presumption would be repealed. Or. Advisory Committee on Evidence Law Revision, *supra* note 59, § 98.

[64] *See* note 82 and text accompanying notes 78–82 *infra.*

[65] *See, e.g.,* Proposed Or. R. Evid. 311(v) ("A man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage."). This presumption undoubtedly has reduced empirical validity in the culture of the 1980's.

[66] "A person is innocent of a crime or wrong." Proposed Or. R. Evid. 311(a).

[67] MCCORMICK, *supra* note 49, § 342.

[68] A more appropriate location would be in ORS 17.250 (1979), which lists instructions that are to be given by the court "on all proper occasions."

[69] "In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Proposed Or. R. Evid. 308. This rule is based on Federal Rule 301 as originally promulgated by the Supreme Court but rejected by Congress. *See* note 75 *infra.*

[70] *See* ORS 41.360 (1979).

attempting to establish the presumed fact still has the burden of persuasion.[71] Under proposed rule 308, the opponent would have the burden both of producing rebutting evidence and of persuading the trier of fact "that the nonexistence of the presumed fact is more probable than its existence."[72] The drafters concluded that this change was necessary because, under the current Oregon rule, a presumption is likely to be confused with evidence.[73] In placing the burden of persuasion on the opponent, however, rule 308 is contrary to both Federal Rule 301[74] and the majority rule at common law.[75] The proposed rule would give presumptions much greater weight than they currently have in Oregon.

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[71] United States Nat'l Bank v. Underwriters at Lloyd's, 239 Or. 298, 396 P.2d 765 (1964). This case held that a presumption ceases to be controlling upon production of rebutting evidence that at least equals it. If the jurors' minds are equally divided, they are to decide against the proponent of the presumption.

[72] Proposed Or. R. Evid. 308.

[73] *Id.* commentary; *see* United States Nat'l Bank v. Underwriters at Lloyd's, 239 Or. 298, 326–27, 396 P.2d 765, 775 (1964) (jurors are to weigh a presumption like "any other evidentiary fact"); ORS 41.360 (1979) (rebuttable presumptions "may be controverted by other evidence").

Uniform Jury Instruction No. 202 provides in relevant part:

> A presumption is a deduction which the law expressly directs to be made from particular facts and is to be considered by you along with the *other* evidence. However, since these presumptions are disputable presumptions only, they may be outweighed or equalled by *other* evidence. Unless outweighed or equalled, however, they are to be accepted by you as true.

Oregon State Bar Committee on Procedure and Practice, Uniform Jury Instruction for Civil Cases No. 2.02 (1976) (emphasis added). *See also* Morgan, *Evidence —Presumptions— Burden of Proof*, 23 OR. L. REV. 269 (1944) (criticizing treatment of presumptions as evidence).

[74] In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVID. 301.

[75] *See* MCCORMICK, *supra* note 49, § 345. "The most widely followed theory of presumptions in American law has been . . . the Thayer or 'bursting bubble' theory." *Id.* The Thayer view is that a presumption disappears upon production of evidence sufficient to support a finding that the presumed fact does not exist. J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 337 (1898). The Thayer view of presumptions was adopted in Model Code of Evidence rule 704; Federal Rule of Evidence 301; and the Uniform Commercial Code, U.C.C. § 1–201(31). Wigmore generally supported the Thayer view, *see* 9 J. WIGMORE, *supra* note 4, § 2491 (3d ed. 1940), but favored instructing the jury that it might draw any inference warranted by the general probability underlying the presumption. *Id.* § 2498 (a).

Morgan argued that a presumption does not disappear with the introduction of rebutting evidence, but remains in the case. Moreover, not only the burden of

Although some scholars favor a rule that shifts the burden of persuasion to the opponent of a presumption once the basic fact is established,[76] the desirability of such a shift depends on the soundness of the presumption. If all presumptions were the products of careful legislative or judicial consideration or empirical verification, it might be desirable for the opponent of a presumption to bear the burden of persuasion. Historically, this has not been the case. Even when the correlation between a basic fact and a presumed fact is high, it is questionable whether a correlation that obtains generally should control the outcome of a specific case when the evidence on the existence of the presumed fact is equally balanced. The jury is already likely to give the proponent of the presumption the benefit of any logical inference or probability arising from the proven facts. An instruction that the burden of disproving the presumed fact has shifted to the opponent would give the presumption too great a weight. A modified version of Federal Rule 301, which makes clear that the burden of persuasion remains with the proponent of the presumption,[77] would be preferable to either proposed rule 308 or current law.

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production, but also the burden of persuasion shifts to the opponent of the presumption. Morgan, *Further Observations on Presumptions,* 16 S. CAL. L. REV. 245 (1943); Morgan, *Instructing the Jury upon Presumption and Burden of Proof,* 47 HARV. L. REV. 59 (1933). *See also* note 76 *infra.* The Morgan view was adopted, at least in part, in Uniform Rule of Evidence 14 (1953 version). It was also included in the Federal Rules of Evidence as originally proposed, *see* Proposed Fed. R. Evid. 301 (as passed by the House of Representatives), *reprinted in* 1 WEINSTEIN, *supra* note 32, at 301–3, but it was rejected in the final version in favor of the Thayer-Wigmore approach. *See* 1 WEINSTEIN, *supra* note 32, at 301–8 to –13. Some states follow the Morgan view for some presumptions and the Thayer-Wigmore view for other presumptions. *See, e.g.,* CAL. EVID. CODE § 600 (West 1966).

A third approach, followed in Oregon, allows the trier of fact to treat a presumption as if it were evidence. *See* notes 71 & 73 *supra.* Under this view, the trier is to weigh the presumption along with the evidence in the case to determine whether the proponent has carried the burden of persuasion.

[76] *See, e.g.,* E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 74–81 (1956); Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity,* 12 STAN. L. REV. 5, 20 (1959). *But see* Laughlin, *In Support of the Thayer Theory of Presumptions,* 52 MICH. L. REV. 195 (1953). *See also* note 75 *supra.*

[77] *See* FED R. EVID. 301, *supra* note 74. Alaska rule 301 supplements the federal rule with the following language:

> The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of producing evidence, the presumed fact shall be deemed proved, and the court shall instruct the jury accordingly. When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the

C. Presumptions in Criminal Cases

Rule 309 prohibits the prosecution in criminal cases from using either conclusive or rebuttable presumptions.[78] Recent decisions of the United States Supreme Court make clear that a presumption, as distinguished from an inference,[79] is constitutionally impermissible in a

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existence of the presumed fact from the proved fact, but no mention of the word "presumption" may be made to the jury.

ALASKA R. EVID. 301 (a).

This additional language resolves four issues that have created uncertainty under the federal rule: (1) the amount of rebutting evidence that must be introduced by the opponent of the presumption to avoid a directed verdict on the issue; (2) whether the jury may or must find in accordance with the presumption if no rebutting evidence is offered; (3) if the presumption is rebutted, whether the jury may still be instructed that it may infer the existence of the presumed fact from the proof of the basic fact; and (4) whether the word "presumption" may be used in jury instructions. *See generally* 1 D. LOUISELL & C. MUELLER, *supra* note 57, §§ 65–77; 10 J. MOORE, FEDERAL PRACTICE §§ 301.01–.31 (2d ed. 1979); 1 WEINSTEIN, *supra* note 32, ¶¶ 301[01]–[03]; 21 C. WRIGHT & K. GRAHAM, *supra* note 2, §§ 5121–5148; Orland, *Presumptions: Reflections on Washington's Proposed Rule 301,* 13 GONZ. L. REV. 935 (1978).

[78] (a) The judge is not authorized to direct the jury to find a presumed fact against the accused.

(b) When the presumed fact establishes guilt or is an element of the offense or negates a defense, the judge may submit the question of guilt or the existence of the presumed fact to the jury only if:

(1) A reasonable juror on the evidence as a whole could find that the basic facts have been established beyond a reasonable doubt; and

(2) the presumed facts follow from the basic facts beyond a reasonable doubt.

Proposed Or. R. Evid. 309. This is perhaps the most poorly drafted rule in the proposed code. It is modeled after proposed Federal Rule 303, *reprinted in* 1 WEINSTEIN, *supra* note 32, at 303–1, which was intensely criticized and ultimately rejected by Congress. *See Proposed Rules of Evidence: Hearings on H.R. 5463 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary,* 93d Cong., 1st Sess. 249 (1973).

[79] A rebuttable presumption is the means by which a rule of substantive law is invoked to *compel* the trier of fact to reach a particular conclusion, in the absence of contrary evidence, once the facts constituting its hypothesis are established . . . . An inference, on the other hand, is no more than a logical tool enabling the trier of fact to proceed from one fact to another if the trier believes that the weight of the evidence and the experiential accuracy of the inference warrant so doing. The rebuttable presumption forces the defendant to come forth or to suffer certain defeat on the issue involved. An inference does not put the defendant in such a position. It does not shift the burden of going forward to the defendant, for the trier of fact is left free to reject the inference in part or in whole. Nor does it change the burden of persuasion or relieve the Government of its obligation to prove each element of the crime beyond a reasonable doubt.

McAbee v. United States, 434 F.2d 361, 362–63 (9th Cir. 1970) (citation omitted)

criminal case if it could be interpreted by the jury as conclusive or as shifting the burden of persuasion.[80] The Court has held that the state "must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant" through a presumption.[81] Present Oregon statutes are misleading and arguably unconstitutional because they do not prohibit presumptions in criminal cases.[82] Rule 309 would eliminate this trap for unwary prosecutors and judges.

But the rule sets some traps of its own.[83] Its use of the term "presumed facts"[84] is confusing; the rule should be revised to make clear

(emphasis in original); *accord,* State v. Stilling, 285 Or. 293, 590 P.2d 1223, *cert. denied,* 100 S. Ct. 169 (1979). *See generally* 9 J. WIGMORE, *supra* note 4, § 2491 (3d ed. 1940).

[80] Sandstrom v. Montana, 442 U.S. 510 (1979); Mullhaney v. Wilbur, 421 U.S. 684 (1975). *See also* State v. Stilling, 285 Or. 293, 297, 590 P.2d 1223, 1226, *cert. denied,* 100 S. Ct. 169 (1979) ("We hold [the] usage of the words 'disputable presumption' or 'presumption', in a jury instruction on the intent element of a crime to be impermissible when the presumption runs contrary to the burden of proof in the case."); note 82 *infra.*

[81] Patterson v. New York, 432 U.S. 197, 215 (1977). *See generally* Dunham, *Criminal Presumption and Inference Instructions,* 6 WILLAMETTE L.J. 497 (1970); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases,* 86 YALE L.J. 1299 (1977).

[82] *See* ORS 41.350 (1979) (conclusive presumptions); ORS 41.360 (1979) (rebuttable presumptions); ORS 136.430 (1979) (civil evidence rules apply in criminal cases unless otherwise provided). Conclusive presumptions are clearly unconstitutional in criminal cases under Sandstrom v. Montana, 442 U.S. 510, 522–23 (1979).

The rebuttable presumptions in ORS 41.360 (1979) may also be unconstitutional. In *Sandstrom,* the Court held unconstitutional a jury instruction based on a Montana statute that is almost identical to ORS 41.360(3) (1979) (rebuttable presumption that "a person intends the ordinary consequence of his voluntary act"). The instruction was defective because the jury might have interpreted it as shifting the burden of persuasion to the defendant on the element of intent. Before *Sandstrom* was decided, however, the Oregon Supreme Court had upheld an instruction based on ORS 41.360(2) and (3) (1979). State v. Stilling, 285 Or. 293, 590 P.2d 1223, *cert. denied,* 100 S. Ct. 169 (1979). The *Stilling* instruction was held not to shift the burden of persuasion because it did not explain the effect of the rebuttable presumption and was qualified with the words " '[y]ou may infer intent in accordance with this rule.' " *Id.* at 295, 590 P.2d at 1225. If the statutory language had not been qualified as a permissive inference, however, it would clearly have been unconstitutional under *Sandstrom.*

Moreover, the provision of ORS 41.360 (1979) that a "jury is bound to find according to the presumption" unless it is overcome by rebutting evidence arguably conflicts with the rule that a verdict may not be directed against a criminal defendant. *See generally* Sandstrom v. Montana, 442 U.S. at 516 n.5; Sparf v. United States, 156 U.S. 51, 105 (1894).

[83] *See* note 78 *supra.*

[84] "[T]he judge may submit . . . the existence of the presumed fact to the jury . . . ." Proposed Or. R. Evid. 309 (b).

that it allows only inferences and not presumptions in criminal cases.[85] Also, the rule appears to be based on a misapprehension of constitutional requirements. It prohibits use of even an inference in a criminal case unless the "presumed facts follow from the basic facts beyond a reasonable doubt."[86] According to the commentary, this restriction was based on a perceived trend in United States Supreme Court decisions.[87] However, a Supreme Court decision since the code was drafted makes clear that a beyond-a-reasonable-doubt standard is not constitutionally required before an inference may be used in a criminal case; a more-probable-than-not standard is sufficient.[88]

IV

Relevancy

A. Definition of Relevancy

Article IV of the proposed code adopts most of the relevancy rules in article IV of the Federal Rules of Evidence. Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[89] The only significant change in current law would be to eliminate the often confusing distinction between relevancy and materiality.[90] The proposed rule incorporates the concept of materiality within the definition of relevant evidence by requiring the evidence to be not only probative but also "of consequence" to the case. Thus, the independent objection of immateriality would no longer be needed.

Rule 403 provides that, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."[91] This rule more clearly defines the trial court's discretion to exclude relevant evidence. It also eliminates surprise as an independent

[85] It would also be helpful if definitions of "inference," "presumption," "burden of production," and "burden of persuasion" were added to article III. The definitions of "inference" in ORS 41.320 (1979) and "presumption" in ORS 41.340 (1979) would be repealed by § 98 of the proposed code. Or. Advisory Committee on Evidence Law Revision, *supra* note 59, § 98. *See also* note 79 *supra*.

[86] Proposed Or. R. Evid. 309(b)(2).

[87] Proposed Or. R. Evid. 309 commentary.

[88] County Court v. Allen, 442 U.S. 140 (1979).

[89] Proposed Or. R. Evid. 401.

[90] *See* Mills v. Dunn Bros., 264 Or. 156, 503 P.2d 1250 (1972); ORS 41.220–.230 (1979).

[91] Proposed Or. R. Evid. 403.

ground for excluding relevant evidence.[92] The commentary to rule 403 suggests that surprise is more appropriately remedied by granting a continuance than by excluding the evidence.[93]

B. Character Evidence

Proposed rule 404 specifies when character evidence may be introduced.[94] It adopts the usual distinction that character evidence is admissible when character is "an essential element of a charge, claim or defense" (for example, in a child custody dispute),[95] but that character evidence is generally inadmissible to show that a person acted in conformity with his character.[96] The usual exceptions allowing evidence

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[92] Oregon decisions have assumed that unfair surprise is a ground for excluding evidence, although most statements on the point are dicta. *See, e.g.*, Krause v. Eugene Dodge, Inc., 265 Or. 486, 508, 509 P.2d 1199, 1210 (1973) (dictum); Carter v. Moberly, 263 Or. 193, 200, 501 P.2d 1276, 1279 (1972) (dictum).

[93] Proposed Or. R. Evid. 403 commentary.

[94] (a) Evidence of a person's character or trait of character is admissible when it is an essential element of a charge, claim or defense.

(b) Evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor;

(3) Evidence of the character of a witness, as provided in sections 51 to 53 (Rules 607 to 609) of this Act; or

(4) Evidence of the reputation of a party for violent behavior offered in a civil assault and battery case when self-defense is pleaded and there is evidence to support such defense.

Proposed Or. R. Evid. 404(a)–(b).

[95] Proposed Or. R. Evid. 404(a); *see* ORS 45.620 (1979) (evidence of a party's good character is admissible if the issue involves his character); Guedon v. Rooney, 160 Or. 621, 87 P.2d 209 (1939) (character evidence admissible to show driver's incompetency in action for negligent entrustment of motor vehicle).

[96] Proposed Or. R. Evid. 404(b); Rich v. Cooper, 234 Or. 300, 305, 380 P.2d 613, 615 (1963) (dictum). In addition, rule 404(c) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Proposed Or. R. Evid. 404(c). Florida's version of this rule requires the prosecution to give the defendant 10 days' written notice when it intends to offer evidence of other crimes, and provides for limiting instructions on the purpose of such evidence. FLA. STAT. ANN. § 90.404(2)(b) (West Supp. 1979). A similar provision would be a desirable addition to the Oregon rule.

of the character of an accused,[97] victim,[98] or witness[99] in certain circumstances are retained. Consistent with existing law,[100] the proposed rule permits evidence of the victim's character to be offered in civil assault and battery cases when the defendant presents evidence of self-defense.[101]

The rule clarifies existing law in one important respect. Under present case law, the prosecutor in a homicide case may introduce evidence of the victim's peaceful character if the defendant produces evidence raising the issue of self-defense.[102] Oregon courts have not yet ruled, however, on whether the prosecutor may introduce such evidence in nonhomicide cases. Proposed rule 404 expressly allows evidence of the victim's peaceful character in any criminal case in which self-defense is raised.[103]

By retaining Oregon's already broad rule on the use of character evidence in civil assault and battery cases and possibly expanding its use in criminal cases, rule 404 goes beyond Federal Rule 404 and the state rules modeled after it.[104] The federal rule does not allow evidence of a victim's character in civil cases; in criminal cases, it allows the prosecutor to present such evidence only in homicide prosecutions in which self-defense is raised.

The legislature should consider replacing proposed rule 404 with the federal rule. Character evidence is a particularly dangerous type of evidence because it may cause a jury to base its decision on sympathy

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[97] Proposed Or. R. Evid. 404(b)(1); State v. Rowley, 6 Or. App. 13, 17–18, 485 P.2d 1120, 1122 (1971).

[98] Proposed Or. R. Evid. 404(b)(2), (4); *see* notes 100–03 and accompanying text *infra*.

[99] Proposed rule 404(b)(3) retains the current rules that a witness may be impeached by evidence of the witness's reputation for truthfulness, Lucas v. Kaylor, 136 Or. 541, 299 P. 297 (1931); McIntosh v. McNair, 53 Or. 87, 99 P. 74 (1909); ORS 45.600 (1979), and that evidence of the witness's good character is admissible after the witness has been impeached by evidence of bad character. ORS 45.620 (1979). *See also* text accompanying notes 230–43 *infra*.

[100] *See* Brooks v. Bergholm, 256 Or. 1, 470 P.2d 154 (1970); Linkhart v. Savely, 190 Or. 484, 227 P.2d 187 (1951).

[101] Proposed Or. R. Evid. 404(b)(4).

[102] State v. Holbrook, 98 Or. 43, 66, 188 P. 947, 954, *rehearing denied*, 98 Or. 81, 99–100, 102, 192 P. 640, 647–48 (1920); State v. Wilkins, 72 Or. 77, 87, 142 P. 589, 592 (1914).

[103] Proposed Or. R. Evid. 404(b)(2).

[104] State rules of evidence modeled after Federal Rule 404 include: ARK. STAT. ANN. §§ 28-1001 (1977); NEB. REV. STAT. § 27-404 (1975); N.M. STAT. ANN. § 20-4-404 (1975); OKLA. STAT. ANN. tit. 12, § 2404 (West 1980); S.D. COMP. LAWS ANN. §§ 19-12-4 to -5 (1979); WIS. R. EVID. 904.04; WYO. R. EVID. 404. The Montana rule 404 differs from the federal rule by allowing the prosecutor to introduce evidence that the victim was peaceful to rebut evidence of self-defense in cases in which the victim is incapable of testifying, as well as in homicide cases. *See* MONT. R. EVID. 404(a)(2).

for the victim or disapproval of the victim's past conduct rather than on the relevant facts. When evidence of a victim's character is allowed, unfair pressure is placed on the defendant to present evidence of his own character. The federal rule allows evidence of a victim's character in homicide cases largely out of necessity; the victim is not alive to tell what happened. In other criminal proceedings and in civil assault and battery cases, the use of character evidence is highly questionable. The legislature should delete the proposed rule's authorization of evidence of a victim's character in nonhomicide cases.

Article IV not only clarifies when character evidence is admissible but also expands the types of evidence that may be offered to prove character.[105] When character evidence is admissible under rule 404, rule 405 allows opinion evidence as well as reputation evidence.[106] Reputation evidence is often nothing more than opinion evidence in disguise;[107] it is perhaps unrealistic to expect witnesses to distinguish between personal opinion and perceived reputation. A jury is less likely to be misled if opinion evidence is clearly labeled as such rather than introduced under the guise of reputation evidence.

Neither proposed rule 405 nor Federal Rule 405, after which it is modeled, defines the community from which reputation evidence may be drawn. The trend in common-law jurisdictions is to permit evidence of reputation in the community where a person works as well as the community where he lives.[108] Alaska has added the following specification to its rule: "reputation in any community or group in which the individual habitually associated."[109] A similar definition would be a desirable addition to the Oregon rule.

C. Habit Evidence

Proposed rule 406 admits evidence of habit or routine practice to prove that the conduct of a person or organization on a particular occasion was in conformity with that habit or practice.[110] Rule 406 rejects

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105 Under existing case law, character may be proved by reputation evidence, *e.g.*, Rich v. Cooper, 234 Or. 300, 380 P.2d 613 (1963); State v. Holbrook, 98 Or. 43, 192 P. 640 (1920), but not by opinion evidence. *See, e.g.*, State v. Bailey, 90 Or. 627, 640, 178 P. 201, 205 (1919) (not allowing witness to be impeached by opinion evidence of character).

106 "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." Proposed Or. R. Evid. 405(a).

107 *See* McCormick, *supra* note 49, § 44.

108 *Id.* § 191.

109 Alaska R. Evid. 405(a).

110 Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence

the current rule[111] that excludes habit evidence when there is an eyewitness to the conduct. The "no eyewitness" requirement is unduly restrictive, especially when the only eyewitness is the opposing party.[112] Although habit evidence is sometimes confused with character evidence,[113] which is generally inadmissible because of its questionable probative value and possible prejudicial effect, the reasons for restricting character evidence do not apply to habit evidence.[114] Unlike character, which is a mere disposition to engage in certain conduct, habit is specific, repetitive, often unconscious conduct.[115] Habit evidence, the drafters correctly concluded, has a sufficiently high probative value to justify expanding its admissibility.[116]

D. Subsequent Remedial Measures

Proposed rule 407 codifies existing case law;[117] it provides that subsequent remedial measures are not admissible to prove negligence or culpable conduct.[118] Subsequent measures are admissible for other purposes, however, such as proving ownership, control, or the feasibilty of precautionary measures.

Rule 407 is silent on the admissibility of subsequent remedial measures in products liability actions alleging defective design. Although

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> of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Proposed Or. R. Evid. 406.

[111] Fenton v. Aleshire, 238 Or. 24, 393 P.2d 217 (1964).

[112] Proposed Or. R. Evid. 406 commentary. For example, in Fenton v. Aleshire, 238 Or. 24, 393 P.2d 217 (1964), evidence of the decedent's habit of using the crosswalk was held inadmissible because the defendant was an eyewitness to the accident.

[113] *See* McCormick, *supra* note 49, § 195.

[114] *See id.*

[115] *See id.*

[116] *See* Proposed Or. R. Evid. 406 commentary.

[117] Phipps v. Air King Mfg. Corp., 263 Or. 141, 501 P.2d 790 (1972) (evidence that defendant designed and constructed a satisfactory second truss after the first collapsed was inadmissible to prove negligence); Rich v. Tite-Knot Pine Mill, 245 Or. 185, 421 P.2d 370 (1966) (evidence that defendant installed a guard on the machine after the accident was inadmissible to prove negligence).

[118] When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Proposed Or. R. Evid. 407.

the case law is divided on this question,[119] the better view is that evidence of subsequent measures should be admitted; the evidence often has high probative value, and a rule of admissibility is unlikely to deter manufacturers from making needed corrections. Rather than leaving this issue to the courts, with consequent uncertainty until it is resolved, the legislature should amend the rule to allow evidence of subsequent remedial measures to show defective design in products liability cases.[120]

E. Conduct or Statements Made in Settlement Negotiations

Proposed rule 408 is intended to prevent statements made in settlement negotiations from being used against a party at trial.[121] It prohibits evidence not only of settlement offers but also of "conduct or statements made in compromise negotiations."[122] Under current Oregon law, any admission of fact made during negotiations can be introduced at trial unless the parties agree otherwise when the admission is made.[123] To protect themselves, negotiating parties must preface admissions of fact with labels such as "hypothetical" or "without prejudice." The proposed rule would encourage freer and more open negotiations.

Nevertheless, a possible loophole remains. Rule 408 does not clearly preclude an admission made during negotiations from being used for impeachment purposes. For example, a defendant who concedes an

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[119] For cases holding that Federal Rule 407 or similar state rules do not exclude subsequent remedial measures offered to prove defective design, see Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977); Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974); Chart v. General Motors Corp., 80 Wis. 2d 91, 258 N.W. 2d 680 (1977). *But see* Price v. Buckingham Mfg. Co., 110 N.J. Super. 462, 266 A.2d 140 (1970). *See generally* L. FRUMER & M. FRIEDMAN, 1 PRODUCTS LIABILITY § 12.04 (1979).

[120] *See, e.g.*, ME. R. EVID. 407, which includes such a provision.

[121] Proposed Or. R. Evid. 408 commentary.

[122] (a) (1) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

(2) Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

(b) (1) Subsection (a) of this section does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

(2) Subsection (a) of this section also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Proposed Or. R. Evid. 408.

[123] ORS 41.810 (1979).

element of liability during settlement negotiations is subject to possible impeachment if the defendant denies liability at trial. If the rule is truly to further open negotiations, an amendment is necessary. Alaska has added the following language to its rule: "Exclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement."[124]

F. Sexual History of Rape Victims

Rule 412 would replace Oregon's current statute[125] restricting the admissibility of a victim's sexual history in rape prosecutions with Federal Rule 412.[126] It prohibits reputation evidence and opinion evi-

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[124] ALASKA R. EVID. 408.

[125] ORS 163.475 (1979).

[126] (a) Notwithstanding any other provision of law, in a prosecution under ORS 163.355 to 163.425, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) Notwithstanding any other provision of law, in a prosecution under ORS 163.355 to 163.425, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:

(1) Admitted in accordance with paragraphs (1) and (2) of subsection (c) of this section and is constitutionally required to be admitted; or

(2) Admitted in accordance with subsection (c) of this section and is evidence of:

(A) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape, sodomy or sexual abuse is alleged.

(c) (1) If the person accused of committing rape, sodomy or sexual abuse intends to offer under subsection (b) of this section evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) of this subsection shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subsection (b) of this section, the court shall order a hearing in chambers to determine if

dence of a rape victim's sexual history.[127] Evidence of specific instances of a victim's prior sexual conduct is allowed only when (1) the defendant is constitutionally entitled to offer such evidence; (2) the defendant claims consent and the evidence is of prior sexual conduct with the defendant; or (3) the evidence is offered to prove that the defendant was not the source of semen or injury.[128] Before the evidence is allowed, the defendant must give notice of intent to offer the evidence and must satisfy the court at an in camera hearing that the evidence is admissible.[129]

The proposed rule is more carefully drafted than the existing Oregon statute. It clarifies the procedures that must be followed before evidence of sexual history may be received. It also avoids any sixth amendment challenge by providing that evidence of sexual history is admissible whenever a defendant is constitutionally entitled to offer it.[130] Despite

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such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subsection (b) of section 5 (Rule 104) of this Act, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) of this section that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross examined.

(d) For purposes of this section, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape, sodomy or sexual abuse is alleged.

Proposed Or. R. Evid. 412. Federal Rule 412 was added by Act of Oct. 28, 1978, Pub. L. No. 95-540, 92 Stat. 2047. Most states that have adopted versions of the Federal Rules of Evidence did not have an opportunity to consider Federal Rule 412. *See* note 10 *supra*. Over half the states have recently enacted laws to control or prohibit use of evidence of a rape victim's sexual history. Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 32 n.196 (1977). *See, e.g.*, IOWA CODE ANN. § 782.4 (West 1975); IOWA R. CRIM. PROC. 20(5); LA. REV. STAT. ANN. § 15.498 (West 1977); MICH. COMP. LAWS ANN. § 750.520 (1976-1977); MINN. STAT. ANN. § 609.347 (West 1977); N.Y. CRIM. PROC. LAW § 60.42(5) (McKinney 1976-1977); TEX. PENAL CODE ANN. tit. 5, § 21.13(a) (Vernon 1976-1977). *See also* State v. Davis, 269 N.W.2d 434 (Iowa 1978) (discussing these various statutes); State v. Ball, 262 N.W.2d 278 (Iowa 1978) (same). *See generally* Comment, *Federal Rule of Evidence 412: Was the Change an Improvement?* 49 U. CIN. L. REV. 244 (1980).

127 Proposed Or. R. Evid. 412(a).

128 Proposed Or. R. Evid. 412(b).

129 Proposed Or. R. Evid. 412(c).

130 The original Oregon statute, which lacked such a provision, was held to

these improvements, at least two amendments to rule 412 should be considered. First, it would be helpful to lawyers and judges and would reduce the chance of reversible error if the rule defined further when a defendant may be constitutionally entitled to offer evidence of a victim's sexual history.[131] Second, the provision requiring a criminal defendant to serve notice of intent to prove sexual history directly upon the rape victim[132] could become a tool for harrassment or intimidation. It would be preferable if such notice were conveyed through the prosecutor's office.

V

Privileges

Privileges tend to be the most controversial part of any evidence code. Unlike most other evidence rules, privileges are not designed to make the factfinding process more effective and reliable. Instead, they serve substantive purposes entirely unrelated to the search for truth. Privileges protect various confidential relationships by precluding the use of certain evidence, no matter how reliable and essential the evidence may be to the particular case. Not surprisingly, there is substantial disagreement about which relationships are sufficiently fundamental to justify this interference in the truth-finding process.[133] The rules of

deny the defendant's sixth amendment right to confront an opposing party. In State v. Jalo, 27 Or. App. 845, 557 P.2d 1359 (1976), the court struck down ORS 163.475(3) (1975) because it prohibited the defendant from introducing evidence of the complainant's prior sexual activity with others to show that she had a motive for falsely accusing him. The legislature subsequently amended the statute. *See* note 131 *infra*. *See generally* Caulfield, *Oregon Sexual Offenses Evidence Law: An Evaluation,* 55 Or. L. Rev. 493 (1976); Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment,* 128 U. Pa. L. Rev. 544 (1980).

[131] ORS 163.475 (1979) provides some specificity that the proposed rule lacks. After State v. Jalo, 27 Or. App. 345, 557 P.2d 1359 (1976), held this statute unconstitutional, *see* note 130 *supra*, the legislature amended it to provide: "Evidence of the complainant's previous sexual conduct that may be considered relevant includes, but is not limited to: (a) Evidence that relates to the motive or bias of the complainant; or (b) Evidence that is necessary to rebut or explain scientific or medical evidence offered by the state." Act of July 27, 1977, ch. 822, § 1, 1977 Or. Laws 863 (codified at ORS 163.475(5)(a)-(b) (1979)). *See generally* Tanford & Bocchino, *supra* note 130.

[132] Proposed Or. R. Evid. 412(c).

[133] *See, e.g.,* 8 J. Wigmore, *supra* note 4, § 2292 (McNaughton rev. 1961) (generally favoring the lawyer-client privilege); Radin, *The Privilege of Confidential Communications Between Lawyer and Client,* 16 Calif. L. Rev. 487 (1928) (arguing against the lawyer-client privilege); Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?* 52 Yale L.J. 607 (1943) (opposing the physician-patient privilege); Comment, *The Newsman's Privilege After* Branzburg: *The Case for a Federal Shield Law,* 24 U.C.L.A. L. Rev. 160 (1976) (arguing for a press privi-

privilege adopted by the United States Supreme Court as part of the Federal Rules of Evidence generated so much opposition and controversy in Congress that Congress ultimately deleted them to avoid further delay in the passage of the federal rules.[134] Privileges thus remain the only significant area of evidence law that is not covered by the federal rules.

Article V of the proposed Oregon code creates no new privileges. It restates eight of the most important privileges: the attorney-client privilege,[135] physician- and psychotherapist-patient privilege,[136] husband-wife privilege,[137] clergyman-penitent privilege,[138] stenographer-employer privilege,[139] public officer privilege,[140] and informer privilege.[141] The

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lege); Beaver, *The Newsman's Code, the Claim of Privilege and Everyman's Right to Evidence,* 47 OR. L. REV. 243 (1968) (arguing against a press privilege); Comment, *The Child-Parent Privilege: A Proposal,* 47 FORDHAM L. REV. 771 (1979) (arguing for a child-parent privilege); 3 WHARTON'S CRIMINAL EVIDENCE § 578 (13th ed. 1973) (showing uniform lack of acceptance of child-parent privilege).

[134] 2 WEINSTEIN, *supra* note 32, ¶ 501[01].

[135] ORS 44.040(1)(b) (1979); Proposed Or. R. Evid. 503. *See* note 160 and text accompanying notes 160–70 *infra.*

[136] ORS 44.040(1)(d), (h) (1979); Proposed Or. R. Evid. 504. *See* note 172 and text accompanying notes 171–73 *infra.*

[137] ORS 44.040(1)(a) (1979); Proposed Or. R. Evid. 505. *See* note 175 and text accompanying notes 174–87 *infra.*

[138] ORS 44.040(1)(c) (1979). Proposed rule 506 provides:

> (a) As used in this section, unless the context requires otherwise:
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> (1) "Confidential communication" means a communication made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
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> (2) "Member of the clergy" means a minister of any church, religious denomination or organization who in the course of the discipline or practice of that church, denomination or organization is authorized or accustomed to hearing confidential communications and, under the discipline or tenets of that church, denomination or organization, has a duty to keep such communications secret.
>
> (b) A member of the clergy shall not, without the consent of the person making the communication, be examined as to any confidential communication made to the member of the clery[*sic*] in the member's professional character.

Proposed Or. R. Evid. 506.

[139] ORS 44.040(1)(f) (1979); Proposed Or. R. Evid. 508. *See* note 154 and text accompanying notes 154–59 *infra.*

[140] ORS 44.040(1)(e) (1979). Proposed rule 509 provides: "A public officer shall not be examined as to public records determined to be exempt from disclosure under ORS 192.500."

Proposed Or. R. Evid. 509.

[141] Proposed Or. R. Evid. 510. *See* note 188 and text accompanying notes 188–90 *infra.* The Oregon privilege not to disclose an informer's identity has developed primarily through case law. *See* State v. Williams, 253 Or. 613, 456 P.2d 497 (1969); State v. Penney, 242 Or. 470, 410 P.2d 226 (1966); State *ex rel.* Kerns

proposed rules are more specific about the scope of the various privileges than existing law.

Article V would also repeal several privileges and limit the scope of others. The privileges that would be repealed include those for licensed nurses,[142] certificated staff members of schools,[143] certificated school counselors,[144] clinical social workers,[145] and naturopaths;[146] as well as the privilege of a criminal defendant to prevent his spouse from testifying against him.[147] However, the privilege for marital communications would be retained,[148] as would all other existing privileges, whether derived from case law or statute, that are not expressly repealed.[149]

Although article V clarifies existing law on the number of privileges and their scope, it unfortunately makes no attempt to include all the privileges that will survive the new rules. For example, the common-law privilege not to reveal a political vote[150] could easily be added to the proposed code. At a minimum, a cross-reference to the remaining constitutional[151] and statutory[152] privileges not covered by the new

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v. Read, 11 Or. App. 48, 501 P.2d 82 (1972). *See also* ORS 135.855 (1979) (exempting the identity of a prosecution informant from discovery).

142 ORS 44.040(1)(g) (1979); Or. Advisory Committee on Evidence Law Revision, *supra* note 59, § 98.

143 ORS 44.040(1)(i) (1979); Or. Advisory Committee on Evidence Law Revision, *supra* note 59, § 98.

144 ORS 44.040(1)(k) (1979); Or. Advisory Committee on Evidence Law Revision, *supra* note 59, § 98.

145 ORS 44.040(1)(l) (1979) (to be repealed June 30, 1981); Or. Advisory Committee on Evidence Law Revision, *supra* note 59, § 98.

146 ORS 44.040(1)(m) (1979); Or. Advisory Committee on Evidence Law Revision, *supra* note 59, § 98.

147 ORS 136.655 (1979); Or. Advisory Committee on Evidence Law Revision, *supra* note 59, § 89. *See* text accompanying notes 176–80 *infra*.

148 ORS 44.040(1)(a) (1979); Proposed Or. R. Evid. 505. *See* note 175 and text accompanying notes 183–87 *infra*.

149 Proposed Or. R. Evid. 514.

150 State *ex rel.* Heath v. Kraft, 20 Or. 28, 23 P. 663 (1890). Proposed Federal Rule 507 states the privilege as follows: "Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally." Proposed Fed. R. Evid. 507, *reprinted in* 2 WEINSTEIN, *supra* note 32, at 507–1. For reasons that are not clear, the Advisory Committee did not include this rule in article V. *See* Or. Advisory Committee on Evidence Law Revision, *supra* note 59, commentary to deleted materials, at 187–88. The legislative interim subcommittee, however, has voted to add proposed Federal Rule 507. *Hearings on the Proposed Evidence Code Revision Before the Subcomm. on Evidence of the Joint Comm. on the Judiciary,* 60th Or. Legis. Ass'y (May 27, 1980), tape 13, side 2, at 0345 [hereinafter cited as *Joint Hearings*]. All legislative materials cited in this Article are located in the Oregon State Archives, Salem, Oregon.

151 *E.g.,* OR. CONST. art. I, § 12 (privilege against self-incrimination); *id.* art. IV, § 9 (privilege for words spoken in legislative debate).

152 *E.g.,* ORS 44.520(1)(a) (1979) (identity of a news reporter's source);

rules would be helpful. The legislature should also clarify whether general provisions in article V, such as the waiver rule,[153] apply to privileges recognized elsewhere in Oregon law.

A. Stenographer-Employer Privilege

Of all the privileges retained in article V, the most likely candidate for legislative repeal is the stenographer-employer privilege.[154] Oregon is the only state that recognizes such a broad privilege.[155] The stenographer-employer relationship deserves no more protection than relationships with parents, children, partners, accountants, trustees, or chief executive officers, none of which are protected by a privilege. This privilege could be a significant impediment to investigations of fraudulent or unlawful business activity.[156]

After the legislature adopted the stenographer-employer privilege in 1929,[157] Dean Wigmore felt sufficiently concerned to send a letter to the *Oregon Law Review* that stated in part:

> [T]his new privilege is a departure which not only violates a long-standing fundamental principle of the law of evidence, but is not founded on any public necessity . . . .
>
> It is difficult to see what situation could have given rise to a claim for such a privilege. This new section deserves the reprobation of all who wish well to the law of evidence and the administration of justice.[158]

ORS 107.600 (1979) (communications during conciliation proceedings and pertinent court records); ORS 147.115 (1979) (certain information submitted by an applicant for crime victim compensation); ORS 192.525 (1979) (medical records); ORS 426.460 (6) (1979) (records of a patient at a drug and alcohol addiction treatment facility); ORS 675.580 (1979) (certain communications to a clinical social worker); ORS 677.425(1) (1979) (information given to the Board of Medical Examiners in doctor disciplinary proceedings).

153 *See* text accompanying notes 191–95 *infra*.

154 "A stenographer shall not, without the consent of his or her employer, be examined as to any communication or dictation made by the employer to him or her in the course of professional employment." Proposed Or. R. Evid. 508.

155 8 J. WIGMORE, *supra* note 4, § 2286 n.24 (McNaughton rev. 1961). Some states have created a privilege for legal stenographers. *Id.* § 2301; Annot., 96 A.L.R.2d 159–60 (1964). Such a privilege would be unnecessary under the proposed Oregon rules because a legal stenographer would already be within the attorney-client privilege as a "representative of the lawyer." *See* Proposed Or. R. Evid. 503(a)(5) (defining "representative of the lawyer" as "one employed to assist the lawyer in the rendition of professional legal services").

156 Even if a stenographer voluntarily reported an employer's illegal conduct, the employer could use the privilege to prevent the stenographer from testifying before a grand jury or at trial.

157 Act of Feb. 3, 1929, ch. 171, § 1, 1929 Or. Laws 162 (codified at ORS 44.040(1)(f) (1979)).

158 12 OR. L. REV. 216, 217 (1933) (quoting letter from John H. Wigmore to the *Oregon Law Review*).

The new rules provide an opportunity to abolish this unjustified privilege.[159]

B. Attorney-Client Privilege

Proposed rule 503 largely codifies the present Oregon attorney-client privilege.[160] However, contrary to the general approach taken in article

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[159] The legislative interim subcommittee has voted to delete the privilege. *Joint Hearings, supra* note 150, (May 27, 1980), tape 13, side 2, at 0355.

[160] (a) As used in this section, unless the context requires otherwise:

(1) "Client" means a person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(3) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(4) "Representative of the client" means a person who may be charged with liability for the alleged acts, omissions or transactions for which the person's employer may be charged or whose duty or job is to report to the client's lawyer concerning a matter of interest to the client.

(5) "Representative of the lawyer" means one employed to assist the lawyer in the rendition of professional legal services, but does not include a physician making a physical or mental examination under ORS 44.610 to 44.640.

(b) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(1) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;

(2) Between the client's lawyer and the lawyer's representative;

(3) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;

(4) Between representatives of the client or between the client and a representative of the client; or

(5) Between lawyers representing the client.

(c) The privilege created by this section may be claimed by the client, a guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) There is no privilege under this section:

(1) If the services of the lawyer were sought or obtained to enable

V of cutting back evidentiary privileges, rule 503 expands the attorney-client privilege beyond its current boundaries. It omits or qualifies several standard exceptions to the privilege.[161]

Moreover, the rule creates a broader attorney-client privilege for corporations than has ever been recognized in Oregon. The Advisory Committee rejected the rule adopted by some federal courts[162] that the

> or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
>
> (2) As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;
>
> (3) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;
>
> (4) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
>
> (5) As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Proposed Or. R. Evid. 503.

161 Rule 503 does not mention the exceptions for disclosure of the fact of employment and the name and address of a client, *see* Cole v. Johnson, 103 Or. 319, 205 P. 282 (1922), and for disclosure of the existence of assets left with the lawyer, *see* State *ex rel.* Hardy v. Gleason, 19 Or. 159, 23 P. 817 (1890). Although the Advisory Committee states that adoption of the rule would not affect these exceptions, *see* Proposed Or. R. Evid. 503 commentary, it is unclear why they are not expressly stated.

In addition to these omissions, the rule qualifies the standard exception that disclosure of confidential communications to third persons destroys the privilege. Rule 503(a)(2) provides: "'Confidential communication' means a communication not intended to be disclosed to third persons *other than those to whom disclosure is in furtherance of the rendition of profesional legal services to the client* or those reasonably necessary for the transmission of the communication." Proposed Or. R. Evid. 503 (a)(2) (emphasis added). Arguably, under this qualification, when a lawyer sends a demand letter to a third person on behalf of a client, everything stated in the letter is privileged because the letter is sent "in furtherance of the rendition of professional legal services to the client." The legislature should redefine "confidential communication" to eliminate this overly broad exception.

162 *See, e.g.*, United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), *cert. granted*, 100 S.Ct. 1310 (1980); Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962). The "control group" test limits the corporate attorney-client privilege to those communications between counsel and the corporation's decisionmakers, usually the corporation's top management. The 1974 version of the Uniform Rules of Evidence adopts this test by defining "representative of the client" as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." UNIFORM RULE OF EVIDENCE 502(a)(2) (1974 version). A similar definition was adopted in the first two drafts of proposed Federal Rule 503. 2 WEINSTEIN, *supra* note 32, ¶ 503[01] (quoting these two drafts). Because of lack

only corporate employees within the attorney-client privilege are those belonging to the "control group" of the corporation.[163] Instead, the Committee extended the privilege to low-level corporate employees in certain circumstances. The privilege covers any corporate employee "who may be charged with liability for . . . acts . . . for which the . . . employer may be charged or whose duty . . . is to report to the client's lawyer concerning a matter of interest to the client."[164] Under the proposed rule, corporations might cause reports or other records written by low-level corporate employees to become privileged from discovery by channeling them to corporate legal counsel.

The legislature should limit the privilege by redefining "representative of the client"[165] to exclude low-level corporate employees.[166] It should also specify that the privilege does not attach unless the primary purpose of the communication is to obtain legal services for the corporation.[167] Furthermore, rule 503 should be modified to include some of the traditional common-law exceptions that were omitted.[168] Finally, the attorney-client privilege for experts retained by an attorney should

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of consensus, the definition was deleted and left to case law development. *Id.*

For two other leading views of the scope of the corporate attorney-client privilege, see Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970) (adopting a "subject matter" test), *aff'd per curiam by equally divided court*, 400 U.S. 348 (1971) (Justice Douglas not participating), and D. I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964) (establishing 11 guidelines for determining when the privilege applies). *See generally* Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339 (1972); Simon, *The Attorney-Client Privilege As Applied to Corporations*, 65 YALE L. J. 953 (1956); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970); Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360 (1970).

[163] Proposed Or. R. Evid. 503 commentary.

[164] Proposed Or. R. Evid. 503(a)(4).

[165] *Id.*

[166] *See, e.g.*, UNIFORM RULE OF EVIDENCE 502(a)(2) (1974 version); note 162 *supra*. The legislative interim subcommittee has voted to adopt the control group test as defined in the 1974 version of the uniform rule. *Joint Hearings, supra* note 150, (Apr. 8, 1980), tape 8, side 2, at 29.

[167] Under rule 503(b), a communication may be privileged even though the delivery of legal services to the corporation is only an incidental purpose of the communication.

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made *for the purpose of facilitating* the rendition of professional legal services to the client:
>
> (1) Between the client or the client's representative and the client's lawyer or a representative of the lawyer . . . .

Proposed Or. R. Evid. 503(b) (emphasis added).

[168] *See* note 161 and accompanying text *supra*.

be limited to experts who convey communications from the client.[169] Experts who merely provide opinions or advice or who assist in trial preparation are adequately protected by the qualified immunity available under the work-product doctrine.[170]

C. Psychotherapist-Patient Privilege

Under present law, the psychologist-patient privilege extends to criminal cases but the psychiatrist-patient privilege does not.[171] To eliminate the inconsistency, the drafters of proposed rule 504[172] chose

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[169] 2 D. LOUISELL & C. MUELLER, *supra* note 57, § 209, at 530–31. Rule 503(a)(5) provides: "'Representative of the lawyer' means one employed to assist the lawyer in the rendition of professional legal services, but does not include a physician making a physical or mental examination under ORS 44.610 to 44.640." Proposed Or. R. Evid. 503(a)(5). According to the commentary, "the definition includes an expert employed to assist in rendering legal advice. It also includes an expert employed to assist in the planning and conduct of litigation, though not one employed to testify as a witness." Proposed Or. R. Evid. 503 commentary.

[170] *See* 2 D. LOUISELL & C. MUELLER, *supra* note 57, § 209, at 530–31; 2 WEINSTEIN, *supra* note 32, ¶ 503(a)(3)[01]; 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2021 (1970).

[171] *Compare* ORS 44.040(1)(d) (1979) *with* ORS 44.040(1)(h) (1979).

[172] (a) As used in this section, unless the context requires otherwise:

(1) "Confidential communication" means a communication not intended to be disclosed to third persons other than those present to further the interest of the patient in the examination or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist or regular physician or surgeon.

(2) "Patient" means a person who is examined or interviewed by a psychotherapist or regular physician or surgeon.

(3) "Psychotherapist" means:

(A) A person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction; or

(B) A person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(4) "Regular physician or surgeon" means a person authorized and licensed or certified to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental, emotional or physical condition, including drug addiction.

(b) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications in a civil action, suit or proceeding, made for the purposes of diagnosis or treatment of the patient's mental, physical or emotional condition, including drug addiction, among the patient, the patient's psychotherapist, regular physician or surgeon or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist or regular

to limit the privilege of both types of psychotherapists to civil cases.[173] The preferable solution would be to extend the psychiatrist-patient privilege to criminal cases. There is a societal interest in encouraging open communication by patients to their psychotherapists. Of all professional groups, psychotherapists have one of the strongest justifications for a broad privilege. Few things could be more inhibiting to free communication by a patient than knowing that his psychotherapist could be subpoenaed to testify against him in a subsequent criminal case. Confidentiality is essential to a successful psychotherapeutic relationship, and the proposed rule should be amended to provide it.

D. Husband-Wife Privilege

Present law provides two privileges for married persons. The first, which applies only when one spouse is a criminal defendant, prohibits the other from being compelled or allowed to testify without the consent of both.[174] This privilege is sometimes called *spousal immunity*. The second privilege bars inquiry into confidential communications made between a husband and wife during their marriage.[175]

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physician or surgeon.

(c) The privilege created by this section may be claimed by the patient, by a guardian or conservator of the patient, or by the personal representative of a deceased patient. The person who was the psychotherapist or regular physician or surgeon may claim the privilege but only on behalf of the patient. Such person's authority so to do is presumed in the absence of evidence to the contrary.

(d) (1) There is no privilege under this section for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist or regular physician or surgeon in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) If the judge orders an examination of the mental, physical or emotional condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(e) Except as provided in ORS 44.640, there is no privilege under this section for communications made in the course of a physical or mental examination performed under ORS 44.610 to 44.640.

Proposed Or. R. Evid. 504.

[173] Proposed Or. R. Evid. 504 commentary.

[174] [I]n all criminal actions in which the husband is the party accused, the wife is a competent witness and when the wife is the party accused, the husband is a competent witness; but neither husband nor wife in such cases shall be compelled or allowed to testify in such cases unless by consent of both of them.

ORS 136.655 (1979).

[175] ORS 44.040(1)(a) (1979). Proposed rule 505 provides:

(a) As used in this section, unless the context requires otherwise:

The drafters wisely proposed to repeal the privilege of a criminal defendant to prevent his spouse from testifying.[176] The United States Supreme Court recently eliminated this privilege under federal law.[177] The privilege is too broad because, unlike other privileges, it prohibits not merely confidential communications, but all adverse testimony. Jeremy Bentham observed that it "secures . . . one safe and unquestionable and ever ready accomplice for every imaginable crime."[178] The primary justification for the privilege is to protect the marriage relationship,[179] but when one spouse is willing to testify against the other, this justification has little persuasive force.[180]

It was the apparent intent of the Advisory Committee to preserve the other aspect of spousal immunity, that is, the privilege not to be forced to testify against a spouse who is a criminal defendant.[181] This privilege should be preserved. A spouse's unwillingness to testify against the other may indicate a surviving marital relationship that should not be de-

(1) "Confidential communication" means a communication not intended to be disclosed by a spouse to any person other than the other spouse.

(2) "Marriage" means a legally recognized relationship under the laws of this state.

(b) In any civil or criminal action, a spouse has a privilege to refuse to disclose and to prevent the other spouse from disclosing any confidential communication made by one spouse to the other during the marriage.

(c) The privilege created by subsection (2) of this section may be claimed by either spouse as to communications. A spouse may testify to observations of the other spouse if the observing spouse consents to testify. The authority of the spouse to claim the privilege is presumed in the absence of evidence to the contrary.

(d) Neither husband nor wife shall be examined either during the marriage or afterward as to any other matter occurring during the marriage unless the spouse called as a witness consents to testify.

(e) There is no privilege under this section:

(1) In all criminal actions in which one spouse is charged with bigamy or with an offense or attempted offense against the person or property of the other spouse or of a child of either, or with an offense against the person or property of a third person committee[*sic*] in the course of committing or attempting to commit an offense against the other spouse; or

(2) As to matters occurring prior to the marriage.

Proposed Or. R. Evid. 505.

176 *See* ORS 136.655 (1979); Or. Advisory Committee on Evidence Law Revision, *supra* note 59, § 89.

177 Trammel v. United States, 100 S. Ct. 906 (1980).

178 5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 338 (1827).

179 MCCORMICK, *supra* note 49, § 85.

180 Trammel v. United States, 100 S. Ct. 906 (1980).

181 *See* Proposed Or. R. Evid. 505 commentary.

stroyed by the subpoena and contempt power of the state.[182]

Unfortunately, rule 505 contains apparent drafting errors resulting from the attempt to merge spousal immunity and the privilege for marital communications into one rule.[183] Under rule 505(c) and (d), the privilege not to testify against one's spouse would be extended to civil cases,[184] would cover not only communications by but also observations of one's spouse,[185] and would cover "any other matter" occurring during the marriage, even if it did not relate to the marriage.[186] Thus, the rule would give spouses in civil cases a new privilege not to testify about matters that do not involve any confidential communications.

It does not appear that the Advisory Committee intended such a drastic change from current Oregon law and the common law,[187] nor can such a sweeping privilege be justified. Rule 505 will thus require legislative amendment. To avoid confusion, the legislature should state the privilege for marital communications and the privilege not to testify against a spouse who is a criminal defendant in separate rules. It should also state whether communications include observations and define the scope of any observations included. Finally, it should address the question of sham marriages entered into for the purpose of suppressing testimony.

E. Privilege Against Disclosing an Informer's Identity

Rule 510 codifies the privilege of the state and its political subdivisions not to disclose the identity of an informer.[188] The privilege may not be

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[182] This privilege continues to exist under federal law and in twenty-four states. *See* Trammel v. United States, 100 S. Ct. 906, 911 & n.9 (1980). As the Supreme Court stated, "vesting the privilege in the witness spouse . . . furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs." *Id.* at 914.

[183] Rule 505(b) states the general rule of privilege for marital communications and does not encompass spousal immunity. *See* note 175 *supra*. The difficulty arises from the language in rule 505(c) and (d), which confuses the privilege for marital communications with spousal immunity. *See* notes 185 & 186 *infra*.

[184] Proposed Or. R. Evid. 505(c) and (d).

[185] "A spouse may testify to observations of the other spouse if the observing spouse consents to testify." Proposed Or. R. Evid. 505(c). Under this rule, the spouse of a party in an automobile injury case could refuse to testify about whether he saw the party apply the brakes immediately before the accident. Such testimony is not privileged under existing law. *See* ORS 44.040(1)(a) (1979).

[186] Proposed Or. R. Evid. 505(d). This rule would allow an opposing party's spouse in a civil case to refuse to testify about matters that do not involve any communications or confidentiality whatsoever. *See* note 175 *supra*.

[187] *See* Proposed Or. R. Evid. 505 commentary.

[188] (a) The state or a political subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or

invoked when (1) the informer's identity has already been disclosed or the informer testifies for the prosecution; (2) the informer "may be able to give testimony necessary to a fair determination of the issue of

its staff conducting an investigation.

(b) The privilege created by this section may be claimed by an appropriate representative of the state or political subdivision if the information was furnished to an officer thereof.

(c) No privilege exists under this section:

(1) If the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the state.

(2) If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the state or political subdivision is a party, and the state or political subdivision invokes the privilege, and the judge gives the state or political subdivision an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the state or political subdivision elects not to disclose identity of the informer, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. In civil cases, the judge may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the state or political subdivision. All counsel and parties shall be permitted to be present at every stage of proceedings under this paragraph except a showing in camera, at which no counsel or party shall be permitted to be present.

(3) If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible. The judge may require the identity of the informer to be disclosed. The judge shall, on request of the state or political subdivision, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this paragraph except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the state or political subdivision.

Proposed Or. R. Evid. 510.

guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the state or political subdivision is a party"; or (3) the prosecution relies on the informer to establish the legality of the methods used to obtain evidence and the judge is not satisfied that the informer is reliable or credible.[189] Rule 510 provides specific procedures, including in camera hearings, to determine whether these exceptions apply. If the court orders the state to name the informer and the state refuses, the judge in a criminal case may order the charges dismissed and, in a civil case, may make any order that justice requires.

Proposed rule 510 is virtually identical to Federal Rule 510, which is somewhat awkwardly drafted. The Alaska version[190] would be preferable. The legislature should also consider extending the privilege to sister states and the federal government, in light of the frequency of federal-state or interstate cooperation in criminal investigations. Otherwise, the cooperating agency might be compelled to name the informer, thus destroying the privilege.

F. Waiver

Rule 511 provides that a privilege is waived when the holder "voluntarily discloses or consents to disclosure of any significant part of the matter or communication," unless the disclosure itself is a privileged communication.[191] This rule may change existing law in one respect. Although current law is confused, some cases suggest that waiver occurs when the holder voluntarily testifies on the general subject covered by the privilege, even though no privileged matter is disclosed.[192] The first two sentences of the proposed rule, which are identical to Federal Rule 511, appear to narrow this common-law rule by providing that a privilege is not waived unless the holder "voluntarily discloses or consents to disclosure of any significant part of the matter or communication."

But the last sentence of the proposed rule, which the Advisory Com-

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189 Proposed Or. R. Evid. 510(c).

190 ALASKA R. EVID. 510.

191 A person upon whom sections 32 to 42 (Rules 503 to 514) of this Act confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication. Voluntary disclosure does not occur with the mere commencement of litigation but rather at the holder's offering of himself or herself as a witness.

Proposed Or. R. Evid. 511.

192 *See* Stark St. Properties, Inc. v. Teufel, 277 Or. 649, 658 n.12, 562 P.2d 531, 536 n.12 (1977); Bryant v. Dukehart, 106 Or. 359, 366, 210 P. 454, 456–57 (1922); McNamee v. First Nat'l Bank, 88 Or. 636, 640–41, 172 P. 801, 802 (1918).

mittee added to the text of Federal Rule 511, is confusing. It provides: "Voluntary disclosure does not occur with the mere commencement of litigation, but rather at the holder's offering of himself or herself as a witness."[193] This sentence suggests that waiver may occur when the holder voluntarily testifies, but does not disclose any "significant part" of the matter or communication. The legislature should either clarify the sentence or delete it.

Rule 512 addresses a problem for which there is no existing judicial or legislative authority in Oregon.[194] It excludes evidence of erroneously compelled and other involuntary disclosures. Thus, a privilege would not be waived by a disclosure made in compliance with an erroneous court order. Nor would it be waived by other disclosures made without opportunity to claim the privilege, such as a disclosure made by an eavesdropper who overhears a confidential communication or by a person used to transmit the communication.[195].

G. Comment on a Privilege During Trial

Rule 513 provides that (1) a claim of privilege is not a proper subject for comment by the judge or counsel; (2) jury trials should be conducted, to the extent practicable, to allow claims of privilege to be made outside the jury's hearing; and (3) a party is entitled to an instruction that no inference may be drawn from a claim of privilege.[196] Rule 513 would be a desirable addition to Oregon law. A party should not have to suffer adverse comment and possible prejudice as the price for asserting a privilege provided by law.

The legislature should consider an amendment, however, to allow

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193 Proposed Or. R. Evid. 511.

194 "Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) Compelled erroneously; or (b) Made without opportunity to claim the privilege." Proposed Or. R. Evid. 512.

195 Proposed Or. R. Evid. 512 commentary.

196 (a) The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn from a claim of privilege.

(b) In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

Proposed Or. R. Evid. 513. Under current law, a party may be required to assert a privilege in front of the jury. *See* State v. Hixson, 237 Or. 402, 391 P.2d 388 (1964); State v. Inman, 8 Or. App. 180, 492 P.2d 804 (1972). Comment on a criminal defendant's assertion of the privilege against self-incrimination, however, is constitutionally prohibited by Griffin v. California, 380 U.S. 609 (1965).

comment when a party asserts the fifth amendment privilege against self-incrimination in a civil case.[197] Because the fifth amendment protects only against criminal liability,[198] there is no constitutional bar to commenting on the assertion of a fifth amendment privilege in a civil trial.[199] Moreover, a civil litigant's assertion of the fifth amendment privilege may deprive the opposing party of information that is central to the determination of liability and inaccessible by any other means. In such cases, an exception to the proposed rule's general prohibition against comment on a claim of privilege may be necessary to prevent the opposing party from being unfairly disadvantaged.

VI

WITNESSES

Article VI governs competency of witnesses, oath requirements,[200] modes of impeachment, examination procedures, and exclusion of witnesses.

A. Competency

Rule 601 restates ORS 44.020:[201] unless otherwise provided, any

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197 Such an exception is contained in WIS. STAT. ANN. § 905.13 (West 1979).

198 *See, e.g.*, Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); MCCORMICK, *supra* note 49, § 121.

199 Baxter v. Palmigiano, 425 U.S. 308 (1976); Grognet v. Fox Valley Trucking Serv., 45 Wis. 2d 235, 172 N.W.2d 812 (1969).

200 Rule 603 requires the witness to testify under oath or affirmation. Unlike ORS 44.310 and .360 (1979), it does not exempt witnesses less than 10 years old from the requirement. Rule 604 departs from existing law by requiring interpreters to qualify as experts under rule 702, *see* text accompanying notes 282–84 *infra*, and extending the oath requirement to interpreters for handicapped witnesses. Existing law requires only interpreters for non-English-speaking witnesses to be sworn. *Compare* ORS 45.520 (1979) *with* ORS 44.095 (1979).

Rule 603–1 as proposed by the Advisory Committee suggests, but does not make mandatory, a new, shortened form of oath or affirmation. "The person who swears or affirms holds up a hand, while the person administering the oath or affirmation asks: 'Do you promise to tell the whole truth under penalty of perjury?' The person swearing or affirming must answer in an affirmative manner." Proposed Or. R. Evid. 603–1. *Compare id. with* ORS 44.330 (1979). The legislative interim subcommittee has voted to reject the shortened form in favor of a longer, more traditional form of oath or affirmation. *Joint Hearings, supra* note 150, (Oct. 19, 1979), tape 2, side 1, at 1630.

Under the Oregon Constitution, the precise form of oath required in a given situation depends on the beliefs of the oathtaker. "The mode of administering an oath, or affirmation shall be such as may be most consistent with, and binding upon the conscience of the person to whom such oath or affirmation may be administered." OR. CONST. art. I, § 7. Therefore, the legislature can only recommend, and cannot prescribe, one form of oath over another. *See* Andros v. Dep't of Motor Vehicles, 5 Or. App. 418, 429–30, 485 P.2d 635, 640–41 (1971).

201 (1979).

person "who, having organs of sense can perceive, and perceiving can make known the perceptions to others," may be a witness.[202] Similarly, rule 602 retains the requirement[203] that the witness have personal knowledge.[204] Article VI would make significant changes, however, in the rules of competency for judges, jurors, and lawyers.

1. Judges and Jurors

In contrast with present Oregon law,[205] rules 605 and 606(a) disqualify judges and jurors from testifying in cases in which they are sitting.[206] The proposed rules would effect a long overdue reform in Oregon law. The prejudice inherent in allowing judges or jurors to testify in cases in which they are sitting justifies an absolute prohibition.

Rule 606(b) provides that jury verdicts may not be impeached by juror testimony about statements made during deliberations, a juror's mental processes, or the effect of anything on a juror's emotions or decision.[207] A juror may testify only about whether any extraneous

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[202] A clearer definition of the criteria for competency would be Federal Rule 601 with additional language. The federal rule provides: "Every person is competent to be a witness except as otherwise provided in these rules." FED. R. EVID. 601. The suggested additional language is:

> A person is disqualified from being a witness if the court finds that (1) the witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand them or (2) the witness is incapable of understanding the duty of a witness to tell the truth.

This language has been adopted by several states. *See* CAL. EVID. CODE § 701 (West 1966); ALASKA R. EVID. 601; ME. R. EVID. 601(b); MONT. R. EVID. 601(b).

[203] *See* ORS 44.060 (1979).

[204] Except as provided in section 59 (rule 703) of this Act, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.

Proposed Or. R. Evid. 602.

[205] "The judge or any juror may be called as a witness by either party, but in the former case it is in the discretion of the court or judge to order the trial to be postponed or suspended and to take place before another judge." ORS 44.050 (1979).

[206] "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." Proposed Or. R. Evid. 605.

> A member of the jury may not testify as a witness before that jury in the trial of the case in which the member is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

Proposed Or. R. Evid. 606(a).

[207] Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the

prejudicial information or outside influence was improperly injected into the jury's deliberations. Thus, a juror who has received a threatening telephone call may testify about the call itself, but not about any effect the call had on the juror's decision.

Rule 606(b) departs from existing law[208] only in prohibiting juror testimony about "any matter or statement occurring during the course of the jury's deliberations."[209] The Advisory Committee concluded that this further limitation was necessary to protect the secrecy of the jury's deliberations.[210] Public disclosure of jury deliberations would undermine the finality of jury verdicts and the jury's need for privacy to engage in full and free debate.[211]

2. Lawyers

Rule 606–1 is not contained in the Federal Rules of Evidence or in most state codes.[212] Subject to certain exceptions, it prohibits a lawyer or a member of the lawyer's firm from testifying at a trial in which the lawyer represents one of the parties.[213] Although Disciplinary Rule 5–

> juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by a juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Proposed Or. R. Evid. 606(b).

[208] In State v. Gardner, 230 Or. 569, 575–76, 371 P.2d 558, 561 (1962), the Oregon Supreme Court approved Uniform Rule of Evidence 41, which provides:

> Upon an inquiry as to the validity of a verdict or an indictment no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined.

UNIFORM RULE OF EVIDENCE 41 (1953 version).

[209] *See* Proposed Or. R. Evid. 606 commentary.

[210] *See id.*

[211] *See id.*

[212] No state code has the precise language of proposed rule 606–1. Usually, states cover the problem of the lawyer as witness in their supreme court or disciplinary rules. *E.g.,* Mo. CT. R. 4–19; R.I. CT. R. 42–11. Pennsylvania has a statute that prohibits a lawyer from serving as a witness at a trial in which he represents one of the parties. 42 PA. CONS. STAT. ANN. rule 222 (Purdon 1975).

[213] An attorney representing a party litigant at trial shall not offer to be a witness or offer a member of the attorney's firm as a witness at that trial unless:

> (1) The testimony of the attorney or member will relate solely to an uncontested matter;
>
> (2) The testimony of the attorney or member will relate solely to a

101(B) of the Code of Professional Responsibility already subjects lawyers to this prohibition, it has been unclear whether courts have authority to enforce the disciplinary rule by preventing the attorney from testifying.[214] Rule 606–1 would give courts this authority.

B. Impeachment[215]

1. Impeaching One's Own Witness

Rule 607 allows a witness to be impeached by any party, including the party calling the witness.[216] Under ORS 45.590, a party may not impeach his own witness by evidence of bad character, but may impeach by prior inconsistent statements or contradictory evidence.[217] The existing statute is a vestige of the common-law requirement that parties must "vouch" for their witnesses.[218] This requirement is rejected by modern authorities, which recognize that parties rarely control which witnesses have relevant knowledge and must take their witnesses as they find them.[219]

In one significant respect, rule 607 as proposed by the Advisory Committee may narrow the right to impeach one's own witness. Before a party may impeach his witness by prior inconsistent statements, the testimony must be both injurious to the party's case and "contrary to

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matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) The testimony of the attorney or member will relate solely to the nature and value of legal services rendered in the case by the lawyer or the lawyer's firm to the client;

(4) As to any matter, refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or the lawyer's firm as counsel in the particular case; or

(5) The court finds that the interests of justice require the testimony.

Proposed Or. R. Evid. 606–1.

214 *See* 3 WEINSTEIN, *supra* note 32, ¶ 601[04].

215 There is no rule in article VI that lists all the permissible grounds for impeachment. Such a rule, with cross-references to the rules regulating the various modes of impeachment, would be a desirable addition to article VI. *See, e.g.*, CAL. EVID. CODE § 780 (West 1966); FLA. STAT. ANN. § 90.608 (West Supp. 1979).

216 The credibility of a witness may be impeached by any party, including the party calling the witness, except in order to impeach the credibility of a party's own witness with a prior inconsistent statement, the testimony of the witness at trial must be contrary to that which the calling party anticipates and must be actually injurious to the calling party's case.

Proposed Or. R. Evid. 607.

217 ORS 45.590 (1979).

218 *See* 3A J. WIGMORE, *supra* note 4, § 898 (Chadbourn rev. 1970).

219 *See, e.g.*, FED. R. EVID. 607; CAL. EVID. CODE § 785 (West 1966); UNIFORM RULE OF EVIDENCE 20 (1953 version).

that which the . . . party anticipates."[220] While existing case law requires the testimony to be injurious,[221] there is no clear requirement of surprise.[222]

The rationale for requiring surprise is to prevent a party from subverting the hearsay rule by calling a witness solely for the purpose of introducing a prior inconsistent statement.[223] This concern, however, does not justify an absolute prohibition against unsurprised litigants impeaching their witnesses by inconsistent statements.[224] At the very least, the rule should recognize an exception for impeachment by prior inconsistent statements on redirect examination after unfavorable testimony has been elicited during cross-examination.

A surprise requirement invites disputes over whether a party was truly surprised by a change in the witness's testimony.[225] Adequate protection against the use of prior inconsistent statements merely to parade hearsay before the jury is provided by rule 403, which gives the trial judge discretion to exclude evidence that is unfairly prejudicial or misleading.[226] Neither the federal rules, the model code, nor the

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[220] Proposed Or. R. Evid. 607.

[221] *E.g.*, Rhodes v. Harwood, 273 Or. 903, 544 P.2d 147 (1975) (testimony not prejudicial; impeachment by inconsistent statement not allowed); State v. Bruce, 31 Or. App. 1189, 572 P.2d 351 (1977) (testimony prejudicial; allowed).

[222] ORS 45.590 (1979) contains no surprise requirement. Although some state courts have engrafted a surprise requirement on similar statutes, *see, e.g.*, Missouri Pac. R. R. v. Sullivan, 197 Ark. 360, 122 S.W. 2d 947 (1938) (surprise; impeachment by inconsistent statement allowed); Foremost Dairies, Inc. v. Cutler, 212 So. 2d 37 (Fla. App. 1968) (no surprise; not allowed), Oregon courts have not clearly interpreted ORS 45.590 to require surprise. *See* State v. Gardner, 2 Or. App. 265, 467 P.2d 125 (1970), *cert. denied*, 406 U.S. 972 (1972) (surprise not required). *But cf.* Rhodes v. Harwood, 273 Or. 903, 544 P.2d 147 (1975) (refusing to decide whether surprise is required but stating that when calling party is not surprised, there is all the more reason to require that testimony be prejudicial); State v. Cain, 230 Or. 286, 369 P.2d 769 (1962) (impeachment by inconsistent statement allowed because prosecutor was surprised). In cases of surprise, Oregon allows limited use of leading questions to refresh the witness's memory of the prior inconsistent statement. *See* Mace v. Timberman, 120 Or. 144, 153, 251 P. 763, 766 (1926).

[223] *See* Proposed Or. R. Evid. 607 commentary; McCormick, *supra* note 49, § 38.

[224] *See generally* McCormick, *supra* note 49, § 38; S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 300–01 (2d ed. 1977 & Supp. 1979).

[225] For an example of the difficulties raised by the surprise requirement, see State v. Green, 71 Wash. 2d 372, 428 P.2d 540 (1967).

[226] 3 Weinstein, *supra* note 32, ¶ 607[01]. *But see* Graham, *The Relationship Among Federal Rules of Evidence 607, 801(d)(1)(A) and 403: A Reply to Weinstein's Evidence*, 55 Tex. L. Rev. 573 (1977); Peeples, *Prior Inconsistent Statements in the Rule Against Impeachment of One's Own Witness: The Proposed Federal Rules*, 52 Tex. L. Rev. 1383 (1974). These commentators argue that Federal Rule 607 should be interpreted or amended to include a surprise requirement.

uniform rules contain a surprise requirement.[227] It should be deleted from the proposed Oregon rule.[228]

2. Grounds for Impeachment[229]

(a) Character for Truthfulness

Rule 608(a)[230] allows a witness to be impeached by character evidence showing lack of veracity.[231] The rule would change existing law to allow the witness's credibility to be attacked not only by reputation evidence, but by opinion evidence as well.[232] Rule 608(b)[233] improves

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[227] FED. R. EVID. 607; MODEL CODE OF EVIDENCE rule 106 (1942); UNIFORM RULE OF EVIDENCE 607 (1974 version).

[228] The legislative interim subcommittee has voted to delete this requirement. *Joint Hearings, supra* note 150, (Oct. 20, 1979), tape 2, side 2, at 0720.

[229] Federal Rule 610, which generally prohibits impeachment on the basis of religious belief, was omitted by the Advisory Committee because the Oregon Constitution already contains a similar prohibition: "No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religeon [*sic*]; nor be questioned in any Court of Justice touching his religeous [*sic*] belief to affect the weight of his testimony." OR. CONST. art. I, § 6; *see* Or. Advisory Committee on Evidence Law Revision, *supra* note 59, commentary to deleted materials, at 251.

It would serve the purposes of codification, however, if this restriction were stated in article VI. The legislative interim subcommittee has voted to add Federal Rule 610. *Joint Hearings, supra* note 150, (Oct. 20, 1979), tape 2, side 2, at 1380. The federal rule provides: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced." FED. R. EVID. 610.

[230] The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but:

(1) The evidence may refer only to character for truthfulness or untruthfulness; and

(2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Proposed Or. R. Evid. 608(a).

[231] Existing law is in accord. Lucas v. Kaylor, 136 Or. 541, 299 P. 297 (1931); ORS 45.600 (1979).

[232] *See* note 230 *supra*. Oregon follows the traditional common-law rule that prohibits impeachment by opinion evidence. *See* State v. Bailey, 90 Or. 627, 640, 178 P. 201, 205 (1919); MCCORMICK, *supra* note 49, § 44. Impeachment by reputation evidence is expressly authorized by ORS 45.600 (1979). The proposed rule, however, recognizes that witnesses are often unable to distinguish between perceived reputation and personal opinion and that the jury is likely to be able to give appropriate weight to opinion evidence. *See* note 107 and accompanying text *supra*.

[233] Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in section 53 (Rule 609) of this Act, may not be proved by extrinsic evidence. Further, such specific instances of conduct may not, even if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness. However, if a witness testifies

upon Federal Rule 608(b)[234] by continuing the current Oregon prohibition[235] against impeaching a witness by prior wrongful conduct that did not result in a criminal conviction, even if the acts relate to the witness's truthfulness.[236] This rule prevents a freewheeling and possibly prejudicial inquiry into accusations against a witness that have never been proven and that may not even involve violations of law.

Probably the most significant reform in article VI is the limitation in rule 609 on impeaching a witness by evidence of a prior crime. Under existing law, a witness may be impeached by evidence of any criminal conviction, no matter how unrelated to veracity, remote in time, or prejudicial.[237] Rule 609, as proposed by the Advisory Committee, limits impeachment to convictions for felonies or for misdemeanors involving false statement.[238] Going a step further, the legislative interim sub-

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> as a character witness on the issue of credibility, the witness may be asked on cross-examination if the witness hasn't heard or doesn't know of specific instances of bad conduct relevant to the character trait of credibility.

Proposed Or. R. Evid. 608(b).

[234] Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness, or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified....

FED. R. EVID. 608(b).

[235] A witness "may not be impeached by evidence of particular wrongful acts, except that it may be shown ... that he has been convicted of a crime." ORS 45.600 (1979).

[236] *See* note 233 *supra*. However, the last sentence of proposed rule 608(b) allows a character witness, on cross-examination about the credibility of another witness, to be asked about prior wrongful conduct "relevant to the character trait of credibility" of the other witness. Because "credibility" can be broadly construed, this language may undercut the drafters' intent to prevent witnesses from being impeached by character evidence that does not bear on truthfulness. *See* Proposed Or. R. Evid. 608 commentary. Under the federal rule, *see* note 234 *supra*, a character witness can be asked about specific instances of another witness's conduct only if they relate to truthfulness. FED. R. EVID. 608(b). The last sentence of proposed rule 608(b) could easily be amended to replace "credibility" with "truthfulness."

[237] ORS 45.600 (1979); Marshall v. Martinson, 268 Or. 46, 48–51, 518 P.2d 1312, 1313–15 (1974) (trial court lacks discretion to exclude evidence of criminal conviction, regardless of possible prejudice; impeachment by drunk driving conviction allowed); Oregon v. Mack, 37 Or. App. 487, 587 P.2d 516 (1978) (remoteness of prior sodomy conviction does not render it inadmissible). Before 1975, a witness could even be impeached by conviction of a traffic infraction. This is now precluded by ORS 484.400 (1979).

[238] Proposed Or. R. Evid. 609(a). The rule does not allow impeachment by

committee has voted to amend the rule to allow impeachment only when the crime, even if a felony, involved "dishonesty or false statement."[239] This amendment confines impeachment by prior conviction to the only purpose for which it is properly allowed, namely, to cast doubt on the truthfulness of a witness.[240]

Proposed rule 609 incorporates a drafting error from Federal Rule 609. It provides that evidence of a criminal conviction may be used to impeach a witness only "during cross-examination." This is inconsistent with rule 607, which allows parties to impeach their own witnesses

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criminal convictions more than 10 years old, Proposed Or. R. Evid. 609(b), or convictions in a justice's or municipal court. Proposed Or. R. Evid. 609(a). Nor does it allow impeachment for juvenile offenses. Proposed Or. R. Evid. 609(e). Finally, it adds a provision, not contained in Federal Rule 609, that would allow the witness "to briefly explain the circumstances of the crime or former conviction." Proposed Or. R. Evid. 609(c).

[239] *Joint Hearings, supra* note 150, (Oct. 20, 1979), tape 2, side 2, at 1300. Several states have limited impeachment to crimes involving dishonesty or false statement. *See, e.g.,* FLA. STAT. ANN. § 90.610 (West Supp. 1979); ALASKA R. EVID. 609; *cf.* West Virginia v. McAboy, 236 S.E. 2d 431 (W. Va. 1977) (limiting impeachment of criminal defendant to convictions of perjury or forgery).

Because of the disproportionate emphasis the jury is likely to place on a criminal conviction, some commentators argue strongly against allowing any conviction to be used for impeachment. *See, e.g.,* Spector, *Rule 609: A Last Plea for Its Withdrawal,* 32 OKLA. L. REV. 334 (1979). Montana rejects the use of any conviction for impeachment purposes. MONT. R. EVID. 609.

When the witness is a criminal defendant, the danger that a prior conviction will prejudice the jury is particularly great. Many observers argue that jurors are either unable or unwilling to follow instructions limiting the use of a prior criminal record to whatever bearing it has on the defendant's veracity as a witness. In one survey, 98% of the lawyers questioned believed that it was impossible for the limiting instruction to be effective. Note, *To Take the Stand or Not To Take the Stand: The Dilemma of the Defendant with a Criminal Record,* 4 COLUM. J. L. & SOC. PROB. 215, 218 (1968). *See also* Note, *The Limiting Instruction—Its Effectiveness and Effect,* 51 MINN. L. REV. 264 (1966).

[240] Still another approach was suggested by Justice Tongue in Smith v. Durant, 271 Or. 643, 534 P.2d 955 (1975):

> Another alternative would be the adoption of a rule to the effect that upon the impeachment of a witness for the prior conviction of a crime (however that term may be defined or limited) the nature of the crime could not be revealed to the jury by the party impeaching the witness unless the witness denies having been previously convicted of a crime. Thus, except in the event of such a denial, the impeachment would be limited to the more neutral fact of the commission of "a crime." This would minimize the danger of prejudice from the fact that the previous crime involved conduct of the same nature as that for which the party is charged in the subsequent trial and would leave it to the party calling the witness to decide whether, on re-examination, to reveal the nature of that crime in the course of explaining any mitigating circumstances relating to the prior conviction.

Id. at 662 n.10, 534 P.2d at 964 n.10.

during direct examination, and with rule 806, which allows a hearsay declarant to be impeached, even though the declarant does not testify. Deleting the words "during cross-examination" from rule 609 would remove the inconsistency.

The legislature should also decide whether rule 609 allows a witness to be impeached after a guilty verdict is returned but before sentence is imposed. Technically, there is no conviction until sentencing. Although Federal Rule 609 has generally been construed to allow impeachment before sentencing,[241] the issue has created interpretative problems for the federal courts.[242] Oregon could avoid these problems with a minor amendment making explicit the right to impeach by prior criminal conviction at any time after a guilty verdict is returned.[243]

(b) Bias or Interest

The drafters of the Oregon code added rule 609–1,[244] which is not included in the Federal Rules of Evidence. It allows a witness to be impeached by evidence of bias or interest. Before the conduct or statements indicating bias or interest can be shown by extrinsic evidence, however, the witness must be asked about them and must be shown any written statements. If the witness denies or does not fully admit the conduct or statements, then the opponent may prove them by extrinsic evidence.

The drafters intended this rule to be construed to overrule *State*

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241 *See, e.g.,* United States v. Klein, 560 F.2d 1236 (5th Cir. 1977); United States v. Rose, 526 F.2d 745 (8th Cir. 1975), *cert. denied,* 425 U.S. 905 (1976).

242 *See* 3 WEINSTEIN, *supra* note 32, ¶ 609[01]. *See generally* Annot., 14 A.L.R.3d 1272 (1967).

243 This amendment would overrule State v. Bouthillier, 4 Or. App. 145, 476 P.2d 209 (1970) (not allowing impeachment by guilty verdict before it is entered as judgment).

244 (a) The credibility of a witness may be attacked by evidence that the witness engaged in conduct or made statements showing bias or interest. However, before this can be done, the statements must be related to the witness and the conduct described, with the circumstances of times, places and persons present, and the witness shall be asked whether the witness made the statements or engaged in such conduct, and, if so, allowed to explain. If the statements are in writing, they shall be shown to the witness.

(b) If a witness fully admits the facts claimed to show the bias or interest of the witness, additional evidence of that bias or interest shall not be admitted. If the witness denies or does not fully admit the facts claimed to show bias or interest, the party attacking credibility of the witness may then offer evidence to prove those facts.

(c) Evidence to support or rehabilitate a witness whose credibility has been attacked by evidence of bias or interest shall be limited to evidence showing a lack of bias or interest.

Proposed Or. R. Evid. 609–1.

Highway Commission v. Superbilt Manufacturing Co.[245] In *Superbilt,* the Oregon Supreme Court held that an expert witness may not be questioned about the amount of fees the calling party paid him for testifying at unrelated trials.[246] Although the court stated that this inquiry strayed into "purely collateral matters,"[247] prior fees clearly are relevant to show a witness's financial interest.[248] A regularly retained expert may have both a bias based on loyalty and an interest in ensuring future employment.

(c) Prior Inconsistent Statements

The Advisory Committee refused to adopt Federal Rule 613, which would greatly relax the foundation requirements for impeaching a witness by prior inconsistent statements. Instead, it retained ORS 45.610.[249] ORS 45.610 contains two distinct foundation requirements: (1) before a witness may be questioned about a prior written statement, the questioner must show it to him; and (2) before a prior inconsistent statement, whether written or oral, may be proved by extrinsic evidence, the questioner must relate it to the witness; state the time, place, and persons present; and give the witness an opportunity to admit, deny, or explain the statement.

The first requirement is cumbersome, time-consuming, and an impediment to effective cross-examination.[250] Allowing the witness to read the

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[245] 204 Or. 393, 281 P.2d 707 (1955); *see* Proposed Or. R. Evid. 609-1 commentary. The rule is intended to codify existing case law, except for *Superbilt. Id. See, e.g.,* State v. Dowell, 274 Or. 547, 547 P.2d 619 (1976) (requiring foundation to be laid before witness is impeached by prior statement showing bias); State v. Estlick, 269 Or. 75, 523 P.2d 1029 (1974) (allowing impeachment of own witness for bias or interest); State v. Guerrero, 11 Or. App. 284, 501 P.2d 988 (1977) (allowing evidence of bias even though it revealed that witness and defendant had been in penitentiary together).

[246] The Highway Commission's expert had admitted over objection that the Commission had paid him for appraisals and testimony in other condemnation cases. *Id.* at 405, 281 P.2d at 712–13.

[247] *Id.* at 406, 281 P.2d at 713.

[248] City of Chicago v. Van Schaak Bros. Chem. Works, 330 Ill. 264, 273, 161 N.E. 486, 490 (1928); Graham, *Impeaching the Professional Expert Witness by a Showing of Financial Interest,* 53 IND. L. J. 35, 46, 50–52 (1977).

[249] A witness may be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places and persons present, and he shall be asked whether he made the statements, and if so, allowed to explain them. If the statements be in writing, they shall be shown to the witness before any question is put to him concerning them.

ORS 45.610 (1979).

[250] This requirement is derived from the rule in Queen Caroline's Case, 2 Brod. & B. 284, 129 Eng. Rep. 976 (C.P. 1820). Wigmore states that "for unsoundness of principle, impropriety of policy, and practical inconvenience in trials," the Queen

statement before he is asked about it gives him the opportunity to fabricate an explanation. The legislature should adopt Federal Rule 613-(a),[251] which abolishes this unnecessary requirement.

The second foundation requirement in ORS 45.610 has greater merit. Fairness requires that the witness have the opportunity to admit, explain or deny a prior inconsistent statement before it is proved by extrinsic evidence.[252] Moreover, if the witness is willing to admit to making the statement, court time should not be wasted with extrinsic evidence.[253] The drafters wisely rejected Federal Rule 613(b), which allows the witness's opportunity to explain or deny to come *after* extrinsic evidence of the statement.[254] This sequence may waste time and could mislead the jury.

Federal Rule 613(b) is superior to the Oregon statute in one respect, however: it gives the trial judge the discretion to dispense with the foundation requirement when the "interests of justice . . . require."[255] This provision allows for contingencies such as the making or discovery of the prior inconsistent statement after the witness has testified, the

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Caroline's Case decision "committed the most notable mistake that can be found among the rulings upon the present subject." 4 J. WIGMORE, *supra* note 4, § 1259 (McNaughton rev. 1961); *see* MCCORMICK, *supra* note 49, § 28; Ladd, *Some Observations on Credibility: Impeachment of Witnesses,* 52 CORNELL L. Q. 239 (1967).

The rule has continued to survive perhaps only because it is "more honored in the breach than in the observance." United States v. Dilliard, 101 F.2d 829, 837 (2d Cir. 1938) (Learned Hand, J.), *cert. denied,* 306 U.S. 635 (1939). Dean McCormick states: "It is believed . . . that its actual invocation in trials is relatively infrequent in most states, and that the generality of judges and practitioners are unaware of this possible hidden rock in the path of the cross-examiner." MCCORMICK, *supra* note 49, § 28. One recent federal case reversed the trial court in part because of the interference with cross-examination caused by strict compliance with the rule. Wright Root Beer Co. v. Dr. Pepper Co., 414 F.2d 887 (5th Cir. 1969).

[251] "In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel." FED. R. EVID. 613(a). The requirement for disclosure to opposing counsel is intended to prevent unfounded insinuations that the witness made a prior inconsistent statement. FED R. EVID. 613 (Advisory Committee Note).

[252] *See* MCCORMICK, *supra* note 49, § 37.

[253] *See id.*

[254] Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interest of justice otherwise require. This provision does not apply to admissions or a party-opponent as defined in rule 801(d)(2).

FED. R. EVID. 613(b).

[255] *Id.*

impossibility or impracticality of recalling the witness to lay the necessary foundation, and other circumstances that would make the foundation requirement unfair.[256] An approach that combines the best features of the Oregon statute and the federal rule is Alaska rule 613.[257] While requiring the foundation to be laid *before* extrinsic evidence is admitted, the Alaska rule adds flexibility to cover situations in which fairness justifies dispensing with the foundation requirement.[258] The legislature should replace ORS 45.610 with the Alaska rule.

C. Examination of Witnesses

1. Refreshing Recollection

Rule 612,[259] which is identical to Federal Rule 612, would make two significant changes in existing law. First, it would give trial courts the

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256 *See* McCORMICK, *supra* note 49, § 37.

257 (a) Prior statements of a witness inconsistent with his testimony at a trial, hearing or deposition, and evidence of bias or interest on the part of a witness are admissible for the purpose of impeaching the credibility of a witness.

(b) Before extrinsic evidence of a prior contradictory statement or of bias or interest may be admitted, the examiner shall lay a foundation for impeachment by affording the witness the opportunity, while testifying, to explain or deny any prior statement, or to admit, deny, or explain any bias or interest, except as provided in subdivision (b) (1) of this rule.

(1) The court shall permit witnesses to be recalled for the purpose of laying a foundation for impeachment if satisfied that failure to lay a foundation earlier was not intentional, or if intentional, was for good cause; even if no foundation is laid, an inconsistent statement may be admitted in the interests of justice.

(2) In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

ALASKA R. EVID. 613.

258 Adoption of the Alaska rule would also consolidate the foundation requirements for impeachment by bias and prior inconsistent statements into one rule, eliminating the need for proposed rule 609–1.

259 If a witness uses a writing to refresh memory for the purpose of testifying, either while testifying, or before testifying, if the court in its discretion determines it is necessary in the interest of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under

discretion to order a party to produce writings used to refresh a witness's memory *before* testifying. The current statute provides only for production of writings used to refresh memory *while* testifying.[260] Because writings reviewed immediately before taking the stand can influence a witness as much as those used on the stand, it is appropriate to allow the judge to order the writings to be produced for opposing counsel to use in cross-examination.[261] This procedure provides a check on the improper coaching of witnesses and on testimony that is derived entirely from the writings rather than from the witness's independent recollection.

The second change intended by rule 612 is to remove present restrictions on the kinds of writings that may be used to refresh memory.[262] The current statute authorizes a writing to be used to refresh recollection only if it meets the requirements for the past recollection recorded exception to the hearsay rule; it must have been written by the witness or at his direction, at or near the time of the event, when the facts were still fresh in the witness's memory.[263] This restriction has been largely ignored by Oregon courts, which have followed the position of Dean Wigmore[264] that any writing, regardless of authorship or date of preparation, may be used to jog a witness's memory.[265] Unlike writings used as records of past recollection, writings used to refresh memory are not evidence, but merely aids to the giving of evidence;[266] the jury does not see them. Consequently, there is no reason to require them to meet the same standards of reliability imposed on records of past recollection.

Although the drafters clearly intended that *any* writing should be allowed to refresh recollection,[267] no such provision is stated in the

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this section, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Proposed Or. R. Evid. 612.

[260] ORS 45.580 (1979).

[261] *See* McCORMICK, *supra* note 49, § 9.

[262] *See* Proposed Or. R. Evid. 612 commentary.

[263] ORS 45.580 (1979).

[264] 3 J. WIGMORE, *supra* note 4, §§ 758–761 (Chadbourn rev. 1970).

[265] *See, e.g.*, Waterway Terminals Co. v. P.S. Lord Mechanical Contractors, 242 Or. 1, 55–61, 406 P.2d 556, 580–83 (1965) (authorship) (citing 3 J. WIGMORE, *supra* note 4, § 759 (3d ed. 1940)); State v. Crater, 230 Or. 513, 370 P.2d 700 (1962) (date); Banks v. Community Church, 178 Or. 1, 7, 165 P.2d 65, 67 (1946) (authorship); State v. Moran, 15 Or. 262, 14 P. 419 (1887) (date); State v. Liston, 18 Or. App. 26, 523 P.2d 609 (1974) (uncertified transcript of tape recording allowed to refresh memory).

[266] *See, e.g.*, Rigelman v. Gilligan, 265 Or. 109, 506 P.2d 710 (1973); State v. Sutton, 253 Or. 24, 450 P.2d 748 (1969); Hall v. Brown, 102 Or. 389, 202 P. 719 (1921); McCORMICK, *supra* note 49, § 9.

[267] Proposed Or. R. Evid. 612 commentary.

rule.[268] Nor does the rule authorize refreshing memory by a tangible object other than a writing.[269] It should be amended to provide that any writing, photograph, recording, or object may be used to refresh a witness's recollection.[270]

2. The Court's Right to Call and Examine Witnesses

Federal Rule 614,[271] which authorizes the court to call and question witnesses, was omitted by the Advisory Committee out of reluctance to expand the court's role in the examination of witnesses. The Advisory Committee states, however, that it did not intend to deny or limit the inherent power of trial courts to call and interrogate witnesses.[272] Because such inherent power does exist,[273] it would be desirable to specify procedures for its exercise. The legislative interim subcommittee has voted to include Federal Rule 614 in the proposed code.[274]

D. Exclusion of Witnesses

Federal Rule 615 was rejected in favor of an amended version of ORS 45.510,[275] which would give trial judges discretion to deny a party's request to exclude witnesses.[276] Federal Rule 615[277] is superior

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[268] *See* note 259 *supra.*

[269] *See id. See generally* 3 J. WIGMORE, *supra* note 4, § 758 (Chadbourn rev. 1970).

[270] *See, e.g.,* ALASKA R. EVID. 612. The legislature should also consider substituting Uniform Rule of Evidence 612 for Federal Rule of Evidence 612. The uniform rule addresses certain issues that the federal rule does not cover. For example, it provides for refreshing recollection by an object other than a writing. It also qualifies the production requirement when it is not practicable to produce a writing or object that the witness reviewed before testifying. Finally, it provides for inspection out of court of a writing or object that cannot be brought into court.

[271] (a) The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

FED. R. EVID. 614.

[272] Or. Advisory Committee on Evidence Law Revision, *supra* note 59, commentary to deleted materials, at 252.

[273] *See, e.g.,* Frangos v. Edmunds, 179 Or. 577, 173 P.2d 596 (1946) (power to examine any witness); State v. Beaver Portland Cement Co., 169 Or. 1, 124 P.2d 524 (1942) (power to call expert witness); *cf.* State v. Spicer, 3 Or. App. 120, 473 P.2d 147 (1970) (power to require production of evidence not requested by either party).

[274] *Joint Hearings, supra* note 150, (Oct. 19, 1979), tape 2, side 1, at 1104.

[275] (1979).

[276] Unlike ORS 45.510 (1979), proposed rule 615 makes a distinction between criminal and civil cases.

(1) In a civil action, suit or proceeding, if either party requests

to the proposed rule because it not only makes exclusion mandatory upon request, but also clearly specifies which individuals must be exempt from any exclusion order. The proposed rule does neither. By providing more specific guidelines for trial courts, Federal Rule 615 would promote consistency in the granting of exclusion orders. The legislative interim subcommittee has voted to include the federal rule in the proposed code.[278]

VII

Opinions and Expert Testimony

A. Lay Witnesses

Article VII governs both expert testimony and opinion testimony by lay witnesses. Under rule 701, a lay witness may give his opinion if it is (1) rationally based on his perception and (2) "helpful" in understanding his testimony or in determining a relevant fact.[279] Unlike some old Oregon decisions that take a restrictive view towards admitting opinions by lay witnesses,[280] the proposed rule recognizes that lay opinions often have significant evidentiary value, and they cannot always be avoided without repeatedly interrupting the witness.[281]

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the exclusion of a witness, the court may exclude from the courtroom any witness of the adverse party not at the time under examination, so that the witness may not hear the testimony of other witnesses.

(2) In a criminal action or proceeding, if either party moves to exclude a witness from the courtroom and the other party does not object, the court shall exclude the witness. If the motion to exclude a witness is opposed, the court, in its discretion and upon good cause shown for not excluding the witness, may deny the motion.

Proposed Or. R. Evid. 615.

[277] At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Fed. R. Evid. 615.

[278] *Joint Hearings, supra* note 150, (Jan. 18, 1980), tape 3, side 2, at 0892.

[279] Proposed Or. R. Evid. 701.

[280] *See, e.g.,* Everart v. Fischer, 75 Or. 316, 147 P. 189 (1915), stating that before a lay opinion would be allowed, "the matter about which the opinion is given must be *incapable* of accurate reproduction or description before the jury." *Id.* at 326, 147 P. at 190 (emphasis added). *But see* note 281 *infra. See generally* Butler, *How the Adoption of the Uniform Rules of Evidence Would Affect the Law of Evidence in Oregon: Rules 56–61,* 42 Or. L. Rev. 181, 181–84 (1963).

[281] The general rule, of course, is that a lay witness may testify only to facts and not to opinions or conclusions. But lay witnesses are frequently permitted to use so-called "short hand" descriptions, in reality

B. Experts

Article VII also adopts the "helpfulness" standard for expert testimony, whether expressed in opinion or nonopinion form.[282] Rule 702 allows a qualified expert to testify when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Although the commentary states that this rule would not change existing law,[283] it is more liberal than some Oregon cases, which require the jury to be "incapable" of drawing correct conclusions without an expert's assistance.[284]

1. Admissibility of Expert Opinions Based on Facts Not in Evidence

Rule 703 allows experts to base their opinions on facts not in evidence, provided they are facts that would be "reasonably relied upon by experts

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> opinions, in presenting to the court their impression of the general physical condition of a person . . . . This seems to us to be a common sense view of the matter. It leaves the witness free to speak his ordinary language, unbewildered by admonitions from the judge to testify to facts, when all the while the witness is sure in his own mind that he *is* testifying to facts. The jury understands what the witness means, and the right of cross-examination removes the likelihood of harm to the other side.

State v. Garver, 190 Or. 291, 315–16, 225 P.2d 771, 782 (1950) (emphasis in original).

[282] Consistent with the general approach of article VII to admit opinions when helpful to the jury, proposed rule 704 provides that neither a lay nor an expert opinion is objectionable merely "because it embraces an ultimate issue." Proposed Or. R. Evid. 704. Under existing case law, experts may give opinions on ultimate issues, provided the opinions are relevant and helpful. *See, e.g.*, Ritter v. Beals, 225 Or. 504, 525, 358 P.2d 1080, 1089 (1961). Rule 704 merely extends this rule to lay witnesses.

The helpfulness and relevancy standards in proposed rules 701, 702, and 403, *see* text accompanying note 91 *supra,* would exclude opinions on ultimate issues when the opinions merely tell the jury what result to reach or are framed in terms of inadequately defined legal criteria. *See* FED. R. EVID. 704 (Advisory Committee Note).

> Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

Id. (citing MCCORMICK, *supra* note 49, § 12).

[283] Proposed Or. R. Evid. 702 commentary.

[284] *See, e.g.*, Fisher v. Oregon Short Line Ry., 22 Or. 533, 30 P. 425 (1892).

> When the nature of a question is such that a man of ordinary intelligence and experience is *incapable* of drawing correct conclusions from the facts in evidence without the assistance of some one who has special skill or knowledge on the subject, the opinion of an expert is desirable and competent evidence.

Id. at 538, 30 P. at 428 (emphasis added).

in the particular field in forming opinions."[285] The traditional common-law rule that the facts supporting an expert's opinion must be in evidence before the opinion may be expressed[286] has never been strictly followed in Oregon. For example, the Oregon Supreme Court has held that a real estate appraiser may base an opinion on hearsay reports of sales of comparable property.[287] Similarly, a medical expert may base an opinion on medical charts and records made by others.[288] Moreover, any attempt to exclude expert opinions not based solely on facts in evidence would be futile. An expert opinion is necessarily based partly on earlier experience, training, or education, none of which are usually in evidence. Like Federal Rule 703, the proposed Oregon rule is based on the view that if facts, such as the laboratory test reports on which doctors base treatment decisions, are reliable enough for experts to use in their own field, they are reliable enough for use in court.[289] Its enactment would reduce the number of witnesses and the time expended in laying foundations for expert opinions.

This rule should not be viewed as allowing parties to bring inadmissible hearsay before the jury under the guise of facts relied on by experts.[290] Rule 703 merely allows experts to rely on certain facts not in evidence; it does not require that these facts be disclosed to the jury.[291] Even if these underlying facts are disclosed to the jury, they are not hearsay because they are not offered for their truth, but only to support and explain the expert's opinion. Rule 703 might be better understood if it expressly stated that it does not authorize substantive use of other-

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[285] The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Proposed Or. R. Evid. 703.

[286] *See* Natwick v. Moyer, 177 Or. 486, 493, 163 P.2d 936, 939 (1945); McCORMICK, *supra* note 6, § 15.

[287] State Highway Comm'n v. Arnold, 218 Or. 43, 71, 341 P.2d 1089, 1102, *modified*, 218 Or. 81, 343 P.2d 1113 (1959).

[288] Lewis v. Baker, 243 Or. 317, 326, 413 P.2d 400, 405 (1966); *cf.* State v. Norton, 7 Or. App. 122, 490 P.2d 194 (1971) (psychiatrist may base opinion partly on report of psychologist who has not testified).

[289] *See* FED. R. EVID. 703 (Advisory Committee Note), *adopted by* Proposed Or. R. Evid. 703 commentary.

[290] *See generally* S. SALTZBURG & K. REDDEN, *supra* note 224, at 426–27; 3 WEINSTEIN, *supra* note 32, ¶¶ 703[01]–[02]; McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463 (1977); Note, *Hearsay Basis of Psychiatric Opinion Testimony: A Critique of Federal Rule of Evidence 703*, 51 S. CAL. L. REV. 129 (1977).

[291] *But see* Proposed Or. R. Evid. 705, discussed in text accompanying notes 293–303 *infra*.

wise inadmissible facts relied on by experts, and that a party is entitled to a limiting instruction upon request.[292]

2. Disclosure of Grounds for Expert Opinions

Rule 705[293] deviates from both current law and Federal Rule 705[294] by requiring an expert to disclose the "underlying facts or data" supporting an opinion before expressing the opinion. It would overturn *Wulff v. Sprouse-Reitz*,[295] which held that an expert witness may state an opinion without first specifying its grounds. The Advisory Committee recommended this change partly because the Oregon Rules of Civil Procedure, unlike their federal counterpart,[296] do not allow pretrial discovery of the grounds of an opposing expert's opinion.[297] Therefore, under present Oregon practice, a party may not be able to discover that the opinion of an opposing expert rests on inadequate or impermissible grounds until after the opinion is given. This practice makes effective cross-examination of the expert difficult.[298]

However, by requiring the underlying facts to be stated every time an expert opinion is offered, the proposed rule goes too far. It encourages the use of the widely criticized hypothetical question[299] and invites disputes over whether all the underlying facts have been disclosed. Moreover, it requires the expert to disclose facts that he relied on under rule 703 but that are not themselves admissible evidence.[300] Even though

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292 Because of apparent concern that the rule would open the door to hearsay, the legislative interim subcommittee has voted to reject rule 703. *Joint Hearings, supra* note 150, (Jan. 18, 1980), tape 3, side 2, at 1656. The legislature should reconsider this action in light of the suggestions offered above. Rule 703 would be a desirable addition to Oregon law.

293 "The expert may testify in terms of opinion or inference and give reasons therefor after first disclosing the underlying facts or data on which the expert bases an opinion. The question need not be in hypothetical form unless the court, in its discretion, requires it." Proposed Or. R. Evid. 705.

294 Federal Rule 705 requires prior disclosure only when ordered by the court. FED. R. EVID. 705.

295 262 Or. 293, 306-09, 498 P.2d 766, 773-74 (1972). For an analysis of this decision, see Comment, *Opinion Testimony of Expert Witnesses: Oregon's New Rule*, 52 OR. L. REV. 443 (1973).

296 *See* FED. R. CIV. P. 26(b)(4). There is no comparable provision under the Oregon Rules of Civil Procedure.

297 *See* Proposed Or. R. Evid. 705 commentary.

298 *See* Smith & Henley, *Opinion Evidence: An Analysis of the New Federal Rules and Current Washington Law*, 11 GONZ. L. REV. 692, 697-98 (1976) (urging that courts liberally allow discovery of expert opinions in order to facilitate effective cross-examination of experts at trial).

299 *See, e.g.*, MCCORMICK, *supra* note 49, § 16; 2 J. WIGMORE, *supra* note 4, § 686 (3d ed. 1940); Honigman, *The Hypothetical Question Meets Its Answer*, 36 MICH. S.B.J. 12 (1957); Ladd, *Expert Testimony*, 5 VAND. L. REV. 414 (1952); Note, *Evidence: The Hypothetical Question in the Examination of Expert Witnesses*, 28 OKLA. L. REV. 650 (1975).

300 *See* text accompanying notes 285-92 *supra*.

the underlying facts may be sufficiently reliable to be a component of the expert's opinion, they should not necessarily be disclosed to the jury. If the expert's proponent is allowed to present inadmissible facts to the jury on the pretext of "explaining" the expert's opinion, there is a danger that the jury will consider the facts for their truth, despite instructions prohibiting such use.

The legislative interim subcommittee has voted to reject the Advisory Committee's version of rule 705 and to recommend adoption of the federal rule, which requires prior statement of the grounds of an expert opinion only when ordered by the court.[301] This would retain current law as enunciated in *Wulff v. Sprouse-Reitz.* An even better solution would be to adopt Federal Rule 705 with two amendments. The first amendment would require the court to prevent the expert's proponent from bringing out the underlying facts when those facts are not independently admissible and the danger of their misuse outweighs their value as support for the expert's opinion.[302]

The second amendment would allow an adverse party to request the court to determine whether an expert opinion rests on adequate grounds before it allows the expert to state the opinion.[303] This amendment would protect against mistrials caused by the introduction of expert opinions that are later discovered not to rest on proper grounds. It would also give the adverse party advance notice of the grounds of the expert's opinion; this procedure would assist in cross-examination, particularly if the expert did not intend to state the underlying facts during direct examination.

3. Court Appointment of Experts

The Advisory Committee omitted Federal Rule 706, which authorizes

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[301] *Joint Hearings, supra* note 150, (Jan. 18, 1980), tape 4, side 1, at 0596.

[302] *See* ALASKA R. EVID. 705(c): When the underlying facts or data would be admissible in evidence for any purpose other than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

[303] *See* ALASKA R. EVID. 705(b): "An adverse party may request a determination of whether the requirements of Rule 703 are satisfied before an expert offers an opinion or discloses facts or data"; *cf.* FLA. STAT. ANN. § 90.705 (2) (West Supp. 1979):

> Prior to the witness giving his opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for his opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for his opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.

the court to appoint expert witnesses.[304] According to the commentary, the drafters wanted to discourage the practice of court-appointed expert witnesses.[305] But courts already have inherent authority to appoint expert witnesses,[306] and rule 706 would provide procedures for the exercise of this discretion. Accordingly, the legislative interim subcommittee has voted to add Federal Rule 706 to the proposed code.[307]

VIII

HEARSAY

Article VIII is closely patterned after article VIII of the Federal Rules of Evidence. Rule 801 contains the applicable definitions.[308]

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304 (a) The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the judge unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party including a party calling him as a witness.

(b) Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the judge may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Nothing in this rule limits the parties in calling expert witnesses of their own selection.

FED. R. EVID. 706.

305 Or. Advisory Committee on Evidence Law Revision, *supra* note 59, commentary to deleted materials, at 270. The Advisory Committee felt that court-appointed experts were unnecessarily expensive and that juries might give special weight to such experts solely because they were court-appointed. *Id.*

306 *E.g.*, State v. Beaver Portland Cement Co., 169 Or. 1, 124 P.2d 524 (1942).

307 *Joint Hearings, supra* note 150, (Jan. 18, 1980), tape 4, side 1, at 0704. The federal rule could be improved by adding a provision that if the parties agree in the selection of an expert, only that expert shall be appointed. *See* MODEL CODE OF EVIDENCE rule 403(b) (1942); UNIFORM EXPERT TESTIMONY ACT § 4; and UNIFORM RULE OF EVIDENCE 59 (1953 version).

308 Hearsay is defined as "a statement, other than one made by the declarant

A. Out-of-Court Statements That Are Not Hearsay

1. Prior Inconsistent and Consistent Statements

Oregon follows the traditional common-law view that prior statements by a witness are hearsay. Accordingly, prior inconsistent statements are allowed only for impeachment purposes,[309] and prior consistent statements only for rehabilitation.[310] By contrast, proposed rule 801 defines certain prior inconsistent and consistent statements by a witness as nonhearsay and admits them as substantive evidence.[311]

When a hearsay declarant is on the stand and subject to cross-examination, the usual hearsay dangers are not present. In fact, it can be argued that *any* prior statement by a witness should be considered nonhearsay.[312] However, such a rule might encourage witnesses merely to read from prepared scripts and then submit to cross-examination regarding them.[313] To limit the use of prepared statements,[314] the federal rules define as nonhearsay only (1) prior consistent statements offered

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while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Proposed Or. R. Evid. 801(c). Oregon law is in accord. Timber Access Indus. Co. v. U.S. Plywood-Champion Papers, Inc., 263 Or. 509, 515, 503 P.2d 482, 485 (1972).

Rule 801(a)(2) addresses an issue on which there is no Oregon case law. It provides that nonverbal conduct is not hearsay unless intended as an assertion. Thus, the drafters rejected the view of Wright v. Tatham, 112 Eng. Rep. 488 (Ex. 1837), *aff'd*, 7 Eng. Rep. 559 (H. L. 1838), that nonverbal, nonassertive conduct is hearsay if offered to show a belief on the part of the actor. Proposed Or. R. Evid. 801 commentary.

See generally Ingerman, *Hearsay: A Comparison of Oregon Law and the Federal Rules of Evidence*, 12 WILLAMETTE L.J. 95 (1975).

309 State v. Derryberry, 270 Or. 482, 528 P.2d 1034 (1974).

310 *See* Cook v. Safeway Stores, Inc., 266 Or. 77, 511 P.2d 375 (1973) (prior consistent statement admissible to rebut suggestion of recent fabrication); Hale v. Smith, 254 Or. 300, 460 P.2d 351 (1969) (admissible to bolster denial that prior inconsistent statement was made).

311 A statement is not hearsay if:

> (1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
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> (A) Inconsistent or at variance with the testimony of the witness, and was given under oath at a trial, hearing, or in a deposition if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination;
>
> (B) Consistent with the testimony of the witness and is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence of [*sic*] motive....

Proposed Or. R. Evid. 801(d)(1).

312 This is the view adopted by Model Code of Evidence rule 503(b). *See* 3A J. WIGMORE, *supra* note 4, § 1018 (Chadbourn rev. 1970).

313 *See* MCCORMICK, *supra* note 49, § 251.

314 *See* FED. R. EVID. 801(d) (Advisory Committee Note).

to rebut a suggestion of recent fabrication or undue influence, and (2) prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."[315]

The proposed Oregon rule follows the federal rule for prior consistent statements.[316] For prior inconsistent statements, it adds to the federal rule the requirement that "the party against whom the testimony is now offered, or a predecessor in interest, [have] had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination."[317] This additional requirement is unnecessary. There is no reason why cross-examination at the time the statement is offered into evidence cannot adequately expose inaccuracies in the earlier testimony.[318] Most exceptions to the hearsay rule do not have a contemporaneous cross-examination requirement. Moreover, statements made closer to the event in question, especially those made before litigation begins, may often be more reliable than those made at trial;[319] the cross-examination requirement might exclude statements with significant probative value. Finally, it would invite disputes over whether the party

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315 FED. R. EVID. 801(d)(1)(A)-(B). Some jurisdictions, in accordance with Uniform Rule of Evidence 63(1) (1953 version), give substantive effect to any prior inconsistent statement, whether or not made under oath. *E.g.*, CAL. EVID. CODE § 1235 (West 1966); N.J. STAT. ANN. 2A: 84A, rule 63(1)(a) (West 1976). In State v. Derryberry, 17 Or. App. 262, 521 P.2d 1065 (1974), the Oregon Court of Appeals adopted Uniform Rule of Evidence 63(1) for prior inconsistent statements, but the Oregon Supreme Court reversed. 270 Or. 482, 528 P.2d 1034 (1974). Justices O'Connell and Bryson dissented, favoring the uniform rule. *Id.* at 492, 528 P.2d at 1038.

316 FED. R. EVID. 801(d)(1)(B).

317 Proposed Or. R. Evid. 801(d)(1)(A).

318 *See* FED. R. EVID. 801(d) (Advisory Committee Note).

319 The arguments for admitting prior inconsistent statements as substantive evidence are well summarized by the California Law Revision Commission:

> Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely non-existent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

CAL. EVID. CODE § 1235 comment (West 1966), *quoted by* Proposed Or. R. Evid. 801 commentary.

against whom the testimony is offered had "an opportunity and similar motive to develop the testimony."[320] Rule 801 should be amended to delete this requirement.

2. Statements of Identification

Rule 801[321] also defines a witness's out-of-court identification of another person as nonhearsay.[322] Contrary to the federal rule, such indentifications are admissible only when "corroborated by other evidence."[323] The drafters added the corroboration requirement "to prevent convictions based largely on the testimony of police officers that the victim had identified the defendant as the perpetrator of an offense even though the victim is unable to so identify the defendant at trial."[324] It is unclear, however, whether the rule requires corroboration of the accuracy of the earlier identification, or merely corroboration that it occurred. The legislature should clarify this issue or delete the requirement.[325]

3. Admissions

Under current law, admissions by a party are viewed as hearsay, but are admissible as an exception to the hearsay rule.[326] Proposed rule 801(d)(2)[327] follows the federal rule, which defines admissions as

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[320] Proposed Or. R. Evid. 801(d)(1)(A).

[321] Rule 801(d)(1)(C) provides that a statement "of identification of a person made after perceiving the person if corroborated by other evidence" is not hearsay. Proposed Or. R. Evid. 801(d)(1)(C). The rule should be amended to make clear that it covers photographic identifications. *See* United States v. Lewis, 565 F.2d 1248 (2d Cir. 1977) (construing Federal Rule 801(d)(1)(C) to cover photographic identifications).

[322] In State v. Fennell, 7 Or. App. 256, 489 P.2d 964 (1971), the Oregon Court of Appeals allowed a police officer to testify that a witness had previously identified the defendant's photograph, but it is unclear whether the court viewed the identification as nonhearsay or as an exception to the hearsay rule.

[323] Proposed Or. R. Evid. 801(d)(1)(C).

[324] Proposed Or. R. Evid. 801 commentary.

[325] The legislative interim subcommittee has voted to delete the corrobation requirement. *Joint Hearings, supra* note 150, (Mar. 18, 1980), tape 6, side 1, at 3012.

[326] *See, e.g.*, Oxley v. Linnton Plywood Assoc., 205 Or. 78, 284 P.2d 766 (1955).

[327] A statement is not hearsay if:

> (2) The statement is offered against a party and is:
>
> (A) That party's own statement, in either an individual or a representative capacity;
>
> (B) A statement of which the party has manifested the party's adoption or belief in its truths;
>
> (C) A statement by a person authorized by the party to make a statement concerning the subject;
>
> (D) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or
>
> (E) A statement by a coconsipirator of a party during the course

nonhearsay.[328] In addition, rule 801(d)(2)(D) expands the scope of allowable admissions. Under current law, an employee's admission of liability, at least if not made at the time of the act in question, is generally inadmissible against the employer.[329] Thus, a truck driver's admission of fault made several days after the accident may not be received against the trucking company employer.[330] Under rule 801(d)(2)(D), however, an employee's statement may be received as the employer's admission whenever it concerns a matter "within the scope of the agency or employment" and is "made during the existence of the relationship."[331]

B. Exceptions to the Hearsay Rule

1. Exceptions That Do Not Require the Declarant to Be Unavailable

Rule 803 lists twenty-two exceptions to the hearsay rule that apply regardless of the declarant's availability.[332] The rule broadens several

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and in furtherance of the conspiracy.

Proposed Or. R. Evid. 801(d)(2).

[328] The drafters of Federal Rule 801(d)(2) chose this approach because admissions, unlike other exceptions to the hearsay rule, are not justified on the grounds of probable trustworthiness. Admissions are allowed because the adversary system requires that all a party's prior statements be admissible against him. FED. R. EVID. 801(d)(2) (Advisory Committee Note). *See also* Strahorn, *A Reconsideration of the Hearsay Rule and Admissions,* 85 U. PA. L. REV. 484, 564 (1937).

[329] *See, e.g.,* Timber Access Indus. Co. v. U.S. Plywood-Champion Papers, Inc., 263 Or. 509, 503 P.2d 482 (1972); Madron v. Thomson, 245 Or. 513, 419 P.2d 611 (1966); Hansen v. Oregon-Washington R.R. & Nav. Co., 97 Or. 190, 188 P. 963 (1920). *See generally* Swearington, *supra* note 13, at 219–21.

[330] *See, e.g.,* Madron v. Thomson, 245 Or. 513, 518, 419 P.2d 611, 614 (1966); Parker v. Smith Lumber Co., 70 Or. 41, 51–52, 138 P. 1061, 1064 (1914); Alden v. Grande Ronde Lumber Co., 46 Or. 593, 595–96, 81 P. 385, 385 (1905). If the agent is a defendant, however, the agent's admission of fault may be received against the agent and then used against the principal under the doctrine of respondeat superior. Madron v. Thompson, 245 Or. 513, 419 P.2d 611 (1966).

[331] Proposed Or. R. Evid. 801(d)(2)(D). The proposed rule follows Federal Rule 801(d)(2)(D) and the trend in recent codifications. *See, e.g.,* N.M. STAT. ANN. § 20-4-801 (1975); MINN. R. EVID. 801.

[332] The following are not excluded by section 63 [rule 802] of this Act, even though the declarant is available as a witness:

(1) Reserved.

(2) A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) A statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain or bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements made for purposes of medical diagnosis or treatment

currently recognized exceptions. For example, rule 803(17) extends

and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause of [*sic*] external source thereof in so far as reasonably pertinent to diagnosis or treatment.

(5) A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the memory of the witness and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of [*sic*] circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Evidence that a matter is not included in the memoranda[,] reports, records, or data compilations, and in any form, kept in accordance with the provisions of paragraph (6) of this section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth:

(A) The activities of the office or agency;

(B) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding however, in criminal cases matters observed by police officers and other law enforcement personnel; or

(C) In civil actions and proceedings and against the government in criminal cases, factual observations, resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with section 66 of this Act [rule 902], or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Statements of births, marriages, divorces, deaths, legitimacy,

existing law, which already admits market reports,[333] to allow other commercial publications. Rule 803(4) expands the exception for statements made for purposes of medical treatment; the rule includes statements of medical history, statements to nontreating physicians, and

ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Statement of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Statements of fact concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) The record of a document purporting to establish or effect an interest in property, as proof of content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in a document in existence 20 years or more the authenticity of which is established.

(17) Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Reserved.

(19) Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation of a person's character among associates of the person or in the community.

(22) Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than

even statements to family members and other nonphysicians, if the statements are "reasonably pertinent to diagnosis or treatment."[334]

Rule 803 also adopts a few hearsay exceptions on which Oregon courts have not yet ruled. Rule 803(11) creates an exception for records of religious organizations;[335] rule 803(16), for ancient documents;[336] and rule 803(22), for judgments of felony convictions to prove any fact essential to the judgment.[337] Rule 803(7) and (10) allow the absence of a document or entry in business or public records to prove that something does not exist or has not occurred.[338] In the

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the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that:

(A) The statement is offered as evidence of a material fact;

(B) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) The general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence.

A statement may not be admitted under this paragraph unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Proposed Or. R. Evid. 803.

[333] ORS 72.7240 (1979) admits market reports to prove the prevailing price of goods. Under rule 803(17), the admissibility of market reports would not be limited to this purpose.

[334] Existing case law does not go this far. *See, e.g.,* Reid v. Yellow Cab Co., 131 Or. 27, 279 P. 635 (1929).

[335] Although there are no Oregon cases creating a separate hearsay exception for records of religious organizations, such records may be admissible under the Uniform Business Records as Evidence Act. ORS 41.680–.710 (1979).

[336] ORS 41.360(34) and 42.080 (1979) provide for the authentication of ancient documents, but there is no Oregon case law recognizing ancient documents as exceptions to the hearsay rule.

[337] Currently, judgments of felony conviction have collateral estoppel effect under certain circumstances. *See, e.g.,* Casey v. Northwestern Security Ins. Co., 260 Or. 485, 490 P.2d 208 (1971). To the extent that the doctrine of collateral estoppel applies, it will not be necessary to prove again a fact established in an earlier litigation. Therefore, the practical effect of rule 803(22) may be limited.

[338] Scattered statutes recognize this exception only in limited circumstances. *E.g.,* ORS 57.781 (1979) (certificate by Corporation Commissioner is prima facie evidence of nonexistence of certain facts that "would appear from presence or absence of documents filed in his office").

case of public records, rule 803(10) permits the absence of a record or entry to be shown by a certificate of the records custodian. This rule eliminates the costly and burdensome requirement of calling the custodian as a witness in order to establish that a particular record or entry does not exist.[339]

Finally, rule 803(24) creates a catchall exception for hearsay statements that are not covered by any other exception, but have "equivalent qualities of trustworthiness." According to *Timber Access Industries Co. v. Plywood-Champion Paper, Inc.*,[340] Oregon courts already have the authority to admit hearsay statements that are highly reliable, even though they do not fit within a traditional exception. The proposed rule more carefully defines when this general hearsay exception can be used. For example, a party who intends to offer a statement under this exception must give the opponent advance notice of the particulars of the statement, including the name and address of the declarant.

Rule 803 could be improved in at least three respects. First, rule 803(6), the business records exception, is inartfully drafted. The rule fails to require that the entrant and his informant have a business duty to report the information in the business record. This requirement has long been imposed by case law and is necessary to insure the trustworthiness of the hearsay.[341] It could easily be added.[342]

Second, it is unclear which kinds of public records and reports are admissible under rule 803(8).[343] In particular, the rule arguably allows reports of police investigations to be used in civil cases, despite the high risk of unreliability. As an alternative, the legislature should consider adopting Maine rule 803(8), which is more clearly and carefully drafted.[344]

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[339] *See* State v. Harris, 288 Or. 703, 609 P.2d 798 (1980) (suggesting that in the absence of a statute authorizing a public records custodian to certify the absence of an entry, the custodian would have to appear as a witness).

[340] 263 Or. 509, 503 P.2d 482 (1972). *But see* State v. Harris, 288 Or. 703, 609 P.2d 798 (1980).

[341] *See, e.g.*, Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930); Wynn v. Sundquist, 259 Or. 125, 485 P.2d 1085 (1971); 4 WEINSTEIN, *supra* note 32, ¶ 803(6) [02]. The Advisory Committee commentary to rule 803(6) cites *Johnson v. Lutz* and *Wynn v. Sundquist* with approval. *See* Proposed Or. R. Evid. 803 commentary.

[342] The rule could be amended as follows: "A memorandum, report, record or data compilation . . . made at or near the time by, or from information transmitted by, a person with knowledge *acting* [if kept] in the course of a regularly conducted business activity . . . ."

[343] This rule is identical to Federal Rule 803(8).

[344] (a) To the extent not otherwise provided in B of the subdivision, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

Third, the legislature should reconsider the Advisory Committee's rejection of Federal Rule 803(18), which creates a hearsay exception for learned treatises.[345] Under current law, treatises may be used only to impeach, not as substantive evidence.[346] Statements in learned treatises may have considerable probative value, and the federal rule requires the treatise to be "established as a reliable authority" before it can be used as substantive evidence. As an additional safeguard, it requires an expert to be on the stand to interpret, challenge, or be questioned about the treatise. The rule would be particularly helpful in medical malpractice cases; it would allow jurors to consider information from medical treatises about standards of care or other evidence that might be difficult or unduly expensive to obtain directly from the testimony of expert witnesses.

2. Exceptions That Require the Declarant to Be Unavailable

Rule 804 lists five hearsay exceptions that apply only when the declarant is unavailable.[347] It broadens the definition of "unavailability"

(b) The following are not within this exception to the Hearsay Rule: i. Investigative reports by police and other law enforcement personnel; ii. Investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; iii. Factual findings offered by the state in criminal cases; iv. Factual findings resulting from special investigation of a particular complaint, case, or incident; v. Any matter as to which sources of information or other circumstances indicate lack of trustworthiness. Any writing admissible under this subdivision shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy to each adverse party a reasonable time before the trial, unless the court finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

ME. R. EVID. 803(8).

345 To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

FED. R. EVID. 803(18).

346 Eckleberry v. Kaiser Foundation, 226 Or. 616, 359 P.2d 1090 (1961). Present law already allows some books to be received as substantive evidence. ORS 41.670 (1979) provides: "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are primary evidence of facts of general notoriety and interest." The court in *Eckleberry* held that this statute did not include medical treatises.

347 (a) "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of a statement;

(2) Persists in refusing to testify concerning the subject matter

beyond present law[348] to include a witness's lack of memory and a witness's refusal to testify about the subject matter of his out-of-court

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of a statement despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of a statement;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of an exception under paragraph (2), (3) or (4) of subsection (b) of this section, the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(b) The following are not excluded by section 63 (Rule 802) of this Act if the declarant is unavailable as a witness:

(1) Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) A statement made by a declarant while believing that death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) (A) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more pro-

statement.[349] The definition of "unavailability" presents one difficulty, however. For three of the exceptions, rule 804 (a)(5) requires that the proponent try to depose the declarant.[350] This requirement could be excessively expensive, particularly when the declarant is out of state.[351] Several states with rules based on Federal Rule 804 have re-

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> bative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this paragraph unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Proposed Or. R. Evid. 804.

[348] Present case law limits unavailablility to mental or physical inability to testify, *e.g.*, Hansen-Rynning v. Oregon-Washington R.R. & Nav. Co., 105 Or. 67, 209 P. 462 (1922) (dictum); death, *e.g.*, State v. Crawley, 242 Or. 601, 410 P.2d 1012 (1966); absence from the state, *e.g.*, Rogers v. Donovan, 268 Or. 24, 518 P.2d 1306 (1974); claims of privilege, *e.g.*, State v. Rawls, 252 Or. 556, 451 P.2d 127 (1969); and inability to find the declarant after good faith efforts. State v. Anderson, 42 Or. App. 29, 599 P.2d 1225 (1979). *See also* ORS 41.900(8) (1979).

[349] Rule 804(a)(3) defines as unavailable the declarant who "[t]estifies to a lack of memory of the subject matter of a statement." Proposed Or. R. Evid. 804(a)(3). To assure that the trial court has the right to probe a claim of lack of memory, the legislature should substitute "establishes" for "testifies to."

[350] Under rule 804(a)(5), a witness is unavailable if the witness "[i]s absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of an exception under paragraph (2), (3) or (4) of subsection (b) of this section, the declarant's attendance or *testimony*) by process or other reasonable means." Proposed Or. R. Evid. 804(a)(5) (emphasis added).

[351] The words "or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony" were added to Federal Rule 804(a)(5) by House amendment. H. R. REP. No. 650, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7088. The Senate Judiciary Committee report commented as follows:

> Under the House amendment, before a witness is declared unavailable, a party must try to depose a witness (declarant) with respect to dying declarations, declarations against interest, and declarations of pedigree. None of these situations would seem to warrant this needless, impractical and highly restrictive complication. A good case can be made for eliminating the unavailability requirement entirely for declarations against interest cases.
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> Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them . . . . No purpose is served unless the deposition, if taken, may be used in evidence.

S. Rep. No. 93-1277, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7067.

jected this requirement,[352] and Oregon should follow their lead.

Three of the hearsay exceptions in rule 804 would change existing law. Rule 804(b)(1), the exception for former testimony, eliminates the requirement[353] that the parties to both proceedings be identical. Under the proposed rule, it is sufficient in a civil case if the party against whom the former testimony is offered had a "predecessor in interest" with "an opportunity and similar motive to develop the testimony" at the earlier proceeding.[354] Rule 804(b)(2) eliminates the requirement that the declarant must have died before a dying declaration may be admitted;[355] the declarant's belief that death was imminent is sufficient.[356] Finally, rule 804(b)(3) expands the exception for declarations against interest[357] to include declarations against penal interest.[358]

C. Impeaching the Hearsay Declarant

Rule 806 allows a hearsay declarant to be impeached just as a witness may be impeached.[359] Because the declarant usually will not be in court,

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[352] *E.g.*, NEB. REV. STAT. § 27-804(a)(5) (1975); MONT. R. EVID. 804(a)(5).

[353] Patty v. Salem Flouring Mills Co., 53 Or. 350, 96 P. 1106, *modified*, 98 P. 521 (1908).

[354] Proposed Or. R. Evid. 804(b)(1).

[355] This requirement is implied by ORS 41.900(4) (1979), which makes admissible "the declaration or act of a dying person, made or done under a sense of impending death, respecting the *cause of his death*." (Emphasis added).

[356] Consistent with existing law, proposed rule 804(b)(2) makes dying declarations admissible in all civil and criminal cases. *See* McCredie v. Commercial Cas. Ins. Co., 142 Or. 229, 20 P.2d 232 (1933) (implying in dictum that dying declarations would be admissible in any criminal case); ORS 41.900 (4), 136.430 (1979). The federal rule restricts the use of such declarations to civil actions and homicide prosecutions.

[357] Declarations against penal interest are not admissible in Oregon. State v. Anderson, 10 Or. App. 34, 497 P.2d 1218 (1972).

[358] However, "a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Proposed Or. R. Evid. 804(b)(3).

[359] When a hearsay statement, or a statement defined in subparagraph (C), (D) or (E) of paragraph (2) of subsection (d) of Section 62 (Rule 801) of this Act, has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the hearsay statement of the declarant, is not subject to any requirement under ORS 45.610 relating to impeachment by evidence of inconsistent statements. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Proposed Or. R. Evid. 806.

however, the rule does not require the declarant to be given an opportunity to deny or explain a prior inconsistent statement.[360] The first sentence of the rule covers not only hearsay but also certain admissions that rule 801(d)(2) defines as nonhearsay. These admissions are mistakenly omitted from the second and third sentences of rule 806. The rule should be amended to include them.

IX

Authentication and Identification

Article IX is virtually identical to article IX of the Federal Rules of Evidence. It clarifies and simplifies the requirements for authenticating evidence. Under rule 901(a), the requirement of authentication is satisfied by evidence "sufficient to support a finding that the matter in question is what its proponent claims."[361]

A. Authentication by Extrinsic Evidence

Rule 901(b) lists ten examples of authentication procedures that would satisfy rule 901(a).[362] The chief departure these examples make

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[360] Proposed Or. R. Evid. 806 commentary.

[361] For a comparison of Federal Rule 901(a) with the common-law requirements for authentication, see S. Saltzburg & K. Redden, *supra* note 224, at 642–45.

[362] By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of subsection (a) of this section:

(1) Testimony by a witness with knowledge that a matter is what it is claimed to be.

(2) Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances.

(5) Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if:

(A) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the

from existing law is to expand the admissibility of handwriting exemplars. Under current law, a handwriting exemplar may be offered for comparison with the writing in question only if the exemplar is admitted to be or treated as genuine by the party against whom it is offered.[363] Such an exemplar cannot always be found. Under the proposed rule, it is sufficient if the exemplar is itself authenticated as having been written by the party in question.[364]

Although the examples listed in rule 901(b) provide useful guidelines for judges and lawyers, they could be expanded. The rule does not indicate when or to what extent the chain of custody must be established,[365] even though this issue arises frequently in criminal litigation.[366] Rule 901(b)(4),[367] entitled "distinctive characteristics and the like," is too general; it should be subdivided into more specific examples, along the lines suggested in the official commentary.[368] Rule 901(b)(6)

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public office where items of this nature are kept.

(8) Evidence that a document or data compilation, in any form:

(A) Is in such condition as to create no suspicion concerning its authenticity;

(B) Was in a place where it, if authentic, would likely be; and

(C) Has been in existence 20 years or more at the time it is offered.

(9) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Any method of authentication or identification otherwise provided by law or by other rules prescribed by the Supreme Court.

Proposed Or. R. Evid. 901(b).

[363] ORS 42.070 (1979). This statute would not be repealed by the proposed code. In light of its modification by proposed rule 901(b)(3), the legislature should consider repealing it.

[364] *See* Proposed Or. R. Evid. 901(b)(3); note 362 *supra*.

[365] *See* S. SALTZBURG & K. REDDEN, *supra* note 224, at 643.

[366] *See, e.g.*, State v. Anderson, 242 Or. 368, 409 P.2d 681 (1966); State v. Broadsword, 32 Or. App. 331, 574 P.2d 670 (1978), *cert. denied*, 439 U.S. 870 (1978); State v. Reese, 25 Or. App. 231, 548 P.2d 998 (1976).

[367] *See* note 362 *supra*.

[368] Proposed Or. R. Evid. 901 commentary (adapted from 5 WEINSTEIN, *supra* note 32, ¶¶ 901(b)(4)[01]–[05]). The Advisory Committee suggests the following subcategories of rule 901(b)(4):

(i) *Subject Matter.* A document or telephone conversation may be shown to have emanated from a particular person or business by the fact that it would be unlikely for anyone other than the purported author or declarant to be familiar with the subject matter of the document or conversation.

(ii) *Physical Attributes.* The appearance, physical characteristics, and identifying marks of a writing may sufficiently identify the source of the document.

(iii) *Internal Patterns.* Writings may be authenticated by evidence that the internal word or thought patterns are particularly characteristic of the purported writer.

(iv) *External Circumstances.* Circumstances preceding, surround-

should be amended to cover in one place all the procedures for authenticating telephone conversations.[369] A more inclusive list of authentication procedures would provide even greater guidance to the bench and bar.

B. Self-Authenticating Documents

Rule 902 lists eleven categories of self-authenticating documents; these documents require no extrinsic evidence of authenticity.[370] The

ing and following the transmission of a writing may sufficiently authenticate the writing.

(v) *Reply-letter Technique.* A letter or telegram may be authenticated by testimony or other proof that the writing was sent in reply to a duly authenticated writing.

Id.

[369] Although the heading to rule 901(b)(6) implies that it covers all the methods for authenticating telephone conversations, a telephone conversation that does not meet its requirements may be authenticated under rule 901(b)(4) or (5). *See* note 362 *supra*. At a minimum, a cross-reference to rule 901(b)(4) and (5) should be added to rule 901(b)(6).

[370] Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) A document purporting to bear the signature, in an official capacity, of an officer or employe of any entity included in subsection (1) of this section, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employe certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position of (A) the executing or attesting person, or (B) any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuiness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) A copy of an official record or report or entry therein, or of a

rule expands the types of official publications that may be self-authenticated.[371] In addition, unlike existing law,[372] it includes documents such as newspapers, periodicals, trade inscriptions, signs, tags, and labels.[373] The rule would eliminate the burden of calling witnesses solely for the purpose of laying a foundation for these documents.

Although rule 902 is an improvement over present practice, the drafters failed to specify the rule's relationship to the numerous self-authentication statutes[374] in ORS chapter 43 that would not be repealed

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document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of this section or otherwise complying with any law or rule prescribed by the Supreme Court.

(5) Books, pamphlets or other publications purporting to be issued by public authority.

(6) Printed materials purporting to be newspapers or periodicals.

(7) Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper, signatures thereon and documents relating thereto to the extent provided by ORS chapters 71 to 83.

(10) Any signature, documents or other matter declared by law to be presumptively or prima facie genuine or authentic.

(11) (A) A document bearing a seal purporting to be that of a federally recognized Indian tribal government or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(B) A document purporting to bear the signature, in an official capacity, of an officer or employe of any entity included in subparagraph (A) of this paragraph, having no seal, if a public officer having a seal and having official duties in the district or political subdivision or the officer or employe certifies under seal that the signer has the official capacity and that the signature is genuine.

Proposed Or. R. Evid. 902.

[371] *Compare* rule 902(5) *with* ORS 43.310 and .330(1), (2), (4), (5) (1979).

[372] Most of the existing self-authentication statutes are set forth in ORS chapter 43. Rather than listing general categories, such as public records, chapter 43 consists of numerous statutes describing specific types of documents that are self-authenticating. *See, e.g.*, ORS 43.110 (1979) (judicial records); ORS 43.310 (1979) (written laws of a sister state, the District of Columbia, a territory of the United States, or a foreign country); ORS 43.330(1), (3) (1979) (departmental records of a state or the United States); ORS 43.330(9) (1979) (fingerprints, photographs, and other identification records of any penitentiary, jail, or reformatory); ORS 43.410 (1979) (legislative or other public records in the custody of the state archivist); ORS 43.430 (1979) (books, records, and documents of a federal executive department or government-owned corporation).

[373] *See* note 370 *supra*.

[374] *See* note 372 *supra*.

by the proposed code. The overlap between these provisions is confusing. For example, both rule 902 and ORS chapter 43 provide a certification procedure to authenticate public documents, official records, and recorded or filed documents. ORS 43.340 and .350[375] require only that the custodian of the records or document certify the copy to be accurate. Under rule 902(2) and (4), however, the certification must be made by an officer who has an official seal. If the custodian has no seal, an officer with a seal must certify that the custodian's signature is genuine. To avoid confusion, the legislature should amend rule 902 (2) and (4) to conform to the less burdensome certification requirements of ORS 43.340 and .350.[376] The remaining self-authentication statutes in chapter 43 should be either incorporated in rule 902, cross-referenced by it, or repealed.[377]

X

CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

A. The Requirement of an Original or Duplicate

Article X governs the method of proving the contents of writings, recordings, and photographs. Under ORS 41.610 and .640,[378] the contents of a writing must be proved by the original writing; secondary evidence of the contents is admissible only when the proponent gives sufficient reason for not producing the original. This rule is often referred to as the "original document rule" or, less accurately, as the "best evidence rule."[375] Rule 1002 restates this general rule and extends it to include recordings and photographs.[380]

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375 (1979).

376 (1979).

377 In addition to the self-authentication statutes in ORS chapter 43, ORS 41.930 (1979) (providing for the self-authentication of hospital records) would not be repealed. The legislature should consider adding hospital records to the categories of self-authenticating documents in rule 902. Wisconsin has added hospital records to its rule 902. *See* WIS. R. EVID. 909.02(11).

378 (1979).

379 Any reference to the "best evidence rule" is misleading; there is no general rule of evidence that a party must offer only the highest or best form of evidence. *See* MCCORMICK, *supra* note 49, § 229; Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 IOWA L. REV. 825, 826 (1966).

380 "To prove the contents of a writing, recording or photograph, the original writing, recording or photograph is required," subject to the exceptions set forth in article IX. Proposed Or. R. Evid. 1002. "'Photographs' includes still photographs, X-ray films, videotapes and motion pictures." Proposed Or. R. Evid. 1001(3). "'Writings' and 'recordings' mean letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording or other form of data compilation." Proposed Or. R. Evid. 1001(4).

This apparent adherence to the traditional rule is deceptive, for rule 1003 creates an exception more expansive than the general rule. Rule 1003 provides that a duplicate,[381] including a photocopy, is admissible in place of the original unless "(1) [a]genuine question is raised as to the authenticity of the original; or (2) [i]n the circumstances it would be unfair to admit the duplicate in lieu of the original."[382] This rule largely repeals the requirement of an original document. Although existing law permits duplicates to be offered in certain circumstances,[383] rule 1003 would admit duplicates in the vast majority of cases. Thus, the focus of evidentiary concern would be changed from excluding duplicates in lieu of originals to excluding oral testimony in lieu of either originals or duplicates.

This change is a prime example of how the proposed code would modernize existing law. Because of significant advances in copying techniques since the adoption of ORS 41.610[384] and .640,[385] those statutes' insistence upon an original has become an unnecessary technicality in most situations. Adequate safeguards against unreliable copies are contained in rule 1003. A duplicate must be the product of a method that insures accuracy,[386] and the duplicate is not admissible if there is a question about the authenticity of the original or if other circumstances would make admission unfair.[387] When feasible, litigants probably will continue to offer originals because of their greater persuasive effect. When the originals are not readily available, however, the rule should save time and expense.

Although the content is sound, the format of rules 1002 and 1003 is unnecessarily confusing. These rules should be revised, and perhaps combined, to make clear that the common-law requirement of an original document is no longer the general rule. Rather, the rule is that either

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381 "'Duplicate' means a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, by mechanical or electronic re-recording, by chemical reproduction or by other equivalent techniques *which accurately reproduce the original.*" Proposed Or. R. Evid. 1001(1) (emphasis added).

382 Proposed Or. R. Evid. 1003.

383 *See* ORS 41.610, .640 (1979). The Oregon Court of Appeals has upheld the admission of photostatic copies, without proof that the originals were unavailable, when there was no dispute about the accuracy of the copies. State v. White, 4 Or. App. 151, 477 P.2d 917 (1970).

384 (1979); Act of Oct. 11, 1862, ch. 8, § 760, 1892 Or. Gen. Laws.

385 (1979); Act of Oct. 11, 1862, ch. 8, § 691, 1892 Or. Gen. Laws. The 1949 amendment to this statute recognizes the existence of modern copying techniques, but allows "photostatic, microphotographic, or photographic" copies in place of originals only when "expressly [authorized] by statute." Act of Feb. 24, 1949, ch. 75, § 1, 1949 Or. Laws.

386 *See* note 381 *supra.*

387 Proposed Or. R. Evid. 1003; *see* text following note 381 *supra.*

an original or a duplicate may be offered, unless an original is required by one of the exceptions stated in rule 1003.

Rule 1005 qualifies rule 1003 by requiring certified copies, rather than merely duplicates, to prove the contents of official records or documents.[388] Other evidence of the contents, including noncertified duplicates, is admissible only when a certified copy cannot be obtained.[389] The rule is confusing because it is worded permissively[390] when it is intended to be mandatory[391] and it does not make clear that it supersedes rule 1003.[392] To avoid misunderstanding, rule 1003 should be amended to indicate that it is qualified by rule 1005, and rule 1005 should be amended to make clear that its requirements are mandatory.

B. Exceptions to the Requirement of an Original or Duplicate

Rule 1004 provides that any type of secondary evidence may be offered when the original has been lost or destroyed, is unobtainable, or is in the possession of the opponent; or when the writing, recording or photograph pertains only to a collateral matter.[393] This list of exceptions

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[388] The contents of an official record or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Section 69 (Rule 902) of this Act. If such a copy cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Proposed Or. R. Evid. 1005.

The drafters intended proposed rule 1005 to be identical to Federal Rule 1005. *See* Proposed Or. R. Evid. 1005 commentary. However, a phrase was inadvertently omitted that dispenses with the certification requirement when the copy is "testified to be correct by a witness who has compared it with the original." FED. R. EVID. 1005. The legislature should restore this language. There is no reason for requiring a certified copy when a witness is available to testify that the copy is accurate.

[389] Like the proposed rule, existing law does not require an original to prove the contents of public records or documents, *see* ORS 41.640(c), 192.050 (1979); it allows certified copies of certain public records and documents in lieu of the originals. *See, e.g.,* ORS 43.110, .210, .340, .360, .390, .410 (1979). Unlike the proposed rule, existing law does not allow oral evidence of the contents if a certified copy "cannot be obtained by the exercise of reasonable diligence." Proposed Or. R. Evid. 1005. If the original or a certified copy cannot be obtained, only a noncertified duplicate may be offered. *See* ORS 41.640(2) (1979).

[390] The rule states: "The contents of an official record . . . *may* be proved by [certified] copy." Proposed Or. R. Evid. 1005 (emphasis added).

[391] *See* Proposed Or. R. Evid. 1005 commentary.

[392] *See generally* S. SALTZBURG & K. REDDEN, *supra* note 224, at 240 (Supp. 1979); 5 WEINSTEIN, *supra* note 32, ¶ 1005[01].

[393] The original is not required, and other evidence of the contents of a writing, recording or photograph is admissible when:

(1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(2) An original cannot be obtained by any available judicial process

is generally consistent with existing law.[394] No preference for certain forms or "degrees" of secondary evidence is established, on the assumption that parties will offer the most convincing evidence available.[395]

Rule 1006 authorizes "a chart, summary, or calculation" to be received in lieu of voluminous records.[396] This rule largely codifies existing law.[397] The legislature, however, should clarify two issues. First, the rule should make clear that it authorizes oral as well as written summaries.[398] Second, the rule should make explicit that the "chart, summary or calculation" may be considered as evidence, and not merely as an illustration of other evidence, unless the court orders otherwise.[399]

CONCLUSION

As the preceding discussion indicates, the proposed evidence code would not effect a radical transformation of existing practice. Most rules codify existing law, and the changes are evolutionary rather than revolutionary. Generally, the code would expand the admissibility of evidence, placing greater confidence in the jury, although retaining needed protections against unreliable, misleading, or unduly prejudicial evidence. It would repeal some unnecessary technicalities, eliminate ambiguities, and revise a number of unsound evidentiary rules, particularly in the areas of competency, impeachment, and privilege.

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or procedure;

(3) At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or

(4) The writing, recording or photograph is not closely related to a controlling issue.

Proposed Or. R. Evid. 1004.

394 *See* ORS 41.610, 640(1)(a)-(b) (1979).

395 Proposed Or. R. Evid. 1004 commentary.

396 The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Proposed Or. R. Evid. 1006.

397 ORS 41.640(1)(e) (1979); *see* Shephard v. Hub Lumber Co., 273 Or. 331, 541 P.2d 439 (1975); Scott v. Astoria R.R., 43 Or. 26, 72 P. 594 (1903); State Highway Comm'n v. DeLong Corp., 9 Or. App. 550, 495 P.2d 1215 (1972).

398 Testimonial summaries are allowed under Oregon law, which follows the traditional common-law rule. Hubble v. Hubble, 130 Or. 177, 279 P. 550 (1929); Scott v. Astoria R.R., 43 Or. 26, 72 P. 594 (1903); 5 WEINSTEIN, *supra* note 32, ¶ 1006[01].

399 *See* 5 WEINSTEIN, *supra* note 32, ¶ 1006[02].

This Article sometimes has suggested that the proposed code should go even further to correct deficiencies in current law. In some areas in which the drafters have undertaken reforms, the Article has suggested that a particular state rule or the uniform rule would provide a model that is superior to the federal rule. The Article is premised on the view that it is important to incorporate the best possible evidentiary rules, regardless of their source, and to correct any technical errors prior to adoption.

Enactment of a comprehensive code would provide lawyers and judges with an authoritative, concise statement of Oregon evidence law, convenient for instant reference in trial. It should further consistency and predictability in evidentiary rulings throughout the state, reducing the frequency of erroneous rulings and costly retrials. It would also allow judges and practitioners to benefit from the developing body of case law interpreting the federal rules and similar state rules. Finally, Oregon attorneys who practice in both state and federal courts would no longer have to learn two separate systems of evidence.

The Advisory Committee is to be commended for its outstanding work over the past years in drafting the proposed code. Now the task falls to the legislature to refine it further and to provide Oregon with a new evidence code. Evidence is too important an area of law to consign to legislative neglect. The rules of evidence affect not merely the efficiency and expense of litigation, but the quality of justice as well. Yet Oregon has entered the 1980's with an evidence code that was originally drafted in 1850. The proposed code, with minor amendments, merits the strong support of the bar, the judiciary, and the public as a long overdue modernization and clarification of Oregon's law of evidence.

EVIDENCE CODE
Joint Work Session
Staff Proposal
February 3, 1981

House Judiciary Committee
HB 2030, Exhibit D
February 5, 1981 - 3:10 p.m.
2-page exhibit
presented by staff

Proposed and adopted changes to HB 2030 Article 1

Rule 101:

lopted. (3) Rules of privilege. Sections 32 to [41] 42 (Rules 503 to [513] 514) of this Act relating to privileges apply at all stages of all actions, suits and proceedings.

.opted. (4) Rules inapplicable. Sections 1 to 31 (Rules 100 to 412) and sections [42] 43 to 78 (Rules [514] 601 to 1008) of this Act do not apply in the following situations:

...

)pted. (c) Proceedings for extradition [.], except as required by ORS 133.743 to 133.857.

)pted. (d) Sentencing [.], except as required by ORS 137.090.

...

)posed. (g) Proceedings under ORS chapter 135 relating to conditional release, security release [or] , release on personal recognizance [.], or preliminary hearings, subject to ORS 135.133.

Rule 103:

)posed. (1) Effect of erroneous ruling. Evidentiary error is not presumed to be prejudicial in a civil case. Error, in any case, may not be predicated....

Rule 106:

)pted. When part of an act, declaration, conversation or writing is given in evidence by one party, all relevant portions of the whole, on the same....

Proposed ORS 135.133

Proposed. Application of rules of evidence. The rules of evidence shall apply in any preliminary hearing under this chapter, except that hearsay may be admitted if the court determines that it would impose an unreasonable hardship on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing, and if the witness furnishes information bearing on the informant's reliability and, as far as possible, the means by which the information was obtained.

Proposed. ORS 135.185 is amended to read:

135.185 Holding defendant to answer. If it appears from the preliminary hearing that there is probable cause to believe that a crime has been committed and that the defendant committed it, the magistrate shall make a written order holding the defendant for further proceedings on the charge. When hearsay evidence was admitted at the preliminary hearing, the magistrate in determining the existence of probable cause, shall consider (a) the extent to which the hearsay quality of the evidence affects the weight it should be given, and (b) the likelihood of evidence other than hearsay being available at trial to provide the information furnished by hearsay at the preliminary hearing.

House Judiciary Committee
HB 2030, Exhibit E
February 5, 1981 - 3:10 p.m.
3-page exhibit
presented by staff

EVIDENCE CODE
Joint Work Session
Staff Proposal
February 3, 1981

Oregon Rule of Evidence 103

Commentary

Oregon Rule of Evidence 103 is identical to Rule 103 of the Federal Rules of Evidence. By enacting this rule the Legislature does not intend to change current Oregon practice with regard to rulings on evidence, with one exception.

Under subsection (1), rulings on evidence cannot be assigned as error unless a substantial right is affected, and the nature of the error was called to the attention of the trial judge to alert the court to the proper course of action and enable opposing counsel to take proper corrective measures. The objection and the offer of proof are the techniques for accomplishing these objectives.

Subsection (1) abolishes the rule established by the Oregon Supreme Court in civil cases, that erroneously admitted evidence is deemed prejudicial unless the contrary is affirmatively shown. Meyer v. Harvey Aluminum, 263 Or 487, 495, 501 P2d 795 (1972); Elam v. Soares, 282 Or 93, 193, 577 P2d 1336 (1978). The Legislature intends that no presumption regarding evidentiary error operate in favor of either party in the appeal of a civil case.

Subsection (1) does not otherwise change the law in Oregon with respect to harmless error. Section 3, Article VII (Amended), Oregon Constitution, allows the appellate courts of this state to affirm the judgment of a lower court, notwithstanding any error committed by the trial court, if the error is either so technical in nature or so unsubstantial that as a practical matter there is little, if any, likelihood that the erroneous evidence affected the verdict. State v. Van Hooser, 11 Or App 146, 501 P2d 78 (1972). Subsection (1) of the rule is also in accord with current ORS 19.125 and 131.035. Under these statutes, a ruling of a trial court must be not only erroneous but prejudicial to warrant reversal. Edwards, Guardian v. Hovet, 185 Or 284, 200 P2d 955 (1949); Kuffel v. Reiser, 268 Or 152, 519 P2d 365 (1974).

Paragraph (a) of subsection (1) restates the rule in Oregon that if counsel wishes to raise an error of the trial court on appeal, counsel must so advise the court by offer, objection, motion or other appropriate action, so the trial court may avoid the error. Frangos v. Edmunds, 179 Or 577, 173 P2d 596 (1946). Similarly, paragraph (b) is consistent with the current requirement that in making an offer of proof, counsel should be distinct and clear. The offer should embody the pertinent facts in such terms as to be understood and ruled upon in the intended sense by the trial judge, and examined and applied in the proper light by any reviewing court. Downey v. Traveler's Inn, 243 Or 206, 412 P2d 359 (1966).

Under subsection (2), a true and complete record of what occurred in the trial court must be reproduced for the appellate court. The second sentence of this subsection is designed to resolve doubts about what testimony the witness would have given, and, in nonjury cases, to provide the appellate

court with material for a possible final disposition of the case in the event of a reversal of a ruling that excluded evidence. The subsection is couched in discretionary language because of the practical impossibility of stating a satisfactory rule in mandatory terms.

Under subsection (3), excluded evidence in a jury case, to the extent practicable, must be prevented from coming to the attention of the jury. For example, questions on which an offer of proof is based should not be asked in the presence of the jury. This subsection is consistent with the holding in State v. Jordan, 146 Or 504, 26 P2d 558 (1933), affirmed 146 Or 504, 30 P2d 751, that doubtful questions of evidence or procedure should not be proposed or discussed in the jury's presence, and that the court should exclude the jury while hearing preliminary testimony on the question of admissibility of evidence.

In subsection (4), the Legislature reaffirms the plain error principle that courts should not be bound by breakdowns of the adversary system. Subsection (4) is an exception to subsection (1) of this rule, particularly with regard to a ruling admitting evidence when no timely objection or motion to strike appears in the record. Subsection (4) does not change the Oregon rule that a question not raised and preserved in the trial court will not be considered upon appeal unless, upon examination of the entire record, the reviewing court finds that the error is manifest and that the ends of justice will not otherwise be satisfied. State v. Hickmann, 21 Or App 303, 540 P2d 1406 (1975).

House Judiciary Committee
HB 2030, Exhibit F
February 5, 1981 - 3:10 p.m.
6-page exhibit
presented by Elliott Lynn

PROPOSED CHANGES IN ARTICLES II, III & IV, OF THE PROPOSED OREGON EVIDENCE CODE HOUSE BILL 2030

The Oregon Trial Lawyers' Proposals

Section 6a Rule 106

DISCUSSION - The present Rule 106 embodies ORS 41.880 and essentially allows evidence to be admitted at the time any part of an act, declaration, conversation or writing is introduced. The reason for the timely introduction of evidence is so that a more fair and complete understanding of the evidence will result. A problem arose with respect to the Oregon Supreme Court's interpretation of ORS 41.880 in the case of Black -v- Nelson, 246 Or 161 (1967). That case generally stated that in order for evidence to be introduced, it must be material, and affect in some way, the part already given in evidence. In other words, the statute would not be given a literal interpretation.

In order to prevent any problems with the interpretation of Section 6a Rule 106, the following proposal is made.

PROPOSAL - Remove the language on page 3,line 3 ",the whole,". Substitute in its' place, the following, ",the whole on the same subject as long as otherwise admissible,".

SECTION 11 Rule 201(f)

DISCUSSION - Because of the constitutional problem of taking Judicial notice at the Appellate Court level, which effectively precludes a jury finding, and because of the unfairness and procedural problems of judicial notice on appeal in a civil case, the following proposal is made.

PROPOSAL - Section 11 Rule 201 (f) should be changed to read, "Judical notice may be taken at any stage of the trial proceedings." This involves the insertion of the word "trial" to modify the word "proceedings".

Section 14 Rule 305 and Section 15 Rule 306

DISCUSSION - Because the phrase "burden of persuasion" is confusing and carries a connotation that it is less trustworthy than "proof", it should not be adopted. The common person understands and uses phrases pertaining to proof, such as "prove it to me", and will find the phrase "burden of persuasion" difficult to grasp. Also, "burden of proof" is quantified more easily than the proposed "burden of persuasion".

The present jury instructions are couched in clear terms regarding the burden of proof, and are generally understood by the public and the legal community. There is no reason for making this confusing change.

PROPOSAL - In Section 14 Rule 305 and Section 15 Rule 306, the phrase "burden of persuastion" should be deleted and the phrase "burden of proof" substituted.

Section 18 Rule 309

DISCUSSION - The advisory committee commentary in Section 18 Rule 309 makes clear that the "net effect of this section is to reduce presumptions in criminal cases to nothing more than permissible inferences."

PROPOSAL - Therefore, the third full paragraph on page 32 of the Proposed Evidence Code with commentary, beginning with "therefore, the net effect..", should be adopted as official commentary.

Section 24 Rule 404

DISCUSSION - The advisory committee commentary makes clear that it chose not to expand the use of circumstantial character evidence in civil cases. The commentary on page 47 paragraph 4 states that "sub-section 2 of this section should not be construed to allow admission of character evidence under circumstances in which it would not be currently admitted," and then goes on to point out that it still proscribes character evidence with respect to care, negligence or accident proneness, etc. in negligence cases, therefore;

PROPOSAL - The fourth full paragraph on page 47 of the advisory committee commentary, dealing with Section 24 Rule 404 should be adopted as part of the official commentary.

Section 25 Rule 405

DISCUSSION - Section 25 Rule 405 is a drastic departure from existing Oregon law. This section would allow any witness to give his opinion regarding the truthfullness of any other witness. The witnesses opinion would be based on his or her perception of events that may have taken place at any time in the past. The witness may give his opinion that another witness is a liar, with very little basis for making that opinion. The opposing attorney is then required to delve into facts and circumstances which form the basis for the witnessess' opinion. These facts and circumstances may have occured years before and may be open to several different interpretations. This would open up the need for a trial within a trial to determine if the facts which arose as a result of incidents were properly interpreted by the witness and the calling of other witnesses who may have seen or heard the same incidents but who drew different conclusions.

The witnesses' perception will of necessity, have involved peripheral matters, such as the interpretation of a contract which may have taken place between the witnesses and on which each placed a different meaning. As an example, a witness is called and he gives his opinion that the plaintiff is a liar. The basis of his opinion may be that in previous dealings with the plaintiff, the plaintiff has not lived up to his end of the contract with respect to timely delivery, etc. and therefore, the witness preceives the plaintiff as a liar.

Opinion evidence is much different than reputation evidence because reputation evidence involves what the witness has heard regarding general knowledge in the community, and does not deal with the specific opinion of the witness based upon his or her personal dealings with the person whose truthfullness is challenged. Reputation in a community is a sum of all the witnesses' actions and interactions in the community and is much more trustworthy and less prejudical than an opinion. Reputation evidence has been accepted for many years in the Oregon Courts, but there is no history of opinion evidence being admitted, and there is no Oregon case allowing opinion evidence.

In summary, if opinion evidence is allowed, it will create "trials within trials" regarding peripheral matters and will involve the calling of additional witnesses to testify regarding extraneous and peripheral matters, creating delay at trial and increased cost of trials.

Section 25 Rule 405 makes specific reference to Section 24 Rule 404 (2) which allows evidence of the character of a witness as provided in Section 51 through 53 which are Rule 607 and 609, Section 52 Rule 608 allows the credibility of a witness to be supported or attacked by opinion evidence regarding the character for truthfullness

or untruthfullness. However, it does not allow specific instances of the conduct of a witness to be proved by extrinsic evidence. Furthermore, it does not allow inquiry into specific instances of conduct on cross-examination of the witness even if they would be probative of truthfullness or untruthfullness. It is so restrictive that it only allows a witness on cross-examination to be asked if they "have heard"or "know" of specific instances of bad conduct relevant to the character trait of credibility.

Therefore, it appears that Section 52 Rule 608 allows evidence in the form of an opinion but does not allow cross-examination regarding specific instances of conduct even if they are probative of truthfullness or untruthfullness. This must be contrasted with Section 25 Rule 405 where a witness can give an opinion and upon cross-examination, inquiry is allowable into relevant specific instances of conduct. There is a seeming contadictory policy between Rule 405 and Rule 608.

Even if "opinion" is deleted, there still remains apparent contradiction of policy in the evidence to be received regarding "reputation" evidence.

PROPOSAL - The word opinion should be deleted from Section 25 Rule 405 and Section 52 Rule 608. The last sentence of Section 25 Rule 405 Subsection 1 which reads "On cross-examination, inquiry is allowable into relevant specific instances of conduct." should be deleted.

Section 26 Rule 406

DISCUSSION - The present Oregon law requires that there be an absence of eye witnesses as a prerequisite to receiving evidence regarding the habit of a person or of the routine practice of an organization. This requirement should be kept and reinforced in the Proposed Evidence Code.

It is not difficult to envision a situation where two automobiles collide at an intersection which has a stop sign controlling one direction. Both eye witnesses will testify as to their version of what happened. Then the defendant who was alleged to have run the stop sign, will parade in several witnesses who have previously driven with him, and who have known him for years and years, testify that it is his habit, custom and routine to stop at every stop sign. This has almost no reliable probative value. The real question is what happened on that particular occasion, and a parade of witnesses who did not see what happended will be of no use to the Court. It will take the Court's time and will require that a plaintiff and a defendant scout up several people who will come in and testify that they are both very, very safe drivers and never break the law.

The Oregon Rule requiring an absence of eye witnesses is and has been a workable rule and should be adopted in the Proposed Evidence Code.

PROPOSAL - The present Oregon law requiring an absence of eye witnesses before evidence of habit or routine practice can be admitted, should be codified in the new Evidence Code.

EVIDENCE CODE
Joint Work Session
Staff Proposal
February 3, 1981

House Judiciary Committee
HB 2030, Exhibit G
February 5, 1981 - 3:10 p.m.
1-page exhibit
presented by staff

Oregon Rule of Evidence 100

Commentary

Oregon Rule of Evidence 100 is based on Rule 1103 of the Federal Rules of Evidence.

House Judiciary
HB 2030, Exhibit H
February 5, 1981 - 3:10 p.m.
1-page exhibit
presented by staff

EVIDENCE CODE
Joint Work Session
Staff Proposal
February 3, 1981

Oregon Rule of Evidence 102

Commentary

Oregon Rule of Evidence 102 declares the purpose and the proper approach to the construction of ORE 100 to 1008. It is based on Rule 102 of the Federal Rules of Evidence. ORE 102 replaces ORS 41.020 (1979 Replacement Part), a more general description of the law of evidence.

House Judiciary Committee
HB 2030, Exhibit I
February 5, 1981 - 3:10 p.m.
4-page exhibit
presented by staff

EVIDENCE CODE
Joint Work Session
Staff Proposal
February 3, 1981

Oregon Rule of Evidence 104

Commentary

Oregon Rule of Evidence 104 tracks the language of Rule 104 of the Federal Rules of Evidence. The Legislature intends that the adoption of ORE 104 will not change prevailing Oregon law relating to preliminary questions of admissibility.

Subsection (1) of this rule assigns to the trial judge the responsibility for making certain preliminary determinations regarding qualifications, privilege and admissibility. Is the alleged expert a qualified physician? Was a stranger present during a conversation between attorney and client? Is a witness whose former testimony is offered unavailable? In each instance, the admissibility of evidence will turn on the answer to the question.

To the extent that these preliminary inquiries are factual, the judge will necessarily receive evidence and act as a trier of fact. The subsection provides that in doing so, the judge is not bound by the rules of evidence except those relating to privilege. Often, however, preliminary questions call for an evaluation of evidence in terms of a legal standard. When a hearsay statement is offered as a declaration against interest, for example, a decision must be made whether it possesses the required against-interest characteristics. These decisions, too, are to be made by the judge.

Subsection (1) is consistent with ORCP 59B and ORS 136.310, which provide that the court shall decide "all questions of law, including the admissibility of testimony, [and] the facts preliminary to such admission . . . ." The subsection is of general application. However, it must be read as subject to subsections (2) and (3) of this rule.

Subsection (2) recognizes that in some situations the relevance of an item of evidence depends upon the existence of a particular preliminary fact. Thus, when an oral statement is relied upon to prove notice to X, it is without probative value unless X heard it. If a letter purporting to be from Y is relied upon to establish an admission by Y, it has no probative value unless Y wrote or authorized it. Relevancy in this sense has been labeled "conditional relevancy." Morgan, Basic Problems of Evidence 45-46 (1962). Problems arising in connection with it are to be distinguished from problems of logical relevancy treated under Rule 401.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subsection (1), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with the treatment generally given to questions of fact. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If, after all the evidence on the issue is in, the jury could not reasonably conclude that fulfillment of the condition is established, the judge withdraws the matter from the jury's consideration.

Subsection (2) is consistent with the holding of Menefee v. Blitz, 181 Or 100, 179 P2d 550 (1947), which indicates that when the relevance of an item of evidence depends upon the submission of preliminary proof in the form of a foundation, or condition precedent, the party offering the dependent testimony must submit the preliminary proof or establish the condition precedent before the dependent fact can be deemed admissible.

Under subsection (3), preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. This is in accord with State v. Jordan, 145 Or 504, 26 P2d (1934) and State v. Brewton, 238 Or 590, 395 P2d 874 (1964). When other preliminary matters should be so heard must be left to the discretion of the trial judge, who will act as the interests of justice require. Frequently, evidence which is relevant to the fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect.

When an accused is a witness as to a preliminary matter, the accused has the right to be heard outside the jury's presence upon the accused's request. Proper regard for the right of an accused not to testify generally in a case dictates that the accused be given this option.

Under subsection (4), a limitation upon cross-examination is imposed to encourage participation by the accused in the determination of preliminary matters. The accused may testify concerning them without exposure to cross-examination generally. This limitation is necessary because of the scope of

cross-examination permitted under ORE 611. The subsection does not address itself to questions of the subsequent use of testimony given by an accused at a hearing on a preliminary matter.

Subsection (5) declares that nothing contained in the first four subsections of this rule should be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility. This is consistent with section 6, Article I, Oregon Constitution, with existing subsection (16) of ORS 41.900 (1979 Replacement Part), and with the holding in State v. Estabrook, 162 Or 476, 91 P2d 838 (1939). Although the Legislature repeals ORS 41.900, it retains the substantive legal principles of that section in the several rules of the Evidence Code.

House Judiciary Committee
HB 2030, Exhibit J
February 5, 1981 - 3:10 p.m.
1-page exhibit
presented by staff

EVIDENCE CODE
Joint Work Session
Staff Proposal
February 3, 1981

Oregon Rule of Evidence 105

Commentary

Oregon Rule of Evidence 105 is identical to Rule 105 of the Federal Rules of Evidence. It permits the admission of evidence for a limited purpose and the instruction of the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in deciding whether to exclude evidence for unfair prejudice under Rule 403. The Legislature does not intend to imply that limiting or curative instructions are sufficient in all situations, or that Rule 105 limits the authority of a court to order a severance in a multi-defendant case.

This rule is consistent with current Oregon practice. See State v. Moore, 180 Or 502, 176 P2d 631 (1947); Brooks v. Bergholm, 265 Or 1, 470 P2d 154 (1970); Cramer v. Mengerhausen, 275 Or 223, 550 P2d 740 (1976).

House Judiciary Committee
Exhibit K, HB 2030
February 19, 1981
6-page exhibit
presented by Elliott Lynn

PROPOSED CHANGES IN ARTICLES II, III & IV OF THE PROPOSED OREGON EVIDENCE CODE

The Oregon Trial Lawyers' Proposals

Section 14 Rule 305 and Section 15 Rule 306

PROPOSAL

In Section 14 Rule 305 and Section 15 Rule 306, the phrase "burden of persuasion" should be deleted and the phrase, "burden of proof" substituted in its' place.

DISCUSSION

Because the phrase "burden of persuasion" is confusing and carries a connotation that it is less trustworthy than "proof", it should not be adopted. The average person understands and uses phrases pertaining to "proof", and will find the phrase "burden of persuasion difficult to grasp. Also, "burden of proof" is mentally quantified more easily than the proposed"burden of persuasion."

The present Oregon Jury Instructions are couched in clear terms regarding the"burden of proof", and are generally understood by the public and the legal community. There is no reason for making this confusing change.

Section 18 Rule 309

PROPOSED COMMENTARY

The net effect of Rule 309 is to reduce presumptions in criminal cases to nothing more than permissible inferences.

DISCUSSION

The advisory committee commentary on Section 18 Rule 309 makes clear that the net effect of this section is to reduce

presumptions in criminal cases is nothing more than permissible inferences. The intention and the goal of Rule 309 should be set forth in the official commentary so that there will be no misunderstanding about the purpose of the adoption of the Rule.

Section 24 Rule 404

PROPOSAL

The fourth full paragraph on page 47 of the Advisory Committee Commentary, dealing with Section 24, Rule 404 should be adopted as the official commentary. It reads as follows:

> " The Advisory Committee chose not to expand the use of circumstantial character evidence in civil cases. The members merely retained in paragraphs (C & D of Sub-section 2) of this section those uses of such evidence already sanctioned under existing law. Sub-section (2) of this section should not be construed to allow admission of character evidence under circumstances in which it would not be currently admitted, such as character evidence with respect to care, negligence, or "accident proneness" in negligence cases."

DISCUSSION

The Advisory Committee commentary makes clear that it chose not to expand the use of circumstantial character evidence in civil cases. The commentary on page 47 paragraph 4 states that "sub-section 2 of this section should not be construed to allow admission of character evidence under circumstances in which it would not be currently admitted", and then goes on to point out that it still proscribes character evidence with respect to care, negligence

or accident proneness, etc. in negligence cases.

Section 25 Rule 405

PROPOSAL

The word"opinion"should be deleted from Section 25 Rule 405 and Section 52 Rule 608. The last sentence of Section 25 Rule 405 Sub-section 1 which reads "On cross-examination, inquiry is allowable into relevant specific instances of conduct." should be deleted.

DISCUSSION

Section 25 Rule 405 is a drastic departure from existing Oregon law. This section would allow any witness to give his"opinion"regarding the truthfullness of any other witness. The witnesses opinion would be based on his or her perception of events that may have taken place at any time in the past. The witness may give his opinion that another witness is a liar, with very little basis for making that opinion. The opposing attorney is then required to delve into facts and circumstances which form the basis for the witnesses'opinion. These facts and circumstances may have occured years before and may be open to several different interpretations. This would open up the need for a trial within a trial to determine if the facts which arose as a result of incidents were properly interpreted by the witness and the calling of other witnesses who may have seen or heard the same incidents but who drew different conclusions.

The witnesses' perception will of necessity, have involved peripheral matters, such as the interpretation of a contract which may have taken place between the witnesses and on which each placed a different meaning. As an example, a witness is called and he gives his opinion that the plaintiff is a liar. The basis of his

opinion may be that in previous dealings with the plaintiff, the plaintiff has not lived up to his end of the contract with respect to timely delivery, etc. and therefore, the witness perceives the plaintiff as a liar.

Opinion evidence is much different than reputation evidence because reputation evidence involves what the witness has heard regarding general knowledge in the community, and does not deal with the specific opinion of the witness based upon his or her personal dealings with the person whose truthfullness is challenged. Reputation in a community is a sum of all the witnesses' actions and interactions in the community and is much more trustworthy and less prejudical than an opinion. Reputation evidence has been accepted for many years in the Oregon Courts, but there is no history of opinion evidence being admitted, and there is no Oregon case allowing opinion evidence.

In summary, if opinion evidence is allowed, it will create "trials within trials" regarding peripheral matters and will involve the calling of additional witnesses to testify regarding extraneous and peripheral matters,creating delay at trial and increased cost of trials.

Section 25 Rule 405 makes specific reference to Section 24 Rule 404 (2) which allows evidence of the character of a witness as provided in Section 51 through 53 which are Rules 607 and 609. Section 52 Rule 608 allows the credibility of a witness to be supported or attacked by opinion evidence regarding the character for truthfullness or untruthfullness. However, it does not allow specific instances of the conduct of a witness to be proved by extrinsic evidence. Furthermore, it does not allow inquiry into specific instances of conduct

on cross-examination of the witness even if they would be probative of truthfullness or untruthfullness. It is so restrictive that it only allows a witness on cross-examination to be asked if they "have heard" or "know" of specific instances of bad conduct relevant to the character trait of credibility.

Therefore, it appears that Section 52 Rule 608 allows evidence in the form of an opinion but does not allow cross-examination regarding specific instances of conduct even if they are probative of truthfullness or untruthfullness. This must be contrasted with Section 25 Rule 405 where a witness can give an opinion and upon cross-examination, inquiry is allowable into relevant specific instances of conduct. There is a seeming contradictory policy between Rule 405 and Rule 608.

Even if "opinion" is deleted, there still remains apparent contradiction of policy in the evidence to be received regarding "reputation evidence".

SECTION 26 Rule 406 -Substitute this proposed amendment for the present Rule 406 contained in H.B. 2030.

PROPOSAL

Routine Business Practice.

Evidence of the routine business practice of an organization is relevant to prove that the conduct of the organization on a particular occasion was in conformity with that routine practice.

DISCUSSION

The present Oregon law prohibits the introduction of evidence of the general habits of a person when offered for the purpose of showing the nature of his or her conduct upon a specific occasion. The present law should be kept and reinforced in the Proposed Evidence Code. There is no need for this change and it will cause prejudice,

confusion, and more lengthy trials if evidence of habit can be introduced.

It is not difficult to envision a situtation where two automobiles collide at an intersection which has a stop sign controlling one direction. Both eye witnesses will testify as to their version of what happened. Then the defendant who was alleged to have run the stop sign, will parade in several witnesses who have previously driven with him, and who have known him for years, testify that it is his habit, custom and routine to stop at every stop sign. This has almost no reliable probative value. The real question is what happened on that particular occasion, and a parade of witnesses who did not see what happened will be of no use to the Court. It will take the Court's time and will require that a plaintiff and a defendant scout up several people who will come in and testify that they are both very, very safe drivers and never break the law.

House Judiciary Committee
Exhibit L, HB 2030
February 19, 1981
1-page exhibit
presented by Allison Smith

ARTICLE IV

Proposed amendments to HB 2030, requested by the Oregon District Attorneys Association, February 18, 1981.

On page 5 of the printed bill, on line 39;

After "same" delete the semicolon and add ", or evidence of a pertinent trait of character of the accused offered by the prosecution following evidence offered by the accused under subsection (b) of this subsection."

On page 6 of the printed bill, in line 14;

Delete "or by testimony in the form of an opinion"

On page 7 of the printed bill, on line 11;

Before "Evidence" add "Except where lack of liability insurance is an element of an offense,"

On page 7 of the printed bill, on line 15;

After "witness" add "or motive"

House Judiciary Committee
Exhibit M, HB 2030
February 19, 1981
4-page exhibit
presented by Jim McCandlish

OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

ARTICLE IV

Rule 404(2)(b)

This paragraph would expand the use of character evidence concerning the victim's peacefulness beyond its present limitation to homicide cases only. State v. Holbrook, 98 Or 43 (1920). Federal Rule 404 retains this limitation. Professor Kirkpatrick criticizes the proposed expansion, and recommends limiting such character evidence to homicide cases.

> "Character evidence is a particularly dangerous type of evidence because it may cause a jury to base its decision on sympathy for the victim or disapproval of the victim's past conduct rather than on the relevant facts. When evidence of the victim's character is allowed, unfair pressure is placed on the defendant to present evidence of his own character. The federal rule allows evidence of a victim's character in homicide cases largely out of necessity; the victim is not alive to tell what happened. In other criminal proceedings and in civil assault and battery cases, the use of character evidence is highly questionable. The legislature should delete the proposed rule's authorization of evidence of a victim's character in non-homicide cases.". 59 Or. L. Rev. 43, 63-64 (1980).

Proposed Amendment

On page 6, line 3, after "prosecution", insert "in a homicide case".

Rule 412

The proposed rule would allow testimony on prior sexual conduct of the prosecutrix, if more probative than prejudicial when:

(1) The accused raises the defense of consent and the evidence is of prior sexual behavior with the accused; or

(2) The accused offers evidence of sexual conduct between the prosecutrix and another on the issue of whether or not he was the source of semen or injury; and

(3) If constitutionally required, without further definition.

It is recommended that Section (5) of ORS 163.475 be retained. This section was added to the statute by the 1977 Legislature to correct the vagueness problems of the prior statute, which was held unconstitutional in State v. Jalo, 27 Or App 845 (1976). ORS 163.475(5) is broader than the specifics of the proposed rule in several respects:

(1) It is not limited to "source of semen or injury"; rather it would allow "(e)vidence that is necessary to rebut or explain scientific or medical evidence offered by the state." For example, the results of a hair analysis test would be challengeable now, but not under the proposed rule, unless constitutionally required.

(2) Evidence establishing motive or bias of the prosecutrix is specifically allowable under present law; but not so under the proposed rule, unless constitutionally required.

Professor Kirkpatrick suggests that in order to provide trial courts with more guidance, greater specificity is desirable. 59 Or. L. Rev. at 69. The proposed Rule 412 needs careful review to incorporate the suggested changes. No specific amendments are proposed at this time.

OREGON CRIMINAL DEFENSE LAWYER'S ASSOCIATION

Proposed Amendments - ORE 412

1. On Page 7 of the bill, Line 18, delete "or opinion." On Line 22, delete "or opinion" and delete the second "or." On Line 23, delete "opinion."

Commentary - The reference to "opinion evdience" is unnecessary because of its deletion as proper character evidence from ORE 405. (It is)

2. On Line 24, after "section", delete "and is" and insert "; and."

Delete Line 25.

On Line 26, after "(b)", delete the remainder of the line and insert "is evidence that. . ."

Delete Line 27 through 31 and insert:

"(A) Relates to the motive or bias of the alleged victim; or

(B) Is necessary to rebut or explain scientific or medical evidence offered by the state; or

(C) Is otherwise constitutionally required to be admitted.". ≥

Commentary - Delete the first three paragraphs of the Commentary on Page 64 of the Proposed Evidence Code and insert:

"(1) The evidence relates to motive or bias; or

(2) The evidence rebuts scientific or medical evidence offered by the state; or

(3) Is otherwise constitutionally required.

This section specifies two instances in which such evidence is constitutionally required, and comports with existing Oregon law. ORS 163.475(5), as modified by the 1977 legislature in response to the prior statute being declared unconstitutional in State v. Jalo, 27 Or App 845, 557 P2d 1359 (1976). Paragraph (C) recognizes that an unusual chain of circumstances in any given case may require that evidence of the prosecutrix's past sexual behavior be admitted in deference to the constitutional rights of the accused. ".

House Judiciary Committee
Exhibit N, HB 2030
February 26, 1981
3-page exhibit
presented by staff

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Lewis and Clark College
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FEB 5 1981

February 3, 1981

Senate Committee on Justice
House Judiciary Committee
State Capitol Building
Salem, Oregon 97310

ATTENTION: Kris LaMar, Room 346

RE: Sec. 17, "Rule 308", Proposed Oregon Evidence Code

Sec. 17, "Rule 308", entitled Presumptions in Civil Proceedings, of the Proposed Oregon Evidence Code, should not be enacted.

This section as proposed, would create the so-called "Morgan approach" to civil presumptions. Under that view, the presumption does not cease to operate upon satisfactory rebuttal, but rather continues to operate by shifting the burden to preponderate on the issue to the opponent. The jury would be so instructed.

The better view of the effect of civil presumptions is the so-called "Thayer approach". Under that approach the burden to persuade by a preponderance of the evidence never shifts and rests throughout the trial on the party initially allocated that burden.

The Thayer view is better than the Morgan view for the following reasons:

(1) The Thayer view is simpler and more easily applied. The law of presumptions is profoundly complex and legalistic. It is a source of confusion to trial lawyers and trial judges. In the absence of any compelling reasons of fairness, it should not be made any more intricate than necessary. The Thayer view keeps the matter of presumptions as simply a procedural device for court administration of an orderly proceeding; the jury is never told of any presumptions, is never required to distinguish presumptions from inferences, is never told to alter its findings in case of equipose.

The Morgan view can create horrendously complicated jury instructions. For example, in a personal injury case under the

affirmative defense of "assumption of risk" the defendant has the initial bruden of showing that plaintiff voluntarily assumed a known danger. Thus, the jury would be instructed that defendant must prove by a preponderance of evidence that plaintiff (1) actually knew of the danger and (2) did voluntarily encounter it. Suppose defendant sufficiently proves that he duly mailed plaintiff a letter notifying plaintiff of the danger. This proof gives rise to a presumption that plaintiff received the letter. Plaintiff offers proof that he did not receive the letter.

In that example, under the Morgan view, the burden of persuasion of non-receipt of the letter would have shifted to the plaintiff, but the general issue of assumption of risk would not; the issue of voluntariness would remain with defendant. Ergo, the instruction to the jury might go something like this:

"Ladies and gentlemen of the jury, you must decide whether or not plaintiff voluntarily and knowingly encountered the [danger involved in this case]. You have heard evidence that defendant mailed a notice of the danger to plaintiff. I instruct you that the burden of proof beyond a preponderance of the evidence is on plaintiff to show that he did not receive the letter, but the burden of proof beyond a preponderance of the evidence is on defendant to show that plaintiff voluntarily assumed the risk... etc., etc." The instruction would gain added complexity if we recognized that a presumption of letter receipt may not be a presumption of actual knowledge. Thus, the jury may have to further bifurcate the shifting of burdens between voluntariness, receipt, and knowledge.

Under the Thayer view, the jury would simply be advised that the burden of preponderance on the issue of assumption of risk is on the defendant.

In short, the problem with the Morgan view is that it tends to fragment general issue areas for jury weighing and to scatter a single issue area into a multitude of issues with consequent disparity in shifting of burdens. While this fragmentation may be somewhat justified by microscopic analysis, much is lost in the simple and streamlined submission of general questions of fact to an unsophisticated, but "street-wise", jury.

(2) The Federal Rules of Evidence (Rule 301) adopts the Thayer approach. Thus, the Thayer view becomes the law applicable in the federal courts of Oregon. In the absence of compelling reasons of fairness, it would be better if the state and federal courts of Oregon maintained a uniform procedural practice.

(3) The Morgan view gives too great a weight to presumptions. While there may be a few presumptions that might warrant this added effect, most of the presumptions indiscriminately listed in Sec. 18, "Rule 309" of the proposal do not deserve such treatment and are not necessarily supported by logical or scientific study. It is enough, therefore, that most of these presumptions be given the effect of "smoking out" an explanation from the opponent against whom they operate and, then, in the case of such rebuttal being left to the inferences arising therefrom.

Therefore, I urge that the joint committee amend Rule 308 to read in substantial conformity to Federal Rule of Evidence 301.

Sincerely yours,

Ron Lansing

Ronald B. Lansing
Professor of Law

RBL/yt

cc: Representative Tom Mason, Chairman,
House Judiciary Committee
Senator Jan Wyers, Chairman,
Senate Justice Committee

House Judiciary Committee
Exhibit O, HB 2061
February 26, 1981
5-page exhibit, presented by Bruce Smith

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January 27, 1981

Senate Committee on Justice and
House Judiciary Subcommittee
State Capitol
Salem, OR 97310

Dear Committee Members:

Enclosed are the recommendations of the Oregon State Bar Ad Hoc Committee on the Proposed Code of Evidence for the following sections:

§14. Rule 305. The Allocation of the Burden of Persuasion.

§15. Rule 306. Instructions on the Burden of Persuasion.

§17. Rule 308. Presumptions in Civil Proceedings.

§18. Rule 309 Presumptions in Criminal Proceedings.

These recommendations represent a majority vote of the Ad Hoc Committee on the Proposed Code of Evidence and do not purport to be the position of the Oregon State Bar as a whole. The members of the Committee are: G. Marts Acker, Portland; Douglass M. Hamilton, Portland; James L. Knoll, Portland; Norman Sepenuk, Portland; and Bruce Smith, Eugene.

Very truly yours,

Bruce Smith
Chairman
Ad Hoc Committee on Proposed
Code of Evidence

BES/sjc
Encl.

OREGON STATE BAR
AD HOC COMMITTEE ON PROPOSED CODE OF EVIDENCE

SUBJECT: Section 14. Rule 305. Allocation of the burden of persuasion.; and Section 15, Rule 306. Instructions on the burden of persuasion.

RECOMMENDATION: The proposed Rules should be amended to substitute "burden of proof" for "burden of persuasion."

DISCUSSION

"Burden of proof" is a time-tested phrase that seems to work well. "Proof" is a simple, strong word. "Persuasion" is a more complex word which imports a lesser degree of conviction. It may lead to argument that a party need only be persuasive, and need not prove his case.

The Commentary to Section 14. Rule 305. states that the section is a modified version of California Evidence Code section 500. That section, however, uses the words "burden of proof," which should be retained in the Oregon Rules. No reason to do otherwise is stated in the Commentary of the Advisory Committee.

Oregon State Bar
Ad Hoc Committee on
Proposed Code of Evidence

OREGON STATE BAR AD HOC COMMITTEE

ON THE PROPOSED RULES OF EVIDENCE

SUBJECT : Section 17 (Rule 308), House Bill 2030

"PRESUMPTIONS IN CIVIL PROCEEDINGS. In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."

RECOMMENDATION:

The committee recommends that the Alaskan modification of Federal Rule of Evidence 301 be adopted in place of the proposed rule.

"In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom the presumption operates fails to meet the burden of producing evidence, the presumed fact shall be deemed proved, and the court shall instruct the jury accordingly. When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact, but no mention of the word 'presumption' may be made to the jury." Alaska R. Evid. 301 (Fed. R. Evid. 301).

DISCUSSION:

Rule 308 represents a substantial change from present Oregon law dealing with presumptions in civil proceedings. Oregon law presently provides that a presumption in a civil case continues despite contradictory evidence introduced by an opponent of the presumption. The burden of proving the evidentiary point

"established" by the presumption does not shift to the opponent regardless of what evidence may be introduced pertaining to the fact to be presumed. The Oregon rule provides for an instruction which calls to the attention of the jury the existence of the presumption once the underlying facts supporting the presumption have been established. See U.S. Nat'l Bank v. Underwriters at Lloyds, 239 Or 298, 396 P.2d 765 (1964).

The proposed rule imposes upon the opponent of the presumption the burden of going forward with the evidence to rebut the presumption as well as shifts to that party the burden of proof (the risk of nonpersuasion). Should the opponent offer evidence which only balances the scale as opposed to tipping the scale in his favor, under the proposed rule he would lose on that particular point. Under existing Oregon law, the proponent would lose as he would on any point which he fails to prove.

The proposed rule is contrary to the Federal Rules of Evidence and the common law rule followed by a majority of states. See C. McCormick, Handbook of the Law of Evidence, §345(2d cleary ed. 1972) and Kirkpatrick, Reforming Evidence Law in Oregon, 59 Or Law Rev. 43, 5658.

The recommended rule not only brings Oregon law into line with the majority of the other jurisdictions and reduces the unnecessary attention drawn to presumptions but also eliminates four problems created under the federal rule. The additional language resolves the question of the amount of rebutting evidence which an opponent of the presumed fact needs to introduce to avoid a directed verdict; establishes that a jury must find in accordance with the presumption if no rebutting evidence is offered; and permits the jury to be instructed that it may infer the existence of the presumed fact from the proof of the basic fact when the presumption is rebutted.

Even if the correlation between the basic facts and the presumed fact is high, the committee questions whether that general correlation should control the outcome in a specific case when the evidence on the existence of the presumed fact is equally balanced or highly contested. The instruction to the jury that it may infer the existence of the presumed fact from the proven facts will likely cause the jury to give the proponent of the presumption the benefit of any logical inference arising from the proven facts. The committee feels an instruction that the opponent of the presumption has the burden of disproving the presumed fact gives the presumption too much weight. See Kirkpatrick, Reforming Evidence Law in Oregon, 59 Or Law Rev. 58.

OREGON STATE BAR
AD HOC COMMITTEE ON PROPOSED CODE OF EVIDENCE

SUBJECT: Section 18. Rule 309. Presumptions in criminal proceedings.

RECOMMENDATION: The proposed Rule should be amended to substitute "facts giving rise to the presumed fact" instead of "basic facts." The Rule would then read:

> SECTION 18. Rule 309. Presumptions in criminal proceedings. (1) The judge is not authorized to direct the jury to find a presumed fact against the accused.
>
> (2) When the presumed fact establishes guilt or is an element of the offense or negates a defense, the judge may submit the question of guilt or the existence of the presumed fact to the jury only if:
>
> (a) A reasonable juror on the evidence as a whole could find that the (basic facts) facts giving rise to the presumed facts have been established beyond a reasonable doubt; and
>
> (b) The presumed facts follow from the (basic facts) facts giving rise to the presumed facts beyond a reasonable doubt.

DISCUSSION

The words "basic facts" are believed to be confusing without definition. The suggested change is from the Study Draft of the Proposed Federal Criminal Code.

Oregon State Bar
Ad Hoc Committee on Proposed
Code of Evidence

House Judiciary Committee
Exhibit P, HB 2030
February 26, 1981
1-page exhibit
presented by Allison Smith

Amendments proposed January 29, 1981, by Allison Smith for the Oregon District Attorneys Association to HB 2030.

Page 4

Line 19 - insert "a reasonable juror could find that" after "if"

Line 20 - delete "A reasonable juror" and "as a whole could find that" and insert "viewed in the light most favorable to the plaintiff," after "evidence"

These amendments would make the entire rule read:

SECTION 18. Rule 309. Presumptions in criminal proceedings. (1) The judge is not authorized to direct the jury to find a presumed fact against the accused.

(2) When the presumed fact establishes guilt or is an element of the offense or negates a defense, the judge may submit the question of guilt or the existence of the presumed fact to the jury only if a reasonable juror could find that:

(a) On the evidence viewed in the light most favorable to the plaintiff the basic facts have been established beyond a reasonable doubt; and

(b) The presumed facts follow from the basic facts beyond a reasonable doubt.

House Judiciary Committee
Exhibit Q, HB 2030
February 26, 1981
1-page exhibit

Oregon Criminal Defense Lawyers Association presented by Jim McCandlish

Rule 309

The OCDLA supports the Rule as drafted, with minor amendments to conform the language of the Rule to the intent of the drafters, as reflected in the Advisory Committee Commentary. Page 32, Paragraph 4 of the Interim Report states:

> "Therefore the net effect of this section is to reduce presumptions in criminal cases to nothing more than permissible inferences."

Proposed Amendments

On p. 4 of the bill, line 17, delete the period and insert "; but, in accordance with subsection (2) of this rule, the judge may instruct the jury that it may find an inferred fact against the accused.".

On line 18, delete "persumed fact" and insert "fact to be inferred".

On line 19, delete "persumed fact" and insert "fact to be inferred".

On line 22, delete "presumed facts" and insert "facts to be inferred".

Proposed Commentary Changes

On page 32, paragraph 4, line 1, delete "Therefore," and insert "The Joint Committee substituted 'fact to be inferred' for 'presumed fact' to clarify that"

House Judiciary Committee
Exhibit R, HB 2030
March 5, 1981
13-page exhibit
presented by Allison Smith

HB 2030 ARTICLE V PRIVILEGES

TO: Joint Interim Committee on the Judiciary

FROM: John L. Collins, Yamhill County District Attorney
Chairman, Oregon District Attorneys Association
Legislative Subcommittee on Evidence Code Revision

The following is a review of Article V on Privileges. The Interim Judiciary Committee has, in several instances, made significant changes from the Advisory Committee proposal. Some of these changes would pose a substantial impediment to the truth-finding process which is of paramount importance in a criminal case. Our ODAA subcommittee respectfully submits the following:

SECTION 32 LAWYER-CLIENT PRIVILEGE:

We see a very significant problem when this section is read in connection with Section 39 on Waiver of a Privilege. The problem relates to the definition of "representative of the lawyer." A suggested change in the wording of Section 39 appears later in this memorandum. However, it is appropriate to discuss the general nature of the problem here. The definition of representative of the lawyer, as worded, would make the lawyer-client privilege applicable to a physician, psychiatrist, psychologist, clinical social worker or other expert used to "assist the lawyer in the rendition of legal services." The committee has concern that this "umbrella privilege" can be used to hide facts necessary for the full determination of the truth. The committee, of course, acknowledges the importance of the lawyer-client privilege and its special constitutional role in criminal cases. For that reason, most of our concerns are addressed under Section 39 on Waiver. Under circumstances discussed more fully under

Section 39, this lawyer-client umbrella privilege could be used by a defendant or defense attorney who might seek to use the privilege to hide information as opposed to using the privilege to protect a free-flow of information between lawyer and client.

We believe that it is appropriate that a defense attorney be able to have his client evaluated by a psychotherapist for purposes of determining whether a psychiatric defense or partial defense should be raised. The lawyer should be able to authorize his client to be candid with the psychotherapist concerning the facts of the crime without fear that the prosecutor may learn of the examination and subpoena the psychotherapist as a witness after the lawyer determines that a psychiatric defense or partial defense is not appropriate. On the other hand, we strongly believe that it is not appropriate for the lawyer to obtain one or more analyses from psychotherapists which would not support a psychiatric defense or partial defense, then find a psychotherapist who would support a psychiatric defense or partial defense, call that supportive psychotherapist as a witness and then assert the lawyer-client privilege to prevent the State from calling upon the other psychotherapist. Under current Oregon law, a defense attorney could not impose this impediment to the truth-finding process. The law should not be revised so as to allow it.

The commentary (page 70, last paragraph) suggests that the "representative of the lawyer" definition was intended to cover a person "employed to assist in the planning and conduct of litigation, though not one employed to testify as a witness." The definition would also not include a physician making a physical or mental examination under ORCP44. The commentary seems, then, to suggest that the Judiciary Committee did not intend for the privilege to be used as

suggested above in a criminal case but the language, in our opinion, would clearly allow it to be so used. Additionally, the reference made to ORCP44 is a reference to a procedure which would not apply in a criminal case. It is interesting that the committee thought civil lawyers ought not to be able to utilize the lawyer-client privilege to withhold information in, for example, a personal injury case, but that they should be allowed to use it in a criminal case. The ODAA subcommittee believes that the Judiciary Committee probably did not intend this result.

SECTION 33 PSYCHOTHERAPIST-PATIENT PRIVILEGE:

Suggested amendment: Add ", in a civil case," after the word "privilege" in subsection (4)(c).

Or, under subsection (2) after the word "privilege" add the same language.

Or, under subsection (4) add: (d) there is no privilege in a criminal proceeding.

The commentary to the section, page 76, indicates that paragraph (c) of subsection (4) means, among other things, that there is no privilege if a defendant in a criminal trial raises a defense of not responsible by reason of mental disease or defect. The ODAA committee's concern is that psychiatric evidence can be raised in several different forms in a criminal trial and the defense of not responsible by reason of mental disease or defect is just one of those ways. The defendant may raise the issue of extreme emotional disturbance in a murder case or may raise the partial defense of diminished responsibility. See ORS 161.300. The issue may also be raised during an allegation that the defendant, due to some temporary psychotic episode, might not have

understood his Miranda rights or the consequences of a consent to search. There are other areas in which this psychiatric evidence could be raised. The committee is concerned that the broad language of the privilege and the vague language of the exceptions to the privilege in Section 33, coupled with the commentary which lists only one of several areas where the issue might arise, may cause a result which the Judiciary Committee does not intend. Current Oregon law does not allow a psychiatrist-patient privilege in a criminal case under any circumstances. (Through an anomaly which the Interim Committee has quite appropriately addressed in Section 33, current Oregon law does allow a privilege for a psychologist-patient privilege in a criminal case.)

The ODAA committee believes that the change which the language of this section could bring about would be harmful to the truth-finding process and was probably not the intent of the Judiciary Committee.

SECTION 33A PHYSICIAN-PATIENT PRIVILEGE:

SECTION 33B NURSE-PATIENT PRIVILEGE:

SECTION 33C SCHOOL COUNSELOR PRIVILEGE:

The ODAA committee finds no problem with these sections since all three are specifically limited to civil actions. The committee has some concern that the school counselor privilege may be worded in a way which would be detrimental to the child abuse reporting requirements of Oregon law. School personnel are currently the greatest source of information leading to the ability of Childrens Services Division, juvenile departments and other authorities to deal with the problem of child abuse. Perhaps commentary would be in order indicating that the privilege was not intended to intrude against the child abuse reporting requirements.

SECTION 33D CLINICAL SOCIAL WORKER PRIVILEGE:

Suggested change: Delete this section or eliminate the language "or criminal court" from the section.

The ODAA committee believes that it is inconsistent to severely limit or eliminate the psychiatrist-patient privilege, the psychologist-patient privilege, the doctor-patient privilege or the nurse-patient privilege in criminal cases but create a privilege for the clinical social worker. The definition of "clinical social workers" under current Oregon law would also include what is commonly referred to as psychiatric social workers, and such people have been used, from time to time, in criminal cases to render professional advice regarding psychiatric issues.

Current Oregon law does provide for this privilege but it is under a section of 44.020 which will "self-destruct" in July of 1981 unless the legislature, through this action, reinstates it.

I can relate an instance where this privilege posed a problem in a case I handled. In recent years, McMinnville has been besieged by a series of fires believed to be arsons. In June of 1980 a young man was apprehended near the scene of two fires. One of the fires, a drug store fire, not only posed danger to many occupants of the building at the time, but posed the risk of a major conflagration in the downtown McMinnville area. The other fire was at the business of a psychiatric social worker licensed by the State Board of Clinical Social Workers. Moments before the fire was discovered, the person later convicted in connection with the arson, ran into the social worker's office. The psychiatric social worker, after hearing a disturbance in his unattended outer office, went to the outer area and found the defendant. The defendant appeared to the psychiatric social worker to be very agitated and intoxicated. The

defendant made certain statements to the psychiatric social worker regarding his mental state. The psychiatric social worker offered to see the defendant immediately but the defendant declined and then left the inner office area. The psychiatric social worker, presuming that the defendant had left the building, went back to his private office. Moments later, the office was ablaze. In a hearing on the arson case, the court ruled that the psychiatric social worker, whose own office building had been set afire by the defendant, could not testify regarding the statements the defendant made to him regarding his mental state moments before his office was set on fire. The defendant was, by a plea of guilty, convicted of the drug store fire; the arson of the psychiatric social worker's office was dismissed in exchange for that plea, along with the defendant's agreement to give a full and complete statement regarding his involvement in other arsons. He admitted to twenty-nine arsons involving over six million dollars fire loss in the McMinnville area over a seven-year period.

The example may be somewhat unusual in that it involved a psychiatric social worker who was involved in the case not only as a clinical social worker but also as a victim. The issue, however, could come up in other contexts. The ODAA committee believes that privileges, as well as any other rule of evidence which limits the ability of the court to obtain all of the facts necessary to a determination of the truth, should be severely limited. In fact, the committee believes that such rules should only exist where they are supported by an overwhelming public policy or constitutional mandate such as exists in the case of the lawyer-client privilege.

In the example cited above, the defendant's mental state moments before both fires would have been extremely relevant to any psychiatric defense which might have been raised. Additionally, even if such a defense had not been raised, the statement would have been extremely relevant to motive and intent, matters which play a crucial part of the truth-finding process in a criminal case.

SECTION 34 HUSBAND-WIFE PRIVILEGE:

The ODAA committee supports the Judiciary Committee's proposal to bring the husband-wife privilege in line with the policy set forth in Trammel v. United States, cited in the commentary.

SECTION 35 CLERGYMAN-PENITENT PRIVILEGE:

The ODAA committee believes, as suggested above, that privileges should be extremely limited. However, the committee acknowledges that this privilege, which rarely arises in a criminal case, is perhaps an area where public policy suggests the privilege should exist.

SECTION 37 PUBLIC OFFICER PRIVILEGE:

The ODAA committee sees some problems where this privilege might be asserted to prevent disclosure of whether the records even exist. However, the committee acknowledges that this is current Oregon law and does not believe that the privilege poses any major problems to criminal prosecution.

SECTION 38 IDENTITY OF INFORMER:

Suggested amendment: Eliminate language which supports an in camera closed hearing.

The ODAA committee believes, especially in light of the recent case of Oregonian v. Deiz, that there might be substantial constitutional problems with a procedure which allows for a closed in camera hearing. Additionally, there may be constitutional confrontation of witnesses problems if the judge is authorized to conduct an in camera hearing where witnesses are called outside the presence of the parties.

The current Oregon law, we believe, adequately protects the State's interests in withholding the identity of the informer. Case law also, we believe, adequately protects the defendant's right to obtain the disclosure of the identity of the informer where it appears the informer may be able to give testimony necessary for a determination of the issue of guilt or innocence.

In other words, the committee believes that public policy supports the retention of this vital law enforcement tool. The privilege does not interfere with the truth-finding process since it only applies where the information does not relate to the guilt or innocence of the accused. However, we do see procedural problems, as suggested above, in providing for an in camera hearing.

SECTION 39 WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE:

Suggested change: The ODAA committee suggests that the Waiver section be amended to read as follows:

> A person upon whom Sections 32 to 42 (Rules 503 to 514) of this act confer a privilege against disclosure of the confidential matter or communication waives the privilege if a person or the person's predecessor while holder of the privilege voluntarily discloses or consents

to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication. Voluntary disclosure does not occur with the mere commencement of litigation but rather at the holder's offering of the holder or other person as a witness who testifies (and testifying on direct examination) as to the subject matter. (of the confidential matter or communication)

As discussed, in general, under Section 32, it would be possible for a defendant to raise a psychiatric defense or partial defense through the testimony of one witness and not waive the privilege with respect to other witnesses who would have relevant information on the same subject matter. For example, a defendant could, at the request of his attorney, be seen by five different psychiatrists, all of whom conclude that the defendant was not suffering from a mental disease or defect at the time of the crime. The defendant could then see a sixth "defense oriented" psychiatrist who would testify that the defendant was suffering from a mental disease or defect at the time of the crime. If the defendant then called psychiatrist number six, under the current wording of the Waiver provision, this would not constitute a waiver with respect to the lawyer-client privilege which may exist as between the defendant and the five previous psychiatrists who would be "representatives of the lawyer" under Section 32. By adding the "or other person" language, this problem would be resolved. We strongly believe that if the defendant places an issue into evidence, he should not be able to invoke a privilege in a way which would allow the disclosure of evidence only if it is favorable to the

defendant. Once the issue is raised, all relevant facts concerning that issue should be available to the trier of fact. The committee can even conceive circumstances where a defense attorney may intentionally send his client to several of the State's top psychiatrists who would render an opinion that the defendant was not suffering form a mental disease or defect at the time of the crime. The lawyer would then send his client to a "defense oriented" psychiatrist who would render an opinion that the defendant was suffering from a mental disease or defect at the time of the crime. By this tactic, the defense attorney may well have not only prevented the jury or judge from hearing the opinions of the other top psychiatrists, he may have made it very awkward, if not impossible, for the State to use those same psychiatrists for a State examination of the defendant. This tactic would not only be highly detrimental to the truth-finding process, it would give an advantage to wealthy defendants not available to the vast majority of defendants who are not in a position to hire multiple psychiatrists.

The language "and testifies on direct examination" in the proposal has been eliminated,in our suggested amendment, due largely to Section 31, Rule 705. Under that rule, an expert may give his opinion without prior disclosure of the underlying facts or data. Thus, the State would be required--or perhaps "baited"--into bringing out the facts on cross examination. Thus, the subject matter would come up during cross examination, not direct examination, and the defendant would be able, therefore, to interject otherwise privileged information without it constituting a waiver. The committee has serious concerns over Section 31, Rule 705, but will address those at a different time.

The ODAA committee wishes to stress that their feelings regarding the present wording of this statute are quite strong. As indicated elsewhere, we believe most fervently that the rules of evidence should advance the ability of the courts to reach the truth of the matter. That central concept should be thwarted only in the case of most overwhelming public policy or constitutional mandate. Under the current waiver provisions, the attorney-client umbrella privilege involving experts hired by the defense would be turned into a tool which would be highly detrimental to the truth-finding process. This concept is supported by the language contained in 8 Wigmore, Evidence, Section 2327, cited on page 97 of the Judiciary Committee's own commentary. Wigmore states:

> To call a witness to the stand and examine him as a witness to one's physical condition formerly communicated to him, is a waiver of the privilege in regard to all his knowledge of the physical condition asked about; no reason could maintain the contrary.

> To call a physician as a witness to one's physical condition is a waiver of the privilege as to the knowledge acquired by other physicians of the same condition. Wigmore, (the emphasis appears in Wigmore's original treatise).

Wigmore goes on to state that:

> A waiver of the privilege as to one physician, called by the opponent, is a waiver of the entire privilege as to other physicians. What further reason is there for secrecy if the patient has thrown it aside by permitting one physician to testify? The unfairness of allowing a party to play fast and loose with medical testimony in this shifty manner is obvious to the untechnical intelligence.

The Oregon Court of Appeals has likewise expressed this concept. In Triplett v. Board of Social Protection, 19 Or App 408 (1974), the court stated:

> Even if we assume, again for argument, that there exists a physician-patient privilege, it was, in our, opinion, waived by the petitioner. When a party fails to object to the privileged testimony of one physician, she waives her physician-patient privilege as to all other testimony and evidence on the same subject. Ibid at 415.

Though Wigmore and Triplett speak in terms of the physician-patient privilege, as pointed out under the discussion of Section 32 herein, the physician-patient privilege would, in a sense, exist where the physician was hired as a "representative of the lawyer," and the privilege would exist in that context.

SECTION 40 PRIVILEGED MATTER DISCLOSED UNDER A COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM THE PRIVILEGE:

The ODAA committee finds no particular application of this section which would be harmful to the criminal process.

SECTION 41 COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE:

Suggested amendment: In subsection (1) add, after the word "counsel" ", in a civil proceeding."

In subsection (2) after the word "In" add the word "non-criminal."

In (3) after "upon request," add "in a civil case,".

In the Advisory Committee's draft of this article, the ODAA subcommittee found no major problem with Section 41, except as it might affect the problem with respect to defense psychiatrists as discussed above. However, the problem becomes even more significant where the Judiciary Committee has reinstated some of the privileges which the Advisory Committee deleted or repealed.

Under current Oregon law, the State is allowed to comment on the assertion of a statutorily created privilege, such as the husband-wife privilege. See State v. Inman, 8 Or App 180 (1964). The prosecutor cannot comment upon the defendant's assertion of the lawyer-client privilege because this is a privilege with a constitutional foundation. We do not, of course, suggest that that should be changed.

If, however, the Judiciary Committee is to reinstate such privileges as the clinical social worker privilege and the psychotherapist-patient privilege through the lawyer-client privilege, it is inherently unfair to deny the prosecution the opportunity to comment on the assertion of that privilege and the judge's ability to explain, through instruction, that the privilege exists so that the jury can understand why certain testimony was not made available to them. The ODAA committee submits the following example: The State wishes to call a clinical social worker as a witness that knows that the defendant will assert the privilege. Under current Oregon law, the State may call that witness, cause the defendant to assert the privilege in front of the jury and then comment thereon in argument. With the proposed change, the State could not call the witness in front of the jury and could not comment on why the State was unable to call a witness. The jury may be aware of the existence of that witness and, especially if the defense obtains an instruction that the jury should hold it against the State if they fail to produce certain evidence, is put in a position where the defendant has withheld evidence but the jury blames the State for that interference with the truth-finding process.

Thank you for your attention.

Respectfully submitted,

JOHN L. COLLINS

JLC:mvd

House Judiciary Committee
Exhibit S, HB 2030
March 5, 1981
1-page Exhibit
presented by Elliott Lynn

OREGON TRIAL LAWYERS ASSOCIATION

COMMITTEE ON PROPOSED CODE OF EVIDENCE

Subject: PROPOSALS ON ARTICLE V. PRIVILEGES

Rule 503. Lawyer-Client Privilege

The Judiciary Committee Commentary on page 68 and 69 of the bound volume of the proposed Oregon Evidence Code should be adopted as the official Commentary. It adopts the "Control Group Test" for determining privilege protection for corporate clients.

However, a recent U.S. Supreme Court case may have criticized and possibly restricted the Control Group Test approach to determining corporate client privileges. The Control Group Test should be adopted recognizing any constitutional contraints.

House Judiciary Committee
Exhibit T, HB 2030
March 5, 1981
2-page exhibit, presented by Marie Evans

OREGON CHAPTER

NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC.

109 N.E. 50th • PORTLAND, OR 97213 • (503) 232-6003

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
IN SUPPORT OF HB 2030 REVISING THE EVIDENCE CODE AND
CONTINUING PRIVILEGED COMMUNICATION FOR CLINICAL SOCIAL WORKERS

Chairman: Tom Mason
Vice-chairperson: Bill Rutherford
Date: March 5, 1981

My name is Marie Evans. I am a registered clinical social worker and am the Executive Director of the Oregon Chapter of the National Association of Social Workers. I am here to speak in support of HB 2030 which revises the evidence code but retains privileged communication for the clients of registered clinical social workers as now provided by ORS 677 and ORS 44.040. By these statutes the State of Oregon Legislature has recognized that registered clinical social workers provide psychotherapy.

Specifically, Chapter 677, Oregon Laws 1977, and Section 7, Chapter 769, Oregon Laws 1979 define "clinical social work" as providing psychotherapy: "...(by) providing diagnostic, preventive and treatment services of a psychosocial nature pertaining to personal adjustment, behavior problems, interpersonal dysfunctioning...developing a psychotherapeutic relationship to employ a series of problem solving techniques...counseling and the use of psychotherapeutic techniques...modifying internal and external conditions that affect a client's behavior, emotions, thinking, and interpersonal processes...explaining and interpreting the psychosocial dynamics of human behavior to facilitate problem solving..."

Payment to registered clinical social workers for providing psychotherapy services has been authorized by Oregon's Adult and Family Services Division since October 1, 1980 (Rules for Oregon Medical Assistance Programs 461-13-000). These rules were written after Attorney General James A. Redden's office rendered an opinion OP-4812, October 18, 1979 stating that clinical social workers use psychotherapeutic techniques and may therefore be reimbursed for their services when providing psychotherapy to persons with mental and emotional conditions. Thus, registered clinical social workers are eligible to be paid in the same manner as are psychiatrists and psychologists for doing psychotherapy.

This decision by the Adult and Family Services Division parallels recognition on the federal level of the role played by clinical social work in the mental health delivery system. The National Institute of Mental Health (1974 study) and the U.S. Department of Health, Education and Welfare (1977 statistics), show that clinical social workers are the major providers across the nation (42% of the total services provided by the four mental health professions,

psychiatrists, psychologists, social workers and psychiatric nurses). The President's Commission on Mental Health recommended that social workers receive third party reimbursement for their services. Federal legislation toward this end has been introduced: such as S. 2176, an amendment to the Medicare-Medicaid law recognizing clinical social workers as independent mental health providers; the Mental Health Systems Act S. 1177 and H.R. 4156; amendments to Title XVII and XIX, Medicare-Medicaid; and H.R. 3990 which would expand coverage of clinical social workers employed in mental health clinics.

In Oregon clinical social workers are the major providers of psychotherapy services, outnumbering psychiatrist and licensed psychologists. Clinical social workers are autonomously practicing professionals who provide psychotherapy in both in-patient and outpatient psychiatric facilities, in county mental health programs, in medical centers, in public and private agencies and in private practice. Clinical social workers are professionally educated at the graduate level in training programs designed to prepare them to practice in health and mental health settings. Their expertise is such that they serve as instructors to psychiatrists in training in most medical schools across the country, including the University of Oregon Medical School.

These facts make the point that a substantial number of Oregonians receiving psychotherapy are clients of clinical social workers. These persons must have equal protection under the law with those of other therapeutic disciplines with privileged communication.

The law which provides privileged communication, previously stated, also contains certain exemptions to that privilege:

ORS 44.040, Section L: (a) when client's consent is given; (b) when client initiates legal action or makes a complaint against the RCSW to the Board of Clinical Social Workers; (c) when client communicates the intent to commit a crime or harmful act; (d) when information reveals that a child was the victim of a crime, abuse or neglect; and (e) when the RCSW is a public employee and his/her employer has determined that examination in court is a necessary performance of his/her duties.

Regarding the last exemption for state employees, the legislative intent when amending the law in 1979 to include this exemption, was to make it possible for the Children's Services Division to write administrative rules defining specifically what was investigatory and what was non-investigatory activity; essentially allowing those cases in which complaints had been filed to exempt privileged communication.

House Judiciary Committee
Exhibit U, HB 2030
March 5, 1981, 3-page exhibit presented by
Jim McCandlish

OREGON CRIMINAL DEFENSE LAWYER'S ASSOCIATION

PRIVILEGES

ORE 504 - Psychotherapist-patient privilege.

I. Problem. The Advisory Committee proposed that ORE 504(1)(c) and 504(2) expressly include "drug addiction" treatment within the privilege, following the language of proposed Federal Rule 504. The Interim Committee deleted "drug addiction" on May 27, 1980 without hearing testimony on the issue.

Proposed Amendments

On page 9 of the bill, line 25, after the comma insert "including drug and alcohol addiction,".

On line 29, after "condition" insert ", including drug and alcohol addiction,".

Commentary

Successful drug and alcohol treatment begins with the patient recognizing the problem and its behavioral manifestations. By extending the pyschotherapist privilege to cover drug and alcohol addiction, the Committee adopts the position that full communication between patient and treating professional is necessary to successful rehabilitation. Additionally, inclusion of drug and alcohol addiction treatment within the scope of the rule reconciles the otherwise conflicting confidentiality requirements of applicable professional oaths and federal regulations. Alcohol treatment is expressly included.

II. Problem. ORE 504(4)(a) excludes assertion of the privilege by an allegedly mentally ill person with respect to communications between patient and psychotherapist during the prehearing detention period before a civil commitment proceeding.

It has been the experience of defense lawyers that clients facing an involuntary commitment hearing are very suspicious of the system and of the workers within the system. A large part of representing these people is getting some degree of confidence established on their behalf. After considerable discussion, it is agreed that it would be extremely difficult to get clients to cooperate with treating physicians in an involuntary commitment hearing if the client was aware that the communications could be used in the future.

The overriding social goal of involuntary commitment is the treatment and cure of the mentally ill person. It is not simply to gather evidence which may be used in the hearing. The goal of the treatment and cure of mentally ill persons will not be achieved by making an exception in the psychotherapist-patient privilege.

Proposed Amendments

On page 9 of the bill delete lines 36 through 39.

On page 10, delete lines 1 through 9 and insert:

"(4) Exceptions.
(a) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional or addictive condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.
(b) Certain examinations. Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of mental examination performed under ORCP 44.".

Commentary

The overriding social goal of involuntary civil commitment is treatment and cure of the mentally ill person. The Judiciary Committee therefore rejects the interim committee's proposal to limit the availability of the privilege during pre-hearing treatment and detention, in order to encourage patient-psychotherapist communication.

ORE 505 - Husband-wife privilege.

Problem. The testimonial privilege as proposed by the Interim Committee allows the testifying spouse to make the decision as to whether to testify or not concerning non-confidential communications and observations, provided the parties are married at the time of trial. If the parties are not married, however, the state may compel testimony. The testifying ex-spouse may have custody of children of the marriage, and be concerned about the impact of such testimony on child support and visitation. The ex-spouse who may be called as a witness is in the best position to make this decision, which concerns an important societal interest.

Proposed Amendment

On page 11 of the bill, line 37, after "spouse" delete ", during the marriage,".

Commentary

With respect to the testimonial privilege in sub-section (3), the Committee deleted the requirement that the parties be married

at the time of taking the testimony. Child support and visitation issues survive the marriage, and are important societal interests. The testifying ex-spouse is in the best position to weigh any potential harm to these interests; and therefore should not be compelled to testify over his or her objection.

/ch

House Judiciary
Exhibit V, HB 2030
March 5, 1981
2-page exhibit
presented by staff

VICTOR ATIYEH
GOVERNOR

Department of Human Resources

MENTAL HEALTH DIVISION

2575 BITTERN STREET N.E., SALEM, OREGON 97310

March 4, 1981

TO: The Honorable Tom Mason
Chairperson
House Committee on the Judiciary

FROM: J. H. Treleaven, M.D.
Assistant Director, Human Resources
Administrator for Mental Health

J. H. Treleaven

Presented by James R. Zigler
Assistant Administrator
Administrative Services

SUBJECT: House Bill 2030--Proposed Oregon Evidence Code
Section 33, Rule 504, Psychotherapy-
Patient Privilege

The Mental Health Division has a particular interest in Section 33 and favors adoption of this Section of House Bill 2030. The language of the Psychotherapist-Patient Privilege indicates that the privilege is to be construed broadly. The Mental Health Division favors a broad interpretation of the patient privilege.

The Division recommends two changes to Section 33. First, we recommend Section 33, Rule 504, (1)(c), be amended to read:

On page 9 of the printed bill, line 25, after "condition," insert "mental retardation, and alcohol or drug abuse,".

Discussion

This proposed amendment extends the patient privilege to additional categories of disabled persons--the mentally retarded and the alcohol- and drug-dependent person. Absent this amendment, the privilege applies only to the mentally ill.

Second, we recommend Section 33, Rule 504, (4), be amended as follows:

On page 9, line 37, after the comma insert "or ORS 427.215 to 427.300,".

In line 38, after "ill" insert "or allegedly mentally retarded person".

In line 39, after "(5)" insert a comma and delete "or" and in the same line after "426.215" insert ", or 427.255".

Discussion

The Mental Health Division endorses the exception to the privilege during the prehearing detention period. As written, however, Section 33, Rule 504, (4), applies only to civil commitment of the mentally ill. The procedure for involuntary commitment of the mentally retarded--ORS 426.215 to 427.300--expressly provides for waiver of the privilege. [See ORS 427.255 to 427.280.] Thus, we recommend the privilege be waived during any statutorily authorized prehearing detention period.

JHT:JRZ:bb

House Judiciary
Exhibit W, HB 2030
March 5, 1981
8-page exhibit presented by staff

ARTICLE V

RULE	ADVISORY COMMITTEE	INTERIM COMMITTEE	PROF. KIRKPATRICK
No Rules 501 or 502			Cross-reference privilege to Constitution (Article I § 12 and Article IV § 9) and other privilege statutes (1)(b) Redefine definition. (1)(d) Exclude low-level corporate employees (1)(e) Limit to an expert who conveys client's commun. Reinstate exceptions for fact of employment; name & address, & assets left (2) Extend privilege to criminal proceedings
503**	503**	Alaska Rule 503(a)(2)	
**Note: FRE 503 was recently interpreted by the U.S. Supreme Court in Upjohn v. U.S., (49 LW 4093, 1/13/81).			
504	Proposed FRE 504	Divided into Psychotherapist-patient Extended to criminal proceedings	
504-1	(Part of above rule)	Divided into physician-patient	
§33(a)	Deleted nurse privilege (ORS 44.040(1)(g))	Reinstated nurse privilege	
§33(b)	Deleted school staff member and school counselor privilege (ORS 44.040(1)(i) & (k)	Reinstated both privileges	
§33(c)	Deleted clinical social worker privilege (ORS 44.040(1)(L)	Reinstated privilege	
505	Original	Broke apart "confidential communications" privilege from "spousal immunity"	Break apart, as interim committee did Add"(4)(c) Arising out of any purported marriage, or entered into by the parties for the purpose of invoking the privilege and avoiding such testimo...

ARTICLE V, cont.

RULE	ADVISORY COMMITTEE	INTERIM COMMITTEE	PROF. KIRKPATRICK
506	ORS 44.040(1)(c)		
507	Deleted		
508	ORS 44.040(1)(f)	Deleted stenographer-employer privilege	Delete stenographer-employer privilege
509	ORS 44.040(1)(e)		
510	FRE 510		Amend to (1) The state or a political subdivision thereo , or sister state or Federal governmental unit or agency thereof has a privilege....
511	FRE 511	Added "and testifying on direct examination as to the subject matter of the confidential matter or communication."	Clarify as suggested by interim committee. Add "This rule shall apply to privileges created in this Act, as well as to privileges recognized under Rule 514."
512	FRE 512		
513	FRE 513		Add to (1) "comment by judge or counsel[.] , except a party's or witness' taking the Fifth Amendment privileg in civil cases."
514	Original		Add "the statutes or Constitution of the State...."

ARTICLE VI

RULE	ADVISORY COMMITTEE	INTERIM COMMITTEE	PROF. KIRKPATRICK
601	ORS 44.020		
602	FRE 602 modified	Rule sex-neutraled. Deleted reference to Rule 703 (not adopted)	
603	FRE 603	Combined "oath" and "affirmation"	
604	FRE 604	Appended ORS 44.095 (use of interpreter) as Section (2)	
605	FRE 605		
606	FRE 606	Deleted blanket prohibition on testimony regarding jury deliberations, except for extraneous or improper influence	
606-1	Disciplinary Rule 5-101(B)		
607	FRE 607 modified	Deleted "surprise" as an element for impeachment	Delete "surprise"
608	FRE 608 modified		
609	FRE 609	Deleted limitations on prior crimes of felonies only, and added "but only if the crime involved dishonesty or false statement" to (1)	Adopt Interim Recommendation (1) Delete "during cross-examination" Lines 31-32. (4) Define "conviction" as any time "after return of a court or jury verdict but before imposition of sentenc
609	Original		

ARTICLE VI, cont.

RULE	ADVISORY COMMITTEE	INTERIM COMMITTEE	PROF. KIRKPATRICK
610	Not adopted	Adopted FRE 610	
611	Retain ORS 45.530 to 45.570	Adopt FRE 611; repeal ORS 530 to 45.570	
612	FRE 612		Add "Writing used to refresh memory. Any writing, photograph, recording, or object may be used to refresh a witness's recollection. If witness...." Change all further references to "writing" to "any writing, photograph, recording, or object" to allow inspection and admission.
Rule in lieu of 613	Retention of ORS 44.610		Adopt FRE 613
614	Declined to adopt	FRE 614	FRE 614
615	Amended ORS 45.510	FRE 615	FRE 615

ARTICLE VII

RULE	ADVISORY COMMITTEE	INTERIM COMMITTEE	PROF. KIRKPATRICK
701	FRE 701		
702	FRE 702		
703	FRE 703	Deleted	Adopt FRE 703, and add: "However, nothing contained in this Rule shall permit th substantive use of otherwise inadmissible facts relied upon by an expert. A party shall be entitled to an instruction limiting consid-eration of such facts for substantive purposes."
704	FRE 704		
705	From Wulff v. Sprouse-Reitz 262 OR 293 (1972), which requires prior disclosure of underlying facts.	Adopted FRE 705, which permits disclosure on direct examination, and requires disclosure on cross-examination, if requested.	Adopt FRE 705, and add: "(b) An adverse party may request a determination of whether the requirements of Rule 703 are satisfied befor an expert offers an opinion or discloses facts or data. (c) When the underlying facts or data would be ad-missible in evidence for any purpose other than to explai or support the expert's opin ion or inference, the Court shall exclude the underlying facts or data if the danger that they will be used for an improper p ose outweigh their value a support for the expert's opinion. If th

RULE	ADVISORY COMMITTEE	INTERIM COMMITTEE	PROF. KIRKPATRICK
705 (cont.)			facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.
706	Not adopted.	FRE 706	FRE 706

ARTICLE VIII

RULE	ADVISORY COMMITTEE	INTERIM COMMITTEE	PROF. KIRKPATRICK
801	FRE 801 modified	Deleted requirement of corroboration in (4)(a)(C)	Either delete requirement of corroboration, or define whether corroboration is of the fact of the prior identification, or the content of the identification by another witness. Delete "or in a deposition [if the party against whom the testimony is now offered or a predecessor in interest had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.]" (4)(a)(A)
802	FRE 802 modified	Added "or as otherwise provided by law."	
803	FRE 803, less exceptions for present sense impressions and learned treatises.	Replaced "observations" with "findings" (8)(c) Deleted "complaint of sexual misconduct" from text of Rule, but not from intent as expressed in commentary.	Change (6)..."with knowledge [if kept] acting in the course...." Add FRE 803(18):"Learned treatises"
804	FRE 804 and Oregonlaw		Delete in (1)(e) "delarant's attendance [or testimony] by process...."
805	FRE 805		Add, after references in sentences 2 and 3, to "statement" the phrase "or a statement defined in subparagraph (A) of subsection (4) of section 62 (Rule 801) of this Act."

ARTICLE VIII, cont.

RULE	ADVISORY COMMITTEE	INTERIM COMMITTEE	PROF. KIRKPATRICK
806	FRE 806, and ORS 45.610		

House Judiciary Committee
HB 2030, Exhibit X
March 12, 1981
3-page exhibit presented by staff

UNL

The University of Nebraska-Lincoln

Office of the Dean
College of Law
Lincoln, Nebraska 68583
(402) 472-2161

March 2, 1981

Hon. Jan Wyers
Oregon State Senate
Salem, OR 97301

Hon. Tom Mason
House of Representatives of Oregon
Salem, OR 97310

Dear Senator Wyers and Representative Mason:

I have been asked by Judge Robert E. Jones of Portland to comment to you in writing concerning Article 3 of the proposed Evidence Code which you are considering for adoption in Oregon. In particular, Judge Jones has asked me to comment upon proposed Rule 308, which embodies the so-called "Morgan" rule on presumptions. To avoid the appearance of being an officious intermeddler, I should mention that I was first a consultant to, and later a member of, the original advisory committee on the Rules of Evidence. In fact, virtually all of my views on this subject may be found in the minutes of the advisory committee meetings in which this subject was discussed.

I am writing you now principally to give you a view in many ways contrary to that of Professor Ron Lansing who has addressed you a letter on this subject dated February 3, 1981. I have known Professor Lansing for a number of years and entertain the highest regard for him. However, I must disagree with the views which he expresses in his letter on several points.

Professor Lansing's description of the respective operations of the "Thayer" and "Morgan" rules on presumptions is quite accurate so far as it goes. He is also quite correct in stating that the law of presumptions has been a source of great confusion to lawyers and judges for a number of years. I would point out that during the years in which this confusion has existed, the Thayer rule of presumptions was that followed, or purportedly followed, in most jurisdictions. The Thayer rule, far from being simple and easily applied as suggested by Professor Lansing, actually presents tremendous difficulties of application. Preeiminent among these is the fact that, contrary to the deceptive simplicity of the congressionally enacted federal rule, there is not one Thayer rule. In fact, there are approximately five sub-species of Thayer, and the existing federal rule provides no clue whatsoever as to which of these is to be utilized. For a complete discussion and description of these variants, I would draw your attention to Mueller, Instructing the Jury Upon Presumptions in Civil

Cases: Comparing Federal Rule 301 With Uniform Rule 301, 12 Land & W. L. Rev. 219 (1977). Somewhat interestingly for your purposes, Professor Mueller's excellent article was written for the purpose of convincing the Wyoming Legislature that the Morgan view should be adopted in that state, which it was.

The explanation as to why the Thayer view has spawned so many progeny is also significant. Professor Lansing asserts that the Morgan views gives too much weight to presumptions. It is precisely because the Thayer view gives too little weight to presumptions that the courts have been so industrious in attempting to modify it so as to overcome this difficulty. Though the ultimate result in the great majority of cases will not be affected by the view of presumptions taken, there will remain a limited number of cases in which the Thayer view will lead to very questionable results. The cases I refer to are those in which the initially burdened party has relied upon a presumption, and has seen that presumption countered by egregiously suspect self-serving testimony by the opponent. In some instances of this sort, the initially burdened party will suffer a directed verdict or involuntary nonsuit without the credibility of the opponent's testimony ever having been evaluated by the trier of fact. Even Wigmore, the most prominent of Thayer's apologists, admitted this to be a substantial deficiency of the Thayer rule.

Professor Lansing's predictions of insuperable difficulties in implementing the Morgan approach are not borne out by the track record. Since Professor Morgan first articulated his view it has commanded an almost constantly increasing following. The Morgan view was adopted for some presumptions by the original Uniform Rules of Evidence in 1950, and the jurisdiction subsequently accepting that rule seem to have experienced no particular difficulty with it. Similarly, the Morgan view was adopted for certain presumptions by California in 1966 with similar effect. The original Advisory Committee on the Federal Rules of Evidence approved the Morgan view, and this rule was accepted by the United States Supreme Court prior to Congressional intervention in the matter. The Commissioners on Uniform State Laws, in adopting new uniform rules based upon the federal rules, considered the matter sufficiently significant to substitute the original Morgan rule for the Thayer version adopted by Congress. Those states, including my own present state of Nebraska, which have had the Morgan rule in effect for several years have experienced no difficulty with it.

One argument raised by Professor Lansing which I cannot dispute is that it would be desirable for both state and federal courts in a given jurisdiction to follow the same rule. However, the fact that you are presently considering such questions as opposed to simply adopting the federal

rules verbatim I would take to be an implied rejection of this argument. Thus if the decision is to be made primarily based upon the merits of the two competing positions, I would most strongly urge you to adopt the version of the rule recommended by the Commissioners on Uniform State Laws.

Sincerely,

John William Strong

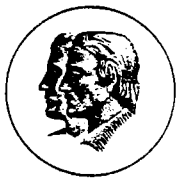
John William Strong
Dean

lg

cc: Hon. Robert E. Jones
Judge, Circuit Court of Oregon
Multnomah County Court House
1021 S.W. 4th Avenue
Portland, OR 97204

Professor Ronald B. Lansing
Northwestern School of Law
Lewis and Clark College
Portland, OR 97219

House Judiciary Committee
HB 2030, Exhibit Y
March 12, 1981
3-page exhibit
presented by staff



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Lewis and Clark College

Northwestern School of Law

March 10, 1981

The Honorable Tom Mason
House of Representatives
Salem, Oregon 97310

The Honorable Jan Wyers
The State Senate
Salem, Oregon 97310

Re: HB 2030 Evidence Code

Dear Representative Mason and Senator Wyers:

This is a response to Dean John William Strong's letter of March 2, 1981, urging adoption of the Morgan view of Rule 308, in the proposed evidence code and countering my arguments favoring the Thayer view.

I number Dean Strong as a friend and a scholar. His views in this area must be respected. It is not easy to say that he is wrong, yet I know that he will forgive me for saying so. Aside from what I urged upon you in my letter of February 3, 1981, let me make three separate points in support of your adoption of the Thayer view of civil presumptions (a view in accord with Federal Rule 301):

(1) Dean Strong says that the Thayer view is given to multi-interpretations and has "spawned many progeny." It is true that, in very subtle ways, the Thayer view has received variant construction by the many states that have for decades employed it. But the Morgan view is likewise susceptible to diverse offspring. Every rule of law receives a degree of diverse treatment. But no matter how many shades of green the Thayer view may turn, and no matter how many shades of red the Morgan view may turn, one still cannot deny that they are as different as red and green.

The relatively greater simplicity of the Thayer view has to do with its central notion, the basic point at which it contrasts with Morgan: Thayer makes rebuttable presumptions simply a matter for court business; jury deliberations are never bothered by presumptions. If there has been no rebuttal of the presumed fact, the jury is told that they must find that

the presumed fact is true. If there has been satisfactory rebuttal of the presumed fact, then there is a question of fact for the jury, and the instructions to the jury are in no way influenced by the presumption. The jury is told in the usual way to decide the issue; it is just as though there never was any presumption in the first place. Presumptions, therefore, under the Thayer view, are strictly an administrative device for "smoking out" the opponent's version of the truth and do not complicate the jury's decision-making process. The only unique questions to be answered under Thayer are (1) Did the proponent sufficiently invoke the presumption by proof of the preliminary fact?; and (2) Did the opponent offer sufficient rebuttal of the presumed fact? Both questions are for the court to decide not for the jury.

Both of those questions are likewise court questions under the Morgan view. The difference is that Morgan throws in another question: Did the opponent establish his/her rebuttal of the presumed fact by the preponderance of the evidence (or possibly by clear and convincing evidence as the case may be)? The latter question is for the jury to decide. This means that the jury will have to be instructed concerning this shifted burden to preponderate. The shift only occurs on the specific issue created by the presumption, an issue which may have to be extrapolated out of larger issue areas where the persuasion burden may lie on the opposite party. This fragmentation or scattering of the issues under the Morgan view, is what creates confusion in an already instructional labyrinth. (See my February 3 letter for an illustration of this complexity.)

(2) Dean Strong urges that rebuttable presumptions need to be accorded greater effect than is accorded under the Thayer view? Why? Why should a rebuttable presumption be weighted by shifting the persuasion burden to the party against whom the presumption operates? If that is done, then it follows that less weight is given the original presumption that assigned the persuasion burden to the proponent in the first place. E.g., Initially, before trial, the law presumes that X is not dead. Thus, proponent must produce evidence and persuade by a preponderance that X is dead. If proponent offers sufficient evidence of X being missing for seven years, a rebuttable presumption arises of X's death. The Morgan advocates argue that the failure of Thayer to shift the burden to persuade to Opponent gives too little weight to the rebuttable presumption of death. But by the same token the Morgan shifting gives too little weight to the initial assumption of non-death.

The reasons of policy or logic that create rebuttable presumptions, are spawned from the same sort of reasons of

policy or logic that created the counter assumptions of status quo in the first place.

(3) One other item in Dean Strong's letter deserves response: the Dean says that the Thayer view is undeserving because the presumption may be "countered by egregiously suspect self-serving testimony." But is it any less true that the proponent may invoke the presumption by equally "egregiously suspect self-serving testimony."? For example, a typical presumption is that a letter duly mailed is presumed to be received. Suppose proponent testifies that he duly mailed the letter. Opponent rebuts by testifying that he did not receive the letter. Under the Thayer view, the presumption would cease to exist and the case would go to the jury with the burden to preponderate on the proponent. The Dean says that this dissipates the value of presumptions because opponent's mere self-serving rebuttal of "no receipt" has burst the presumption bubble. But bear in mind that proponent's mere self-serving evidence of "sending the letter" invoked the presumption. Whatever may be hypothesized in the way of vaguery of rebuttal proof, is equally pertinent for the basic fact invocation proof.

In the final analysis one must remember that the Morgan-Thayer dispute has viability in only a narrow range of instances. If we assume that one litigant's evidence is more persuasive than the other's, then under either view, the greater persuasion wins, and it makes no difference where the burden to persuade lies. In the usual civil case where preponderance is the measure, it is only at the fulcrum of credibility that the persuasion burden makes any difference; it is only when the jury weighs the evidence and finds equipose or equal doubt that the persuasion burden steps in to break ties. In that narrow range of instances, is there compelling reasons to change from majority practice, to create a scattering of issues and resultant confusion in the charge to the jury?

Respectfully,

Ronald B. Lansing
Professor of Law

RBL/yt

cc: Kris LaMar
Dean John William Strong
Hon. Robert E. Jones

House Judiciary Committee
HB 2030, Exhibit Z
March 12, 1981
2-page exhibit
presented by Allison Smith

HB 2030 - ARTICLE III

BURDEN OF PERSUASION; BURDEN OF PRODUCING EVIDENCE; PRESUMPTIONS

TO: House Judiciary Committee

FROM: Frederick Lenzser, Multnomah County
Deputy District Attorney
Member, Oregon District Attorneys Association,
Legislative Subcommittee on Evidence Code Revision

DATE: March 11, 1981

The ODAA has strong objections to Section 18 (Rule 309) as it is presently worded. First, the language in 2(a) should be amended to include that the evidence as a whole be "viewed in a light most favorable to the plaintiff." This is the current standard for judgments of acquittal. Second, subsection (2)(b) provides that "[T]he presumed facts follow from the basic facts beyond a reasonable doubt." The ODAA recommends that the language "beyond a reasonable doubt" be deleted and be replaced by the "rational connection" or "more-likely-than-not" test.

The effect of the new code, as pointed out in the Advisory Committee Commentary on page 32, is to reduce presumptions when used by the State in criminal cases to permissible inferences. The Commentary goes on to state that the United States Supreme Court has failed to articulate clear constitutional principles regarding presumptions so the reasonable doubt standard is used. To the contrary, if a presumption is treated as a permissible inference, the reasonable doubt standard is clearly not mandated under the United States Constitution. See Ulster County v. Allen, 99 S Ct 2213 (1979); and Sandstrom v. Montana, 99 S Ct 2450 (1979). Further, there is no danger that a defendant will be convicted on a lesser burden of proof by the use of only a presumption because the burden of proof is always beyond a reasonable doubt. There is the real danger that a valid presumption as one piece of evidence could be kept from the jury's consideration or could keep the case from going to the jury at all if the court finds that the presumption does not follow from the basic facts beyond a reasonable doubt. Few presumptions could withstand that test. The ODAA sees no reason to add this burden to the prosecution of criminal cases when it is not required by either state or federal law. Third, the Commentary on page 32 suggests what language the court would use in instructing the jury on permissible inferences. The ODAA recommends that simple phrase "may infer" be substituted for "are permitted but not required to find."

Section 18 (Rule 309) deals only with presumptions when used by the State against the defendant. No section deals with presumptions used by the defendant in a criminal case. ORS 136.430 applies the civil rules of evidence to criminal cases when there is no specific criminal statute. Relying on that provision, Section 17 (rule 308) would apply to the use of a presumption by a criminal defendant. This should be expressly stated or noted in the Commentary to avoid a gap in the code.

Section 20 (Rule 311), subsection (1) lists as a presumption "a person is innocent of a crime or wrong." This is not a true presumption but a policy statement that has become engrained in our legal history. The provision should be removed from the list of presumptions and be included as a mandatory jury instruction under ORS 17.250. This would avoid the continuing confusion that the "presumption of innocence" is a form of evidence.

Respectfully submitted,

Frederick Lenzser
Multnomah County
Deputy District Attorney

dp

House Judiciary Committee
Exhibit AA, HB 2030, March 19, 1981-3 pm
3-page exhibit
presented by Jim
McCandlish

OREGON CRIMINAL DEFENSE LAWYER'S ASSOCIATION

Rule 609 - Impeachment for Prior Convictions

I. Discussion

Under current Oregon law, a witness may be impeached by evidence of any prior criminal convictions. ORS 45.600. The Advisory Committee recommended to the Joint Interim Committee that impeachment for prior convictions should only be allowed if the crime (or release from incarceration) occurred within 10 years of trial and is a felony or misdemeanor, provided the latter involves false statement. The Joint Interim Committee rejected this approach for at least two reasons: (1) The distinction between a misdemeanor and a felony is often complex. For example, some felony convictions become misdemeanors at the end of a successful period of probation; and (2) To allow impeachment by prior conviction of any felony is not in keeping with the rationale of the rule, which is to assist the trier of fact in judging the credibility of a witness. Professor Kirkpatrick agrees with the Interim Committee's change in this respect. 59 Or L. Rev. 43, 90 (1980). Only crimes involving an element of lying or deception are directly linked to a witness' credibility. The relationship between crimes of violence, for example, and truth-telling is particularly tenuous. The assumption that such crimes are probative of credibility because a person convicted of assault is a bad man, and a bad man is also a liar does not hold water, as Bentham demonstrated in his classic illustration more than a century ago:

> Take homicide in the way of dwelling. Two men quarrel; one of them calls the other a liar. So highly does he prize the reputation of veracity, that, rather than suffer a stain to remain upon it, he determines to rid his life, challenges his adversary to fight, and kills him. Jurisprudence, in its sapience, knowing no difference between homicide by consent, by which no other human being is put in fear -- and homicide in pursuit of a scheme of highway robbery or nocturnal housebreaking, by which every man who has a life is put in fear of it -- has made the one and the other murder, and consequently felony. The man prefers death to the imputation of a lie, -- and the inference of the law is, that he cannot open his mouth but lies will issue from it. Such are the inconsistencies which are unavoidable in the applications of any rule which takes improbity for a ground of exclusion.

7 Bentham, Rationale of Judicial Evidence, 406 (Browning's ed. 1827).

Aside from the low probative value of some convictions, the divulgence of his or her criminal past exposes the witness to the hazards of jury prejudice. This is particularly harmful where an accused with a criminal record must decide whether to testify. A 1966 study concluded that when the strength of the evidence was constant, defendants without a record were acquitted in 65% of the cases; but were acquitted in only 38% of the cases where the jury knew or suspected that defendant had a criminal record. Kalven and Zeisel, The American Jury 160 (1966). In 1968, a survey of attorneys and judges was undertaken to evaluate whether juries were able to follow an instruction to consider prior conviction evidence only for the purpose of evaluating credibility as opposed to guilt. Negative responses were received from 98% of the attorneys and 43% of the judges. "To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record," 4 Colum. J.L. and Soc. Prob. 213, 218 (1968). To inform the jury in a rape case that the defendant has a prior rape conviction, and then to instruct them to consider the conviction only in evaluating the defendant's credibility is to recommend "A mental gymnastic which is beyond, not only their power, but anybody else." Judge Learned Hand in Nash v. U.S., 54 F 2d 106, 1007 (2d Cir 1932). If the defendant remains silent, statistics indicated that the jury is likely to conclude that he is guilty. Id.

The trend in the law is to limit the use of such impeachment evidence. The drafters of the Model Code of Evidence (Rule 306 (1)(b)) and the Uniform Rules of Evidence (Rule 21) would allow impeachment for prior convictions only if the accused has first introduced evidence of good character. Pennsylvania, New York and Ohio have for some time limited the use of prior convictions to impeach the accused to cases in which the accused has expressly introduced character as an issue. The English Criminal Evidence Act of 1898, Eng. St. 1898, C36, §1, is similarly limited. See 1 Wigmore, Evidence, Section 194 (3d ed. 1940). McCormick strongly criticizes current Oregon law as placing the accused in a grievous dilemna, guilt by silence versus guilt by prior conduct. McCormick on Evidence, §43 (2d Ed 1972). The Hawaii Supreme Court abolished impeachment of the accused by prior convictions entirely on grounds that such evidence violated the accused's right to due process of law under the state consitution. State v. Santiago, 53 Haw 254 (1971).

The OCDLA favors adoption of the Uniform Rule 21 approach, which would limit impeachment of an accused to prior convictions involving dishonesty or false statement, only if the accused has first introduced evidence admissible solely for the purpose of supporting his or her credibility. This approach protects the innocent from the prejudicial dilemma described by McCormick, and tempts the guilty to expose themselves to the rigors of cross-examination. This approach does not limit the use of other crimes evidence where such evidence is relevant to commission of the alleged crime, i.e. to show intent, motive or common plan or design.

Proposed Amendment

1) On page 15 of House Bill 2030, line 32, after the period insert:

"If the witness be the accused in a criminal proceeding, no evidence of prior conviction of a crime shall be admissible for the sole purpose of impairing the credibility of the accused unless the accused has first introduced evidence admissible solely for the purpose of supporting his or her credibility."

II. Discussion

Present law does not restrict the elicitation of prior convictions solely to cross-examination. Such information may properly be admitted as background information on direct examination, in spite of the limitations of ORS 44.590. State v. Gibert, 282 Or 309 (1978). The rule as drafted makes it appear falsely that the party calling the impeachable witness is trying to hide the prior conviction. This restriction is also inconsistent with Rule 607 and 806. Professor Kirkpatrick criticizes this limitation, and suggests that it "incorporates a drafting error from Federal Rule 609".

Proposed Amendments

On page 15, line 31, delete "during".

On line 32, delete "cross-examination".

/ch

House Judiciary Committee
Exhibit BB, HB 2030
1-page exhibit
March 19, 1981 - 3:00 p.m
presented by the Ad Hoc Committee

OREGON STATE BAR
AD HOC COMMITTEE ON PROPOSED CODE OF EVIDENCE

SUBJECT: Section 53. Rule 609. Impeachment by evidence of conviction of crime.

RECOMMENDATION: The Committee supports the proposed Rule 609 as amended by the Judiciary Committee, and opposes the proposed change of the Oregon Criminal Defense Lawyers Association, which we understand would prohibit all impeachment by evidence of conviction of a crime unless the accused had first introduced evidence solely for the purpose of supporting his or her credibility. We believe that the Judiciary Committee Rule is a reasonable approach.

Oregon State Bar
Ad Hoc Committee on Proposed
Code of Evidence

House Judiciary Committee
Exhibit CC, HB 2030
March 19, 1981 - 3:00 p.m.
3-page exhibit
presented by Professor Ron Lansing

Portland, Oregon 97219

Telephone (503) 244-1181

Lewis and Clark College

Northwestern School of Law

March 18, 1981

Re: Testimony Regarding Section 53 - Proposed Rule 609 Oregon Evidence Code

(1) The legislature should enact the Interim Committee's proposed rule regulating impeachment by evidence of conviction of crime. The Advisory Committee proposal does not further the search for truth and could lead to injustices; it should be rejected.

The Advisory Committee proposal would allow impeachment by evidence of recent conviction of any felony (in Oregon all crimes punishable by "imprisonment in excess of one year" are felonys, (O.R.S. 165 525). These include criminally negligent homicide (O.R.S. 163 145), most assaults (O.R.S. 165.165-163.185), arson (164.315-164.325), some criminal mischief (O.R.S. 164.365), riot (166.015), and promoting prostitution (O.R.S. 167.012).

When an attorney attempts to impeach a witness with evidence of a prior conviction, he or she is asking the jury "to infer that the witness with a criminal record possesses a generally evil character, that persons of such character are likely to lie under oath, and, finally, that the witness has in fact lied."[1]

This inference is a totally illogical one: just because a person is willing to ignore societal norms prohibiting fighting, for example, or destroying property, does not mean that person is also willing to ignore social, legal and possibly religious norms regarding testimony under oath. Nonetheless, the impeachment evidence is dramatic and novel to a jury, and can easily shift the jurors' attention from the real issue of the subject of the lawsuit to the collateral issue of the criminal history of the witness.

If a trial attorney wants to argue that a witness is not credible he or she can call attention to the witness' demeanor, use cross-examination to raise inconsistencies, illogicalities and biases, and make use of the other impeachment devices that will be allowed by the Evidence Code (e.g. prior inconsistent statement). These approaches are more likely to present

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[1] "An Eclectic Approach to Impeachment by Prior Convictions," 5 U. Mich. J. Law Ref. 522, 523 (1972).

information that is relevant to veracity, and make use of irrelevant prior convictions superfluous as well as dangerous.

Finally, it should be noted that the Interim Committee proposal will benefit the State as well as the defense in a criminal case. When the State's major witness has a prior conviction, the prosecution is vulnerable to the strategy of omitting a defense case and merely attacking the sufficiency of the State's evidence. This tactic will be greatly circumscribed under the Interim Committee approach.

(2) The legislature should amend Proposed Rule 609 by inserting the following language on p. 15 of House Bill 2030, line 32, after the period:

> "If the witness be the accused in a criminal proceeding, no evidence of prior conviction of a crime shall be admissible for the sole purpose of impairing the credibility of the accused unless the accused has first introduced evidence admissible solely for the purpose of supporting his or her credibility."

A criminal defendant with an impeachable prior conviction is faced with a dilemma: if he or she does not take the stand, the jury will probably infer that there is something to hide. Nash v. U.S., 54 F.2d 106, 1007 (2d Cir. 1932). One poll revealed that 71% of those questioned believed that a defendant's failure to testify was an indication of guilt. "To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record", 4 Col.J.Law & Soc. Prob. 215,221 (1968). If the defendant does testify and the conviction is revealed, the jury may convict because it believes that the defendant is a generally dangerous individual; if the conviction was for a crime similar to that charged, the jury may convict because of an assumed propensity to commit "that sort of crime". McCormick, Evidence, § 43 p. 89 (2d. Ed. 1972), "An Eclectic Approach to Impeachment by Prior Convictions," supra at 525.

McCormick has termed this effect on the accused "the sharpest and most prejudicial impact." McCormick, supra at 89. Studies show that juries make the prejudicial and improper inferences despite contrary instructions from the court. "To Take the Stand or Not to Take the Stand," supra at 217-18. While the dilemma is lessened for a defendant who is glib and can explain away the effect of a prior conviction, a person's liberty should not depend on such a serendipitous factor. The Model Code of

Evidence (Rule 306(1) (b)), the Uniform Rules of Evidence (Rule 21), the English Criminal Evidence Act of 1898 (61 & 62 Vict., c36, § 1), and the State of Pennsylvania (42 Pa.Con. Stats. Ann. § 5918) have recognized this problem and have passed rules similar to the proposed amendment.

Again, the State is not without means to persuade a jury that the defendant's testimony may be suspect. In addition to normal impeachment methods, the State can, and usually does, argue that the defendant has the greatest motive for lying: a desire to retain his or her freedom.

Respectfully submitted,

Susan F. Mandiberg
Assistant Professor of Law
Lewis & Clark Law School

SFM/yt

House Judiciary Committee
Exhibit DD, HB 2030
March 26, 1981
2-page exhibit
presented by Bill Gary

Proposed amendments to HB 2030
(Evidence Code Article VI)
by the Oregon District Attorneys' Association

1. On page 14 of the bill, lines 18 through 37, (Section 47, Rule 604,) delete in its entirety subsection (2) and (3).

2. On page 15, line 5, (Section 50, Rule 606-1), after "attorneys" insert "private law."

3. On page 15, line 19, (Section 52, Rule 608), delete "of opinion or," and on line 22 delete "opinion or."

4. The District Attorneys urge tht the Advisory Committee proposal be adopted instead of the Judiciary Committee proposal. The District Attorneys further urge tht the Advisory Committee proposal be amended as follows:

"Section 53. Rule 609. Impeachment by evidence of conviction of crime.

"(1) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime in other than a justice's court or a municipal court shall be admitted if elicited from the witness during cross-examination or established by public record [during cross-examination] but only if the crime:

"(a) Was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted; or

"(b) Involved false statement, or dishonesty regardless of the punishment.

"(2) Evidence of a conviction under this section is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

"(3) When the credibility of a witness is attacked by evidence that the witness has been convicted of a crime, the witness shall be allowed to briefly explain the circumstances of the crime or former conviction.

"(4) The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

"(5) An adjudication by a juvenile court that a child is within its jurisdiction is not a conviction of a crime."

5. On page 16, lines 35 through 37, (Section 55, Rule 612), after "justice requires" delete "except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial."

House Judiciary Committee
Exhibit EE, HB 2030
March 26, 1981
1-page exhibit
presented by staff

March 26, 1981

OCDLA Response to Proposed Rule Of Evidvence 606-1: Competency of attorney as witness.

The OCDLA is concerned with the intent behind (5) of this rule, i.e., just what does "the interests of justice" really mean? The Association feels that this too much delegation to the court.

The OCDLA would also like to have a clause added which clarified that (5) was not a waiver of the attorney-client privilege. Perhaps this could be included in the commentary, instead.

House Judiciary Committee
Exhibit FF, HB 2030
March 26, 1981
6-page exhibit
Presented by staff

OREGON STATE BAR
AD HOC COMMITTEE ON PROPOSED CODE OF EVIDENCE

SUBJECT: Section 51. Rule 607. Who may impeach.

> "The credibility of a witness may be impeached by any party, including the party calling the witness, except in order to impeach the credibility of a party's own witness with a prior inconsistent statement, the testimony of the witness at trial must be actually injurious to the calling party's case."

RECOMMENDATION: The proposed rule is unduly restrictive in requiring that actually injurious testimony is required before impeachment by prior inconsistent statement is allowed.

Federal Rule 607 should be enacted:

> "The credibility of a party may be attacked by any party, including the party calling him."

DISCUSSION

Present Oregon Law.

The early common law rule prohibited a party from impeaching his own witness under any circumstances. The rule was based upon the fiction that the party calling the witness vouches for his trustworthiness. That concept often is invalid, because a party rarely has free choice in selecting his witnesses, they are dictated by events.

The greatest effect of the common law rule was to prohibit impeachment of one's own witness by inconsistent statements, which McCormick describes as the most effective

form of impeachment. McCormick, Evidence 75 (2d ed. 1972). McCormick traces the history of reforming statutes which modified the absolute prohibition of the common law rule. A provision in the 1849 draft of the Field Code of Civil Procedure was adopted by the English Common Law Procedure Act of 1854. Oregon, together with 10 other states, adopted the English statute except that it omitted the condition that the witness must be proved to be adverse. McCormick, supra, 76, §38.

The Oregon statutes, in their present form, were first enacted in 1862. Deady's General Laws of Oregon (1845-1864):

ORS 45.590

> "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with present testimony, as provided in ORS 45.610 * * *"

ORS 45.610

> "A witness may be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places and persons present, and he shall be asked whether he made the statements, and if so, allowed to explain them. * * *"

What McCormick describes as "two troublesome qualifications" have been imposed on the statutory reform by many courts: one is that the party seeking to impeach must show that he was surprised at the testimony of the

witness; the second is that the witness' testimony must be positively harmful to the party calling him, rather than a mere failure to give expected favorable testimony. McCormick, supra, 76, §38. The present state of the law in Oregon is a rejection by the Courts of the first limitation, surprise, (State v. Gardner, 2 Or. App. 265, 467 P.2d 125 (1970)) but adoption of the second. Langford v. Jones, 18 Or 307, 22 P. 1152, 22 P. 1064 (1890). Thus, one common law limitation was imposed upon the statute, but not the other.

The statute is unequivocal in allowing impeachment by inconsistent statements and there was no apparent justification for judicially imposing a common law limitation that the testimony being impeached must be positively harmful. Particularly when that qualification was left out of the Deady Code. This limitation upon the statute, as with some other hearsay rules, has in the past probably been disregarded more than it has been followed. See, e.g., State v. McDaniel, 39 Or 161, 65 P. 520 (1901); City of Woodburn v. Aplin, 64 Or 610, 131 P. 516 (1913); State v. Rosser, 162 Or 293, 86 P.2d 441, 87 P.2d 783, 91 P.2d 295 (1939); State v. Young, 1 Or. App. 562, 463 P.2d 374 (1970); State v. Gardner, 2 Or. App. 266, 467 P.2d 125, Sup. Ct., review denied (1970); State v. Green, 3 Or. App. 411, 474 P.2d 9 (1970); State v. Anderson, 10 Or. App. 34, 497 P.2d 1218. The reason is apparent. To follow such a rule is to grant immunity to an untruthful

witness and encourage perjury. As stated by McCormick:

> "While the power to attack the character of one's own witness may be of little practical value to the attacker, and is of little moment to the administration of justice, a rule against the showing of the prior statements of one's own witness, to aid in evaluating his testimony, is a serious obstruction to the ascertainment of truth." McCormick, supra, 77, §38.

The result of the common law rule is to leave:

> "the party at the mercy of the witness and his adversary. If the truth lies on the side of the calling party, but the witness' character is bad, the witness may be attacked by the adversary if he tells the truth; but if the witness tells a lie, the adversary will not attack him, and the calling party, under the rule, cannot. McCormick, supra, 75 §38.

Federal Rule.

The new Federal Rule of Evidence, §607, places no limitation upon impeachment of one's own witness. It simply states:

> "The credibility of a witness may be attacked by any party, including the party calling him."

In discussing Federal Rule 607, Weinstein states:

> "The legal writers have not had a kind word to say about the orthodox rule for many decades. They have called it 'antiquated,' 'anachronistic,' 'irrational,' 'pernicious,' 'an evidential sacred cow,' 'a serious obstacle to the ascertainment of truth,' and a rule 'more honored in its breach than in its observance.' [Citing authority] While not agreeing completely on the historical derivation of the impeachment restriction, they are in accord that the justifications offered in explanation of the rule are invalid." (4 Weinstein on Evidence §§607-9, 607-10)

Proposed Oregon Rule.

The Advisory Committee's proposed rule read:

> "Who may impeach. The credibility of a witness may be impeached by any party, including the party calling the witness, except in order to impeach the credibility of a party's own witness with a prior inconsistent statement, the testimony of the witness at trial must be contrary to that which a calling party anticipates and must be actually injurious to the calling party's case."

The proposed rule was amended by the Joint Committee on the Judiciary to remove the surprise requirement.

In Rhodes v. Harwood, 273 Or 903 (1975), the Oregon Supreme Court held that under ORS 45.590, impeachment by a party of his own witness by evidence of a prior inconsistent statement may occur only when the testimony of the witness is prejudicial or damaging to the party calling him. In State v. Bruce, 31 Or. App. 1189 (1977), the Court of Appeals reaffirmed the rule of Rhodes but held that the answer "I don't remember" was the equivalent of "no, I did not say that", and was sufficiently prejudicial to permit introduction of the prior inconsistent statement. The Advisory Committee states that it:

> "Intends that the response 'I don't know' by a witness who previously had indicated a knowledge of the facts not be considered testimony actually injurious to the calling party's case for the purposes of this section. To the extent that this contention is contrary to Bruce, the Advisory Committee intends to change current Oregon law."

The Advisory Committee has been unduly restrictive in this area. The requirement of surprise has been almost

universally criticized, but since it was removed by the Joint Committee on the Judiciary, no further comment will be made on that point. By requiring the statement be actually injurious, and by providing that an "I don't remember" statement is not injurious, an open invitation is issued to perjury. It is obvious that a statement can be tailored to avoid subsequent impeachment under the "actually injurious" requirement. A response of, "no, I did not say that," may also be found not to be actually injurious. For example, in Rhodes v. Harwood, supra, a witness denied that the defendant told him that she had shot at a party and disposed of the gun. The witness stated that he had not made such a statement to another party. The third party then testified that the witness had made such a statement to him, but the evidence was ruled inadmissible because the testimony of the declarant was found not to be prejudicial or damaging to the party calling the witness.

Although Rhodes was a civil case, this rule probably has its most significant impact in criminal cases, when witnesses may initially give a truthful account of a crime to the police, then prior to trial be threatened or have second thoughts, and be able to have a lapse of memory and avoid impeachment. The Oregon District Attorneys' Association has also opposed the proposed rule. Federal Rule 607 should be adopted in Oregon.

Oregon State Bar
Ad Hoc Committee on
Proposed Code of Evidence

House Judiciary Committee
Exhibit GG, HB 2030
March 26, 1981
1-page exhibit
presented by staff

March 26, 1981

OCDLA response to proposed rule of evidence 607: Who may impeach.

The OCDLA takes no position on the effect of an "I don't know" response.

The Association would the following amendment made to p. 15, lines 15 & 16:

> including the party calling the witness, except in order to impeach the credibility of a party's own witness [with a prior inconsistent statement,] by any means permitted in this Code, the testimony of of the witness at trial must be actually injurious to the calling party's case.

House Judiciary Committee
Exhibit HH, HB 2030
7-page exhibit
presented by staff

OREGON TRIAL LAWYERS' POSITION ON ARTICLE VI OF THE PROPOSED CODE OF EVIDENCE

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

PROPOSAL

Rule 608 allows the credibility of a witness to be attacked or supported by evidence in the form of opinion or reputation by allowing evidence of the witness' character for truthfullness or untruthfullness. The word "opinion or" on line 19, page 15 and line 22, page 15 should be deleted.

DISCUSSION

The Advisory Committee recognized the danger of admitting opinion evidence, but apparently decided other factors would minimize the danger.

Quoting from the Advisory Committee Proposal on Rule 405, page 50 of the Bound Version of the Proposed Oregon Evidence Code;

> "Of the three methods of proving character provided by this section, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time."
>
> Continuing on page 51,
>
> "No Oregon case has been found in which opinion evidence has been used to prove character."

This Rule is a definite departure from existing law.

The Oregon Trial Lawyers Association has argued against allowing opinion evidence because it necessarily requires inquiry into the basis for the opinion, which will of necessity, lead to the calling of additional witnesses,offering of further evidence regarding the circumstances surrounding the specific incidents or specific conduct. In other words, it creates a necessity for "trials within trials". If inquiry is prohibited, then an opinion can be given without any basis.

The Advisory Committee has apparently created inconsistent policies regarding inquiry into specific instances and specific conduct as evidenced by comparing Rule 608 with Rule 405.

Rule 608 allows a witness to give an opinion regarding another witness' character for truthfullness or untruthfullness. The opinion can and probably will be based upon specific conduct on specific occasions. However, Rule 608 specifically prohibits cross-examination inquiry of the witness regarding specific instances and specific conduct, even if probative of truthfullness or untruthfullness. The damaging witness may only be asked on cross-examination if the witness "has heard" or "knows" of specific instances of bad conduct relevant to the character trait of credibility.

Contrast this with Rule 405, Subsection (1) where the witness is allowed to give opinion evidence regarding the character of another witness, and on cross-examination, inquiry is allowable into relevant, specific instances of conduct.

Therefore, Rule 404, Subsection (2)(c) allows evidence of the character of a witness as provided by Rule 608, which allows opinion evidence, but does not allow inquiry into specific conduct. Whereas, Rule 405 allows opinion evidence regarding a person's character or trait of character and allows inquiry into relevant specific instances of conduct. This appears to be an inconsistent policy. If inquiry into specific instances of conduct is proscribed by Rule 608, can witnesses give opinions which have no factual basis?

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF A CRIME

PROPOSAL

The Oregon Trial Lawyers Association supports the proposed Rule 609 as amended by the Judiciary Committee, but proposes the following minor changes: Proposed Amendment: On page 15, line 31, delete "during". On line 32, delete "cross-examination".

DISCUSSION

The present proposed Rule 609 does not allow the defendant to divulge to the court and jury that the witness has been convicted of a crime in other than a Justices Court or a Municipal Court, unless during cross-examination, that information is elicited from the witness. This effectively precludes the defendant from presenting evidence that a witness has been convicted of a crime and makes it appear that the defendant or his witnesses have attempted to hide that fact, or at least have not been open and honest with the jury. In all fairness, either

side should be allowed to elicit evidence that the witness has been convicted of a crime on direct examination or at any other time.

RULE 612. WRITING USED TO REFRESH MEMORY

PROPOSAL

The Rule should be modified in such a manner that the entire file of a testifying expert cannot be introduced into evidence in total. This can be done by inserting the Legislative intent into the Official Commentary.

DISCUSSION

It is understood that a witness may refresh his or her memory by any object, even a ham sandwich. The object is used to spark the memory of the testifying witness and is not necessarily evidence in and of itself. However, recognizing that a witness may have memory refreshed and then testify differently than the writing which has refreshed his or her memory, the Rule allows the adverse party to inquire.

In the case of adverse experts, such as a treating physician or a professional engineer, they are normally testifying from memory refreshed by recorded information. If the adverse party is allowed to introduce the entire written contents of the file,it would not only cause unnecessary evidence to be introduced to the jury, but also allow hearsay evidence to be introduced where it would not otherwise be admissible. It would also require the Judge and the parties to inspect and excise portions of the file, which is a time consuming process.

RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT.

PROPOSAL

The Oregon Trial Lawyers' Association joins with the Oregon State Bar ad hoc Committee and opposes enactment of Rule 614 as proposed by the Judiciary Committee and agrees with the Advisory Committee that the Federal Rule should not be adopted.

DISCUSSION

We strongly believe that State Court Judges should not be encouraged to have an expanded role in the calling or interrogation of witnesses. The Advisory Committee Commentary states that they were reluctant to provide the Court with an expanded role in the examination or cross-examination of witnesses. They, therefore; did not adopt Federal Rule 614 but they did not intend to deny or limit the inherent power of a Trial Court to call and interrogate witnesses.

The Judiciary Committee Commentary stated that they recognized that Judges have inherent power to call and examine witnesses and cited Frangos -v- Edmunds, 179 Or 577, 173 P2d 596 (1946), and decided to adopt Federal Rule 614. In examining the minutes of the testimony before the Judiciary Committee, it is clear that the Judiciary Committee Counsel informed the committee that the Judges already have the power to call and interrogate witnesses, therefore; the committee was merely codifying existing Oregon law. This is incorrect.

Frangos is a 29 page opinion regarding a Trial Judge whose courtroom behavior was unusual. The entire case has 35 classifying key notes, and key note number 31 deals with the duties of a Trial Judge. Key note number 31 is a quotation from page 28 of the 29 page opinion and reads as follows:

> "The function of a trial judge is not that of a mere moderator. He is "the governor of the trial for the purpose of assuring its proper conduct and the fair and impartial administration of justice between the parties to the litigation. The wide discretionary powers vested in him are to be exercised so that abuses of justice shall not be accomplished under forms of law." 53 Am. Jur., Trial 74. He may, in the exercise of a sound discretion, control the examination of witnesses and may, when necessary, in the furtherance of impartial justice, examine a witness, though he should not by the form, manner or extent of his questions, indicate to the jury his opinion on the merits. 53 Am. Jur. , Trial 74 and 75."

The Judge merely by calling a witness spotlights and emphasizes that witnesses testimony.

The Judge merely by interrogating and asking specific questions directed at specific areas, spotlights and emphasizes his interest in those areas. The jury surely will not miss the Judge's interest and will give greater emphasis themselves to the areas of interest of the giver of law. The Trial Judge has tremendous prestige and authority, and subsequently influences the jury to an extent beyond that which either party can generate. Therefore, the calling, examining or cross-examining of witnesses by the Court should be on a restricted basis. Frangos argueably allows

the Judge to examine a witness called by either party only when necessary in the furtherance of impartial justice. It does not address itself to any alleged inherent authority of the Court to call witnesses, not otherwise called by the parties.

House Judiciary Committee
Exhibit II, HB 2030
March 26, 1981
1-page exhibit
presented by staff

March 26, 1981

OCDLA response to proposed rule of evidence 608: Evidence of character and conduct of witness.

The OCDLA feels that allowing impeachment of a witness by opinion is inappropriate since a very personal opinion about any relevant character trait would be allowable.

House Judiciary Committee
Exhibit JJ, HB 2030
March 26, 1981
1-page exhibit
Presented by staff

March 26, 1981

OCDLA response to proposed rule of evidence 611: Mode and order of interrogation and presentation.

The OCDLA proposes the following changes to this proposed rule:

In (1) delete remainder of the sentence after the word "truth".

Putting it in writing would place greater restrictions on inquiry, but would still be in inherent.

In (3) suggest that definition in ORS 45.560 of leading questions be included.

House Judiciary Committee
Exhibit KK, HB 2030
March 26, 1981
1-page exhibit
Presented by staff

March 26, 1981

OCDLA response to proposed rule of evidence 612: Writing used to refresh memory.

The OCDLA suggests that judicial discretion be removed from this section since it would only be needed if allow production of documents before trial. However, if the ODAA's suggestion of March 19 are followed, then judicial discretion should be eliminated entirely.

House Judiciary Committee
Exhibit LL, HB 2030
March 26, 1981
1-page exhibit
Presented by staff

OREGON STATE BAR
AD HOC COMMITTEE ON PROPOSED CODE OF EVIDENCE

SUBJECT: Section 55(b). Rule 614. Calling and interrogation of witnesses by Court.

RECOMMENDATION: The Committee opposes enactment of Rule 614 as proposed by the Judiciary Committee, and agrees with the Advisory Committee that the Federal Rule should not be adopted. We do not believe that judges should be encouraged or invited to have an expanded role in the interrogation of witnesses.

Oregon State Bar
Ad Hoc Committee on Proposed
Code of Evidence

House Judiciary Committee
Exhibit MM, HB 2030
March 26, 1981
1-page exhibit
Presented by staff

March 26, 1981

OCDLA response to proposed rule of evidence 615: Exclusion of witnesses.

The OCDLA prefers the Advisory Committee proposal because it sets out the procedure more clearly and is more in keeping with the adversary system.

House Judiciary Committee
Exhibit NN, HB 2030
April 2, 1981 - 2:15 p.m.
2-page exhibit
presented by staff

AGENDA FOR MARCH 19, 1981

House Judiciary
Sub-Committee
Evidence

Public Hearing

Rule 511	
Rules 601 to 603	No objections
Rule 604	1. ODAA favors deletion of subsections 2 to 4 as not being rules of evidence.
Rule 605	No objections
Rule 606	1. ODAA favors Advisory Committee proposal.
Rule 606-1	1. No objections.
Rule 607	1. OSB and ODAA object to requirement that the party calling the witness must show "actual injury" to its case, before being able to impeach credibility of its own witness with prior inconsistent statement; especially as the Commentary indicates that an "I don't know/remember" answer is not sufficiently prejudicial to allow the use of prior statements.
Rule 608	No objections.
Rule 609	1. The printed bill provides for impeachment by prior conviction, if the earlier crime involved dishonesty or false statement. OSB supports this. OCDLA would further limit such impeachment to case in which the accused first introduced evidence of good character. ODAA favors a return to the Advisory Committee proposal: prior felonies and misdemeanors involving dishonesty or false statement. 2. Prof. Kirkpatrick and ODAA want to move or delete "during cross-examination." 3. Prof. Kirkpatrick raises the question whether "conviction" should include post-verdict/prior to sentencing defendant.
Rules 609-1 to 611	No objections.

Rule 612	1. Prof. Kirkpatrick recommends expansion of the class of things to refresh memory. 2. ODAA recommends deletion of the final "except...." clause, as applicable only to the Federal Jencks Act.
ORS 44.610	No objection
Rule 614	OSB opposes adoption of the rule, because judges should not be encouraged to interrogate witnesses.
Rule 615	No objections

House Judiciary Committee
Exhibit OO, HB 2030
April 2, 1981 - 2:15 p.m.
1-page exhibit
presented by Bruce Smith

Section 39. Rule 511. Waiver of privilege.

A person upon whom sections 32 to 42 (Rules 503 to 514) of this Act confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication. Voluntary disclosure does not occur with the mere commencement of litigation but rather at the holder's offering of himself or herself as a witness [and testifying on direct examination as to the subject matter of the confidential matter or communication]. Voluntary disclosure also occurs when the holder has intentionally offered or taken the testimony of the other party to the confidential communication, either on trial or by deposition. Once such testimony has been taken, the privilege is waived not only as to the party testifying but as to any other person who communicated with the holder regarding the subject matter at issue or any related matter, which communication might be deemed privileged by the same rule that created a privilege for the party deposed or testifying at trial.

(State ex rel Calley v. Olsen, 271 Or 369, 532 P2d 230 (1975))

House Judiciary Committee
Exhibit PP, HB 2030
April 9, 1981 - 1:30 p.m.
2-page exhibit
presented by staff

April 2, 1981

Article VII

Rule 701

No objections

Rule 702

No objections

Rule 703 (deleted)

Kirkpatrick recommends that the rule regarding the basis of expert testimony be restored; and, that it be amended to provide further:

"However, nothing contained in this Rule shall permit the substantive use of otherwise inadmissible facts relied upon by an expert. A party shall be entitled to an instruction limiting consideration of such facts for substantive purposes."

Rule 704

No objections

Rule 705

The bill does not require an expert to testify on direct examination as to the facts that form the basis of the expert's opinion, unless the court so orders. The Advisory Committee felt the expert should be required to disclose these facts. Kirkpatrick prefers the proposed rule, with 2 amendments to protect the adverse party:

"(b) An adverse party may request a determination of whether the requirements of Rule 703 are satisfied before an expert offers an opinion or discloses facts or data.
(c) When the underlying facts or data would be admissible in evidence for any purpose other than to explain or support the expert's

opinion or inference, the Court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Rule 706

The bill expressly provides for court-appointed experts. OSB opposes the rule as unduly encouraging the courts to do this.

House Judiciary Committee
Exhibit QQ, HB 2030
April 9, 1981 - 1:30 p.m.
1-page exhibit
Presented by Bruce Smith

OREGON STATE BAR
AD HOC COMMITTEE ON PROPOSED CODE OF EVIDENCE

SUBJECT: Section 61(a). Rule 706. Court-appointed experts.

RECOMMENDATION: The Committee opposes the enactment of Rule 706 as recommended by the Judiciary Committee and agrees with the Advisory Committee that court appointment of experts should be discouraged. Although the court may have inherent power to appoint experts, the enactment of Federal Rule 706 may invite or encourage court appointment of experts, which may unduly influence the jury.

Oregon State Bar
Ad Hoc Committee on Proposed
Code of Evidence

House Judiciary Committee
Exhibit RR, HB 2030
April 9, 1981 - 1:30 p.m.
13-page exhibit
presented by Bruce Smith

OREGON STATE BAR
AD HOC COMMITTEE ON PROPOSED CODE OF EVIDENCE

SUBJECT: Section 62. Rule 801. Definitions.

"(4) Statements which are not hearsay. A statement is not hearsay if:

(a) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

(A) Inconsistent or at variance with the testimony of the witness, and was given under oath at a trial, hearing, or in a deposition if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination;

(B) Consistent with the testimony of the witness and is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence of motive; or

(C) One of identification of a person made after perceiving the person."

RECOMMENDATION: The issue is use of prior inconsistent statements as substantive evidence. The proposed rule is unduly restrictive in requiring that the prior inconsistent statements must have been given under oath and taken by the same party against whom the testimony is now offered, or a predecessor in interest, with an opportunity or motive to develop the same testimony.

Proposed Federal Rule of Evidence 801(d), as submitted to Congress by the United States Supreme Court (but not adopted) should be enacted. The Rule provided:

"Statements Which are not Hearsay. A statement is not hearsay if

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; * * *."

DISCUSSION

Present Oregon Law.

In State v. Derryberry, the Oregon Court of Appeals adopted Rule 63(1) of the Uniform Rules of Evidence that a prior inconsistent statement of a witness may be used, not only for the purpose of impeachment, but also as substantive evidence to establish the truth of the facts stated. The Oregon Supreme Court reversed. State v. Derryberry, 270 Or. 482 (1974).

In Derryberry, the defendant was accused of stealing furniture. Witness Clark originally told two police officers the defendant had stolen the furniture. When called at trial, witness Clark recanted the testimony and said that the defendant had purchased the furniture. The trial judge permitted the two police officers to testify to the prior statement of witness Clark, and gave an instruction that the jury could consider the testimony as substantive evidence, as well as for impeachment. This was the only direct evidence the State had to support its case.

The Court of Appeals affirmed the trial court, and the Supreme Court, in an opinion by Justice Tongue, reversed, upon the ground that it did not satisfy the traditional requirements of: (1) Some special circumstances to vouch for the trustworthiness of the out-of-court statement so as to justify dispensing with the need for cross-examination at the time the statement was made; and (2) some necessity for

the use of the out-of-court statement, usually as a result of the unavailability of the witness. Justices O'Connell and Bryson dissented.

Subsequently, in Rhodes v. Harwood, 273 Or. 903 (1975), on the issue of admissibility of the prior inconsistent statements as substantive evidence, Justice O'Connell again dissented, Justice Bryson concurred in the majority opinion for other reasons, and Justice Denecke, who had not participated in the Derryberry decision, joined in Justice O'Connell's dissent. Thus, three of the seven Justices of the Supreme Court at that time appeared to favor admitting prior inconsistent statements as substantive evidence, but the majority was opposed.

McCormick Analysis.

McCormick presents a well-reasoned analysis of the issue, as follows:

> "As previously observed, the traditional view is that a prior statement of a witness is hearsay if offered to prove the happening of matters asserted therein. This categorization does not, of course, preclude using the prior statement for other purposes, e.g., to impeach the witness by showing a self-contradiction if the statement is inconsistent with his testimony or to support his credibility under certain circumstances when the statement is consistent with his testimony. But the prior statement is admissible as proof of matter asserted therein, i.e. as 'substantive' evidence, only when falling within one of the exceptions to the hearsay rule. This position has increasingly come under attack in recent years on both logical and practical grounds.

The logic of the orthodox view is that the previous statement of the witness is hearsay since its value rests on the credit of the declarant, who was not (1) under oath, (2) subject to cross-examination, or (3) in the presence of the trier, when the statement was made.

The counter-argument goes as follows: (1) The oath is no longer a principal safeguard of the trustworthiness of testimony. Affidavits, though under oath, are not exempted from the hearsay rule. Moreover, of the numerous exceptions where evidence is admitted despite its being hearsay, in only one instance is the out-of-court statement required to have been under oath. And that instance, namely prior testimony, may arguably be regarded as a case of nonhearsay rather than as a hearsay exception.

(2) The principal reliance for achieving credibility is no doubt cross-examination, and this condition is thought to be satisfied. As Wigmore, who originally adhered to the traditional view, expressed it:

> 'Here however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the hearsay rule has been already satisfied.'

* * * *

(3) With respect to affording the trier of fact the advantage of observing the demeanor of the witness while testifying, the considerations are similar to those respecting cross-examination. As Judge Learned Hand's classic statement puts it:

> 'If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court.'

An additional persuasive factor against the orthodox rule is the superior trustworthiness of earlier statements, on the basis that memory hinges on recency. The prior statement is always nearer and usually very much nearer to the event than is the testimony. The fresher the memory, the fuller and more accurate it is. The requirement of the hearsay exception for memoranda of past recollection, that the matter have been recorded while fresh in memory, is based precisely on this principle." McCormick on Evidence, p.601 (2d ed. 1972).

Federal Rules of Evidence

The proposed Federal Rule of Evidence 801(d), quoted above, was submitted to Congress by the United States Supreme Court. The Supreme Court Advisory Committee's notes on the proposed rule state:

"Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. As has been said by the California Law Revision Commission with respect to a similar provision:

'Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent

> testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.'" Proposed Federal Rules of Evidence, 127-128 (1974).

Proposed Federal Rule 801(d)(1) was substantially modified by the House Judiciary Committee to require that a prior inconsistent statement of a witness is only admissible as substantive evidence if given under oath. The Federal Rule of Evidence adopted by Congress now reads:

> "(d) Statements which are not hearsay. A statement is not hearsay if --
>
> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, * * *"

An extensive discussion of the legislative history on the changes made by Congress are contained in 4 Weinstein on Evidence, §801, where he states:

"The Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Rules of Evidence of the Judicial Conference of the United States strongly opposed these changes, as indicated in its letter of May 22, 1974 to the Chairman of the Committee on the Judiciary of the Senate, at pp. 35-41.

> The result of either [the Subcommittee on the Judiciary's or the House's] version is virtually complete destruction of the usefulness of the provision.
>
> The traditional rule respecting prior inconsistent out-of-court statements of a witness has been that they are admissible to impeach but not as substantive evidence, and juries are to be instructed accordingly. Under that rule the fact that the witness may be cross-examined on the statement under oath in open court at the trial has been held to be of no significance. The traditional rule is still the prevailing majority rule.
>
> The foundation of the traditional rule is that the requirement of oath, right of cross-examination, and observation of demeanor must be satisfied simultaneously with the making of the statement; supplying them subsequently has not been considered adequate.
>
> The conclusion is not a sound one, as is disclosed by examination of three leading cases most vigorously espousing the traditional rule: State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939); Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967); People v. Johnson, 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968).
>
> * * *
>
> The Rule as submitted by the Court has positive advantages. The prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play. A realistic method is provided for dealing with the turncoat witness who changes his story on the stand. Comment, California

Evidence Code § 1235; McCormick, Evidence § 38 (2nd ed. 1972). The rubric of requiring surprise as a condition to impeaching one's own witness is eliminated, consistently with Rule 607. And it eliminates 'the historic ritual,' United States v. Klein, 488 F.2d 481,483 (2nd Cir. 1973), of instructing the jury to use the prior statement for impeachment only. See McCormick, Evidence § 251 (2nd ed. 1972).

* * * *

The instances in which the Rule as proposed to be amended would operate would be few in number. Departures from prior testimony given under oath and subject to cross-examination do not constitute a problem area. The problem area consists of cases in which the prior statement, now recanted on the stand, was not given under those conditions, and a rule which fails to deal with those cases is of slight practical significance.

The Joint Committees strongly urge that the Rule as submitted by the Court be reinstated."

Proposed Oregon Code of Evidence Rule.

The proposed Oregon Rule 801(d)(1)(A) is even more restrictive than the Federal Rule in that it requires the prior testimony under oath to have been subject to examination by the party or predecessor in interest and to be with a similar motive to develop the same testimony as now presented at trial. The comments to the proposed Oregon Rule, however, seem to adopt this approach with reluctance. The comments state:

"Paragraph (1). Paragraph (1) of subsection (d) of this section focuses upon the admissibility of prior statements by a witness. Considerable controversy has attended the question whether a prior out-of-court statement by an individual should be considered hearsay when the individual is presently available for cross-examination under oath in the presence of the trier of fact. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth. The argument in favor of treating these latter statements as hearsay is based upon the ground that the conditions of oath, cross-examination, and demeanor observation did not prevail at the time the statement was made and cannot adequately be supplied by the later examination. The logic of the situation is troublesome. In so far as the oath is concerned, its mere presence has never been regarded as sufficient to remove a statement from the hearsay category, and it receives much less emphasis than cross-examination as a truth-compelling device. While strong expressions are found to the effect that no conviction can be had or important right taken away on the basis of statements not made under fear of prosecution for perjury, Bridges v. Wixon, 326 US 135, 65 SCt 1443, 89 LEd 2103 (1945), the fact is that, of the many common law exceptions to the hearsay rule, only that for reported testimony has required the statement to have been made under oath.

Nor is it satisfactorily explained why cross-examination cannot be conducted subsequently with success. The decisions contending most vigorously for its inadequacy in fact demonstrate quite thorough exploration of the weaknesses and doubts attending the earlier statement. State v. Saporen, 205 Minn 358, 285 NW 898 (1939); Ruhala v. Roby, 379 Mich 102, 150 NW 2d 146 (1967); People v. Johnson, 68 Cal 2d 646, 68 Cal Rptr 599, 441 P2d 111 (1968). In respect to demeanor, as Judge Learned Hand observed in Di Carlo v. United States, 6 F2d 364 (2d Cir 1925), when the jury decides that the truth is not what the witness says now, but what he said before, they are still deciding from what they see and hear in court. The bulk of the case law nevertheless has been against allowing prior statements of witnesses to be used generally as substantive evidence. Most of the writers and Uniform Rule 63(1) have taken the opposite position.

The position taken by the Advisory Committee on Evidence Law Revision in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence, but with a recognition that particular circumstances call for a contrary result. The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates three situations in which the statement is excepted from the category of hearsay. Compare Uniform Rule 63(1) which allows any out-of-court statement of a declarant who is present at the trial and available for cross-examination."

This concern of the Advisory Committee about not wanting to encourage "use of prior prepared statements as substantive evidence" is addressed by McCormick as follows:

"Nevertheless some uneasiness was manifested less complete rejection of the orthodox view encourage a practice whereby lawyers would offer in evidence a carefully prepared statement in lieu of testimony, merely tendering the witness to be cross-examined concerning it. Such a practice seems not in fact to have materialized in jurisdictions following the lead of Wigmore and the Model Code, due no doubt to the trial bar's conclusion that testimony of a live witness in the vast majority of cases carries greater conviction than his previously prepared statement. Nevertheless, the abuse of prepared statements was a substantial possibility. The result was an intermediate position, neither rejecting nor admitting prior statements of witnesses in toto, but allowing certain ones thought by circumstances to be free of the danger of abuse, namely statements of identification, inconsistent statements, and consistent statements when admissible to rebut a charge of 'recent fabrication.'

* * * *

* * * Other than the identification cases, the cases of prior statements of witnesses in the vast majority of instances involve inconsistent statements. Here any planned use of statement in

> place of witness is unlikely. Moreover, the witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invented to explore. The two questioners will lay bare the sources of the change of face, in forgetfulness, carelessness, pity, terror, or greed, and thus cast light on which is the true story and which the false. It is hard to escape the view that evidence of a previous inconsistent statement, when declarant is on the stand to explain it if he can, has in high degree the safeguards of examined testimony. Allowing it as substantive evidence pays an added dividend in avoiding the ritual of a limiting instruction unlikely to be heeded by a jury. Accordingly, jurisdictions which shy away from admitting prior statements of witnesses generally may not hesitate to admit when the statement is inconsistent with already-given testimony." McCormick on Evidence, p.604 (2d ed. 1972).

In support of a restrictive rule it also is argued that the substantive use of prior statements may encourage the manufacture of evidence. This does not preclude the admissibility of admissions, which may equally be manufactured by an unscrupulous party. The argument ignores the fact that this evidence will come before the jury in any event because it is admissible for impeachment purposes. This is perhaps the most important distinction with respect to prior inconsistent statements. Unlike all other hearsay statements that are excluded by the hearsay rule, prior inconsistent statements do go to the jury for impeachment purposes.

> "If the impeaching statement was not made, it should not be used for any purpose; if it was made, it should be used for all purposes. The question of fact as to whether the out-of-court statement was or was not made is no more difficult than any other question of fact to be decided by the jury." Ladd,

Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell LQ 239, 250 (1957).

In evaluating prior statements for either impeachment or substantive evidence, the jury must make the same decisions: (1) was the statement made? (2) which statement is true, statement one or statement two? To expect the jury to make this determination, and then perform the mental gymnastics necessary to limit consideration to impeachment, is unrealistic. Proposed Federal Rule 801(d) quoted on page 2 should be adopted.

Oregon State Bar
Ad Hoc Committee on Proposed
Code of Evidence

House Judiciary Committee
Exhibit SS, HB 2030
April 9, 1981 - 1:30 pm
2-page exhibit
presented by staff

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STATE OF OREGON
LAW IMPROVEMENT COMMITTEE

January 13, 1977

To: Members of the Advisory Committee on Evidence Law Revision

From: Rick Whitlock, Law Clerk
Legislative Counsel's Office

Re: Hearsay exception - Complaint of sexual misconduct

If approved, the following rule would be placed on page 22 of the Hearsay bill as subsection (2) of Section 3. This would follow the excited utterance exception to the hearsay rule pursuant to the suggestion of Judge Unis at the December 17, 1976 meeting.

Section 3. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) * * *

(2) A complaint of sexual misconduct made by the prosecuting witness after the commission of the alleged offense. Such evidence must be confined to the fact that the complaint was made.

COMMENTARY

A. Summary (the following would appear on page 34 of the Hearsay bill.)

Although the Federal Rules of Evidence contain no mention of this exception, the Advisory Committee on Evidence Law Revision included subsection (2), the complaint of sexual misconduct exception, in recognition of the rule expressed by the Oregon Court of Appeals in State v. Waites, 7 Or. App. 137, 470 P.2d 188 (1971).

"In rape cases, and increasingly in cases of sex offenses generally, evidence is admissible that the victim made complaint. The only time requirement is that the complaint have been made without a delay which is unexplained or inconsistent with the occurrence of the offense, in general, a much less demanding time aspect than with the typical excited utterance situation.

In its origin, the theory of admissibility was to repel any inference that because the victim did not complain, no outrage in fact transpired. Accordingly, if the victim did not testify, evidence of complaint was not admissible. * * * [A]dmissible evidence under traditional doctrine included only the fact that the complaint was made* * *." C. McCormick, Evidence, sec. 297, p. 709 (2d ed. 1972).

The Oregon rule "provides that a person to whom a complaint of sexual misconduct is made by the prosecuting witness can testify that a complaint was made, but cannot testify as to the details of the complaint." State v. Waites, supra, at P. 140; See also State of Oregon v. Tom, 8 Or. 177 (1879); State v. Sargent, 32 Or. 110, 49 P. 889 (1897); State v. Ogden, 39 Or. 195, 65 P. 449 (1901); State v. Whitman, 72 Or. 415, 143 P. 1121 (1914); State v. Matson, 120 Or. 666, 253 P. 527 (1927); State v. Haworth, 143 Or. 495, 21 P. 2d 1091 (1933); State v. Yielding, 238 Or. 419, 395 P.2d 172 (1964); and State v. Wilson, 75 Or. Adv. Sh. 913, ___ Or. App. ____, 532 P.2d 825 (1975). The "* * * evidence is permissible for the limited purpose of establishing that a complaint was made but nothing more. State v. Sargent, 32 Or. 110, 112, 49 P. 889 (1897). See also State v. Whitman, 72 Or. 415, 416-417, 143 P. 1121 (1914)." (Emphasis supplied.) State v. Emery, 4 Or. App. 527 at 530 n. 1, 480 P2d 445 (1971). Accordingly, it has been held that testimony as to prior assaults and as to the location of the assault in question is beyond the scope of this exception. State v. Waites, supra. It has also been held that the identity of the assailant is likewise beyond the scope of this exception and thus inadmissible. State v. Wilson, 75 Or. Adv. Sh. 913, ___Or. App. ____, 532 P.2d 825 (1975).

The Advisory Committee on Evidence Law Revision intends that the present Oregon law relating to this exception be retained in full.

B. Derivation (the following would appear on page 73 of the Hearsay bill as a continuation of paragraph three.)

Subsection (2) of Section 3 of this Act reflects the rule set forth in State v. Waites, 7 Or. App. 137, 140, 470 P.2d 188 (1971).

House Judiciary Committee
HB 2030, Exhibit TT
July 2, 1981 - 1:30 p.m.
5-page exhibit
presented by staff

EVIDENCE CODE
Work Session
Text: March 12, 1981
Commentary: May 5, 1981

Oregon Rule of Evidence 309

SECTION 18. Rule 309. Presumptions in criminal proceedings. (1) The judge is not authorized to direct the jury to find a presumed fact against the accused.

(2) When the presumed fact establishes guilt or is an element of the offense or negates a defense, the judge may submit the question of guilt or the existence of the presumed fact to the jury only if:

(a) A reasonable juror on the evidence as a whole could find that the [basic] facts giving rise to the presumed fact have been established beyond a reasonable doubt; and

(b) The presumed [facts follow] fact follows from the [basic] facts giving rise to the presumed fact beyond a reasonable doubt.

COMMENTARY

Oregon Rule of Evidence 309 states the effect of presumptions in criminal proceedings. The rule is a modification of Federal Rule 303, which was recommended by the United States Supreme Court in October 1972 but deleted by the Congress in enacting the Federal Rules of Evidence. Federal Rule 303 was

based upon A.L.I. Model Penal Code section 1.12(5) P.U.D. (1962) and United States v. Gainey, 380 US 63 (1965).

Rule 309 indicates that a presumption may not be used against an accused to remove any matter in a criminal proceeding from final determination by the jury. Such an action would violate the axiom that a verdict cannot be directed against the accused, 9 Wigmore, Evidence, section 2495 at 312 (3d ed 1940), or its corollary that a judge is without authority to direct a finding against the accused as to any element of a crime, A.L.I. Model Penal Code, section 1.12(1) P.U.D. (1962). Were it not for the rule, the existence of an adverse presumption might compel a defendant to introduce rebuttal evidence, including the defendant's testimony, and thus force a waiver of the constitutional right to remain silent. McCormick, Evidence, section 344 at 819 (2d ed 1972).

The net effect of this rule is to reduce presumptions in criminal cases to nothing more than permissible inferences when they are used against the accused. For example, the prosecution in a controlled substances case may wish to use the presumption of knowledge of illegal importation from the fact of possession of heroin. In this circumstance, the judge first must determine as a matter of law that guilty knowledge follows from possession beyond a reasonable doubt. If so, the judge instructs the jury that if they find beyond a reasonable doubt that the defendant was in possession of the heroin, then they are permitted, but not required, to find that the defendant knew of the illegal importation of the drug.

Rule 309 only modifies the evidentiary effect of a presumption when it is used against an accused. When used on behalf of the criminal defendant, a

presumption continues to impose on the prosecution the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Because the operation of presumptions may infringe upon the rights of the accused, the United State Supreme Court has carefully limited their effect through a series of criminal decisions. In Tot v. Unites States, 319 US 463, 63 SCT 1241, 87 LEd 1519 (1943), the court held that a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the fact to be presumed. Compare United States v. Gainey, 380 US 63, 85 SCt 754, 13 LEd 2d 658 (1965) (rational connection exists between the proved fact of unexplained presence at a still site and the presumed fact of carrying on an illegal distilling business), with United States v. Romano, 382 US 136, 86 SCt 279, 15 LED 2d 210 (1965) (unexplained presence does not, however, support a reasonable inference about the defendant's specific function in connection with a distilling operation).

In Leary v. United States, 395 US 6, 89 SCt 1532, 23 LEd 2d 57 (1969), the Supreme Court revealed that a stricter test than mere "rational connection" must be met. There the court held that a presumption establishing an element of an offense is constitutional only if the presumed fact is more likely than not to flow from the basic facts. The court struck down, on this ground, a rule that possession of marijuana presumes guilty knowledge of its illegal importation. Although most marijuana is imported, the court concluded that it would be pure speculation to say that a majority of possessors know the source of their marijuana. See also Turner v. United States, 396 US 298, 90 SCt 642, 24 LEd 2d 610, reh. den. 397 US 958, 90 SCt 929, 25 LEd 2d 144 (1970), involving the same presumption but different drugs. After an extensive review of the evidence, the Turner court upheld the presumption as to heroin because

all heroin consumed in the United States is illegally imported; it struck down the presumption as to cocaine, because a reasonable possibility exists that the purchase has been legal.

In Barnes v. United States, 412 US 837, 93 SCt 2357, 37 LEd 2d 380 (1973), the Supreme Court indicated that a presumption that follows from basic facts beyond a reasonable doubt is sufficient to pass the test of due process. This decision exposed the final question, whether such a connection is also constitutionally necessary. In Ulster County Court v. Allen, 442 US 140, 99 SCt 2213, 60 LEd 2d 77 (198), the Supreme Court ruled that it is not, except in one circumstance: "As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the [more-probable-than-not] test described in Leary." 442 US at 167.

Although the Supreme Court has indicated that the reasonable doubt standard is not required in judging presumptions in all criminal cases, the Legislative Assembly sought to avoid any possible conflict with the defendant's constitutional rights. Therefore, Rule 309 specifically provides that the presumed facts must follow from the basic facts beyond a reasonable doubt. It also provides that the judge may not submit the existence of the presumed fact to the jury unless a reasonable juror on the evidence as a whole could find that the basic facts have been established beyond a reasonable doubt.

Perhaps because of the delay in articulating federal constitutional principles governing the effect of presumptions in criminal cases, Oregon law on point is in a formative state. Following the reasoning in Tot, supra, the Oregon Court of Appeals impliedly ruled that a jury may infer an element

establishing a prima facie case if there is rational connection between the presumption and the facts upon which it is based. State v. Offord, 14 Or App 195, 512 P2d 1375 (1973). Although the court cited Leary and Turner, supra, it did not apply either the "more likely than not" or the "reasonable doubt" standard. See also State v. Bartolon, 8 Or App 538, 495 P2d 772 (1972). ORE 309 is intended to culminate developments at both the state and federal level.

EVIDENCE CODE
Work Session
Text: July 2, 1981
Commentary: July 2, 1981

House Judiciary Committee
HB 2030, Exhibit UU
July 2, 1981 - 1:30 pm
23-page exhibit
presented by staff

Oregon Rule of Evidence 104

SECTION 5. Rule 104. Preliminary questions. (1) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (2) of this section. In making its determination [it] the court is not bound by the rules of evidence except those with respect to privileges.

(2) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(3) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.

(4) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(5) Weight and credibility. This section does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

COMMENTARY

Oregon Rule of Evidence 104 outlines the respective roles of court and jury in deciding preliminary questions. The rule tracks the language of Rule 104 of the Federal Rules of Evidence. The Legislative Assembly intends that its adoption not change prevailing Oregon law on preliminary questions of admissibility.

Subsection (1). This subsection assigns to the trial judge the responsibility for making certain preliminary determinations regarding qualifications, privilege and admissibility. Is the alleged expert a qualified physician? Was a stranger present during a conversation between attorney and client? Is a witness whose former testimony is offered unavailable? In each instance, the admissibility of evidence will turn on the answer to the question.

To the extent that these preliminary inquiries are factual, the judge will necessarily receive evidence and act as a trier of fact. The subsection provides that in doing so the judge is not bound by the rules of evidence, except those relating to privilege. Preliminary questions may also call for an evaluation of evidence in terms of a legal standard. When a hearsay statement is offered as a declaration against interest, for example,a decision

must be made whether it possesses the required against-interest characteristics. The judge is to make these decisions as well.

Subsection (1) is consistent with ORCP 59B and ORS 136.310, which provide that the court shall decide "all questions of law; including the admissibility of testimony, [and] the facts preliminary to such admission . . . ." The subsection has general application, but must be read as subject to subsections (2) and (3) of this rule.

Subsection (2). Subsection (2) recognizes that in some situations the relevance of an item of evidence depends upon the existence of a particular preliminary fact. Thus, when an oral statement is relied upon to prove notice to X, it is without probative value unless X heard it. If a letter purporting to be from Y is relied upon to establish an admission by Y, it has no probative value unless Y wrote or authorized it. Relevancy in this sense has been labeled "conditional relevancy." Morgan, Basic Problems of Evidence 45-46 (1962). Problems arising in connection with it are to be distinguished from problems of logical relevancy treated under Rule 401.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subsection (1), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. The accepted treatment, provided in the rule, is the treatment generally given to questions of fact. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If, after all the evidence on the issue is in,

the jury could not reasonably conclude that fulfillment of the condition is established, the judge withdraws the matter from the jury's consideration.

Subsection (2) is consistent with the holding of Menefee v. Blitz, 181 Or 100, 179 P2d 550 (1947), which indicates that when the relevance of an item of evidence depends upon the submission of preliminary proof in the form of a foundation, or condition precedent, the party offering the dependent testimony must submit the preliminary proof or establish the condition precedent before the dependent fact can be deemed admissible.

Subsection (3). Under subsection (3), preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. This is in accord with State v. Jordan, 145 Or 504, 26 P2d (1934) and State v. Brewton, 238 Or 590, 395 P2d 874 (1964). Whether other preliminary matters should be so heard must be left to the discretion of the trial judge, to act as the interests of justice require. Frequently, evidence which is relevant to the fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, although not relevant to jury issues, may be heard by the jury with no adverse effect.

When an accused is a witness as to a preliminary matter, the accused has the right to be heard outside the jury's presence upon the accused's request. Regard for the right of an accused not to testify generally in a case dictates that the accused be given this option.

Subsection (4). Subsection (4) imposes a limit on cross-examination to encourage an accused to participate in the determination of preliminary matters. The accused may testify in such matters without exposure to cross-examination generally. The limitation is necessary because of the scope of cross-examination permitted under ORE 611. The subsection does not address the question of subsequent use of testimony given by an accused at a hearing on a preliminary matter.

Subsection (5). Subsection (5) declares that nothing contained in the first four subsections of this rule should be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility. This is consistent with section 6 of Article I of the Oregon Constitution, with ORS 41.900(16) and with the holding in State v. Estabrook, 162 Or 476, 91 P2d 838 (1939). Although the Legislative Assembly repeals ORS 41.900, it retains the substantive legal principles of that section in the several rules of the Oregon Evidence Code.

EVIDENCE CODE
Joint Work Session
Text: February 3, 1981
Commentary: May 11, 1981

Oregon Rule of Evidence 100

SECTION 1. Rule 100. Short title. Sections 1 to 78 (Rules 100 to 1008) of this Act shall be known and may be cited as the Oregon Evidence Code.

COMMENTARY

Oregon Rule of Evidence 100 gives the title of this evidence code. It is based on Rule 1103 of the Federal Rules of Evidence.

EVIDENCE CODE
Staff Proposal
Text: July 2, 1981
Commentary: July 2, 1981

Oregon Rule of Evidence 101

SECTION 2. Rule 101. Applicability of Oregon Evidence Code. (1) Courts. The Oregon Evidence Code applies to all courts in this state [in all actions, suits and proceedings,] except for:

(a) The small claims division of the Oregon Tax Court as provided by ORS 305.545;

(b) The small claims division of a district court as provided by ORS 46.415; and

(c) The small claims department of a justice's court as provided by ORS 55.080.

(2) Proceedings generally. The Oregon Evidence Code applies generally to civil actions, suits and proceedings, criminal actions and proceedings and to contempt proceedings except those in which the court may act summarily.

(3) Rules of privilege. Sections 32 to [41] 42 (Rules 503 to [513] 514) of this Act relating to privileges apply at all stages of all actions, suits and proceedings.

(4) Rules inapplicable. Sections 1 to 31 (Rules 100 to 412) and sections [42] 43 to 78 (Rules [514] 601 to 1008) of this Act do not apply in the following situations:

(a) The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under section 5 (Rule 104) of this Act.

(b) Proceedings before grand juries, except as required by ORS 132.320.

(c) Proceedings for extradition, except as required by ORS 133.743 to 133.857.

(d) Sentencing, except as required by ORS 137.090.

(e) [Granting or revoking] Proceedings to revoke probation, except of required by ORS 137.090.

(f) Issuance of warrants of arrest, bench warrants or search warrants.

(g) Proceedings under ORS chapter 135 relating to conditional release, security release [or], release on personal recognizance, or preliminary hearings, subject to Section ___ of this Act.

(h) Proceedings to determine proper disposition of a child in accordance with ORS 419.500(2).

COMMENTARY

Oregon Rule of Evidence 101 describes the courts and types of proceedings to which the Oregon Evidence Code applies. Subsection (1) is based on Rule 101 of the Federal Rules of Evidence, which declares that the federal rules apply in federal courts and before federal magistrates. Subsections (2) through (4) are based on Rule 1101 of the Federal Rules of Evidence, which creates certain exceptions to the scope of the federal rules. As the exceptions to the application of the Oregon Evidence Code are less complex, they have been combined in this rule for clearer organization.

Subsection (1). This subsection indicates that the Oregon Evidence Code generally applies to all courts of Oregon. Put differently: any court over which the Supreme Court has general administrative and supervisory authority under ORS 1.002 is a court to which the rules of evidence apply. However, the Legislative Assembly does not intend to repeal or limit the effect of statutes which provide for certain divisions or departments of courts to conduct proceedings without regard to the technical rules of evidence. Appropriate exception is therefore made for the small claims division of a district court under ORS 46.415, the small claims division of the Tax Court under ORS 305.545, and the small claims department of a justice court under ORS 55.050. These may continue to conduct informal hearings and dispositions of actions as provided for in those statutes

Currently, the rules of evidence except those of privilege do not apply to administrative agencies in contested cases. ORS 183.450. Nothing in ORE 101 should be construed to alter present Oregon practice under the administrative procedures statutes.

Subsection (2) This subsection states the general principle that, except as otherwise provided, the rules of evidence apply to all actions, suits and proceedings conducted in a court of justice. Contempt is punishable summarily when it is committed in the immediate view and presence of the court. ORS 33.030. The circumstances that suspend application of the rules of evidence in this situation are not present, however, in other cases of criminal contempt. Subsection (2) is subject to the qualifications expressed in the succeeding subsections.

Subsection (3). This subsection is made necessary by the limited applicability of the remaining rules of the Evidence Code. The privilege rules themselves, of course, contain internal exceptions and recognize other exceptions under other statutes. The Legislative Assembly recognizes that a particular privilege may, therefore, not apply in a given proceeding.

Subsection (4). Subsection (4) indicates particular proceedings in which the non-privilege rules of evidence do not apply. The Legislative Assembly does not intend this subsection as an expression of when due process or other constitutional considerations require an evidentiary hearing.

Paragraph (a). This paragraph restates the provisions of the second sentence of Rule 104(1), relating to preliminary questions. It is inserted here for convenience.

Paragraph (b). This paragraph is intended to deal with what evidence can be admitted in grand jury proceedings, not with what amount of admitted evidence is necessary to support an indictment. ORS 132.320 states that a grand jury may receive only evidence that would be admissible at trial except

for certain experts' reports and affidavits from unavailable witnesses. However, the Oregon Supreme Court has held that the statute is admonitory only, and the fact that a grand jury may have been prejudiced by inadmissible hearsay evidence not allowed under that statute is not grounds for dismissing or quashing an indictment. The Legislative Assembly (adopts)(disavows) this case law gloss. State v. McDonald, 231 Or 24, 361 P2d 1001 (1961).

Paragraph (c). Extradition proceedings are covered in detail by statute. ORS 133.743 to 133.857. As they are essentially administrative in character, and as the question of the guilt or innocence of the accused is not an issue, application of the formal rules of evidence would be inappropriate and impracticable.

Paragraph (d). This paragraph exempts sentencing from the rules of evidence and directs attention instead to the statute that specifically governs sentencing procedure. ORS 137.090. Early case law based upon the statute would imply that the state can prove any aggravating circumstance by unsworn statements. Coffman v. Gladden, 229 Or 99, 366 P2d 171 (1961). This case was decided before the institution of presentence reports. Since then, ORS 137.090 has been interpreted as requiring the sentencing court to take the testimony of witnesses when considering any aggravating information that is not contained in the presentence report, if the defendant requests. State v. Collins, 43 Or App 265 (1979); State v. Brown, 44 Or App 597 (1980). A remaining issue is whether witnesses who are sworn are restricted to giving testimony subject to the rules of evidence. State v. McKinney, 7 Or App 248, 489 P2d 976 (1971). As an investigator can put hearsay evidence in a presentence report, State v. Scott, 237 Or 390, 390 P2d 328 (1964), it seems pointless to prevent a witness under oath from saying the same thing.

However, it can be argued that a trained probation officer is able to eliminate untrustworthy hearsay and bring to the court's attention only hearsay that is reliable and valuable for its legitimate use. The Legislative Assembly considers judges capable of determining the reliability of hearsay evidence, and agrees that it is pointless to assign different values to the same hearsay depending upon the manner in which it is presented to the court.

Paragraph (e). A probation revocation proceeding consists of an adjudicatory and a dispositional phase. This paragraph does not mandate the application of the Oregon Evidence Code to either, although the Legisltive Assembly recognizes that due process may require the application of certain rules in the adjudicatory phase. Gagnon v. Scarpelli, 441 US 778, 93 SCt 1756, 36 LEd 2d 656 at n 5 (1973) (use of hearsay to sustain finding of violation impermissible in certain circumstances). The dispositional phase of a revocation proceeding is conceptually no different from sentencing with respect to the presentation of aggravating or mitigating circumstances. Therefore, the limitations of ORS 137.090 should apply here. See Rule 101(4)(d), supra.

Paragraph (f). Warrants of arrest and search warrants are issued upon complaint or affidavit showing probable cause. ORS 133.110, 133.545 and 133.555. The nature of the proceedings makes application of the rules of evidence inappropriate and impracticable.

Paragraph (g). Proceedings under ORS chapter 135 relating to conditional release, security release or release on personal recognizance do not call for application of the rules of evidence.

Strict application of the rules of evidence to preliminary hearings would impose signficant burdens on the state, with little concomitant increase in protection for defendants. In fact, it would probably incline prosecutors to avoid preliminary hearings by returning indictments before the date scheduled for the hearing. Kirkpatrick, "Reforming Evidence Law in Oregon," in 59 Or L Rev 43, 48 (1980). Federal Rule 1101(d)(3) exempts preliminary examinations from the rules of evidence, as do the majority of state evidence codes patterned after the federal rules. Oregon follows suit, in principle.

The Legislative Assembly has exempted preliminary hearings from the Oregon Evidence Code, "subject to Section __ of this Act." This new statute, which follows the American Law Institute's Model Code of Pre-Arraignment Procedure (Tent. Draft No. 5, April 25, 1972), in effect restores all of the Evidence Code with the exception of the rule against hearsay, and even that only upon showing of good cause. The result is considerably stricter than the federal practice. Although the preliminary hearing is not a criminal prosecution of the accused, but only a judicial inquiry to determine whether there is probable cause to believe that a crime has been committed and that the defendant committed it, it is a formal proceeding that must be held in accordance with procedures established by law. ORS 135.070 to 135.225 now grant the accused an array of protections, including the right to counsel, the right to subpena witnesses, the right to cross-examine witnesses and the right to make or waive the making of a statement. A general application of the rules of evidence is consistent with the spirit and intent of those statutes. The Legislative Assembly also understands that evidential rules are already applied in most preliminary hearings in Oregon, and wishes the practice to continue.

Paragraph (h). The Legislative Assembly deleted the Advisory Committee's blanket exemption of juvenile departments from courts to which the Oregon Evidence Code applies. Rule 101(1). The Legislative Assembly believes that the Code should apply in the adjudicatory phase of a juvenile court proceeding, whether for delinquency or dependency. However, it added paragraph (h) to subsection (4) of Rule 101 to clarify that during the dispositional phase of a juvenile court proceeding, evidence may be admitted in accordance with ORS 419.500(2).. This statute allows the receipt of materials relating to the child's mental, physical and social history and prognosis without regard to their competency or relevancy under the rules of evidence.

EVIDENCE CODE
Joint Work Session
Text: January 29, 1981
Commentary: May 11, 1981

Oregon Rule of Evidence 102

SECTION 3. Rule 102. Purpose and construction. The Oregon Evidence Code shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

COMMENTARY

Oregon Rule of Evidence 102 declares the purpose and proper approach to the construction of the Oregon Evidence Code. It is based on Rule 102 of the Federal Rules of Evidence. ORE 102 replaces ORS 41.020, a more general description of the law of evidence.

EVIDENCE CODE
Staff Proposal
Text: July 2, 1981
Commentary: July 2, 1981

Oregon Rule of Evidence 103

SECTION 4. Rule 103. Rulings on evidence. (1) Effect of erroneous ruling. Evidential error is not presumed to be prejudicial (in a civil case). Error, (in any case,) may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

(a) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(b) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(2) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon. It may direct the making of an offer in question and answer form.

(3) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(4) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

COMMENTARY

Oregon Rule of Evidence 103 is identical to Rule 103 of the Federal Rules of Evidence. By enacting this rule the Legislative Assembly does not intend to change current Oregon practice with regard to rulings on evidence, with one exception.

Subsection (1). Under subsection (1), rulings on evidence cannot be assigned as error unless a substantial right is affected, and the nature of the error was called to the attention of the trial judge to alert the court to the proper course of action and enable opposing counsel to take proper corrective measures. The objection and the offer of proof are the techniques for accomplishing these ends.

Subsection (1) abolishes the rule established by the Oregon Supreme Court in civil cases, that erroneously admitted evidence is deemed prejudicial unless the contrary is affirmatively shown. Meyer v. Harvey Aluminum, 263 Or 487, 495, 501 P2d 795 (1972); Elam v. Soares, 282 Or 93, 102-103, 577 P2d 1336 (1978). The Legislative Assembly intends that no presumption regarding evidential error operate in favor of either party in the appeal of a civil case. (The Oregon Supreme Court has apparently reached the same conclusion

with regard to criminal cases. State v. McLean, 255 Or 464, 473-480, 468 P2d (1970). To the extent it has not, the Legislative Assembly approves the suggestion in Elam v. Soares, supra, that the concepts of "presumptions" and "burdens" as used in the trial of cases are not appropriate for application in the appellate process. 282 Or at 103.)

Subsection (1) does not otherwise change the law in Oregon with respect to harmless error. Section 3 of Article VII (Amended)of the Oregon Constitution requires the appellate courts of this state to affirm the judgment of a lower court, notwithstanding any error committed by the trial court, if the error is either so technical in nature or so unsubstantial that as a practical matter there is little, if any, likelihood that the erroneous evidence affected the verdict. State v. Van Hooser, 266 Or 19, 511 P2d 359 (1972). Subsection (1) of the rule is also in accord with current ORS 19.125 and 131.035. Under these statutes, a ruling of a trial court must be not only erroneous but prejudicial to warrant reversal. Edwards, Guardian v. Hovet, 185 Or 284, 200 P2d 955 (1949); Kuffel v. Reiser, 268 Or 152, 519 P2d 365 (1974).

Paragraph (a). This paragraph restates the Oregon rule that if counsel wishes to raise an error of the trial court on appeal, the court must be so advised by offer, objection, motion or other appropriate action so it may avoid the error. Frangos v. Edmunds, 179 Or 577, 173 P2d 596 (1946).

Paragraph (b). Paragraph (b) is consistent with the present requirement that in making an offer of proof, counsel should be distinct and clear. An offer of proof should embody the pertinent facts in such terms as to be

understood and ruled upon in the intended sense by the trial judge, and examined and applied in the proper light by any reviewing court. Downey v. Traveler's Inn, 243 Or 206, 412 P2d 359 (1966).

Subsection (2). Under subsection (2), a true and complete record of what occurred in the trial court must be reproduced for the appellate court. The second sentence of this subsection is meant to resolve doubts about what testimony a witness would have given, and, in nonjury cases, to provide the appellate court with material for possible final disposition of the case in the event it reverses a ruling that excluded evidence. The subsection is couched in discretionary language because of the practical impossibility of stating a satisfactory rule in mandatory terms.

Subsection (3). To the extent practicable, evidence that is excluded must be prevented from coming to the attention of the jury. For example, questions on which an offer of proof is based should not be asked in the presence of the jury. This subsection is consistent with the holding in State v. Jordan, 146 Or 504, 26 P2d 558 (1933), affirmed 146 Or 504, 30 P2d 751, that doubtful questions of evidence or procedure should not be proposed or discussed in the jury's presence, and that the court should exclude the jury while hearing preliminary testimony on the question of admissibility of evidence.

Subsection (4). In this subsection the Legislative Assembly reaffirms the plain error principle, which allows the courts to act when the adversary system breaks down. Subsection (4) qualifies subsection (1) of this rule, particularly with regard to a ruling admitting evidence when no timely objection or motion to strike appears in the record. Subsection (4) does not

change the Oregon rule that a question not raised and preserved in the trial court will not be considered upon appeal unless, upon examination of the entire record, the reviewing court finds that the error is manifest and that the ends of justice will not otherwise be satisfied. State v. Hickmann, 21 Or App 303, 540 P2d 1406 (1975).

EVIDENCE CODE
Joint Work Session
Text: January 29, 1981
Commentary: May 11, 1981

Oregon Rule of Evidence 105

SECTION 6. Rule 105. Limited admissibility. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

COMMENTARY

Oregon Rule of Evidence 105 is identical to Rule 105 of the Federal Rules of Evidence. It permits the admission of evidence for a limited purpose and the instruction of the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in deciding whether to exclude evidence for unfair prejudice under Rule 403. The Legislative Assembly does not intend to imply that limiting or curative instructions are sufficient in all situations, or that Rule 105 limits the authority of a court to order a severance in a multi-defendant case.

This rule is consistent with current Oregon practice. See State v. Moore, 180 Or 502, 176 P2d 631 (1947); Brooks v. Bergholm, 265 Or 1, 470 P2d 154 (1970); Cramer v. Mengerhausen, 275 Or 223, 550 P2d 740 (1976).

EVIDENCE CODE
Joint Work Session
Text: February 5, 1981
Commentary: May 11, 1981

Oregon Rule of Evidence 106

[Section 6a. ORS 41.880 is amended to read:]

[41.880.] SECTION 6a. Rule 106. When part of transaction proved, whole admissible. When part of an act, declaration, conversation or writing is given in evidence by one party, the whole[,] on the same subject, where otherwise admissible, may at that time be inquired into by the other; when a letter is read, the answer may at that time be given; and when a detached act, declaration, conversation [,] or writing which is necessary to make it understood may at that time also be given in evidence.

COMMENTARY

Oregon Rule of Evidence 106 states the rule on admissibility of the whole where part of a transaction is proved. It replaces ORS 41.880, which is repealed, with language intended to reflect the actual case-law interpretation of that statute. The text of ORS 41.880 is amended (1) to allow contemporaneous as well as later introduction of the remainder of a writing or event, (2) but only, in either event, if the remaining evidence is otherwise admissible. See Black v. Nelson, 246 Or 161, 424 P2d 251 (1967) (remainder excluded as irrelevant), and Myers v. Cessna Aircraft Corp., et al., 275 Or 501, 553 P2d 355 (1976) (remainder excluded as hearsay).

The Legislative Assembly considered but did not adopt Federal Rule of Evidence 106. The federal rule applies only to a "writing or recorded statement." It would exclude the possibility of admitting the remainder of any contemporaneous act, declaration or conversation. This limitation is inconsistent with the broad purpose of the rule, which is one of fairness.

EVIDENCE CODE
Staff Proposal
Text: July 2, 1981
Commentary: July 2, 1981

Oregon Rule of Evidence 504-1

SECTION 33a. Rule 504-1. Physician-patient privilege. (1) Definitions. As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication not intended to be disclosed to third persons except: Persons present to further the interest of the patient in the consultation, examination or interview; persons reasonably necessary for the transmission of the communication; or persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) "Patient" means a person who consults or is examined or interviewed by a physician.

(c) "Physician" means a person authorized and licensed or certified to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a physical condition. "Physician" includes (Christian Science Practitioners and) licensed or certified naturopathic and chiropractic physicians.

(2) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications in a civil action, suit or proceeding, made for the purposes of diagnosis or treatment of the

patient's physical condition, among the patient, the patient's physician or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

(3) Who may claim the privilege. The privilege created by this section may be claimed by the patient, by a guardian or conservator of the patient, or by the personal representative of a deceased patient. The person who was the physician may claim the privilege but only on behalf of the patient. Such person's authority so to do is presumed in the absence of evidence to the contrary.

(4) General exceptions. If the judge orders an examination of the physical condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(5) Exception for certain examinations. Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of a physical examination performed under ORCP 44.

COMMENTARY

Oregon Rule of Evidence 504-1 provides for a physician-patient privilege. It is styled after Rule 504 of the Federal Rules of Evidence, relating to psychotherapists, which was proposed by the Supreme Court but never adopted. The federal Advisory Committee recommended against enactment of a physician-patient privilege rule in light of the many exceptions that have been carved from it to obtain information required by

the public interest or to avoid fraud. The Legislative Assembly considered that the exceptions in Oregon are not so many as to rob the privilege of meaning. It therefore continued, in greater detail, the privilege which was expressly recognized under ORS 44.040(1)(d).

Rule 504-1 closely parallels Rule 504; the Advisory Committee on Evidence Law Revision recommended in fact that the two concepts be merged in a single rule. The Legislative Assembly retained the statutory distinction between communications relating to a physical condition and communications relating to a mental or emotional condition in light of the historical differences in the scope of the applicable privilege. Except where noted below, however, the commentary to Rule 504 shall be taken to apply to Rule 504-1.

Subsection (1). Paragraph (a). The definition of "confidential communication" in paragraph (1)(a) of the rule does not change Oregon law. Currently, the physician-patient privilege in Oregon includes a physician's examination as well as laboratory tests and X-ray pictures. Also covered are oral and written communications intended to convey information as well as the physician's records. Neilson v. Bryson, 256 Or 179, 477 P2d 714 (1970).

Paragraph (b). See commentary to paragraph (1)(b) of ORE 504.

Paragraph (c). The term "physician" includes persons who hold M.D. degrees and are licensed or certified to practice medicine. ORS 677.100 et seq.; Hampton v. Hampton, 241 Or 277, 405 P2d 549 (1965). The definition also includes faith healers, chiropractors and naturopaths. ORS 44.040 was amended in 1979 to provide a testimonial privilege in civil actions for a "naturopathic physician licensed under

ORS chapter 685 . . . as to any information acquired in attending the patient, which was necessary to enable [the physician] to act for the patient." The definition of phyician is not limited, as is the definition of psychotherapist, to a person authorized to practice a medical profession under the laws of one of the United States. A physician duly authorized under foreign law is within the privilege.

Subsection (2). Unlike the privilege between psychotherapist and patient, the physician-patient privilege may only be invoked in civil proceedings. It does not apply in criminal cases. ORS 44.040(1)(d); State v. Betts, 235 Or 127, 384 P2d 193 (1963).

Subsection (3). See commentary to subsection (3) of ORE 504.

Subsection (4). See commentary to paragraph (4)(b) of ORE 504.

Subsection (5). See commentary to subsection (5) of ORE 504.

EVIDENCE CODE
Work Session
Text: March 12, 1981
Commentary: July 2, 1981

Oregon Rule of Evidence 504-2

SECTION 33b. Rule 504-2. Nurse-patient privilege. A licensed professional nurse shall not, without the consent of a patient who was cared for by such nurse, be examined in a civil action or proceeding, as to any information acquired in caring for the patient, which was necessary to enable the nurse to care for the patient.

COMMENTARY

Oregon Rule of Evidence 504-2 retains the privilege against disclosure in a civil action of necessary information acquired by a nurse in caring for a patient. This was formerly codified in ORS 44.040(1)(g).

EVIDENCE CODE
Work Session
Text: March 12, 1981
Commentary: July 2, 1981

Oregon Rule of Evidence 504-3

SECTION 33c. Rule 504-3. School employe-student privilege. (1) A certificated staff member of an elementary or secondary school shall not be examined in any civil action or proceeding, as to any conversation between the certificated staff member and a student which relates to the personal affairs of the student or family of the student, and which if disclosed would tend to damage or incriminate the student or family. Any violation of the privilege provided by this subsection may result in the suspension of certification of the professional staff member as provided in ORS 342.175, 342.177 and 342.180.

(2) A certificated school counselor regularly employed and designated in such capacity by a public school shall not, without the consent of the student, be examined as to any communication made by the student to the counselor in the official capacity of the counselor in any civil action or proceeding in which such student is a party concerning the past use, abuse or sale of drugs, controlled substances or alcoholic liquor. Any violation of the privilege provided by this subsection may result in the suspension of certification of the professional school counselor as provided in ORS 342.175, 342.177 and 342.180. However, in the event that the student's condition presents a clear and imminent danger to the student or to others, the counselor shall report this fact to an appropriate responsible authority or take such other emergency measures as the situation demands.

COMMENTARY

Oregon Rule of Evidence 504-3 preserves two evidential rules regarding communications made by an elementary or secondary school student to school staff. These were formerly codified in ORS 44.040(1)(i) and (k).

Subsection (1). Subsection (1) prohibits any school staff member from disclosing, in a civil action, information learned from a student that would tend to damage or incriminate the student or the student's family. The rule is actually more in the nature of a prohibition than a privilege. A true privilege can be waived. The rule does not designate a holder with that power.

Subsection (2). Subsection (2) prohibits the disclosure in either a criminal or a civil proceeding of information concerning past use of controlled substances or alcoholic liquor communicated by a student to a school counselor. This privilege may be waived by the student and is also subject to an exception in the event of clear and imminent danger to the student or to others.

EVIDENCE CODE
Work Session
Text: March 12, 1981
Commentary: July 2, 1981

Oregon Rule of Evidence 504-4

SECTION 33d. Rule 504-4. Clinical social worker-client privilege. A clinical social worker registered by the State Board of Clinical Social Workers shall not be examined in a civil or criminal court proceeding as to any communication given the clinical social worker by a client in the course of noninvestigatory professional activity when such communication was given to enable the registered clinical social worker to aid the client, except:

(1) When the client or those persons legally responsible for the client's affairs give consent to the disclosure;

(2) When the client initiates legal action or makes a complaint against the registered clinical social worker to the board;

(3) When the communication reveals the intent to commit a crime or harmful act;

(4) When the information reveals that a minor was the victim of a crime, abuse or neglect; or

(5) When the registered clinical social worker is a public employe and the public employer has determined that examination in a civil or criminal court proceeding is necessary in the performance of the duty of the social worker as a public employe.

COMMENTARY

Oregon Rule of Evidence 504-4 retains the privilege against disclosure of any information given by a client to a clinical social worker in the course of non-investigatory professional activity. This was formerly codified in ORS 44.040(1)(L).

House Judiciary Committee
HB 2030, Exhibit VV
July 2, 1981 - 1:30 p.m.
19-page exhibit
presented by staff

EVIDENCE CODE
Work Session
Text: March 12, 1981
Commentary: July 2, 1981

Oregon Rule of Evidence 504

SECTION 33. Rule 504. Psychotherapist-patient privilege. (1) Definitions. As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication not intended to be disclosed to third persons except: Persons present to further the interest of the patient in the consultation, examination or interview; persons reasonably necessary for the transmission of the communication; or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) "Patient" means a person who consults or is examined or interviewed by a psychotherapist.

(c) "Psychotherapist" means a person who is licensed, registered, certified or otherwise authorized under the laws of any state to engage in the diagnosis or treatment of a mental or emotional condition, or reasonably believed by the patient so to be, while so engaged.

(2) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of the patient's mental or emotional condition among the patient, the patient's psychotherapist or persons who are participating in

the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(3) Who may claim the privilege. The privilege created by this section may be claimed by the patient, by a guardian or conservator of the patient, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. The psychotherapist's authority so to do is presumed in the absence of evidence to the contrary.

(4) General exceptions. (a) For the purpose of a civil commitment hearing held pursuant to ORS 426.005 to 426.395, there is no privilege under this section for communications and observations relevant to diagnosis and treatment of an allegedly mentally ill person during a prehearing detention period authorized by ORS 426.070 (5) or 426.175 to 426.215.

(b) If the judge orders an examination of the mental, physical or emotional condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(c) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(5) Exception for certain examinations. Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of mental examination performed under ORCP 44.

COMMENTARY

Oregon Rule of Evidence 504 is based on proposed Rule 504 of the Federal Rules of Evidence, which was prescribed by the United States Supreme Court and submitted to Congress, but not enacted. Aside from minor changes made to conform the rule to the form and style of Oregon statutes, the only differences between this and proposed Federal Rule 504 lie in the exceptions.

Subsection (1). Paragraph (a). "Confidential communication" is defined in terms conformable to those of the lawyer-client privilege, with appropriate changes for the different circumstances. Oregon follows the general rule that the burden of establishing the conditions that give rise to a privilege against disclosure is on the party asserting the privilege. Groff v. S.I.A.C., 246 Or 557, 426 P2d 738 (1967).

Paragraph (b). Oregon courts have not yet given a definition of "patient" for purposes of the psychotherapist-patient and physician-patient privilege, but there should be little controversy surrounding the definition except for persons who are subjects of medical research. The definition of "patient" in Rule 504 and 504-1 does not include a person submitting to examination for scientific purposes. This limitation agrees with the current Oregon requirement that a physician be consulted for treatment in order that the physician-patient privilege attach. State v. O'Neill, 274 Or 59, 545 P2d 97 (1976).

Paragraph (c). The rule defines "psychotherapist" as a person authorized or thought to be authorized by the patient to engage in, while in fact engaged in, the diagnosis or treatment of a mental or emotional condition. The definition is broad enough to include not only psychiatrists and psychologists but other professionals who also treat mental and emotional conditions. In appropriate circumstances such persons may be medical doctors, nurses or clinical social workers. The definition seeks to avoid needless refined distinctions concerning what is and what is not the practice of psychiatry.

Consistent with current approaches to drug abuse problems, the Legislative Assembly intends that "mental or emotional condition" include drug addiction. The rehabilitation of drug dependent persons is a continuing social concern and the privilege rule is designed to encourage persons who are in need of assistance to seek it.

With regard to psychiatrists, this paragraph does not change existing Oregon law. Psychiatrsts are included within the term "regular physician or surgeon" under ORS 44.040(1)(d); Hampton v. Hampton, 241 Or 277, 405 P2d 549 (1965). However, the implied definition of psychologist is more expansive than the one in ORS 44.040(1)(h), in that it extends the privilege to a psychologist licensed under the laws of any state rather than a person licensed to practice psychology under the provisions of ORS chapter 675. Because of the continuing requirement under chapter 675 that any person practicing psychology in this state must be licensed under the chapter, however, the difference in definition should have little practical effect.

No Oregon court has decided whether the psychotherapist-patient privilege would apply when a patient reasonably but falsely believes the person consulted is a psychotherapist.

Subsection (2). The general rule of privilege is that a patient may refuse to disclose, and prevent anyone else from disclosing, any confidential communication to a psychotherapist made for the purposes of diagnosis or treatment. This applies to any proceeding except in the circumstances listed in subsections (4) and (5) of this rule.

Subsection (2) changes Oregon law in two ways. First, it limits the psychotherapist-patient privilege to communications made for the purpose of diagnosis or treatment, i.e., consultation which is not a part of diagnosis or treatment is not privileged. This represents a narrowing of the current psychologist-patient privilege, which applies to "any communication made . . . in the course of professional employment." ORS 44.040(1)(h). It represents a broadening of the current psychiatrist-patient privilege that courts have read into the physician-patient privilege; the latter applies only to "information acquired [by the physician] . . . which was necessary to enable the physician . . . to prescirbe or act for the patient." ORS 44.040(1)(d); Hampton v. Hampton, 241 Or 277, 405 P2d 549 (1965). Second, subsection (2) establishes the psychotherapist-patient privilege in all proceedings. This is the extent of the present psychologist-patient privilege. However, the psychiatrist-patient relation has been subject to the physician-patient rule that the privilege does not apply in a criminal case. State v. Betts 235 Or 127, 384 P2d 193 (1963).

Subsection (3). Subsection (3), like subsection (2), draws upon the lawyer-client privilege for its phrasing. See ORE 503(2), (3). This subsection does not change

Oregon law. The physician (psychiatrist)-patient privilege is not terminiated by the death of the patient. Woosley v. Dunning, 268 Or 233, 520 P2d 340 (1974). Although there is no rebuttable presumption in Oregon that the physician or psychologist may claim the privilege on behalf of the patient, the courts have declared that the privilege is intended to benefit the patient and normally cannot be invoked by another person. Hampton v. Hampton, 241 Or 277, 405 P2d 549 (1965). There are good policy reasons for allowing a psychotherapist to claim the privilege on behalf of the patient.

Subsection (4). The exceptions to the psychotherapist-patient privilege differ substantially from those to the attorney-client privilege, reflecting the basic differences in the relationships. While it has been argued convincingly that the nature of the psychotherapist-patient relationship demands complete security against legally coerced disclosure, the Legislative Assembly finds that there are some instances in which the need for disclosure is sufficiently great to justify the risk of impairing the relationship. These exceptions are incorporated in subsection (4) of this rule.

Paragraph (a). This paragraph provides that there is no privilege in a civil commitment hearing either as to communications or as to observations during a pre-hearing detention period. The Legislative Assembly adopted this exception on the recommendation of Subcommittee 3 of the Governor's Task Force on Mental Health. The subcommittee pointed out that the relationship between an allegedly mentally ill person and hospital medical staff during a period of involuntary pre-hearing detention is more likely to be adversarial than therapeutic, and, therefore, that the policy reasons for the privilege are not as compelling as in an ongoing treatment relationship.

This exception changes Oregon law, which does not exempt communications at any phase of a commitment proceeding from a claim of privilege. ORS 425.075, however, does require a treating physician to notify the court prior to a commitment proceeding of any treatment that might affect the patient's ability to prepare for the hearing. The medical record of such treatment also must be provided.

Paragraph (b). The relationship between psychotherapist and patient in a court-ordered examination is likely to be at arm's length, although not necessarily so. An exception is needed, in any event, if this important procedure is to be used effectively. It will be observed that the exception deals with a court-ordered examination, not with a court-appointed psychotherapist or physician, and is only effective to the extent of the purpose for which the examination is ordered. This exception changes existing Oregon law insofar as it erases the distinction between communications made to psychologists and communications made to physicians and psychiatrists during such examinations. See commentary to subsection (2) of this rule, supra.

Paragraph (c). An exception applies whenever the mental or emotional condition of the patient is put in issue. In a criminal proceeding this means that there is no privilege if a defendant raises the defense of not responsible by reason of mental disease or defect, or the mitigating defense of extreme emotional disturbance. It a civil action, it means there is no privilege in a will contest in which the soundness of the testator's mind is challenged. See Rule 511.

Subsection (5). This subsection retains the exception for communications made in the course of a physical or mental examination performed under ORCP 44.

* * *

A number of other statutes currently affect the operation of the physician-patient and psychologist-patient privilege. Except as noted below, these statutes remain in force:

Under ORS 44.040(1)(j), a licensed physician or local health official shall not be examined as to the existence or contents of any records of a person examined or treated for an infectious venereal disease without the consent of the person unless the public interest clearly requires disclosure. This provision is repealed by section 98 of this Act as unnecessary. With regard to the local health authority officer or employe, it duplicates the privilege created under ORS 434.055. With respect to the physician, it is unneeded in civil actions because of the existence of the physician-patient privilege. The only unique feature is its application of the physician-patient privilege to criminal cases in which treatment for venereal disease is a relevant issue. The Legislative Assembly does not believe there is sufficient justification for extending the physician-patient privilege to a very limited number of criminal cases.

Under ORS 107.600(2), all communications between spouses and from spouses to counselors, the court, attorneys, doctors or others engaged in conciliation proceedings, made during the proceedings, are confidential within the meaning of ORS 44.040(1)(e). This section is amended by section 88 of this Act.

Under ORS 146.750(1), except as required in subsection (3) of Rule 504 (relating to child abuse), any physician having reasonable cause to suspect that a person brought for examination or treatment has been injured with a deadly weapon by other

han accidental means shall report the fact to the appropriate medical examiner as soon as possible.

Under ORS 161.735, a court may order a psychiatric examination of a person convicted of a felony to determine whether the person is suffering frm a severe personality disorder indicating a propensity toward criminal activity. Subsection (4) of ORS 161.735 declares that no statement made by a defendant under the section shall be used against the defendant in any civil proceeding or in any other criminal proceeding.

Under ORS 418.750, all public or private officials have a duty to report possible cases of child abuse, except that psychiatrists, psychologists, clergymen and attorneys are not required to report the privileged communications of adults. ORS 418.775 also provides that the physician-patient privilege is not a ground for excluding evidence in court proceedings on child abuse. Thus, even though the psychologist and psychiatrist have similar duties with regard to reporting possible child abuse, the psychiatrist (whose privilege is founded upon the physician-patient privilege) may be compelled to testify at trial. The psychologist, in contrast, may not be required to testify in a child abuse proceeding as there is no mention of the psychologist-patient privilege in ORS 418.775 which abolishes certain privileges in those proceedings. Section 95 of this Act amends ORS 418.775 and thereby abolishes this distinction.

Under ORS 434.055, no local health official shall be examined as to the existence or contents of records of a person examined or treated for an infectious venereal disease without the consent of the person. This is the same privilege as the one described in ORS 44.040(1)(j), without the exception for public interest. It is

noteworthy that it extends the physician-patient privilege to criminal cases in the context of venereal disease communications.

House Judiciary Committee
HB 2030, Exhibit WW
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presented by staff

VICTOR ATIYEH
GOVERNOR

Department of Human Resources
MENTAL HEALTH DIVISION
2575 BITTERN STREET N.E., SALEM, OREGON 97310

June 25, 1981

TO: The Honorable Tom Mason
Chairperson
House Committee on the Judiciary

FROM: J. H. Treleaven, M.D.
Assistant Director, Human Resources
Administrator for Mental Health

SUBJECT: House Bill 2030--Proposed Oregon Evidence Code
Article V, Section 33, Rule 504,
Psychotherapist-Patient Privilege

The Mental Health Division strongly supports Rule 504 of the Proposed Oregon Evidence Code and offers amendments for two provisions of the Rule to clarify the scope of the Rule, and eliminate potential inconsistencies.

Scope of the Psychotherapist-Patient Privilege

1. Suggested Amendments to Paragraph (1)(c) of Rule 504

At page 9, line 25, of the printed bill, after "condition" insert ", mental retardation or other developmental disability or alcohol or drug dependence".

2. Rationale

In the field of mental health there are three generally recognized client populations: persons affected by mental or emotional disturbances, mentally retarded or other developmentally disabled persons, and persons affected by alcohol or drug abuse or dependence. The bill appears to exclude from the psychotherapist-patient privilege mental retardation and other developmental disabilities and alcohol and drug abuse and dependence. The Mental Health Division sees no useful purpose in excluding from the scope of the privilege any client group, and would urge that the Committee adopt our suggested amendment.

The Division understands that the primary concern may be with extending the scope of the privilege to "drug addiction" or "drug dependence" as we refer to it. Drug dependence poses unique problems--it is destructive to the individual involved, but it also may result in crime to support a habit. In a broad sense, the goal of both the criminal justice system and mental health treatment is to deal effectively with drug dependence--the criminal justice system by incarceration and punishment and the mental health system by affording treatment for the physical addiction and emotional condition underlying the behavior. The policy decision, then, is whether the most effective way to deal with drug dependence is through the criminal justice system or mental health treatment.

Our experience is that behaviors arising from drug dependence are rarely, if ever, eliminated by punishment. Incarceration temporarily prevents the behavior from being inflicted upon society, but it does not eliminate the behavior on a long-term basis. Only treatment when the person is willing to accept treatment seems to produce long-term results. The willingness to seek treatment is clouded by the fact that very frequently the drug being abused is a controlled substance and its very use and possession are illegal. If a drug dependent person knows that statements made to a therapist in the course of treatment could be used in a criminal proceeding, effective treatment of such persons might well be impossible.

For these reasons we strongly urge the Committee to not exclude drug abuse and addiction from the scope of the psychotherapist-patient privilege.

The Involuntary Commitment Exception to the Psychotherapist-Patient Privilege

While the Mental Health Division supports a broad scope for the psychotherapist-patient privilege in terms of the types of patients to be included, the Division also supports the limited exception to the proposed privilege found in paragraph (4)(a) of Rule 504. We further believe that the patient should be warned that information accumulated during the pre-hearing hospitalization may become part of the hearing record. Amendatory language is proposed below.

The paragraph (4)(a) exception would allow otherwise privileged information to be used in a civil proceeding for involuntary commitment of mentally ill persons. Under current law, medical evidence covered by the proposed exception is inadmissable because of the physician-patient privilege. The existence of the privilege is predicated on the need to protect the therapeutic relationship of trust and confidence between the physician (or other psychotherapist) and the patient. Opponents of the (4)(a) exception argue that the exception will harm this therapeutic relationship.

However, the (4)(a) exception is limited to those situations in which the person is taken into custody or detained against his or her will (most often by a peace officer, but sometimes by the person's own physician) and held at a mental health facility, typically, a state mental hospital. The emergency detention period (typically 5-7 days) is primarily a time for crisis stabilization, and diagnosis and evaluation. Treatment consists primarily of providing food, clothing, and shelter, and the administration of medication, physical restraints, and seclusion.

To the extent that a therapeutic relationship exists between the treating physician or psychologists and patient, it is questionable whether the relationship will be damaged by allowing communications and observations concerning the patient to be admitted in a commitment hearing. Paradoxically, this may be particularly true if the psychotherapist takes the precaution of informing the patient that information acquired during the emergency detention period may be used in a commitment hearing. Patients subjected to an emergency hold know or suspect that a commitment hearing is likely. The Division's experience with the evaluation of defendants in criminal cases (where warnings are given) suggests that patients respond positively to being treated with forthrightness, and a warning that information acquired during the detention period may be used in a hearing will not pose a barrier to effective treatment.

For these reasons, the Division supports the proposed paragraph (4)(a) exception to the psychotherapist-patient privilege, and recommends that the Committee amend Rule 504 to require that patients be informed that information acquired during the detention period may be used in a commitment hearing.

Attorneys for allegedly mentally ill persons have argued that medical evidence acquired prior to a hearing should not be admissable because the issue at a commitment hearing is the person's mental condition at the time of the hearing, not a few

days ago. Surely, the patient's condition during the 5-day period prior to the hearing is relevant. The Division recognizes the danger of used dated medical information and, for that reason, supports limiting the exception to the privilege to the medical information obtained in the emergency detention period immediately preceeding the hearing.

The defense bar also has argued that there is no evidence that persons in need of commitment are not being committed. The Governor's Task Force on Mental Health gathered evidence that there are a significant number of people in need of commitment who are not being committed. Relatives of chronically mentally ill persons and psychiatrists testified before Subcommittee #3 of the Task Force concerning instances in which they felt the use of relevant medical information would have resulted in commitment of persons desperately in need of it.

There also was substantial evidence that the criminal justice system and the Psychiatric Security Review Board are being used for essentially harmless people because of the difficulties encountered in the civil commitment process.

Consider these facts:

- From 1971 to 1978, Oregon has committed persons found not responsible of criminal conduct by reason of mental disease or defect at a rate 8 to 10 times greater than New York State.

- 20 to 25 percent of the criminal commitments involve misdemeanants.

- A recent review by Oregon State Hospital Forensic Ward staff of the episodes resulting in criminal commitment revealed that about 25 percent of the episodes involved a non-life-threatening situation. (Perhaps the most notorious case involved a mentally ill elderly woman found "not responsible" of shoplifting a six-pack of beer and being committed to the PSRB in lieu of civil commitment.)

- In the course of its sunset review of the Psychiatric Security Review Board, the Governor's Task Force on Mental Health conducted a survey of trial judges, district attorneys, and the defense bar. One of the questions asked was: "Preliminary information indicates

> that the 'not responsible' defense and commitment to PSRB are being used on occasion, instead of the civil commitment process, to obtain treatment for mentally ill persons who have committed minor offenses. Do you believe this is true?"
>
> Of those responding, 20 percent of the judges and district attorneys believed that statement to be true, and 49 percent of the defense bar believed it to be true.

In summary, there is evidence that Oregon's civil commitment process is sometimes a barrier to assuring that mentally ill persons receive appropriate treatment. The Committee's action in approving the exception to the psychotherapist-patient privilege set forth in paragraph (4)(a) of Rule 504 would be a significant step in remedying this problem.

1. Suggested Amendments to Paragraph (4)(a) of Rule 504

At page 9, line 36 of the printed bill, delete "a civil commitment hearing" and insert "hearings".

At line 37, after "426.395" insert "or 427.215 to 427.300" and after "diagnosis" delete "and" and insert a comma.

At line 38, after "treatment" insert "and behavior". After "person" insert ", an allegedly mentally retarded person or conditionally released person". After "ORS" delete "425.070" and insert "426.005".

At line 39, delete the entire line and insert "to 426.395 or ORS 427.255, provided that the psychotherapist has informed the person that the results of interviews with and observations of the patient may be used as evidence in a court hearing to determine whether the person may be subject to involuntary commitment or conditional release revocation."

Subsection (4)(a) of Rule 504, if engrossed with the preceeding amendments, would read:

> "(4)(a) For the purpose of hearings held pursuant to ORS 426.,005 to 426.395 or 427.215 to 427.300, there is no privilege under this section for communications and observations relevant to diagnosis, treatment and behavior of an allegedly mentally ill person, an allegedly mentally retarded person or a conditionally

released person during a prehearing period authorized by ORS 426.005 to 426.395 or ORS 427.255, provided that the psychotherapist has informed the person that the results of interview with and observations of the patient may be used as evidence in a court hearing to determine whether the person may be subject to involuntary commitment or conditional release revocation."

2. Rationale

ORS 427.255(2) and 427.270 waives the privilege for mentally retarded or developmentally disabled persons detained prior to a commitment hearing. Therefore, the Mental Health Division recommends the exception to the privilege in section 504 be expanded to include the MR-DD.

ORS Chapters 426 and 427 contain provisions for the conditional release of mentally ill and mentally retarded persons, and for the revocation of such conditional releases. A conditional release revocation can be initiated by an emergency hold; therefore, if there is to be an exception to the psychotherapist-patient privilege for commitment hearings, there should be an exception for conditional release revocation hearings.

Lastly, communications and observations of a person's behavior should specifically be included in the exception to the privilege. Behavior is probably included in the phrase "observations relevant to diagnosis" because it is difficult to make a diagnosis without considering the person's behavior. However, to insure that a broad interpretation of the psychotherapist-patient privilege does not lead to exclusion of evidence bearing on the person's behavior during the precommitment detention, the Division urges that "behavior" specifically be included in the paragraph (4)(a) exception.

JHT:js:sw

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Oregon Rule of Evidence 511

SECTION 39. Rule 511. Waiver of privilege by voluntary disclosure. A person upon whom sections 32 to 42 (Rules 503 to 514) of this Act confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication. Voluntary disclosure does not occur with the mere commencement of litigation [but rather at] or, in the case of a deposition taken for the purpose of perpetuating testimony, until the [holder's] offering of the [holder] deposition as [a witness] evidence [and testifying on direct examination as to the subject matter of the confidential matter or communication]. Voluntary disclosure does occur, as to psychotherapists in the case of a mental or emotional condition and physicians in the case of a physical condition, upon the holder's offering of any person as a witness who testifies as to the condition.

COMMENTARY

Oregon Rule of Evidence 511 states the conditions under which a privileged conferred by Article V of the Oregon Evidence Code is waived. Briefly, a privilege is lost when the reason for it ceases to apply. As the commentary to Federal Rule 511 explains:

"The central purpose of most privileges is the promotion of some interest or relationship by endowing it with a supporting secrecy or confidentiality. It is evident that the privilege should terminate when the holder by [the holder's] own act destroys this confidentiality. McCormick, Evidence, sections 93, and 103 (2d ed 1971); 8 Wigmore sections 2242, 2327-2329, 2374, 2389-2390 (McNaughton rev 1961).

". . . .

"By traditional doctrine, waiver is the intentional relinquishment of a known right. Johnson v. Zerbst, 304 US 458, 464, 58 SCt 1019, 82 LEd 1461 (1938). However, in the confidential privilege situations, once confidentiality is destroyed through voluntary disclosure, no subsequent claim of privilege can restore it, and knowledge or lack of knowledge of the existence of the privilege appears to be irrelevant. California Evidence Code section 912; 8 Wigmore section 2327 (McNaughton rev 1961).

Disclosure of the substance of a confidential communication. The first two sentences of the rule are identical to proposed Rule 511 of the Federal Rules of Evidence. They state a waiver rule of general application. If the holder has voluntarily disclosed or consented to the disclosure of any significant part of a privileged communication, then the entire communication may be inquired into. Furthermore, the privilege in question is waived as to other communications on the same subject with the same person, and communications on the same subject with other persons. 8 Wigmore section 2327 (McNaughton rev 1961); State ex rel Calley v. Olsen, 271 Or 369, 532 P2d at 230 (1975); Triplett v. Bd. of Social Protection, 19 Or App 408, 528 P2d at 563 (1974). The rule indicates that waiver occurs as soon as a "significant" part of a communication is disclosed. It is not necessary that the

holder or other person testify to every detail for waiver to be effective. Bryant v. Akehart, 106 Or 359, 210 P 454 (1922); Gerlinger v. Frank, 74 Or 517, 145 P 1069 (1915).

Waiver by disclosure of part or all of a privileged communication can occur in any situation, within or without the context of a lawsuit. The rule makes clear that the mere commencement of litigation does not constitute disclosure. Neilson v. Bryson, 257 Or 179, 477 P2d 714 (1970) (physician-patient privilege not waived by filing personal injury action). Thereafter, however, waiver can occur during discovery or at trial, either on direct or cross-examination. McCormick, Evidence, section 93 (2nd ed 1972).

The one exception to the foregoing principle involves a deposition taken for the purpose of perpetuating testimony. Under the rule, the effect of any waiver of privilege that occurs in such a deposition is delayed until the deposition is offered as evidence by a party at trial. The Legislative Assembly added this provision to address the frequent problem where a party, which does not wish to disclose ahead of time the testimony of its expert and waive the privilege as to other experts consulted, must nevertheless do so because the expert whose testimony it wishes to use will not be available for trial.

Testimony on the subject of a confidential communication. ORE 511 replaces the waiver provisions of ORS 44.040(2). That statute indicated that when the holder of a privilege voluntarily testifies on a subject, any communications the holder may have had with any other person on the subject cease to be privileged. See Patterson v. Skoglund, 181 Or 167, 276 P 248 (1947); Fowler v. Phoenix Insurance Co., 35 Or 559, 57 421 (1899). Taken literally, this would allow the prosecution to call defense counsel as a witness as soon as an accused had finished taking the stand. The rule is

obviously phrased too broadly, and for this reason there is inconsistency among Oregor cases whether testimony on the same subject will waive a privilege, or whether it is necessary that there be testimony as to a particular privileged communication. Stark Street Properties, Inc. v. Teufel, 277 Or 649, 658 Note 12, 562 P2d 531 (1977), citing Bryant v. Dukehart, supra, and McNamee v. First Nat. Bank of Roseburg, 88 Or 636, 172 P 801 (1918).

Rule 511 resolves the present uncertainty by adopting a restrictive view of waiver. A person, merely by disclosing a subject which the person has discussed with an attorney or spouse or doctor, does not waive the applicable privilege; the person must disclose part of the communication itself in order to effect a waiver. As McCormick points out:

> "By the prevailing view, which seems correct, the mere voluntary taking the stand . . . and testifying to facts which were the subject of consultation . . . with counsel is no waiver of the privilege for secrecy of the communications to [one's] lawyer. It is the communication which is privileged, not the facts." McCormick, Evidence, section 93 (2nd ed 1972).

The one exception to the foregoing principle is contained in the final sentence of the rule. Where the holder of a privilege offers any person as a witness who testifies on the subject of the holder's physical, mental or emotional condition, all privileges that might protect communications on that subject between the holder and a physician or psychotherapist, as the case may be, are waived. A simple example of this would be a case in which a party indicates that on a certain day the party was absent from work because of illness. This testimony waives the physician-patient privilege, allowing the opposing party to inquire of the person's doctor as to the person's medical condition. Another example would be a criminal case in which defense

counsel considers the use of a pyschiatric defense or partial defense. The defendant, at the request of the attorney, may see a number of psychiatrists before finding one who will testify that the defendant was suffering from a mental disease or defect at the time of the crime. If the latter testifies at trial that the defendant was not responsibile, under ORE 504 there is no psychotherapist-patient privilege as to any psychotherapist because the mental condition of the defendant is in issue. The non-testifying psychiatrists are still protected by the attorney-client privilege, however, as they are "representatives of the lawyer" under Rule 503. The last sentence of Rule 511 would waive this (and any other) privilege to the extent of permitting the state to inquire of all medical personnel whom the defendant has seen regarding their findings.

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Oregon Rule of Evidence 514

SECTION 42. Rule 514. Effect on existing privileges. Unless expressly repealed by section 98 of this Act, all existing privileges either created under the [statutes] laws of the State of Oregon or developed by the courts of Oregon are recognized and shall continue to exist until changed or repealed according to law.

COMMENTARY

Oregon Rule of Evidence 514 is a new provision adopted to retain all privileges currently recognized under the constitution, statutes or case law of Oregon.

The Legislative Assembly recognizes that the eleven privileges adopted under Rules 503 to 510 are not, and should not be, the only testimonial privileges granted in Oregon. There are others in effect as a result of statute or judicial decision. The adoption of Rules 503 to 510 is not intended to affect any of thoses privileges with the exception of those repealed by section 98 of this Act. Similarly, the Legislative Assembly does not intend that Article V affect the discovery statutes of Oregon or decisional law relating to the work product of attorneys.

A partial list of testimonial privileges currently recognized in Oregon, and not repealed by the 1981 enactment of the Oregon Evidence Code, includes:

(1) Records and testimony before a hospital or professional medical committee charged with the training, supervision or discipline of physicians. ORS 41.675.

(2) Unpublished information, and the source of any information, obtained by a media person in the course of gathering, receiving or processing information for any medium of communication to the public. ORS 44.510 to 44.540.

(3) Information designated confidential by a person as to a matter before the Legislative Counsel Committee. ORS 173.230.

(4) Income tax returns. ORS 314.835.

(5) Juvenile court records and proceedings. ORS 419.567.

(6) Venereal disease records. ORS 434.055.

(7) Nervous disorder reports filed with the Motor Vehicles Division. ORS 482.141.

(8) A voter's choice at an election. State ex rel Heath v. Kraft, 20 Or 28, 23 P 663 (1890).

House Judiciary Committee
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Oregon Rule of Evidence 602

SECTION 44. Rule 602. Lack of personal knowledge. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.

COMMENTARY

Oregon Rules of Evidence 602 indicates that a witness may only testify on matters as to which the witness has personal knowledge. It is a slightly modified version of Rule 602 of the Federal Rules of Evidence. The exception involving Rule 703, which appears as the final sentence of the federal rule, is inserted as an introductory clause in the Oregon rule. The analogous Oregon statute, ORS 44.060, which is repealed, does not differ in its application.

". . .[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an oppportunity to observe, and must have actually observed the fact" is "one of the most pervasive manifestations" of the common law's "insistence upon the most reliable sources

of information." McCormick, Evidence, section 10 at 20 (2d ed 1972). ORE 602 simply codifies that common law requirement.

A party that offers testimony has the burden of establishing that the witness had an opportunity to observe the fact. According to the rule the testimony of the witness may be sufficient to lay this foundation. Absolute personal knowledge is not a requisite; however, it is necessary that the witness sincerely believe that the witness has such knowledge.

This rule does not govern the situation in which a witness testifies to a hearsay statement having personal knowledge of the making of the statement. Rules 801 and 805 apply in that case. This rule would, however, prevent a witness from testifying to the subject matter of the hearsay statement, as the witness has no personal knowledge of it.

The reference to Rule 703 is designed to avoid any quesiton of conflict between the present rule and Rule 703. The provisions of the latter allow an expert to express opinions based on facts of which the expert does not have personal knowledge. This accords with the present status of the law in Oregon. Nutt v. So. Pacific Co., 25 Or 291, 35 P 653 (1894).

Oregon Rule of Evidence 603

SECTION 45. Rule 603. Oath or affirmation. (1) Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience of the witness and impress the mind of the witness with the duty to do so.

(2) An oath may be administered as follows: The person who swears holds up one hand while the person administering the oath asks: "Under penalty of perjury, do you solemnly swear that the evidence you shall give in the issue (or matter) now pending between _____ and _____ shall be the truth, the whole truth and nothing but the truth, so help you God?" If the oath is administered to any other than a witness, the same form and manner may be used. The person swearing must answer in an affirmative manner.

(3) An affirmation may be administered as follows: The person who affirms holds up one hand while the person administering the affirmation asks: "Under penalty of perjury, do you promise that the evidence you shall give in the issue (or matter) now pending between _____ and _____ shall be the truth, the whole truth and nothing but the truth?" If the affirmation is administered to any other than a witness, the same form and manner may be used. The person affirming must answer in an affirmative manner.

COMMENTARY

Oregon Rule of Evide 603 governs the form and administration of oaths and affirmations. It replaces the entirety of ORS 44.310 to 44.360, which are repealed.

Subsection (1). Subsection (1) is identical to Rule 603 of the Federal Rules of Evidence in substance. As a means of discovering the truth, this subsection requires that every witness make an oath or affirmation before testifying. This is important in two respects. First, the making of a promise in a ceremonial setting may induce in the witness a feeling of special obligation to speak the truth. Second, the reference to divine and positive legal sanctions may impress upon the witness the possibility of punishment for perjury, to which the oath or affirmation is a prerequisite.

The requirement of an "oath or affirmation" in this subsection, and the permissive language as to form in subsections (2) and (3), are designed to affor flexibility in dealing with religious adults, atheists, conscientious objectors, mental defectives and children. Although the rule sets forth suggested forms of an oath and affirmation, it does not require any particular verbal formula. Indeed, section 7 of Article I of the Oregon Constitution would prohibit one. Any mode of administering an oath or affirmation which is binding upon the conscience of the person to whom the oath or affirmation is administered is allowable.

This approach is particularly relevant in the case of a witness under 10 years of age. ORS 44.310 has distinguished between child witnesses and all other witnesses with regard to the necessity for an oath or affirmation. That section allows testimony of a child under 10 to be given on a promise in open court to tell the truth, if the court determines that the child can safely be

admitted to testify in accordance with ORS 44.030. Rule 603 makes no such distinction but requires that every witness make an oath or affirmation. The Legislative Assembly considers this change to be more one of form than substance. An "affirmation" under the rule would include a child's promise to tell the truth, once it has been established to the satisfaction of the court that the child understands the nature and obligation of that promise. Where, by virtue of the child's background, reference to the Deity is appropriate, an oath to the same effect would also satisfy the rule.

Except for the above change, there are no measurable differences between subsection (1) and current Oregon law concerning the form and administration of an oath or affirmation. An oath or affirmation may be administered by any person authorized by law to administer oaths.

Subsection (2). Subsection (2) sets out a suggested form of oath. At a time when witnesses were viewed with more suspicion, the oath was regarded as "a summoning of Divine vengeance upon false swearing." If the witness remained untouched by the hand of God, then the witness was telling the truth. 6 Wigmore, section 1816. Under modern common law theory, the witness is reminded of ultimate Divine punishment for failing to speak truthfully and so must have belief in "superhuman . . . retribution to follow false swearing." 6 Wigmore, section 1816.

The Legislative Assembly felt that some witnesses would be more impressed with their duty to tell the truth if they swore an oath which invokes the Deity, while others may be more impressed with the "under penalty of perjury" language. It therefore included both elements in the suggested form.

Subsections (2) and (3) both expressly require an affirmative response from the witness upon the administration of the oath or affirmation.

Subsection (3). Subsection (3) sets out a suggested form of affirmation. Because atheists and non-believers may be unwilling or incapable of taking an oath, the affirmation, a solemn undertaking to tell the truth, has been devised to impress upon the witness the legal ramifications of perjury.

House Judiciary Committee
HB 2030, Exhibit AAA
July 6, 1981 - 1:30 p.m.
presented by Judge Unis
(29-pages)

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
PORTLAND, OREGON 97204

July 6, 1981

RICHARD L. UNIS
JUDGE

DEPT. 6 - ROOM 544
(503) 248-3731

Enclosed please find for your consideration some suggestions and comments concerning various matters contained in Articles II, IV, V, VI, VII and VIII of the Proposed Evidence Code, which articles I obtained yesterday.

Very truly yours,

RICHARD L. UNIS

RLU:ms

Section 7, Rule 201(a). Amend language to read:

> "Sections 7 through 12(Rule 201) of this Act govern judicial notice of adjudicative fact and Section 13 of this Act govern judicial notice of law."

This amendment, if adopted, would avoid any possible confusion that may result from the present language of Rule 201(a) which arguably could be construed to make applicable Sections 7 through 12 when a court takes judicial notice of law.

Section 8. Rule 201(b)(2). Delete the language which reads: "including facts for which notice is provided by statute."

Comment: If notice of a fact is provided by statute, Rule 201(b) requires that it be one not subject to reasonable dispute. If the fact for which notice is provided by statute is one not subject to reasonable dispute because it is (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, notice of that fact will be allowed regardless of whether notice is provided by statute. If the fact is subject to reasonable dispute, notice is not permitted under Rule 201(b) even though notice is provided by statute.

Section 8. Rule 201(b), Page 10:

If the deletion is made as recommended above, delete from the commentary the paragraph which reads:

"Subsection (2) refers to facts for which notice is provided by statute. This phrase anticipates that it may be desirable to supplement ORE 201(b) with a statute authorizing a particular fact to be judicially noticed, even though the fact may not satisfy the general criteria set forth in the rule."

Section 8. Rule 201(b), pages 9 and 10.

Delete the paragraph which commences on page 9: "Rule 201(b) is consistent with Uniform Rule of Evidence 9(1) and with (2). . ." and substitute in lieu thereof the following language from the Advisory Committee's Note to Fed.R.Evid. 201:

"Rule 201(b) is consistent with Uniform Rule 9(1) and (2) which limit judicial notice of facts to those "so universally known that they cannot reasonably be the subject of dispute," those "so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot be the subject of dispute," and those "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." The traditional textbook treatment has included these general categories (matters of common knowledge, facts capable of verification), McCormick §§ 324, 325, and then has passed on into detailed treatment of such specific topics as facts relating to the personnel and records of the court. id., § 327, and other governmental facts, id., § 328. The Califonria draftmen, with a background of detailed statutory regulation ofjudicial notice, followed a somewhat similar pattern. California Evidence Code §§ 451, 452. The Uniform Rules, however, were drafted on the theory that these particular matters are included within the general categories and need no specific mention. This approach is followed in the present rule.

The phrase "propositions of generalized knowledge," found in Uniform Rule 9(1) and (2) is not included in the present rule. It was, it is believed, originally included in Model Code Rules 801 and 802 primarily in order to afford some minimum recognition to the right of the judge in his "legislative" capacity(not acting as the trier of fact) to take judicial notice of very limited categories of generalized knowledge. The limitations thus imposed have been discarded herein as undesirable, unworkable, and contrary to existing practice. What is left, then, to be considered, is the status of a "proposition of generalized knowledge" as an "adjudicative" fact to be noticed judicially and communicated by the judge to the jury. Thus viewed, it is considered to be lacking practical significance. While judges use judicial notice of "propositions of generalized knoweldge" in a variety of situations: determining the validity and meaning of statutes,

formulating common law rules, deciding whether evidence should be admitted, assessing the sufficiency and effect of evidence, all are essentially nonadjudicative in nature. When judicial notice is seen as a significant vehicle for progress in the law, these are the areas involved, particularly in developing fields of specialized knowledge. See McCormick 712. It is not believed that judges now instruct juries as to "propositions of generalized knowledge" derived from encyclopedias or other sources, or that they are likely to do so, or, indeed, that it is desirable that they do so. There is a vast difference between ruling on the basis of judicial notice that radar evidence os speed is admissible and explaining to the jury its principles and degree of accuracy, or between using a table of stopping distances of automobiles at various speeds in a judicial evaluation of testimony and telling the jury its precise application in the case."

Section 12. Rule 201(g), page 18, Commentary. It is suggested that the following language be added after the word "Oregon." in the second line in the second paragraph immediately before the language "ORS 136.310, applicable to criminal proceedings,": "ORCP 59B, so that the second sentence of that paragraph reads:

> "ORCP 59B and ORS 136.310, applicable to criminal proceedings, provide . . ."

The reason for this amendment is that ORCP 59B is applicable to criminal proceedings by virture of Or L 1979, Ch 284, § 113.

Commentary,
Section 12. Rule 201(g),/page 19, fourth line from the top. It is recommended that the words "this statute" appearing in the sixth line, paragraph 2, be deleted and the words "ORS 136.310" be substituted in lieu thereof.

Section 13. Rule 202(5), Commentary, Page 24:

Delete the words "records and" in the 11th line from the bottom of page 24, so the bottom paragraph on that page reads:

> "Subsection (5). Subsection (5) provides that judicial notice may be taken of the rules of: (1) any court in this state;. . ."

The reason for this suggested deletion is that Rule 202(5) does not provide for noticing records, only rules.

Section 21. Rule 401, Commentary, Page 4, lines 4 and 5 of the ~~first~~ second new paragraph. It is suggested that the langauge be amended to read "basis of the danger of unfair prejudice or certain considerations set forth in Rule 403."

This recommendation is made because the language "waste of time" was deleted from Rule 403. See Commentary to Rule 403(Section 23), page 12.

Section 24, Rule 404, Commentary, Page 18, third line from bottom. Delete the words "barred under" and subtitute in lieu thereof the words "governed by" or words of similar import.

Note: The remaining langauge in the bottom paragraph on page 18, Rule 404, should be reviewed for accuracy depending upon the contents of Rule 412.

Section 25. Rule 405. It is recommended that the Commentary to Rule 405(1) be amended to include language to the following effect:

"Rule 405(1) alters existing Oregon law as to the proper methods of proving character when it is in issue in the case under the applicable substantive law. In Guedon v. Rooney, 160 Or 261, 87 P2d 209(1939), the Oregon Supreme Court held that when character is in issue, it can be proved by specific instances of conduct demonstrating that character trait, but not be reputation or opinion evidence. Subsection (1) of Rule 405 changes Oregon law by allowing reputation and opinion evidence to prove character when character is in issue. Subsection (2)(a) of Rule 405 allows proof of specific instances of conduct when character is in issue."

The language appearing in the second new paragraph on page 24, Rule 405 is misleading. It states: "Oregon law allows character to be proved by evidence of reputation. State v. Holbrook, 98 Or 43, 192 P 640(1920); Rich v. Cooper, 234 Or 300, 380 P2d 613(1963). Subsection(1) continues this practice. However, subsection (1) also allows the use of opinion evidence to prove character. This is a departure from prior theory, if not prior practice." This language is misleading by its omitting to state the purpose for which such reputation or opinion evidence is offered.

One can make some sense of the common law rules by carefully distinguishing among the three purposes for which character evidence can be offered. First, character may itself be an ultimate issue in the case under the applicable substantive law. See Guedon v. Rooney, supra(160 Or 261). Rule 404(1) recognizes this purpose. Second, character evidence may be introduced as circumstantial evidence of some other material fact. See, e.g., Rule 404(2). Third, character evidence may be used to impair or enhance the credibility of witnesses who testify in the case, or a hearsay declarant. See, e.g, Rules 608 and 806. The question of how character may be proved depends upon which of these three purposes the character evidence is offered. Under current Oregon law, as noted above, when character is in issue, it can be proved only be specific instances of conduct. Guedon v. Rooney, supra. And, under existing Oregon law, assuming the case is of the type which would permit the use of character evidence as circumstantial evidence of some other material fact, i.e., the second purpose noted above, the only method that may be used to prove character is reputation evidence. See, e.g,, Rich v. Cooper, supra(234 Or at 305-308). Likewise, under prevailing Oregon law, reputation evidence is the only method of proof when character evidence is offered to impeach or support the credibility of witnesses who testify in the case. See Commentary to Rule 608, infra.

In State v. Holbrook, supra(98 Or 43), and Rich v. Cooper, supra(234 Or 300), the court's discussion of the method of proving character involved the second purpose described above for which character evidence can be offered — i.e., as circumstanial evidence of probable conduct. Character was not an ultimate issue under the applicable substantive law in either the Rich or Holbrook case.

Section 27. Rule 407. Is the rule applicable to product liability cases? If it is the intent of the Legislative Assembly to leave this issue for decisional law, perhaps the commentary to Rule 407 could so indicate.

Section 44. Rule 602. Add the following sentence to Rule 602:

> "This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses."

Comment: This language, which appears in Federal Rules of Evidence 602, was deleted when Rule 703 originally was not adopted. However, Rule 703 presently has been adopted; therefore, this language becomes necessary.

It should be noted that the commentary to Rule 602 indicates that the language referring to Rule 703 is contained in Rule 602. See first paragraph under Commentary, page 1, Rule 602, and the last paragraph, page 2 of commentary.

THE COMMENTARY SHOULD BE CORRECTED TO SHOW THAT RULE 602 is identical to Federal Rules of Eviddnce 602 except for the removal of the words "he" and "himself" which appear in Fed. R. Evid. 602 and the insertion of "the witness" where the word "he" appeared. The third sentence of the 1st paragraph under the commentary should be corrected consistent with the above.

Section 47. Rule 604, Commentary, Page 2, bottom line: It is recommended that immediately after the word "expert" and before the period, insert "under Rule 702".

Section 49. Rule 606(2). Commentary, Page 3,

The bottom paragraph which reads "This subsection is more restrictive than current Oregon law," should be deleted, and substituted in lieu thereof the following statement: "This subsection sets forth a different standard than current Oregon law. See Blanton v. Union Pacific Company, 289 Or 617, 616 P2d 477(1980), where the court stated:

"It is equally well established that, with but a few exceptions, '"[a]ffidavit[s] of jurors will not be received to impeach their verdict."' Carson v. Brauer, 234 Or 333, 343, 382 P2d 79(1963), quoting from Cline v. Broy, 1 Or 89, 90(1854). In State v. Gardner, 230 Or 569, 371 P2d 558(1962), we stated the rule 'in its accurate form': '* * *[A] verdict is impeachable if justice demands that it be set aside. * * *' Id. at 573-574. * * *

"We explained our holding in Gardner in Carson v. Brauer, supra, as follows:

'* * * While jurors' affidavits are receivable in evidence in the sense that the trial court should permit them to be filed, affidavits which disclose nothing more than oral misconduct during the jury's deliberations cannot impeach a verdict. In order to make plain the meaning of the rule, we will restate it: The affidavit of a juror concerning utterances of other jurors during the deliberations or at any other material time cannot warrant the impeachment of a verdict. The kind of misconduct of a juror that will be considered in an attack upon a verdict by a juror's affidavit within the rule set forth in Gardner and Imlah cases is misconduct that amounts to fraud, bribery, forcible coercion or any other obstruction of justice that wouldssubject the offender to a criminal prosecution therefor. We do not necessarily use the words "fraud," "bribery," "forcible coercion," and "obstruction of justice" in a purely technical sense, but as words that denote such serious breach of the juror's duties that the trial judge would be justified in citing him for nothing less than a contempt of court. Clark v. United States, 289 US 1, 77 L Ed 993, 53 S Ct 465, is an illustration. When this court said in the Gardner case that affidavits by jurors may impeach verdicts where there was misconduct of such a serious nataure as to have deprived a party of a "fair trial," the words "fair trial" may perhaps mislead some one.* * * To the extent that the "fair trial" language in the Garnder case may have been understood as a departure from the rule that oral misconduct is not a ground for impeachment, the case must be considered as modified by the statement herein made.' 234 Or at 345-46." (Underlining added for emphasis.)

Section 49. Rule 606(2) - continuted

The commentary to Rule 606(2) on pages 3-5 should be corrected to reflect the current Oregon law as stated in the Blanton case and quoted above.

Section 51. Rule 607. Commentary, Pages 4 and 5.

Modification of the language on these pages may be necessary depending upon the content of Rules 613 and 801(4)(a)(A) relating to prior inconsistent statements. As the commentary to Rule 607 is presently written on pages 4 and 5 it is inconsistent with the action last taken by the House Judiciary Committee in adopting what is presently contained in Rules 613 and 801(4)(a)(A).

Section 52. Rule 608(2). Delete the last sentence which reads:

> "However, if a witness testifies as a character witness on the issue of credibility, the witness may be asked on cross-examination if the witness has heard or knows of specific instances of bad conduct relevant to the character trait of credibility."

The reason for this suggested deletion is that is more accurately covered by Rule 405(1) which reads:

> "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." (Underlining added.)

The sentence which is quoted above and presently appears in Rule 608(2) suggests that a reputation witness could be asked "if he knows" of specific instances of bad conduct when the proper question should be "has he heard". Likewise an opinion witness should be asked "did he know" rather than "had he heard." The deletion of the last sentence in Rule 608(2) will avoid misunderstanding as to the proper inquiry on cross-examination.

NOTE: The langauge appearing in the Commentary to RUle 608, page 3, under the paragraph commencing "Subsection (2)" should be corrected to delete reference to the last sentence of Rule 608(2) which is recomended to be deleted.

Section 54. Rule 609-1.

It should be remembered that this section covers, inter alia, prior statements of a witness which show bias or interest. Revision of this rule may be necessary / depending upon the final action taken by the legislative committee as to Rules 613 (impeaching a witness by prior inconsistent statements) and 801(4)(a)(A)(prior inconsistent statement as substantive evidence),

Section 55a. Rule 613.

This section must be made consistent with Rule 801(4)(a)(A). Presently, it is not.

Section 57. Rule 701.

Page 1, Commentary, delete the following langauge appearing in the second line from the bottom of page 1, "are not", and substitute the words "may not be".

Page 2, In Subsection (2) delete the second sentence commencing with the words "That limitation excludes . . ." and substitute in lieu thereof the following sentence "These limitations exclude a non-percipent lay witness from testifying as to the point of impact and lay opinions on questions such as point of impact, estimated speed based upon observation of skid marks, and certainly opinions as to fault."

Page 3. Delete the word "probably" appearing in the first sentence and substitute in lieu thereof the word "clarifies".

Rule 701, page 3, after the citation to State v. Garver, insert the following: "Cf. Youngbluth v. Peoples, 50 Or App 289, 624 P2d 1100(1981)"

Section 58. Rule 702.

Add the following langauge to the Commentary:

"Left for resolution by decisional law is the question as to what standard or test a trial court uses in deciding whether novel scientific evidence is admissible at trial."

It is suggested that the Commentary to the Oregon Evidence Code contain language such as the following:

> "The Oregon Evidence Code is not intended to be a comprehensive cofification of the rules of evidence; a number of evidentiary issues are not covered, and many others, though mentioned are treated in a general fashion. Many evidentiary issues are left for judicial lawmaking."

Section 59. Rule 703.

Add the following language to the Commentary:

"The question whether facts or data are of a type reasonably relied upon in the particular field is a preliminary one for the court to decide under Section 5, Rule 104(1)."

Section 60. Rule 704.

Page 3, Commentary: Delete the following language appearing in the second sentence which reads: "[the rules of relevancy provide] for exclusion of evidence which wastes times" and substitute in lieu thereof the following: "meet the requirements of Section 23, Rule 403. Note: the language "waste of time" was deleted from Section 23, Rule 403.

Page 3, Commentary: Delete the last paragraph and substitute the following paragraph: "Under prevailing Oregon opinion testimony may be admissible even though it concerns an ultimate issue to be found by the jury. See, e.g., Shields v. Campbell, 277 Or 71, 78-79, 559 P2d 1275(1977); Rader v. Gibbons and Reed Company, 261 Or 354, 365, 494 P2d 412(1972); Ritter v. Beals, 225 Or 504, 524-525, 358 P2d 1080(1961). Section 704 generally codifies existing Oregon decisional law."

Section 61. Rule 801, Commentary, Page 10; Top paragraph, consisting of three lines, should be amended, deleted or left intact, depending upon whether revision is made to Rules 607 or 613.

Section 64. Rule 803, Commentary, Page 12:

Suggest deletion of top paragraph which reads:

"Proof of the declarant's perception by the excited statement presents similar considerations when declarant is identified. People v. Poland, 22 Ill 2d 175, 174 NE 2d 804(1961). When the declarant is an unidentified bystander, the cases show greater hestitancy in upholding the statement alone as sufficient, Garrett v. Howden, 73 NM 307, 387 P2d 874(1963); Beck v. Dye, 200 Wash 1, 92 P2d 1113 (1939), a result that would be consistent with subsection (2) of this rule under appropriate circumstances."

As indicated in the Commentary on Page 11, in Oregon, "A statement need not be identified for the bystander's statements to be admissible. Wright v. Swann, 261 Or 440, 493 P2d 148(1972)."

The language which herein is suggested to be deleted from the Commentary to Rule 803(2) was taken from the Advisory Committee's Note to Fed. R. Evid. 803(2). Deletion of that language would remove any possible ambiguity that may arise by its inclusion in light of the holding quoted above from Wright v. Swann.

Section 24. Section 803, Commentary, Page 16:

Delete the last five lines on the bottom of page 16 and substitute in lieu thereof the following:

"As a further safeguard against abuse of the recorded recollection, this subsection provides that the record may be read into evidence by the witness but may not be admitted in evidence as an exhibit unless offered by the adverse party. This safeguard clarifies present Oregon law. In Elam v. Soares, supra (282 Or at 99 n 2), since the memorandum was not admissible, the Oregon Supreme Court did not decide whether to adopt the further requirement of Fed. R. Evid. 803(5) that "the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by the adverse party. Likewise, in State v. Harvey, 49 Or App 123, 126 n 1,619 P2d 288(1980), the same issue was not resolved because defendant did not argue the question on appeal. Under Oregon decisions prior to Elam and Harvey, the writing itself may be admitted as evidence or handed or shown to the jury by the party offering it"

Section 64, Section 803, Commentary, page 24.

The paragraph which commences "Several factors" is taken from the Advisory Committee's Note to Fed. R.Evid. 803(8). I believe these guidelines were included in the Advisory Committee's Note to Fed. R. Evid. 803(8) in support of the view that "factual findings" be liberally construed so that evaluations and opinions in a public report or record may be admissible, a view which has been rejected by the Legislative Assembly when it states on page 23, Commentary: "The Legislative Assembly intends that this paragraph not provide a sweepong exception for public records containing evaluations or opinions. 'Factual findings" is to be strictly construed to allow as evidence only those reports, otherwise in accord with the rule, which are based on firsthand observation by thepublic official making the report. * * *"

If I am correct in my belief, the paragraph which commences "Several factors" probably should be deleted.

NOTE: On page ~~23~~ 24, of the Commentary to Rule 803, a mispelling exists. "Factual finds" should be corrected to read "Factaul findings".

EVIDENCE CODE
Work Session
Text: April 2, 1981
Commentary: July 2, 1981

House Judiciary Committee
HB 2030, Exhibit BBB
July 6, 1981 - 1:30 p.m.
presented by staff
(6[illegible]-pages)

Oregon Rule of Evidence 601

SECTION 43. Rule 601. General rule of competency. Except as provided in sections 43 to 50 (Rules 601 to 606) of this Act, any person who, having organs of sense can perceive, and perceiving can make known the perception to others, may be a witness.

COMMENTARY

Oregon Rule of Evidence 601 states the general principle of competency of witnesses.

At common law, a person might be disqualified from testifying because of criminal conviction, interest in the outcome, marital relationship, sex, race or religion. For over a century these common law rules of incompetency have been revised piecemeal by statute, so that today most of the former grounds for excluding a witness have been converted into mere grounds for impeachment of credibility. McCormick, Evidence, section 4 at 5 (2d ed 1972). Oregon Rule of Evidence 601 confirms this trend.

Rule 601--and Rules 602 to 606-1 which it incorporates by reference--effectively remove all the old common law diqualifications. Under these rules, any person called upon to testify need only recognize the necessity of

telling the truth; have knowledge of the matter from personal observation; have some recollection of that knowledge at the time of testimony; be able to communicate that knowledge; and be free of any disqualification that would render the person's testimony presumably inaccurate or prejudicial, to testify.

The Oregon Revised Statutes previously addressed the issue of competency in two sections: ORS 44.020 (persons capable of being witnesses) and ORS 44.030 (common law disqualifications for mental incompetency and infancy). Rule 601, with its exception, restates the first sentence of ORS 44.020. The adoption of Rules 602 to 612 makes the remainder of that statute unnecessary. The Legislative Assembly repealed ORS 44.030. Whether any person has sufficient ability to perceive, recollect and communicate so it is worthwhile for the person to testify is a question for the trial court to decide in the exercise of sound discretion. This is clearly recognized in the case of mental capacity. State v. Pace, 187 Or 498, 212 P2d 755 (1949). It appears to be the case as well with infancy. State v. Jackson, 9 Or 457 (1881); State v. Jensen, 70 Or 156, 140 P 740 (1914) (child witness must have sufficient intelligence to observe and narrate and possess due sense of nature and obligation of oath); see also State v. Stich, 5 Or App 511, 484 P2d 861 (1971) (competency of child a preliminary question of fact to be decided by trial judge).

In light of the cases just discussed, the Legislative Assembly believes that the adoption of Rule 601 works no change in Oregon law with regard to competency, except in the case of a witness less than 10 years of age. Although no longer required by ORS 44.030 to examine separately a child who is

under 10 years of age for competency, a trial court still may do so to determine whether the child is a competent witness under this Article.

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EVIDENCE CODE

Work Session

Text: July 2, 1981

Commentary: July 2. 1981

Oregon Rule of Evidence 602

SECTION 44. Rule 602. Lack of personal knowledge. Subject to the provisions of section 59 (Rule 703) if this Act, a [A] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.

COMMENTARY

Oregon Rule of Evidence 602 indicates that a witness may only testify on matters as to which the witness has personal knowledge. It replaces ORS 44.060, which was to the same effect. The rule is a slightly modified version of Rule 602 of the Federal Rules of Evidence. The exception involving Rule 703, which appears as the final sentence of the federal rule, is inserted as an introductory clause in the Oregon rule.

The "rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an oppportunity to observe, and must have actually observed the fact" is "one of the most pervasive manifestations" of the common law's "insistence upon the most reliable sources of information." McCormick, Evidence, section 10 at 20 (2d ed 1972). ORE 602 simply codifies that common law requirement.

A party that offers testimony has the burden of establishing that the witness had an opportunity to observe the fact. According to the rule the testimony of the witness may be sufficient to lay this foundation. Absolute personal knowledge is not a requisite; however, it is necessary that the witness sincerely believe that the witness has such knowledge.

This rule does not govern the situation in which a witness testifies to a hearsay statement having personal knowledge of the making of the statement. Rules 801 and 805 apply in that case. This rule would, however, prevent a witness from testifying to the subject matter of the hearsay statement, as the witness has no personal knowledge of it.

The reference to Rule 703 is designed to avoid any quesiton of conflict between the present rule and Rule 703. The provisions of the latter allow an expert to express opinions based on facts of which the expert does not have personal knowledge. This accords with the present status of the law in Oregon. Nutt v. So. Pacific Co., 25 Or 291, 35 P 653 (1894).

EVIDENCE CODE
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Text: April 2, 1981
Commentary: July 3, 1981

Oregon Rule of Evidence 603

SECTION 45. Rule 603. Oath or affirmation. (1) Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience of the witness and impress the mind of the witness with the duty to do so.

(2) An oath may be administered as follows: The person who swears holds up one hand while the person administering the oath asks: "Under penalty of perjury, do you solemnly swear that the evidence you shall give in the issue (or matter) now pending between _____ and _____ shall be the truth, the whole truth and nothing but the truth, so help you God?" If the oath is administered to any other than a witness, the same form and manner may be used. The person swearing must answer in an affirmative manner.

(3) An affirmation may be administered as follows: The person who affirms holds up one hand while the person administering the affirmation asks: "Under penalty of perjury, do you promise that the evidence you shall give in the issue (or matter) now pending between _____ and _____ shall be the truth, the whole truth and nothing but the truth?" If the affirmation is administered to any other than a witness, the same form and manner may be used. The person affirming must answer in an affirmative manner.

COMMENTARY

Oregon Rule of Evidence 603 governs the form and administration of oaths and affirmations. It replaces the entirety of ORS 44.310 to 44.360, which are repealed.

Subsection (1). Subsection (1) is identical in substance to Rule 603 of the Federal Rules of Evidence. As a means of discovering the truth, this subsection requires that every witness make an oath or affirmation before testifying. This is important in two respects. First, the making of a promise in a ceremonial setting may induce in the witness a feeling of special obligation to speak the truth. Second, the reference to divine and positive legal sanctions may impress upon the witness the possibility of punishment for perjury, to which the oath or affirmation is a prerequisite.

The requirement of an "oath or affirmation" in this subsection, and the permissive language as to form in subsections (2) and (3), are designed to afford flexibility in dealing with religious adults, atheists, conscientious objectors, mental defectives and children. Although the rule sets forth suggested forms of an oath and affirmation, it does not require any particular verbal formula. Indeed, section 7 of Article I of the Oregon Constitution would prohibit such a device. Any mode of administering an oath or affirmation which is binding upon the conscience of the person to whom the oath or affirmation is administered is allowable.

A flexible approach is particularly relevant in the case of a witness under 10 years of age. ORS 44.310 distinguished between child witnesses and

all other witnesses with regard to the necessity for an oath or affirmation. That section allowed testimony of a child under 10 to be given on a promise in open court to tell the truth, if the court determines that the child can safely be admitted to testify in accordance with ORS 44.030. Rule 603 makes no such distinction but requires that every witness make an oath or affirmation. The Legislative Assembly considers this change to be more one of form than substance. An "affirmation" under the rule would include a child's promise to tell the truth, once it has been established to the satisfaction of the court that the child understands the nature and obligation of that promise. Where, by virtue of the child's background, reference to the Deity is appropriate, an oath to the same effect would also satisfy the rule.

Except for the above change, there are no measurable differences between subsection (1) and current Oregon law concerning the form and administration of an oath or affirmation. An oath or affirmation may be administered by any person authorized by law to administer oaths.

Subsection (2). Subsection (2) sets out a suggested form of oath. At a time when witnesses were viewed with more suspicion, the oath was regarded as "a summoning of Divine vengeance upon false swearing. If the witness remained untouched by the hand of God, then the witness was telling the truth." 6 Wigmore, section 1816. Under modern common law theory, the witness is reminded of ultimate Divine punishment for failing to speak truthfully and so must have belief in "superhuman . . . retribution to follow false swearing." 6 Wigmore, section 1816.

The Legislative Assembly felt that some witnesses would be more impressed with their duty to tell the truth if they swore an oath which invokes the

Deity, while others may be more impressed with the "under penalty of perjury" language. It therefore included both elements in the suggested form.

Subsection (2), like subsection (3), expressly requires an affirmative response from the witness upon the administration of the oath or affirmation.

Subsection (3). This subsection sets out a suggested form of affirmation. Because atheists and non-believers may be unwilling or incapable of taking an oath, the affirmation, a solemn undertaking to tell the truth, has been devised to impress upon the witness the legal consequences of perjury.

EVIDENCE CODE
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Text: April 2, 1981
Commentary: July 2, 1981

Oregon Rule of Evidence 604

SECTION 47. Rule 604. Interpreters. (1) An interpreter is subject to the provisions of this Act relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.

(2) Use of qualified interpreter for handicapped witness or party. When a witness or a party in a civil or criminal proceeding is a handicapped person, the court shall appoint a qualified interpreter, unless the handicapped person knowingly and voluntarily files a statement with the court indicating that the handicapped person does not desire the court to appoint a qualified interpreter.

(3) The court shall fix the fees and expenses of an interpreter appointed under subsection (2) of this section. In a criminal proceeding the county in which the proceeding is held shall pay the fees and expenses of a qualified interpreter for the defendant or the witness of the defendant if:

(a) The defendant makes a verified statement and provides other information in writing under oath showing inability to obtain a qualified interpreter, and provides any other information required by the court concerning the inability to obtain such an interpreter; and

(b) It appears to the court that the defendant is without means and is unable to obtain a qualified interpreter. Except as provided in ORS 183.418, in a civil proceeding the party plaintiff or defendant requiring the services of a qualified interpreter shall pay the interpreter's fees and expenses.

(4) As used in this section:

(a) "Handicapped person" means a person who cannot readily understand or communicate the English language, or cannot understand the proceedings because of deafness, or because of a physical hearing impairment or physical speaking impairment.

(b) "Qualified interpreter" means a person who is readily able to communicate with the handicapped person, translate the proceedings, and accurately repeat and translate the statements of the handicapped person to the court.

COMMENTARY

Oregon Rule of Evidence 604 governs the use of interpreters.

Subsection (1). This subsection is identical in substance to Rule 604 of the Federal Rules of Evidence. It requires an individual, before serving as an interpreter, to demonstrate such proficiency in communicating with a handicapped witness and in translating statements of the witness as would qualify the individual as an expert. It also requires that the interpreter

promise by oath or affirmation to make a true translation of all proceedings and statements.

With the adoption of this subsection, ORS 45.520 became superfluous and was repealed. ORS 44.095 (itself repealed in light of subsections (2) to (4), infra) repeated the requirement of ORS 45.520 that an interpreter be appointed for any witness who does not understand or speak English. This subsection repeated the requirement of ORS 45.520 that the interpreter be under oath. Subsection (1) of this rule is superior to ORS 45.520 because it affirmatively stresses the interpreter's obligation to make a true translation, and because it emphasizes the broad discretionary power of the trial court to determine the fitness and qualifications of interpreters.

Subsections (2)-(4). Subsections (2) to (4) set forth procedures to be followed in the use of a qualified interpreter for a handicapped person. Except for the absence of the masculine pronoun, these subsections are identical to ORS 44.095 which was repealed.

ORS 44.095 was adopted by the 1973 Legislative Assembly as a part of legislation to make interpreters available to the handicapped. The statute was never challenged or construed in an Oregon court. However, the Court of Appeals for the Ninth Circuit held, in United States v. Barrios, 457 F2d 680 (1972), that a trial judge has broad discretion in appointing and determining the fitness and qualifications of interpreters, and exercise thereof will not be disturbed on review in the absence of prejudice. There is nothing to indicate that Oregon courts would not follow this general rule of law.

Two sections similar to ORS 44.095 were enacted in 1973 and codified as ORS 133.515 (interpreters for handicapped persons in criminal proceedings) and ORS 183.418 (interpreters for handicapped persons in contested case hearings). It is the opinion of the Legislative Assembly that the adoption of Rule 604 in lieu of ORS 44.095 and 45.520, together with the retention of ORS 133.515 and 183.418, preserves Oregon practice with regard to the appointment and use of interpreters in legal proceedings.

EVIDENCE CODE
Work Session
Text: April 2, 1981
Commentary: July 3, 1981

Oregon Rule of Evidence 605

SECTION 48. Rule 605. Competency of judge as witness. The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

COMMENTARY

Oregon Rule of Evidence 605 addresses the question of the competency of the trial judge to be a witness. The rule is identical to Rule 605 of the Federal Rules of Evidence.

Three views exist concerning testimony by a judicial officer in a case the officer is trying. Under the oldest view the judge is a competent witness with discretion to decline to testify. Under the second view, the judge is disqualified from testifying only as to material facts in dispute. Under the third view, the judge is incompetent to testify on any matter. 6 Wigmore, Evidence, section 1909 n 1. McCormick, Evidence, section 68 at 147 (2d ed 1972).

Oregon previously took the first position discussed above, allowing the presiding officer to be a witness. ORS 44.050. Thus, in State v. Houghton,

45 Or 110, 75 P 887 (1908), the trial judge was held competent to testify that there was no inconsistency between testimony of the prosecuting witness at the trial in question and testimony at an earlier trial. The opinion gives the impression, however, that the Oregon Supreme Court would have chosen a different policy had the issue not been foreclosed by legislative mandate.

> "The position and influence of the trial judge, the weight [the judge's] testimony would necessarily have with the jury in case of a conflict with some other witnesses, and many other reasons which readily suggest themselves to the legal mind point to the conclusion that [the judge's] testimony would, as said by Mr. Justice Dunbar in Maitland v. Zanga, 14 Wash 82, 44 P 117, 'lead to embarrassment and would have a tendency to lower the standard of courts and bring them into contempt.'" 45 Or at 112.

The Legislative Assembly believes that the role of a judge as a witness, even as to formal matters, is manifestly inconsistent with the essential role of the judge as arbiter in the adversary system of trial. It therefore repealed ORS 44.050 and, in ORE 605, adopts a broad rule of incompetency illustrated by the third view.

Under the rule, an objection is automatic and need not be made to preserve the point. This saves the opponent of judicial testimony from a choice of evils--either not objecting, with the result that the testimony is allowed, or objecting, "with the probable result [that the] testimony [is excluded] but at the price of continuing the trial before a judge likely to feel that [the judge's] integrity has been attacked by the objector." Fed R Evid 605, Advisory Committee note at 51.

This rule does not prevent a judge from testifying as a witness when the judge has taken a disqualification from presiding.

EVIDENCE CODE
Work Session
Text: April 2, 1981
Commentary: July 3, 1981

Oregon Rule of Evidence 606

SECTION 49. Rule 606. Competency of juror as witness. (1) A member of the jury may not testify as a witness before that jury in the trial of the case in which the member has been sworn to sit as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(2) Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by a juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

COMMENTARY

Oregon Rule of Evidence 606 governs the competency of a juror to be a witness in the same proceeding. Except for pronominal changes, the rule is identical to Rule 606 of the Federal Rules of Evidence.

Subsection (1). The traditional common law and practice in many jurisdictions, including Oregon, held a juror competent to testify. McCormick, Evidence, section 70 at 148 (2d ed 1972); ORS 44.050; ORCP 59C(6). This subsection changes the law in Oregon, for reasons similar to those that favor exclusion of judicial officers as witnesses. See ORE 605. When a juror turns witness, opposing counsel may be prevented from adequately cross-examining or impeaching the juror/witness for fear of giving offense. Furthermore, the juror may be disposed to give excessive weight to the juror's testimony and to other testimony of the side whose partisan the juror has been.

This subsection imposes upon counsel the responsibility of ensuring that a prospective juror is not also a potential witness who will be kept from the stand if counsel fails to challenge the person during voir dire. Because Oregon law has allowed jurors to testify, this responsibility has not weighed as heavily as it will under this rule. It was foreshadowed, however. In State v. Nagel, 185 Or 486, 202 P2d 640 (1944), the court indicated that whenever possible opposing counsel should determine in voir dire whether a prospective juror will be called as a witness, and if so should challenge the person's empanelment. While the court was bound by statute to allow a juror to testify, clearly it did not favor the dual role.

Subsection (2). The familiar rule that a juror may not impeach the juror's own verdict stems from a doctrine nurtured by Lord Mansfield in the

18th century. 8 Wigmore, Evidence, sections 2352, 2353 (McNaughton rev). It is a simplication of several policies: (1) to prevent an invasion of the privacy of the jury room by litigants or the public; (2) to promote finality of jury verdicts; and (3) to protect jurors from annoyance, embarrassment and harassment. On the other hand, simply putting verdicts beyond reach can only promote irregularity and injustice. This subsection offers an accommodation between these competing considerations.

The subsection does not permit a juror to testify about any matter or statement occurring during the course of the jury's deliberations, or about the juror's mental processes or the effect of anything upon any juror's mind which influenced assent to or dissent from a verdict or indictment. A juror may testify, however, regarding (1) whether extraneous information was improperly brought to the jury's attention, or (2) whether outside influence was improperly brought to bear on any juror. Thus, jurors could testify as to any statement made to them by the bailiff, but they could not testify as to the effect of those statements on their deliberations. It would be up to the trial judge to determine whether the bailiff's remarks were in fact prejudicial.

This subsection is more restrictive than current Oregon law. In Oregon,

> "[T]here [has been] no absolute rule . . . prohibiting the use of a juror's affidavit to impeach a verdict; the affidavit may be considered, but its significance in determining whether a new trial will be ordered is for the court to decide in each case . . . . The court must choose between two conflicting interests; on one hand, the interest of the individual who claims that the misconduct deprived

> [the individual] of a fair trial, and on the other hand, the interest of the public in protecting the verdict from attack . . . . A verdict is impeachable if justice demands that it be set aside." State v. Gardner, 230 Or 569, 573-574, 371 P2d 558 (1962).

While announcing these broad principles, the Gardner court did approve State v. Imlah, 204 Or 43, 54-55, 281 P2d 973 (1955), holding that verdicts should not be set aside except in cases of "utmost gravity and importance" where it is "manifest that enforcement of the rule (against impeachment of a verdict) would violate the plainest principles of justice." Furthermore, the Gardner court accepted the limitation expressed in Uniform Rule of Evidence 41 that no evidence shall be received to show the effect of any event or condition upon the mind of a juror as influencing the juror's vote or concerning the mental processes by which it was determined. As the last provision parallels a portion of the language of this subsection, the only change that subsection (2) works in Oregon practice is that it also prohibits inquiry into "any matter or statement occurring during the course of the jury's deliberations."

Until now, therefore, it appears that a juror could testify to the drunken condition of a fellow juror which disabled the latter from participating in the jury's deliberations; about the jury's refusal to follow the instructions of the trial judge; or that some of the jurors took no part in the deliberations. Under this subsection such testimony would not be permitted.

The Legislative Assembly believes that a public policy of finality to litigation and preservation of privacy for jurors to engage in full and free debate requires the rule set forth in subsection (2). It intends, by the adoption of this subsection, to prohibit the practice of questioning jurors

after a trial concerning their deliberations or the methods by which they reached a verdict. Questioning regarding "quotient verdicts," for example, would be prohibited.

For the effect of constitutional considerations in this area, see Parker v. Gladden, 385 US 363, 87 SCt 468, 17 LEd 2d 420 (1966) and the discussion of the case in 2 Litigation 31 (1975). In that case, the court held that a bailiff's remarks to a jury constituted a violation of the Sixth Amendment's confrontation requirement.

EVIDENCE CODE
Work Session
Text: April 2, 1981
Commentary: July 2, 1981

Oregon Rule of Evidence 606-1

SECTION 50. Rule 606-1. Competency of attorney as witness. An attorney representing a party litigant at trial shall not offer to be a witness or offer a member of the attorney's firm as a witness at the trial unless:

(1) The testimony of the attorney or member will relate solely to an uncontested matter;

(2) The testimony of the attorney or member will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) The testimony of the attorney or member will relate solely to the nature and value of legal services rendered in the case by the lawyer or the lawyer's firm to the client;

(4) As to any matter, refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or the lawyer's firm as counsel in the particular case; or

(5) The court finds that the interests of justice require the testimony.

COMMENTARY

Oregon Rule of Evidence 606-1 sets forth the conditions that must exist before an attorney may serve or offer to serve as a witness at a trial in which the attorney is serving as counsel for one of the parties. This is a new rule. It is based on Oregon case law and Disciplinary Rule 5-101(B) of the American Bar Association Code of Professional Responsibility (1969).

Although the most common problems that arise when an attorney is called as a witness involve the attorney-client privilege, the next most common question is whether counsel can continue with the trial. Under current law any attorney, including the one trying the case, can be called as a witness to any fact of the attorney's own knowledge, and if called must testify. It may be unprofessional conduct, however, for an attorney to undertake the trial of a case knowing that the attorney will be a witness. Newman v. Stover, 187 Or 641, 213 P2d 137 (1950); Bronson v. Dept. of Revenue, 265 Or 211, 508 P2d 423 (1973). An attorney who appears as a witness in the trial court, except as to merely formal matters, will not be allowed to argue the case on appeal. Oregon Supreme Court Rules of Procedure, Rule 43.

Rule 606-1 restates the principles that the Oregon Supreme Court set out in Bronson v. Dept. of Revenue, supra. Simply put, these forbid a lawyer from serving as a witness on behalf of the lawyer's client unless certain conditions are met. The Legislative Assembly, by codifying these conditions, seeks to establish a minimum standard of conduct for attorneys. In a given case broader considerations may prevent the trial attorney, as a matter of professional ethics, from testifying and continuing as counsel in that trial. By adopting this rule, the Legislative Assembly does not intend to narrow the scope of the ethical considerations mentioned in the Newman and Bronson cases.

EVIDENCE CODE
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Oregon Rule of Evidence 607

SECTION 51. Rule 607. Who may impeach. The credibility of a witness may be [impeached] attacked by any party, including the party calling the witness[, except in order to impeach the credibility of a party's own witness with a prior inconsistent statement, the testimony of the witness at trial must be actually injurious to the calling party's case].

COMMENTARY

Oregon Rule of Evidence 607 indicates who may impeach a witness and upon what conditions. The rule is identical in substance to Rule 607 of the Federal Rules of Evidence. Prior versions, proposed by the Advisory Committee on Evidence Law Revision and the Interim Judiciary Committee, treated impeachment of one's own witness by prior inconsistent statements differently from other methods of impeachment. This rule, like Federal Rule 607, does not.

Impeachment of adverse witness. Rule 607 does not place any restrictions on the ability of a party to impeach a witness who is called by another party. In this respect the rule does not differ from ORS 45.600, the former Oregon statute on impeachment of adverse witnesses. ORS 45.600 was

declaratory of the common law. Sheppard v. Yocum, 10 Or 402, 410 (1882); State v. Hunsaker, 16 Or 497, 499, 19 P 605 (1888); State v. Edwards, 106 Or 58, 210 P 1079 (1922); State v. Motley, 127 Or 415, 272 P 561 (1928); State v. Gilbert, 138 Or 291, 4 P2d 923 (1932). The distinctions between Article VI and the common law with regard to adverse witnesses lie not in the right but in the manner of impeachment. See infra.

Impeachment of own witness. Rule 607 works a signficant change with respect to impeachment of a party's own witness.

At common law, a party was prohibited from impeaching its own witness. This policy was based on two assumptions: (1) that a party vouches for the credibility of its witnesses, and (2) that a party can wrongly coerce its witnesses if allowed to impeach them. These are false premises.

> ". . .[A] party does not vouch for [the party's] witnesses because, except for expert and character witnesses, . . . witnesses are not chosen but [are] those persons who happen to be present and see the event which is the basis of the case. The second policy concerned with the situation where a party's witness decides to change [the witness's] story [and] testify unfavorably . . . falsely assumes that whenever a witness changes . . . testimony, it will be from falsehood to truth, that the party coerces the witnesses by threatening impeachment, and that the truth is thereby suppressed. Certainly witnesses could be changing their testimony from truth to falsehood and so the coercion, if there is any, could be supporting, not suppressing, the truth." Montana Rules of Evidence, Rule 607, Comment at 44 (1977).

Accord, Chambers v. Mississippi, 410 US 284, 296 n 8, 935 SCt 1038, 35 LEd 2d 297 (1973), acknowledging criticism of the voucher rule as "archaic, irrational, and potentially destructive of the truth-gathering process" and indicating that application of the rule in criminal cases may raise constitutional problems. See also, cases collected in 3 Wigmore, section 905.

Denial of any right to impeach one's own witness leaves a party at the mercy of the witness and the opposing party, and for this reason Oregon has not followed the common law for nearly a century. Leverich v. Frank, 6 Or 212 (1896); State v. Hunsaker, 16 Or 497, 19 P 605 (1888). Over the years, the law relating to impeachment of one's own witness evolved into ORS 45.590. That statute provided that the party producing a witness may not impeach the witness' credibility by evidence of bad character, but the party may (1) contradict the witness by other evidence, or (2) show upon proper foundation that the witness made other statements inconsistent with present testimony (a foundation was not required for an adverse party or its agent). The statute was interpreted to require that the testimony of a witness be material and prejudicial before the calling party may impeach. Langford v. Jones, 18 Or 307, 326, 22 P 1064 (1890); State v. Steever, 29 Or 85, 104, 43 P 947 (1896); State v. Yee Gueng 57 Or 509, 112 P 424 (1910); State v. Merlo, 92 OR 678, 173 P 317, 182 P 153 (1919); Tauscher v. Doernbecher Mgd. Co., 153 Or 152, 56 P2d 318 (1936); State v. Gardner, 2 Or App 265, 467 P2d 125 (1970), SCt review denied; Rhodes v. Harwood, 273 Or 903, 544 P2d 147 (1975); but see State v. Estlick, 269 Or 75, 523 P2d 1029 (1974) (any witness may be impeached to show bias or interest).

The Legislative Assembly found the restrictions in ORS 45.590 against impeaching one's own witness to be in conflict with the persuasive reasoning

of recognized authorities. 3 Wigmore, Evidence, sections 896-899 (3rd ed 1940); McCormick, Evidence, section 50 at 107 (2d ed 1972). An unqualified rule is more consistent with the view of trial as a search for truth. In this regard, the principle of impeachment is wholesome, because it treats the witness as a "channel through which to get at the truth" rather than a partisan of the party calling the witness. Uniform Rules of Evidence, Rule 20, Comment (1953).

Special mention should be made of impeachment by means of prior inconsistent statements. This form of impeachment presents a special danger that the trier of fact will accept the prior statements as substantive evidence. As a safeguard against abuse, the Advisory Committee recommended a rule that prior inconsistent statements can be used to impeach only if (1) the testimony at trial is actually injurious to the calling party's case, and (2) the testimony at trial is contrary to that which the calling party anticipates. The requirement of injury was not new to Oregon law. See supra. The necessity of surprise under case law was unclear. See, e.g., State v. Cain, 230 Or 286, 369 P2d 769 (1962); State v. Briggs, 245 Or 503, 420 P2d 71 (1967); State v. Gardner, 2 Or App 265, 467 P2d 125 (1970); Rhodes v. Harwood, 273 Or 903, 544 P2d 147 (1975).

The Legislative Assembly rejected both of the foregoing limitations. While recognizing that deletion of the element of surprise could result in calling a witness solely for the purpose of putting a prior inconsistent statement before the trier of fact, the Legislative Assembly concluded that this danger is outweighed by other policy considerations. Insofar as the credibility of a witness affects the likelihood that the trier of fact will

find the truth, knowledge of prior statements is helpful. The trier of fact is then better informed to judge whether given testimony is reliable.

As to the requirement that the testimony be injurious to the calling party, this rule was already been stretched by case law. State v. Bruce, 31 Or App 1189, 572 P2d 351 (1977) (holding that answer "I don't remember" to questions about prior inconsistent statements is equivalent of "No, I did not say that" and sufficiently prejudicial to allow introduction of statements). It has been effectively criticized, and the Legislative Assembly abandons it. McCormick, Evidence, sections 38, 251 (2d ed 1972).

EVIDENCE CODE
Staff Proposal
Text: April 2, 1981
Commentary: July 6, 1981

Oregon Rule of Evidence 608

SECTION 52. Rule 608. Evidence of character and conduct of witness. (1) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but:

(a) The evidence may refer only to character for truthfulness or untruthfulness; and

(b) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(2) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in section 53 (Rule 609) of this Act, may not be proved by extrinsic evidence. Further, such specific instances of conduct may not, even if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness. However, if a witness testifies as a character witness on the issue of credibility, the witness may be asked on cross-examination if the witness has heard or knows of specific instances of [bad] conduct relevant to the character trait of credibility.

COMMENTARY

Oregon Rule of Evidence 608 indicates under what circumstances various types of character evidence regarding credibility may be admitted. The rule is a modified version of Rule 608 of the Federal Rules of Evidence. It replaces ORS 45.590, 45.600 and 45.620, which are repealed.

ORE 404 prohibits the admission of character evidence to prove that a person acted in conformity therewith, subject to several exceptions. One such exception is the admission of character evidence touching a witness' credibility. This rule develops that exception.

Subsection (1). While modern practice has purported to exclude opinion evidence, witnesses who testify to reputation are often offering opinion disguised as reputation. See McCormick, Evidence, section 44 (2d ed 1972). This subsection recognizes that reality. Consistent with Rule 405, it allows a witness to testify both as to the reputation for veracity of another witness and as to the witness' opinion of another's veracity based upon personal knowledge. The allowance of reputation evidence to impeach or bolster credibility restates Oregon law. ORS 45.600; McIntosh v. McNair, 53 Or 87, 99 P 74 (1909); Lucase v. Kaylor, 136 Or 541, 299 P2d 197 (1931). The use of opinion evidence, however, is a departure from current practice.

Paragraph (a). In accordance with the bulk of judicial authority, inquiry is limited to character for veracity rather than character generally. The result is to sharpen relevancy and reduce surprise, waste of time and confusion. McCormick, Evidence, section 44 at 91 (2d ed 1972).

Paragraph (b). Character evidence in support of credibility is admissible under this rule only after the witness' character has first been attacked. This limitation is found in Oregon law, ORS 45.620; State v. Smith, 4 Or App 261, 478 P2d 417 (1970), and in the common law as well, McCormick, Evidence, section 49 at 105; 4 Wigmore, section 1104. Opinion or reputation that a witness is untruthful specifically qualifies as an "attack." Evidence of corruption or misconduct, including conviction of crime, also qualifies. Evidence of bias or interest does not. McCormick, Evidence, section 49; 4 Wigmore, sections 1106, 1107.

Subsection (2). In conformity with Rule 405, which forecloses the use of evidence of specific incidents to prove character unless character is an issue in the case, ORE 608 bars evidence of specific instances of conduct for the purpose of attacking or supporting credibility.

Subsection (2) makes an exception in two cases, however. A witness may be directly impeached on cross-examination by inquiry into conviction for a crime of dishonesty or false statement, and if necessary by extrinsic evidence of that conviction. See Rule 609. Furthermore, a witness may be indirectly impeached or rehabilitated on cross-examination of other witnesses who testify to the witness' character, by inquiry into specific instances of conduct . Both exceptions are now part of Oregon law.

The Legislative Assembly amended Federal Rule 608 in one respect. It preserved the current Oregon rule that does not allow the credibility of a witness to be directly attacked by evidence of prior bad acts that did not result in conviction for a crime. Oregon courts have consistently prohibited such evidence. Mannix v. Portland Telegram, 144 Or 172, 23 P2d 138 (1933);

State v. White, 48 Or 416, 87 P 137 (1906). The Legislative Assembly emphasizes its intention not to disturb this practice.

EVIDENCE CODE
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Oregon Rule of Evidence 609

SECTION 53. Rule 609. Impeachment by evidence of conviction of crime. (1) For the purpose of attacking the credibility of a witness, evidence that the witness has entered a plea of guilty or been found guilty by the trier of fact or convicted of a crime in other than a justice's court or a municipal court shall be admitted if elicited from the witness or established by public record [during cross-examination], but only if the crime involved dishonesty or false statement.

(2) Evidence of a conviction under this section is not admissible if [a]:

(a) A period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date[.]; or

(b) The conviction has been expunged by pardon, reversed, set aside or otherwise rendered nugatory.

(3) When the credibility of a witness is attacked by evidence that the witness has been convicted of a crime, the witness shall be allowed to [briefly] explain briefly the circumstances of the crime or former conviction.

(4) The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(5) An adjudication by a juvenile court that a child is within its jurisdiction is not a conviction of a crime.

COMMENTARY

Oregon Rule of Evidence 609 indicates the circumstances in which a witness may be impeached by evidence of a prior conviction or plea or finding of guilt. The rule is based on Rule 609 of the Federal Rules of Evidence. However, there are significant differences between the Oregon rule and both Federal Rule 609 and Oregon practice to date.

Subsection (1). The Legislative Assembly abandoned the traditional approach in both federal and state court which allows impeachment by any prior felony conviction. The Legislative Assembly felt that the distinction between felonies and misdemeanors, for the purpose of determining credibility, is arbitrary. The relationship between crimes of violence and truth-telling is particularly tenuous. The assumption that such crimes are probative of credibility because a person convicted of assault is a bad person, and a bad person is a liar, is false, as Bentham demonstrated more than a century ago:

> "Two men quarrel; one of them calls the other a liar. So highly does he prize the reputation of veracity, that, rather than suffer a stain to remain upon it, he determines to rid his life, challenges his adversary to fight, and kills him. Jurisprudence, in its

> sapience, knowing no difference between homicide by consent, by which no other human being is put in fear--and homicide in pursuit of a scheme of highway robbery or nocturnal housebreaking, by which every man who has a life is put in fear of it--has made the one and the other murder, and consequently felony. The man prefers death to the imputation of a lie,--and the inference of the law is, that he cannot open his mouth but lies will issue from it. Such are the inconsistencies which are unavoidable in the applications of any rule which takes improbity for a ground of exclusion. 7 Bentham, Rationale of Judicial Evidence 406 (Brownings Ed 1827).

Aside from the low probative value of some convictions, the divulgence of a criminal past exposes the witness to the hazard of jury prejudice. In one recent survey, 98% of the attorneys and 43% of the judges polled indicated their belief a jury is unable to follow an instruction to consider prior conviction evidence only for the purpose of evaluating credibility. "To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record," in 4 Col J Law and Soc Prob 213 (1968). To inform the jury in a rape case that the defendant has a prior rape conviction, and then to instruct the jury to consider the conviction only in evaluating the defendant's credibility, is to recommend "a mental gymnastic which is beyond, not only their power, but anybody else." Nash v. United States, 54 F 2d 106, 107 (2d Cir 1932) (L. Hand, J.).

For the reasons just expressed, the Legislative Assembly also abandoned Oregon's practice of allowing a witness to be impeached by evidence of any misdemeanor. ORS 45.600. Although there is authority for the view that violation of a city ordinance cannot be used to impeach, State v. Crawford, 58

Or 116, 113 P 440 (1911); Redsecker v. Wade, 69 Or 153, 164 134 P 5, 138 P 485 (1914), it seems clear that when the punishment may be incarceration even such a violation is admissible under Oregon law. State v. Bunse, 27 Or App 299, 555 P2d 1269 (1977).

Under subsection (1), convictions in an Oregon justice's or municipal court, or in similar courts of other states, however designated, may not be used for impeachment. The offenses triable in these courts do not involve serious moral depravity. Furthermore, the relatively informal proceedings often stray from accepted standards for criminal trials in a court of record.

As for proceedings in a court of record, the Legislative Assembly intends that prior convictions be admitted for the purpose of impeaching a witness' credibility if--and only if--the conviction was for a crime involving dishonesty or false statement. The Legislative Assembly considers either type of a crime to be relevant to the propensity of the witness to testify truthfully.

There is a tendency among federal courts interpreting the federal rule to give "Dishonesty" and "false statement" the same meaning. See. e.g., United States v. Ortega, 56, F2d 803 (9th Cirt 1977); United States v. Seamster, 568 F2d (10th Cir 1978). The Legislative Assembly specifically does not adopt that conclusion, but leaves the issue open for the courts of Oregon to decide. The two concepts no doubt share much in common, but they are not necessarily coextensive: "false statement," for example, emphasizes the existence of an identifiable wrongful communication; "dishonesty" includes this situation, but is often also applied when people take what is not theirs.

Crimes of dishonesty or false statement involve some element of untruthfulness, deceit or falsification bearing on the witness' propensity to testify truthfully. The deceit involved must be more than the mere effort of the criminal actor to hide the fact of the crime or the identity of the actor from the agencies of alw enforcement: by this reasoning all crimes would be crimes of deceit. Rather, the operative deceit must be of the crime victim. Depending on the crime, the victim may be the trier of fact in the case of perjury, a storekeeper in the case of negotiating a bad check, a family member in the case of bigamy, or the general public in the case of bribery. Deceit can be said to exist if the victim of the crime is not aware at the time of its commission of its existence, or its criminality, or its full range of consequences to the victim. The deception may be affirmative, or it may take the form of allowing a person deceived to remain so.

Certain crimes involve dishonesty or false statement by their very nature. (Others involve dishonesty or false statement in their commission in a very high percentage of cases.) The Legislative Assembly intends the following crimes and their inchoate forms, ORS 161.405 et seq. be automatically admissibile for impeachment purposes. A trial court does not have to exclude them:

The above list excludes most crimes of violence or threat of violence. There is no deception in such cases; rather, the victim is painfully aware of what is occurring. The list also omits all consensual crimes between adults. The participants in these crimes are in no way deceived either as to the fact or the criminality or consequences of their conduct.

(Supp list A) A different issue is posed when one of the parties is incapable of consent. A strong argument can be made that any offense, otherwise consensual, that is committed against a person who is physically or legally incapable of consent--a minor, for example--involves an element of deception. Part or all of the reason the law punishes crimes against minors, or punishes them more severely is that the victim is of tender years and judgment, and in the eyes of the law ignorant of the full physical or psychological consequences of the conduct in question. Far from dispelling this ignorance, the criminal defendant takes advantage of it for the defendant's own profit or pleasure. The list, therefore, includes sexual crimes against persons under 18, see ORS 163.315, and crimes involving substances and activities that contribute to the delinquency of a minor.

(Supp list B) Another significant set of crimes on the list are those that invade privacy or destroy privilege. Privacy, by definition, is not invaded if the communication party is aware that a third person has access to the contents of the communication. Disclosure or misuse of communications, by a carrier or keeper of records, can be analyzed either as breach of an earlier promise of privacy or as breach of trust, both of which are relevant to character for trustworthiness.

(Supp list C, D) The more serious crimes of trespass depend for their success on concealment in the great majority of cases. The same is true for theft of services or property which does not involve force or threat of force. These last, in any event, would be crimes of dishonesty. Cf. Smith v. Durant, 271 Or 643, 648, 534 P2d 955 (1975) (dictum: robbery of crime of moral turpitude).

Crimes that do not appear on the list may nvolve dishonesty or false statement on their facts. Arson for revenge or pyromania, for example, does not bear on credibility. Arson for the purpose of defrauding an insurance company clearly does.Such crimes may be used to impeach, upon proper showing by the party seeking to use them. The issue should normally be decided by motion in limine, as counsel will need to know the ruling in advance of trial to make important tactical decisions. At the hearing on the motion, the burden of proof would be on the moving party to show by a preponderance of the evidence that the facts behind a judgment involved an element of dishonesty or false statement. In the case of a conviction under the laws of another jurisdiction, the court should exercise its discretion. Where the elements of the foreign crime are equivalent to the elements of the crime as defined by Oregon law, a showing of this alone without inquiry into the facts the particular offense may be sufficient.

The Legislative Assembly included a plea or finding of guilty as grounds for impeachment. Often there is considerable delay between these events and the actual entry of the judgment of conviction at the time of sentencing. The presumption of regularity of judicial proceedings applies to the part as well as to the whole. A guilty plea or finding arrived at prior to conviction should therefore be grounds for impeachment until otherwise set aside.

Rule 609 as proposed did not allow the party calling a witness to divulge to the trier of fact that the witness had been convicted of an impeachable crime, except during cross examination. This effectively prevents the party from presenting evidence that the witness had been convicted of a crime, making it appear that the party or the witness has attempted to hide that fact or at least has not been open and honest with the trier of fact. In fairness, either side should be allowed to elicit evidence that the witness has been convicted of a crime. Therefore, the Legislative Assembly deleted the limitation of impeachment by crime to "cross-examination."

Subsection (2). Oregon statutes and case law have recognized no time limit on impeachment by evidence of conviction. The Legislative Assembly believes that considerations of fairness and relevancy demand that some time limit be recognized. Subsection (2) provides that upon the expiration of ten years from the later of the date of conviction of a witness, or the witness' release from confinement for the offense, the conviction may no longer be used for impeachment.

Subsection (3). This subsection allows a witness impeached by evidence of a prior conviction to explain briefly the circumstances of the crime or former conviction. It is in accord with current Oregon law. State v. Washington, 36 Or App 547, 585 P2d 24 (1978); State v. Gilbert, 282 Or 309, 577 P2d 939 (1978).

Subsection (4). A presumption of correctness attends all judicial proceedings. It follows that pendency of an appeal does not preclude the use of a conviction for impeachment. State v. Forsythe, 20 Or App 624, 533 P2d

176, Supreme Court review denied (1979). However, the pendency of an appeal is a qualifying circumstance which the trier of fact may properly consider.

Subsection (5). An adjudication by a juvenile court that a child is within its jurisdiction is not a "conviction of a crime." Problems of administration, as well as policy, would be raised by the provision in ORS chapter 419 that records of juvenile court proceedings be kept confidential. Accord, State v. Gustafson, 248 Or 1, 432 P2d 323 (1967); ORS 419.543.

EVIDENCE CODE
Work Session
Text: April 2, 1981
Commentary: July 3, 1981

Oregon Rule of Evidence 609-1

SECTION 54. Rule 609-1. Impeachment for bias or interest. (1) The credibility of a witness may be attacked by evidence that the witness engaged in conduct or made statements showing bias or interest. However, before this can be done, the statements must be related to the witness and the conduct described, with the circumstances of times, places and persons present, and the witness shall be asked whether the witness made the statements or engaged in such conduct, and, if so, allowed to explain. If the statements are in writing, they shall be shown to the witness.

(2) If a witness fully admits the facts claimed to show the bias or interest of the witness, additional evidence of that bias or interest shall not be admitted. If the witness denies or does not fully admit the facts claimed to show bias or interest, the party attacking the credibility of the witness may then offer evidence to prove those facts.

(3) Evidence to support or rehabilitate a witness whose credibility has been attacked by evidence of bias or interest shall be limited to evidence showing a lack of bias or interest.

COMMENTARY

Oregon Rule of Evidence 609-1 allows any party to impeach a witness by evidence of bias or interest. This is a new rule, based on Oregon case law.

Oregon courts have long recognized that the feelings of a witness toward the parties or the interest of a witness in the outcome of a case will slant the witness' testimony. Acts, relationships or motives that are likely to produce bias or interest therefore have been examinable for the purpose of impeaching credibility.

Bias may take the form of friendly feeling toward a party. It may be evidenced by a family or business relationship, or by particular conduct or statements of the witness. Bias may also take the form of hositility to a party as shown by a history of conflict, or a lawsuit against the party.

Self-interest commonly takes the form of having a stake in the outcome of litigation. Interest is suggested, for example, if a witness testifies for the prosecution when the witness is an accomplice in the same crime, or is the subject of another indictment. In its extreme form, self-interest is manifest in corrupt activity such as taking a bribe to testify falsely, or writing a letter to intimidate another witness into giving perjured testimony. State v. Moore, 180 Or 502, 176 P2d 631 (1947).

The principles controlling impeachment of witnesses for bias or interest in Oregon have generally not been established by statute, but by judicial decision. The Legislative Assembly intends that ORE 609-1 codify the case

law, with the one exception noted below of admissibility of evidence of a continuing relationship between an expert witness and the party employing the expert.

Subsection (1). In State v. Estlick, 269 Or 75, 523 P2d 1029 (1974), the court declared that ORS 45.590 replaced the common law on impeachment of a party's own witness. As ORS 45.590 did not prohibit a party from impeaching its own witness by showing bias or interest, the majority refused to adopt such a prohibition by judicial decision. As a result, the trial court may allow a party to introduce, on direct examination, evidence of bias or interest of the party's own witness. There has never been doubt that a party may impeach the credibility of an opposing witness by showing bias or interest.

Matters that would otherwise be irrelevant may be offered to show the bias or interest of a witness. Matters that are relevant but prejudicial may likewise be elicited. In State v. Guerrero, 11 Or App 284, 501 P2d 988 (1972), questions about the witness' acquaintance with the defendant, used to show bias, were allowed even though the inquiry revealed that the persons had been together in the penitentiary. The trial court has a continuing responsibility, in a such case, to instruct the jury as to the purpose for which the testimony may be considered.

Before a witness can be impeached by calling other witnesses to prove declarations or conduct showing bias or interest, the witness must be asked about these facts. In State v. Dowell, 274 Or 547, 547 P2d 619 (1976), the court noted its previous holdings that ORS 45.610 (now ORE 613) requires a

foundation for evidence of bias or interest if the evidence is a prior inconsistent statement. State v. Stewart, 11 Or 52, 4 P 128 (1883); State v. Holbrook, 98 Or 43, 188 P 947 (1920). The court noted that it had not considered whether a similar foundation is required before a witness can be impeached by evidence of prior conduct. Quoting McCormick, Evidence, section 40 at 80-81 (2d ed 1972), the court observed:

> "Some courts, adhering to the analogy of inconsistent statements, make a difference between declarations and conduct evidencing bias, requiring the preliminary question as to the former and not as to the latter. But as suggested in a leading English case, words and conduct are usually intermingled in proof of bias, and 'nice and subtle distinctions' should be avoided in shaping this rule of trial practice. Better require a 'foundation' as to both or neither." 274 Or at 553.

In line with that view, the Supreme Court required that a preliminary foundation be laid for both declarations and conduct evidencing bias.

To evaluate the credibility of a witness fairly, the jury should hear all the facts relating to possible bias and self-interest. State v. Ellsworth, 30 Or 145, 47 P 199 (1896); Clevenger v. Shallhorn 205 Or 209, 296 P2d 651 (1955). For example, it is reversible error not to allow a criminal defendant to cross-examine the victim whether the latter's testimony is prompted by fear of being charged with an offense. State v. Sheeler, 15 Or App 96, 514 P2d 1370 (1973). However, the trial judge retains discretion to control the extent to which proof of bias or interest may go. McCarty v. Hedges, 212 Or

497, 309 P2d 186 (1958); Schrook v. Goodell, 270 Or 504, 528 P2d 1048 (1974). Relevancy is a question of degree, and the judge may and should draw a line to exclude that which is of little value. O'Hara v. Pundt, 210 Or 533, 310 P2d 1110 (1957). Prejudice is also a consideration.

The trial judge is most often required to exercise discretion, weighing the above interests, when there is testimony by an expert witness or testimony that might inject the element of insurance into the case.

Expert fees. Generally, the pecuniary interest of an expert witness and any bias of the expert in favor of the calling party can always be shown, with inquiry limited only by the sound discretion of the trial judge. An expert may be examined as to fees, compensation, previous relationships with the parties or the attorneys, and frequency of testimony in behalf of a plaintiff or defendant. State v. Sack, 210 Or 522, 300 P2d 427 (1957); State Highway Commission v. Supervilt Manufacturing Co., Inc., 204 Or 393, 281 P2d 707 (1955); Hahn v. Dewey, 157 Or 433, 72 P2d 593 (1937). In Oregon, however, a party has not been able to question an expert on the amount of fees received for testimony in unrelated trials. State Highway Commission v. Superbilt Manufacturing, supra. The Legislative Assembly intends that Rule 609-1 be construed to overrule this last principle. The limitation has been criticized. See Graham, "Impeaching the Professional Expert Witness by a Showing of Financial Interest," in 53 Indiana L J 35. The better reasoning is that of the Illinois Supreme Court in City of Chicago v. Van Schaak Bros. Chemical Works, 330 Ill 264, 161 NE 486 (1928):

" . . . [I]t would manifestly be important, where witnesses had repeatedly testified for [a party], to know whether they were receiving only fair and ordinary compensation for their time, or whether the employement was of such a character and the compensation such as to make it desirable that the employment should continue and that the [party] should be fully satisfied with the opinions given. Undoubtedly it was necessary for the [party] to employ the witnesses, but we think the defendants were entitled to have the jury know what the arrangment was under which the opinions were formed and testified to," 161 NE at 489, citing Kerfoot v. City of Chicago, 195 Ill 229, 63 NE 101 (1902).

Insurance. The trial judge and attorneys must exercise particular caution when evidence relating to bias or interest touches upon the existence of liability insurance. Compare Smith v. Pacific Truck Express, 164 Or 318, 100 P2d 474 (1940) (claims adjuster who takes stand for defense may be examined as to connection with company that has insured defendant and is conducting defense); Quigley v. Roath, 227 Or 336, 362 P2d 328 (1961); Null v. Siegrist, 262 Or 264, 497 P2d 664 (1972); with Fairbrother v. Rinker, 274 Or 525, 547 P2d 605 (1976) (where private investigator testifying for defense states profession and fact of employment on behalf of defendant and fee, identification of insurance company as employer adds nothing to inference of bias and is properly excludable); Strandholm v. General Construction Company, 235 Or 145, 382 P2d 843 (1963).

Subsection (2). Some jurisdictions take the position that if a witness fully admits facts claimed to show bias or interest, the impeaching questioner

cannot repeat the attack by calling other witnesses to the same facts. If the witness denies or does not fully admit the facts claimed to show bias or interest, on the other hand, the attacking party may prove those facts by extrinsic evidence. This is the rule in Oregon. State v. Hing, 77 Or 462, 151 P 706 (1915). It is retained to prevent needless delay and the injection of collateral issues.

Subsection (3). This subsection is informed by the same policies that underlie subsection (2). It is settled case law that no "supporting" evidence of lack of bias or interest is admissible unless evidence of bias or interest has been offered. State v. Van Hooser, 10 Or App 642, 501 P2d 78 (1972); State v. Estlick, supra. Thus, if the state calls a witness who is in jail on another charge, on direct examination it may show both this fact and the fact that no promise of leniency has been made. But the two facts must be shown in that order.

Evidence of the truthfulness of the witness cannot be shown regardless of whether evidence of bias or interest is introduced. See ORE 608(1)(b). Under this subsection, evidence that is used to rehabilitate a witness must address itself to the nature of the impeaching evidence, i.e., it must only show lack of bias or interest. Sheppard v. Yocum and DeLashmutt, 10 Or 402 (1882); State v. Estlick, supra.

EVIDENCE CODE
Work Session
Text: April 2, 1981
Commentary: July 3, 1981

Oregon Rule of Evidence 610

SECTION 54[a]b. Rule 610. Religious beliefs or opinions. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the credibility of the witness is impaired or enhanced.

COMMENTARY

Oregon Rule of Evidence 610 prohibits the use of evidence of religious beliefs or opinions to impair or enhance the credibility of a witness. The substance of the rule is identical to Rule 610 of the Federal Rules of Evidence. It is also consistent with section 6 of Article I of the Oregon Constitution, relating to religious tests for witnesses and jurors.

The Legislative Assembly adopts the following commentary by the federal advisory committee:

> "While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that [the witness'] character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not

within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule. Cf. Tucker v. Reil, 51 Ariz 357, 77 P2d 203 (1938). To the same effect, though less specifically worded, is California Evidence Code §789. See 3 Wigmore §936."

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Oregon Rule of Evidence 611

SECTION 54[b]c. Rule 611. Mode and order of interrogation and presentation. (1) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth, avoid needless consumption of time and protect witnesses from harassment or undue embarrassment.

(2) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(3) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

COMMENTARY

Oregon Rule of Evidence 611 contains several guidelines on the manner of asking questions and presenting evidence. The trial court is to follow and enforce these in its discretion. The text is that of Rule 611 of the Federal Rules of Evidence. It replaces ORS 45.530 through 45.570, which are repealed. Adoption of the federal rule will give Oregon courts and attorneys the benefit of decisional law from other jurisdictions which have also adopted the rule. Particularly where state law is not changed, the benefit of these decisions outweighs whatever benefit there may be in the current statutory wording. The Legislative Assembly believes that with one possible exception, discussed below, this rule does not change Oregon law.

Subsection (1). Detailed rules to govern the mode and order of interrogating witnesses and presenting evidence are neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the trial judge. This subsection sets forth the objectives which the judge should seek to attain.

Subsection (2). The practice of limiting cross-examination to the scope of direct and matters affecting credibility promotes the orderly presentation of a case. Thus viewed, the rule is an aspect of the judge's general control over the mode and order of interrogating witnesses and presenting evidence, to be administered as such. The matter is not one in which involvement at the appellate level is likely to prove fruitful. The rule is therefore phrased in terms of a suggestion rather than a mandate to the trial judge.

The qualification "as if on direct examination," applicable when inquiry into additional matters is allowed, is designed to terminate at that point the asking of leading questions as a matter of right and to bring into operation subsection (3) of the rule.

Subsection (3). A leading question is one that suggests to the witness the answer that the examining party desires. ORS 45.560. This subsection continues the traditional view that the suggestive powers of the leading question are undesirable. The same tradition recognizes exceptions, however, for the witness who is hostile, unwilling, or biased; the witness with communication problems; the child witness; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore sections 774-778.

The use of leading questions on cross-examination is phrased as a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as, for example, the "cross-examination" of a party by the party's own counsel after being called by the opponent (savoring more of re-direct), or of an insured defendant who proves to be friendly to the plaintiff.

The one respect in which adoption of Rule 611 may change current law is the use of leading questions to interrogate adverse parties or witnesses on direct examination. In Sinclair v. Barker, 236 Or 599, 390 P2d 391 (1964), the court said: "The trial court took the position that when an adverse party is called as a witness he may be examined by leading questions as in cross-examination. The privilege is not quite

that broad. Leading questions may be allowed upon the direct examination of an adverse party if [the party] appears to be hostile to the examiner." 236 Or at 607. The rule in Oregon thus appears to have been that a witness must be both adverse and hostile before leading questions may be used on direct examination. Subsection (3) of Rule 611 permits leading questions to any adverse party or witness identified with an adverse party, regardless of hostility. To this extent, it overrules Sinclair v. Barker and changes Oregon law.

EVIDENCE CODE
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Text: April 2, 1981
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Oregon Rule of Evidence 612

SECTION 55. Rule 612. Writing used to refresh memory. If a witness uses a writing to refresh memory for the purpose of testifying, either while testifying[,] or before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing to inspect it, to cross-examine the witness thereon, and to introduce [in] into evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this section, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply[,] the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

COMMENTARY

Oregon Rule of Evidence 612 provides the opposing party with access to any writing used by a witness to refresh the witness' memory for the purpose of testifying. Except for its preamble, the rule is identical to Rule 612 of the Federal Rules of Evidence. It makes substantial changes in Oregon law as expressed in ORS 45.580 and 45.630. These statutes are repealed.

Use of writing. It is established trial procedure that during questioning, counsel may hand the witness a written memorandum to inspect which revives the memory and allows the witness to continue speaking. McCormick, Evidence, section 9 at 15 (2d Ed 1972). Until now, Oregon law has required that the memorandum have the same qualities as a record of past recollection, i.e., it must be written by the witness, or at the witness' direction, at or near the time of the event when the facts were still fresh in the witness' memory. ORS 45.580; see ORE 803(5). Rule 612 changes this. It makes no distinction as to the character of the writing used. In accordance with Wigmore and most present day courts, it allows any memorandum to be used without regard to authorship, time of recordation or accuracy, when the purpose is to revive memory.

The above change follows from the difference between a writing used to refresh memory and a record of past recollection. Unlike records of past recollection, writings used to refresh memory are not evidence, but merely aids in the giving of evidence. State v. Sutton, 253 Or 24, 450 P2d 748 (1969); Hall v. Brown. 102 Or 389, 202 P 719 (1921). The trier of fact does not see them. There is therefore no reason why they should meet the standards of reliabilty that are imposed on records of past

recollection, as Oregon courts have tacitly recognized. In recent years, ORS 45.580 has been more honored in the breach than in the observance. Compare Manchester Assur. Co. v. Oregon Ry. & Nav. Co., 46 Or 162, 79 P 60, (1905) (only writing made by witness can be used); Walling v. Van Pelt, 132 Or 243, 285 P 262 (1930) (map not a memorandum for purposes of statute); with Banks v. Community Church, 178 Or 1, 7, 165 P2d 65 (1946) (minute entries made by non-witness appropriate to refresh memory); Waterway Terminals Co. v. P.S. Lord Mechanical Contractors, 242 Or 1, 57, 406 P2d 556, 13 A.L.R. 3d 1 (1965) (suggesting ORS 45.580 applies only to memorandum used as record of past recollection, as "anything which will refresh the memory of a witness may be resorted to"); State v. Liston, 18 Or App 26, 523 P2d 609, SCt review denied (1974) (uncertified transcript of tape recording allowed to refresh memory).

Although the rule speaks of a "writing," the Legislative Assembly intends that its policies of permitted use and required disclosure apply to any material that refreshes the memory of a witness. The refreshing material may be a photograph, a recording or any other object. This expansion is only possible as a result of the rule's abandonment of the criteria in ORS 45.580.

A writing is "used" when counsel reads part of it to refresh the witness' memory, even if the witness does not see it. Waterway Terminals, supra, 242 Or at 61.

Access by opposing counsel. It is settled law that a writing which is used during testimony to refresh the witness' memory must be made available to opposing counsel at the hearing. ORS 45.580. Dispute

exists whether the rule should extend to writings that are used prior to testifying to refresh the memory. ORS 45.580 has not allowed this. Rule 612 would, if the court determines that access is necessary in the interests of justice. The change is appropriate, because a writing reviewed immediately before taking the stand can influence a witness as much as one used on the stand. The procedure provides a check on the improper coaching of witnesses and on testimony that is derived entirely from a writing rather than from the witness' independent recollection. Kirkpatrick, "Reforming Evidence Law in Oregon," in 59 Or L Rev 43, 95 (1980). Although ORCP 36 provides for court-ordered discovery in the interests of justice prior to trial, access at the hearing or trial, to writings used prior to trial, is not addressed and has been unavailable under ORS 45.580.

Any time a writing is produced, the opposing counsel may inspect it, cross-examine the witness upon it, and read it to the jury.

Protection. This rule makes accessible only writings that are used to refresh memory for the purpose of testifying. The phrase "for the purpose of testifying" provides a safeguard against wholesale exploration of an opponent's files, including the attorney's work product. Fed R Evid 612, Comment at 73. A party required to produce a writing may submit it to the court for examination in camera. The court will then excise the portions unrelated to the witness' testimony. If the adverse party objects to the withholding of any portion, that segment is to be preserved for appellate review. See generally, ORCP 36C and ORS 135.873, the latter providing for in camera review of disclosures in criminal cases subject to a protective order of the court.

Sanctions. The rule directs that if the prosecution in a criminal case does not produce a writing that is used to refresh a witness' memory and is ordered to be produced, the witness' testimony is to be stricken or a mistrial declared. The choice lies in the court's discretion. Cf. ORS 135.865 (sanctions for failing to comply with criminal discovery). In civil cases, when a party fails to produce a writing the court has available such remedies as contempt, dismissal and finding issues against the offender. Fed R Evid 612, Comment at 74. The Legislative Assembly intends that the trial court have full discretion in determining the sanction appropriate to the case.

EVIDENCE CODE
Work Session
Text: April 2, 1981
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Oregon Rule of Evidence 613

SECTION 55a. Rule 613. Foundation for impeachment by prior inconsistent statements. A witness may be impeached by evidence that the witness has made, at other times, statements inconsistent with the witness' present testimony; but before this can be done the statements must be related to the witness with the circumstances of times, places and persons present, and the witness shall be asked whether the witness made the statements, and if so, allowed to explain them. If the statements be in writing, they shall be shown to the witness before any before any question is put to the witness concerning them.

COMMENTARY

Oregon Rule of Evidence 613 sets forth the foundation that must be laid before a witness can be impeached by evidence of prior inconsistent statements. The rule recodifies ORS 45.610, which is repealed, with only minor changes in style. It applies to both oral and written statements.

The principal difference between this rule and Federal Rule 613 is the requirement that counsel show a written inconsistent statement to the witness before asking any question pertaining to the statement. This

custom entered the common law with the Queen's Case, 2 Br. & B. 284, 129 Eng Rep 976 (1820). No such requirement exists under Federal Rule 613.

EVIDENCE CODE
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Oregon Rule of Evidence 615

SECTION 56. Rule 615. Exclusion of witnesses. At the request of a party the court may order witnesses excluded until the time of final argument, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, [or] (2) an officer or employe of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

COMMENTARY

Oregon Rule of Evidence 615 provides guidelines for the exercise of the court's discretion in excluding witnesses.

The rule is a modified version of Federal Rule 615. Rather than provide that witnesses shall be excluded ". . . so that they cannot hear the testimony of other witnesses," the rule indicates that witnesses may be excluded ". . . until the time of final argument." The Legislative Assembly believes that the purpose of the rule is better served if witnesses who are excluded are kept from all phases of the trial at which

testimony might be discussed. Potentially, this includes voir dire, opening statements and offers of proof.

The rule is consistent with the holding of the Court of Appeals in State v. Bishop, 7 Or App 558, 492 P2d 509 (1972). Under that decision, when one party moves to exclude witnesses and the other party voices no objection, the motion should always be granted. When the motion is opposed the trial court must exercise its discretion, balancing the good cause shown by the objecting party against the policy favoring exclusion.

State v. Bishop, supra, was a criminal case. It is not clear whether Oregon courts would apply the rule of automatic exclusion of witnesses upon an unopposed motion in a civil trial. While recognizing that there is little reason for a distinction, the Legislative Assembly left the language of Rule 615 permissive on this question.

* * *

NOTE: The Legislative Assembly did not enact Federal Rule 614, which authorizes the trial judge to call and question witnesses. Although that rule is consistent with Oregon law, the Legislative Assembly was reluctant to appear to provide the court with an expanded role in the development of evidence. By not adopting Federal Rule 614, the Legislative Assembly does not intend to deny or limit the inherent power of a trial court to call and examine witnesses. Frangos v. Edmunds, 179 Or 577, 610, 173 P2d 596 (1946).

House Judiciary Committee
HB 2030, Exhibit CCC
July 6, 1981 - 1:30 p.m.
presented by staff
(1-page exhibit)

Oregon Criminal Defense
Lawyer's Association

July 2, 1981

PROPOSED CHANGE IN COMMENTARY TO ORE 702

The Advisory Committee adopts the commentary of the federal advisory committee, FED. R. EVID. 702, Advisory Committee's note, p. 79, with one point of clarification. The Oregon Rules of Evidence leave for judicial determination the controversy over the standard to be used in determining the admissibility of novel scientific evidence. The Oregon Court of Appeals recently adopted the reasonable reliability test in State v. Kersting, 50 Or App 461 (1981), and the Oregon Supreme Court has accepted review. Other jurisdictions have formulated a number of different standards. The Legislature expresses no view on this question, except to say that polygraph examinations are not admissible, unless by stipulation, under any standard adopted by the Oregon appellate courts.

/tp

House Judiciary Committee
Exhibit DDD, HB 2030
July 6, 1981 - 1:30 p.m.
28-page exhibit
presented by staff

ARTICLE III

EVIDENCE CODE
Work Session
Text: April 23, 1981
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Oregon Rule of Evidence 305

SECTION 14. Rule 305. Allocation of the burden of persuasion. A party has the burden of persuasion as to each fact the existence or nonexistence of which the law declares essential to the claim for relief or defense the party is asserting.

COMMENTARY

Oregon Rule of Evidence 305 is closely modeled on California Evidence Code section 500. There is no comparable federal rule. Article III begins with this rule to avoid parallel numbering to the Federal Rules of Evidence.

As used in the rule, "burden of persuasion" means the obligation of a party to produce a particular conviction in the mind of the trier of fact as to the existence or nonexistence of a fact. If the requisite degree of conviction is not achieved, the trier of fact must assume that the fact does not exist. Morgan, Basic Problems of Evidence 19 (1957); 9 Wigmore, Evidence, section 2485 (3d ed 1940); California Evidence Code, section 500, Comment at 1079 (West 1965).

The degree of conviction required by the burden of persuasion (sometimes called the "standard of proof") varies according to the matter. In civil cases, the trier of fact usually must be convinced that the existence of a particular fact is more probable than its nonexistence. This is described as proof by a "preponderance of the evidence." However, in some instances a party is required to produce a substantially greater degree of belief. In actions that allege fraud or gift, for example, the trier of fact must be persuaded by "clear and convincing evidence," which means that the truth of the facts asserted must be highly probable. Cook v. Michael, 214 Or 513, 330 P2d 1026 (1958). Finally, in criminal cases, the prosecution must persuade the trier of fact of the existence of the essential facts "beyond a reasonable doubt."

Rule 305 indicates that the burden of persuasion as to a particular fact rests on the party to whose case the fact is essential. It should be noted that the rule does not attempt to indicate what facts are essential to any particular claim for relief or defense. The elements of a prima facie case or defense are determined by substantive law, not by the law of evidence.

Where the substantive law does not dictate which party has the burden of persuasion on an issue, the court should consider the following factors in making the allocation: (1) access to the evidence; (2) fairness to the litigants; (3) special policy considerations, such as those disfavoring certain defenses; and (4) probability of the existence or nonexistence of the fact. 9 Wigmore, Evidence, section 2486 at 275 (3d ed 1940); McCormick, Evidence, section 337 at 785-88 (2d ed 1972).

In allocating the burden of persuasion to the party to whose case a fact is essential, Rule 305 departs from ORS 41.210 and 41.240. These statutes--which are repealed--allocate the burden of persuasion according to whether the allegations in the pleadings are in affirmative or negative form. This approach has been criticized as establishing a meaningless standard:

> That the burden is on the party having the affirmative (or) that a party is not required to prove a negative . . . is no more than a play on words since practically any proposition may be stated in either affirmative or negative form. Thus, a plaintiff's exercise of ordinary care equals absence of contributory negligence in the minority of jurisdictions which place this element in plaintiff's case. In any event, the proposition seems simply not to be so. Cleary, "Presuming and Pleading: An Essay on Juristic Immaturity," in 12 Stan L Rev 5, 11 (1959).

ORS 41.210 has been literally applied on occasion. See First Nat'l Bank v. Malady, 242 Or 353, 408 P2d 724 (1965) (insurance company bringing declaratory judgment action to test coverage held to have burden of proof, although insured would have burden in action on policy). At other times, Oregon courts have refused to follow the strict language of the statute and have allocated the burden of persuasion on the basis of access to proof, probabilities and policy considerations. See Secretary of State v. Hanover Ins. Co., 242 Or 541, 411 P2d 89 (1966); Carpenter v. Carpenter, 153 Or 584, 57 P2d 1098 (1936); Hauns v. Hauns, 246 Or 282, 423 P2d 499 (1967). To the latter extent, Rule 305 does not depart substantially from existing law.

The burden of persuasion is but one of two "burdens of proof" found in the law of evidence. The other is the burden of producing evidence discussed in Rule 307. A party that has the burden of persuasion must persuade the trier of fact that an alleged fact is true. Logically prior to this, however, the same party has the burden of producing sufficient evidence for the court to find that the trier of fact would be reasonable in so finding. To carry the burden of persuasion, a party must have already satisfied the burden of producing evidence; the converse proposition is not true.

EVIDENCE CODE
Work Session
Text: April 23, 1981
Commentary: May 4, 1981

Oregon Rule of Evidence 306

SECTION 15. Rule 306. Instructions on the burden of persuasion. The court shall instruct the jury as to which party bears the applicable burden of persuasion on each issue after all of the evidence in the case has been received.

COMMENTARY

Oregon Rule of Evidence 306 is original. It is a corollary of the Morgan approach to presumptions adopted in Rule 308.

The rule recognizes that the burden of persuasion is not immutably fixed at the commencement of an action. In most cases the burden will remain on the party to whose claim for relief or defense a fact is essential. In some cases, however, the operation of a presumption may shift the burden of persuasion to the opposing party.

Because the basic facts giving rise to a presumption must be established by the evidence in the case, the burden of persuasion should not be finally assigned until the case is ready to go to the jury. McCormick, Evidence , section 345 at 827 (2d ed 1972). This accords with present practice.

Rule 306 is not intended to prevent attorneys from commenting on the burden of persuasion during voir dire or their opening or closing remarks, nor is it meant to preclude trial judges from making preliminary statements as to the burden of persuasion.

After the burden of persuasion is assigned, the court shall instruct the jury as to the degree of conviction necessary to satisfy the burden: proof by preponderance of the evidence, proof by clear and convincing evidence, or proof beyond a reasonable doubt. See Cook v. Michael, 214 Or 513, 330 P2d 1026 (1958).

EVIDENCE CODE
Work Session
Text: April 23, 1981
Commentary: May 4, 1981

Oregon Rule of Evidence 307

SECTION 16. Rule 307. Allocation of the burden of producing evidence. (1) The burden of producing evidence as to a particular issue is on the party against whom a finding on the issue would be required in the absence of further evidence.

(2) The burden of producing evidence as to a particular issue is initially on the party with the burden of persuasion as to that issue.

COMMENTARY

Oregon Rule of Evidence 307 defines and allocates the burden of producing evidence. The rule is a slightly modified version of California Evidence Code, section 550.

The "burden of producing evidence" on an issue means the liability to an adverse ruling if further evidence on the issue is not produced. The adverse ruling may be a finding or a directed verdict. It is always by the court. In a jury trial, the burden of producing evidence empowers the judge to decide the case without jury consideration. A party is subject to such an adverse decision on a question of fact if a reasonable person could not find in its

favor on the question. Once it has produced that quantum of favorable evidence, the burden of producing evidence is satisfied, and the party will survive a motion for a nonsuit or directed verdict. See McCormick, Evidence, section 338 at 789-91 (2d ed 1972); California Evidence Code, section 550, Comment at 1083 (West 1965).

At the outset of a case, the burden of producing evidence is on the party with the burden of persuasion. Upon that party's discharge of the burden of producing evidence, the burden will lift from it. The burden of producing evidence will shift to the adverse party if, and only if, the initial party has produced such favorable evidence on the issue that it would be entitled to a finding as a matter of law. See McCormick, Evidence, section 338 at 791-93 (2d ed 1972).

Rule 307 is in accord with existing Oregon law. ORS 41.210 provides that the "burden of proof" lies on the party who would be defeated if no evidence were given on either side. Similarly, Oregon courts have held that the party having the burden of producing evidence must produce substantial evidence to avoid a nonsuit or directed verdict. Larson v. Hansen, 223 Or 533, 355 P2d 235 (1960); Fish v. Southern Pacific Co., 173 Or 294, 143 P2d 917 (1943).

EVIDENCE CODE
Work Session
Text: March 12, 1981
Commentary: July 3, 1981

Oregon Rule of Evidence 308

SECTION 17. Rule 308. Presumptions in civil proceedings. In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

COMMENTARY

Oregon Rule of Evidence 308 outlines the effect of a presumption in a civil action. The rule is based upon of Federal Rule 301 as prescribed by the United States Supreme Court in October 1972. It represents a major change in Oregon law.

Under ORE 308, once a party invoking a presumption establishes the basic facts giving rise to it, the burden of establishing the nonexistence of the presumed fact shifts to the opposing party. Morgan, Basic Problems of Evidence (1962). Plaintiff, for example, may raise the presumption that a letter duly addressed and mailed was received in the regular course of the mail. See Rule 311(1)(h). The judge in such a case would determine whether the evidence is sufficient to support a finding of the existence of the basic facts: that the letter was properly addressed, that it was mailed, and that it

was not returned. If so, the judge would instruct the jury that if they find the basic facts to be true, then the burden is on defendant to prove by a preponderance of the evidence that the letter was not received. The jury should never hear the word "presumption" during this instruction.

The constitutionality of imposing the burden of persuasion on the party against whom a presumption operates was settled in Dick v. New York Life Ins. Co., 359 US 437, 79 SCt 921, 3 LEd 2d 935 (1959). In that case, an action under an accidental death clause, the Supreme Court ruled without reservation that the North Dakota presumption of accidental death imposes on a defendant insurer the burden of proving that the death of an insured was due to suicide.

The Legislative Assembly rejected the so-called "bursting bubble" theory under which a presumption vanishes on the introduction of evidence contrary to the presumed fact, even though the evidence may not be credible. Thayer, Preliminary Treatise on Evidence (1968). This approach gives presumptions too slight and evanescent an effect. Morgan and Maguire, "Looking Backward and Forward at Evidence," in 50 Harv L Rev 909 (1937).

The Legislative Assembly also rejected a middle approach to presumptions represented by current Oregon practice. Under Oregon law, a presumption does not disappear from the case when contradictory evidence is introduced, nor does it shift the burden of persuasion to the adversary. Rather, the jury is instructed that a presumption is like any other evidential fact, and its existence does not endow the facts upon which it is based with any special value for evidential purposes. The jury is further instructed to weigh the evidence as a whole, including the presumption, and if its mind is equally divided on the issue, to decide against the party upon whom the burden of

persuasion rests. U.S. National Bank v. Underwriters at Lloyds, 239 Or 298, 396 P2d 765 (1964).

The Legislative Assembly decided to change the practice on presumptions for several reasons. First, it is extremely difficult to phrase a jury instruction without conveying the impression that the presumption itself is evidence. The latter doctrine has long been discredited. See, e.g., McCormick, Evidence, section 345 at 825 n 60 (2d ed 1972); Wycoff v. Mut. Life Ins. Co., 173 Or 592, 147 P2d 227 (1944). Second, under Oregon's approach to presumptions, the jury must weigh the force of the legal conclusion mandated by the presumption against the testimony of witnesses and other direct evidence. That is a difficult or impossible task. Finally, considerations of fairness, policy and probability, which allocate the burden of persuasion on the plaintiff's prima facie case and the defendant's affirmative defenses, also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. Cleary, "Presuming and Pleading: An Essay on Juristic Immaturity," in 12 Stan L Rev 4 (1959).

The approach set forth in this rule is simple and workable, and gives due consideration to the policies behind the creation of presumptions. All presumptions, whether legislatively or judicially created, must be treated in the manner prescribed by this section.

EVIDENCE CODE
Work Session
Text: July 2, 1981
Commentary: July 3, 1981

Oregon Rule of Evidence 309

SECTION 18. Rule 309. Presumptions in criminal proceedings. (1) The judge is not authorized to direct the jury to find a presumed fact against the accused.

(2) When the presumed fact establishes guilt or is an element of the offense or negates a defense, the judge may submit the question of guilt or the existence of the presumed fact to the jury only if:

(a) A reasonable juror on the evidence as a whole could find that the [basic] facts giving rise to the presumed fact have been established beyond a reasonable doubt; and

(b) The presumed [facts follow] fact follows more likely than not from the [basic] facts giving rise to the presumed fact [beyond a reasonable doubt].

COMMENTARY

Oregon Rule of Evidence 309 states the effect of presumptions in criminal proceedings. The rule is a modification of Federal Rule 303, which was recommended by the United States Supreme Court in October 1972 but deleted by

the Congress in enacting the Federal Rules of Evidence. Federal Rule 303 was based upon A.L.I. Model Penal Code section 1.12(5) P.U.D. (1962) and United States v. Gainey, 380 US 63 (1965).

Rule 309 indicates that a presumption may not be used against an accused to remove any matter in a criminal proceeding from final determination by the jury. Such an action would violate the axiom that a verdict cannot be directed against the accused, 9 Wigmore, Evidence, section 2495 at 312 (3d ed 1940), or its corollary that a judge is without authority to direct a finding against the accused as to any element of a crime, A.L.I. Model Penal Code, section 1.12(1) P.U.D. (1962). Were it not for the rule, the existence of an adverse presumption might compel a defendant to introduce rebuttal evidence, including the defendant's testimony, and thus force a waiver of the constitutional right to remain silent. McCormick, Evidence, section 344 at 819 (2d ed 1972).

The net effect of this rule is to reduce presumptions in criminal cases to nothing more than permissible inferences when they are used against the accused. For example, the prosecution in a controlled substances case may wish to use the presumption of knowledge of illegal importation from the fact of possession of heroin. In this circumstance, the judge first must determine as a matter of law that guilty knowledge follows from possession beyond a reasonable doubt. If so, the judge instructs the jury that if they find beyond a reasonable doubt that the defendant was in possession of the heroin, then they are permitted, but not required, to find that the defendant knew of the illegal importation of the drug.

Rule 309 modifies the evidential effect of a presumption only when it is used against an accused. When used on behalf of the criminal defendant, a presumption continues to impose on the prosecution the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Because the operation of presumptions may infringe upon the rights of the accused, the United State Supreme Court has carefully limited their effect through a series of criminal decisions. In Tot v. United States, 319 US 463, 63 SCT 1241, 87 LEd 1519 (1943), the court held that a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the fact to be presumed. Compare United States v. Gainey, 380 US 63, 85 SCt 754, 13 LEd 2d 658 (1965) (rational connection exists between proved fact of unexplained presence at still site and presumed fact of carrying on illegal distilling business), with United States v. Romano, 382 US 136, 86 SCt 279, 15 LED 2d 210 (1965) (unexplained presence does not, however, support reasonable inference about defendant's specific function in connection with distilling operation).

In Leary v. United States, 395 US 6, 89 SCt 1532, 23 LEd 2d 57 (1969), the Supreme Court revealed that a stricter test than mere "rational connection" must be met. There the court held that a presumption establishing an element of an offense is constitutional only if the presumed fact is more likely than not to flow from the basic facts. The court struck down, on this ground, a rule that possession of marijuana presumes guilty knowledge of its illegal importation. Although most marijuana is imported, the court concluded that it would be pure speculation to say that a majority of possessors know the source of their marijuana. See also Turner v. United States, 396 US 298, 90 SCt 642, 24 LEd 2d 610, rehearing denied, 397 US 958, 90 SCt 929, 25 LEd 2d 144 (1970),

involving the same presumption but different drugs. After an extensive review of the evidence, the Turner court upheld the presumption as to heroin because all heroin consumed in the United States is illegally imported; it struck down the presumption as to cocaine, because a reasonable possibility exists that the purchase has been legal.

In Barnes v. United States, 412 US 837, 93 SCt 2357, 37 LEd 2d 380 (1973), the Supreme Court indicated that a presumption that follows from basic facts beyond a reasonable doubt is sufficient to pass the test of due process. This decision exposed the final question, whether such a connection is also constitutionally necessary. In Ulster County Court v. Allen, 442 US 140, 99 SCt 2213, 60 LEd 2d 77 (1981), the Supreme Court ruled that it is not, except in one circumstance: "As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the [more-probable-than-not] test described in Leary." 442 US at 167.

The Legislative Assembly sought to avoid any conflict with the defendant's constitutional rights, but not unnecessarily to hinder the prosecution of criminal cases, e.g., first degree robbery, in which the fact that the gun was loaded very often must be inferred from the fact of its display. Therefore, Rule 309 provides that the presumed fact must follow more likely than not from the basic facts. It also provides that the judge may not submit the existence of the presumed fact to the jury unless a reasonable juror on the evidence as a whole could find that the basic facts have been established beyond a reasonable doubt.

Perhaps because of the delay in articulating federal constitutional principles governing the effect of presumptions in criminal cases, Oregon law

on point is in a formative state. Following the reasoning in Tot v. United States, supra, the Oregon Court of Appeals impliedly ruled that a jury may infer an element establishing a prima facie case if there is rational connection between the presumption and the facts upon which it is based. State v. Offord, 14 Or App 195, 512 P2d 1375 (1973). Although the court cited Leary v. United States and Turner v. United States, supra, it did not apply either the "more likely than not" or the "reasonable doubt" standard. See also State v. Bartolon, 8 Or App 538, 495 P2d 772 (1972). ORE 309 is intended to culminate developments at both the state and federal level.

EVIDENCE CODE
Work Session
Text: March 12, 1981
Commentary: May 5, 1981

Oregon Rule of Evidence 310

SECTION 19. Rule 310. Conflicting presumptions. If presumptions are conflicting, the presumption applies that is founded upon weightier considerations of policy and logic. If considerations of policy and logic are of equal weight, neither presumption applies.

COMMENTARY

Oregon Rule of Evidence 310 is patterned after Uniform Rule 301(b) (Final Draft, August 1974). It sets forth the rule to be followed when one issue in a case generates two or more presumptions that conflict with each other.

Thayer's solution to the problem would be to disregard conflicting presumptions and give them no effect. The facts upon which the presumptions are based would be considered as evidence, along with all other relevant facts. This is a practical solution when all presumptions are based upon probability, or upon procedural convenience. However, a presumption may also rest on logic or social policy. McCormick, Evidence, section 345 at 823 (2d ed 1972). Under Thayer, when one presumption is based on procedural convenience and a conflicting presumption is based on social policy, both must

be disregarded. Doing this eliminates the procedural convenience of one presumption and denies expression to the social policy behind the other. "A weighing of the reasons underlying the particular presumptions in question will lead to a rational solution of any conflict; an inflexible rule that every presumption vanishes upon the introduction of evidence of a fixed kind and quantity will often produce an irrational solution." Morgan, "Some Observations Concerning Presumption," in 44 Harv L Rev 906, 932, n 41 (1931).

The effect of conflicting presumptions under Oregon law is not altogether clear. Early cases have held that conflicting presumptions balance and cancel each other. State ex rel. Olcott, 67 Or 214, 135 P 95 (1913); McVay v. Byars, 171 Or 449, 138 P2d (1943). However, there is also support for the rule that the judge should apply the presumption resting on weightier considerations of policy and logic. State v. Wakefield, 11 Or 615, 218 P 115 (1924); Smith v. Smith, 169 Or 659, 131 P2d 447 (1942). More recently, the Oregon Supreme Court considered a conflict between two presumptions based on probabilities. Dicillo v. Osborn, 204 Or 171, 282 P2d 611 (1955). The court noted that, unlike presumptions of marriage and legitimacy, probability-based presumptions are not concerned with any social policy, and therefore held as a matter of law that there is no way to tell which presumption is stronger. Application of ORE 310 would have yielded the same result.

EVIDENCE CODE
Work Session
Text: March 12, 1981
Commentary: July 3, 1981

Oregon Rule of Evidence 311

SECTION 20. Rule 311. Presumptions. (1) The following are presumptions:

[(1) A person is innocent of a crime or wrong.]

[(2)] (a) A person intends the ordinary consequences of a voluntary act.

[(3)] (b) A person takes ordinary care of the person's own concerns.

[(4)] (c) Evidence wilfully suppressed would be adverse to the party suppressing it.

[(5)] (d) Money paid by one to another was due to the latter.

[(6)] (e) A thing delivered by one to another belonged to the latter.

[(7)] (f) An obligation delivered to the debtor has been paid.

[(8)] (g) A person is the owner of property from exercising acts of ownership over it or from common reputation of the ownership of the person.

[(9)] (h) A person in possession of an order on that person, for the payment of money or the delivery of a thing, has paid the money or delivered the thing accordingly.

[(10)] (i) A person acting in a public office was regularly appointed to it.

[(11)] (j) Official duty has been regularly performed.

[(12)] (k) A court, or judge acting as such, whether in this state or any other state or country, was acting in the lawful exercise of the jurisidiction of the court.

[(13)] (L) Private transactions have been fair and regular.

[(14)] (m) The ordinary course of business has been followed.

[(15)] (n) A promissory note or bill of exchange was given or indorsed for a sufficient consideration.

[(16)] (o) An indorsement of a negotiable promissory note, or bill of exchange, was made at the time and place of making the note or bill.

[(17)] (p) A writing is truly dated.

[(18)] (q) A letter duly directed and mailed was received in the regular couse of the mail.

[(19)] (r) [Identity of person from identity of name.] A person is the same person if the name is identical.

[(20)] (s) A person not heard from in seven years is dead.

[(21)] (t) Persons acting as copartners have entered into a contract of copartnership.

[(22)] (u) A man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.

[(23)] (v) A child born in lawful wedlock is legitimate.

[(24)] (w) A thing once proved to exist continues as long as is usual with things of that nature.

[(25)] (x) The law has been obeyed.

[(26)] (y) An uninterrupted adverse possession of real property for 20 years or more has been held pursuant to a written conveyance.

[(27)] (z) A trustee or other person whose duty it was to convey real property to a particular person has actually conveyed it to the person, when such presumption is necessary to perfect the title of the person or the person's successor in interest.

(2) A statute providing that a fact or a group of facts is prima facie evidence of another fact establishes a presumption within the meaning of this rule.

COMMENTARY

Oregon Rule of Evidence 311 contains a partial list of statutory presumptions. The rule has no federal analogue. It is based on ORS 41.360, which is repealed, and incorporates the majority of presumptions codified under that section. The presumptions repealed and recodified and the reasons therefor are listed below.

The effect of the presumptions listed in this rule will be different in civil and criminal cases. See ORE 308 and 309. Their inclusion is not meant to suggest that any will necessarily pass constitutional muster in a criminal case if used as the sole evidence on a question of fact, i.e., the Legislative Assembly has made no determination that the presumed facts flow from the basic facts beyond a reasonable doubt.

The enumeration of presumptions in this rule does not impair the integrity of judicially created presumptions; nor does it affect the power of the courts to create new presumptions in the future.

Subsection (1). The presumptions in this subsection replace two sets of propositions that were listed as "presumptions" under prior statutes. ORS 41.350, 41.360.

Conclusive presumptions. Subsection (1) does not preserve any of the "conclusive presumptions" found in ORS 41.350. Conclusive presumptions are not true presumptions. When the basic fact giving rise to a conclusive presumption is established, the presumed fact must be taken as true and the adversary is not allowed to dispute the presumed fact. As McCormick points out, ". . . the courts are not stating a presumption at all, but are simply expressing a rule of law . . ." McCormick, Evidence, section 342 at 802 (2d ed 1972). ORS 41.350 is repealed. Only a few of its provisions are recodified.

Under ORS 41.350(1), intent to murder was conclusively presumed from the deliberate use of a deadly weapon which causes death within a year. ORS 41.3650(2) created a conclusive presumption of malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another. Both rules were repealed as the Oregon Supreme Court has held that they cannot be constitutionally applied against a defendant in a criminal case. State v. Elliott, 235 Or 522, 383 P2d 382 (1963).

ORS 41.350(3) was recodified under ORS chapter 42, relating to execution, formalities and interpretation of writings.

ORS 41.350(4) stated that whenever a party has, by declaration, act or omission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, the party shall not, in any litigation arising out of such declaration, act or omission, be permitted to falsify it. This was repealed because it merely repeats the judicially established principle of estoppel in pais, or equitable estoppel. Second Northwestern Finance Corp. v. Mansfield, 121 Or 235, 252 P 400 (1927). By its repeal, the

Legislative Assembly does not intend to affect the law of estoppel as expressed in Earls v. Clarke, 223 Or 527, 355 P2d 213 (1960) and Bennett v. City of Salem, 192 Or 531, 235 P2d 772 (1951).

ORS 41.350(5) was recodified under ORS chapter 91, relating to landlord and tenant.

Under ORS 41.350(6), the issue of a wife cohabiting with her husband who was not impotent or sterile at the time of conception of the child was conclusively presumed to be legitimate. This rule duplicated ORS 109.070(1) and therefore was repealed.

ORS 41.350(7) conclusively presumed the judgment, decree or order of a court when statute declared the same to be conclusive. It provided further that the judgment, decree or order shall be pleaded if there is an opportunity to do so, but if there is no such opportunity then it may be used as evidence with like effect. The first thought is a truism, while the second is addressed in ORCP 20B and ORS 43.110 through 43.220. The subsection was therefore repealed.

ORS 41.350(8) conclusively presumed any other presumption which by statute was expressly made conclusive. This was repealed as a tautology.

Permissive presumptions. Rule 311 retains all of the "permissive presumptions" in ORS 41.360 with the exception of those created by subsections (1), (2), (6), (10), (11), (17), (18), (27), (28), (34), (35), (36) and (39) of that section.

ORS 41.360(1), the presumption of innocence, is not a true rebuttable presumption because there is no presumed fact following from a basic fact. This "presumption" is merely a way of emphasizing to the jury the prosecutor's burden of persuasion. While an instruction on the innocence of the defendant should certainly be given, it has no place in a list of rebuttable presumptions. The provision was recodified in ORS 17.250, which lists instructions that are to be given by the court "on all proper occasions."

The presumption that an unlawful act is done with unlawful intent, ORS 41.360(2), was deleted as it was held to be unconstitutional as applied against a defendant in a criminal case. State v. Bartolon, 8 Or App 538, 495 P2d 772 (1972). The Legislative Assembly believes that it also should not be applied in civil cases. A party should not be able to shift the burden of persuasion to the opposing party on the issue of intent, merely by establishing that an unlawful act has occurred. See ORE 308.

ORS 41.360(6) created the presumption that higher evidence would be adverse from the fact that inferior evidence has been produced. This provision is unnecessary in view of ORS 17.250(7), and was therefore deleted.

ORS 41.360(10), creating the presumption that "former rent or instalments of a debt have been paid when a receipt for latter is produced," was deleted for several reasons. First, it is nearly unintelligible. Second, it can be misinterpreted to mean that all prior payments are presumed to have been made. Third, any person who holds a receipt for payment of rent or an instalment of a debt has no need for the presumption.

ORS 41.360(11), it was presumed that things in the possession of a person are owned by that person. This presumption was deleted because the inference of ownership based on possession is not strong enough to warrant treatment as a presumption. In addition, the burden of persuasion usually is already allocated to the party disputing the claim that the person possessing things owns them.

ORS 41.360(17) was deleted as a potentially inaccurate statement of existing law, particularly in criminal cases. This subsection created the presumption that a judicial record, when not conclusive, still correctly determines or sets forth the rights of the parties.

Also deleted was ORS 41.360(18), the presumption that all matters within an issue were submitted to the jury and passed upon by them. This is an unnecessary provision: res judicata and collateral estoppel operate to establish conclusively the issues on which a judgment rests.

The Legislative Assembly agrees with the revisers of the California Evidence Code in repealing the presumption that acquiescence follows from a belief that the thing acquiesced in is conformable to the right or fact. ORS 41.360(27). "Although it may be appropriate under some circumstances to infer from the lack of protest that a person believes in the truth of a statement made in his presence, it is undesirable to require such a conclusion. The surrounding circumstances may vary greatly from case to case, and the trier of fact should be free to decide whether acquiescence resulted from belief or some other cause." 6 California Law Revision Commission, Reports, Recommendations and Studies, Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence, at 1042-43 (June 1964).

Finally, ORS 41.360(28) was deleted because it was over-broad and might be misapplied. It created the presumption that things happen according to the ordinary course of nature and the ordinary habits of life. Any benefit derived from relying on this presumption may be obtained by requesting the court judicially to notice facts that describe the ordinary course of nature of the ordinary habits of life, when these are matters of common knowledge.

Subsections (34), (35) and (36) of ORS 41.360 have been recodified in Article IX of Oregon Evidence Code, relating to authentication and identification.

ORS 41.360(39) has been rewritten and placed in the Uniform Commercial Code, as one of the badges of fraud. ORS 72.4020(2).

Notwithstanding the above, subsection (1) of Rule 311 does include four statements carried over from ORS 41.360 which are not presumptions in the technical sense of the word, because there are no basic facts giving rise to the presumed fact. These "presumptions" are found in paragraphs (a), (b), (L) and (w). The Legislative Assembly believes these are sufficiently important to include in the evidence code despite this characteristic.

Subsection (2). A number of other statutes provide that certain facts give rise to a "disputable presumption," or are "prima facie" or "primary" evidence of other facts. See, e.g., ORS 30.910 (product not unreasonably dangerous for its inteded use), ORS 73.3070 (signature on negotiable instrument genuine), ORS 377.635 (junk near junkyard placed there by owner or operator), and ORS 656.802 (respiratory ailment of fireman employed for 5 or more years result of employment). Subsection (2) makes it clear that these provisions also create

rebuttable presumptions within the meaning of the rule, and are therefore subject to Article III of the Oregon Evidence Code.

House Judiciary Committee
Exhibit EEE, HB 2030
July 6, 1981 - 1:30 p.m.
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ARTICLE V

EVIDENCE CODE
Work Session
Text: March 12, 1981
Commentary: July 2, 1981

Oregon Rule of Evidence 503

SECTION 32. Rule 503. Lawyer-client privilege. (1) Definitions. As used in this section, unless the context requires otherwise:

(a) "Client" means a person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(b) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(d) "Representative of the client" means a person who has authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client.

(e) "Representative of the lawyer" means one employed to assist the lawyer in the rendition of professional legal services, but does not include a physician making a physical or mental examination under ORCP 44.

(2) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(a) Between the client or the client's representative and the client's lawyer or a respresentative of the lawyer;

(b) Between the client's lawyer and the lawyer's representative;

(c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;

(d) Between representatives of the client or between the client and a representative of the client; or

(e) Between lawyers representing the client.

(3) Who may claim the privilege. The privilege created by this section may be claimed by the client, a guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's

representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(4) Exceptions. There is no privilege under this section:

(a) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(b) As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(c) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

COMMENTARY

Oregon Rule of Evidence 503 states the rule of privilege for confidential communications between lawyer and client. The rule is based on proposed Rule

503 of the Federal Rules of Evidence, which was prescribed by the United States Supreme Court and submitted to Congress but not enacted. Aside from minor changes made to conform this rule to the form and style of Oregon statutes, there are two major differences between it and proposed Federal Rule 503. The Oregon rule contains a definition of "representative of the client," which the federal rule does not, and it specifically excludes a physician making a physical or mental examination under ORCP 44 from the definition of "representative of the lawyer."

The rule arguably does not change Oregon law, but its coverage extends to areas in which current law is silent or unclear. See ORS 44.040 (1)(b), which is repealed.

Subsection (1). Paragraph (a). The definition of "client" includes governmental bodies and corporations--issues on which existing Oregon law is silent. The definition also extends the status of client to one consulting a lawyer with a view to retaining the lawyer, even though actual employment does not result. McCormick, Evidence, section 88 (2d ed 1972); McNamee v. First National Bank, 88 Or 636, 72 P 801 (1918). The client need not be involved in litigation; the rendition of legal service or advice under any circumstances suffices. 8 Wigmore, Evidence, section 2294 (McNaughton rev 1961); Bryant v. Dukehart, 106 Or 359, 210 P 454 (1922). The services must be professional legal services. Purely business or personal matters do not qualify. McCormick, Evidence, section 88 (2d ed 1972); Sitton v. Peyree, 117 Or 107, 241 P 62, 242 P 1112 (1926); Booker v. Brown, 173 Or 464, 146 P2d 71 (1944).

Paragraph (b). A confidential communication is defined in terms of intent. Intent is to be inferred from the circumstances, e.g., taking or failing to take precautions. A communication made in public or meant to be relayed to outsiders or which is divulged to third persons by the client or by the lawyer at the direction of the client can scarcely be considered confidential. McCormick, Evidence, section 91 (2d ed 1972); Leathers v. United states, 250 F2d 159 (9th Cir 1957) (no privilege for communication knowingly made by client in presence and hearing of third person); Baum v. Denn, 187 Or 401, 211 P2d 478 (1949) (no privilege for attorney's negotiation with third party made at client's direction). Unless an intent to disclose is apparent, however, the attorney-client communication is confidential. Bryant v. Dukehart, supra (letter from client to attorney offered by opposing party, held privileged regardless of how communication came into possession of party seeking to use it).

The rule allows some disclosure beyond the immediate circle of lawyer and client and their representatives without impairing confidentiality,as a practical matter. It permits disclosure to persons "to whom disclosure is in furtherance of the rendition of professional legal services to the client," comptemplating that these will include a "spouse, parent, business associate, or joint client." Comment, California Evidence Code, section 952. It also allows disclosure to persons "reasonably necessary for the transmission of the communication" without loss of confidentiality.

Paragraph (c). A "lawyer" is a person licensed to practice law in any state or nation. There is no requirement that the attorney be in private practice. State v. Ayer, 122 Or 537, 259 P 427 (1927). There is also no

requirement that the licensing state or nation recognize the attorney-client privilege, thus avoiding an excursion into conflict of laws. "Lawyer" also includes a person reasonably believed to be a lawyer--an issue that has not confronted the Oregon appellate courts. For similar provisions, see California Evidence Code, section 950.

Paragraph (d). Unlike proposed Federal Rule 503, this rule contains a definition of "representative of the client." The Legislative Assembly agrees here with the comment to Rule 503(a)(2) of the Alaska Rules of Evidence (May 1979):

> "The Proposed Federal Rules of Evidence as submitted to Congress by the United States Supreme Court did not contain a definition of 'representative of the client.' Because of uncertainty about the extent of the privilege to be granted to corporate clients, the Advisory Committee came out in favor of a case-by-case analysis. This approach is rejected here. 'An ad hoc approach to privilege pursuant to a vague standard achieves the worst of possible worlds: harm in the particular case because information may be concealed; and a lack of compensating long-range benefit because persisting uncertainty about the availability of the privilege will discourage some communications.' Note, 'Attorney-Client Privilege for Corporate Clients: The Control Group Test,' in 84 Harv L Rev 424, 426 (1970)."

In determining whether an individual in the corporate context is a representative of the client, the Legislative Assembly specifically adopts the "control group" test, which limits the category to persons with authority to

seek out and act upon legal advice for the client. See, e.g., City of Philadelphia v. Westinghouse Electric Corp., 210 F Supp 483 (ED Pa 1962), mandamus and prohibition denied sub nom, General Electric Co. v. Kirkpatrick, 312 F2d 742 (3d Cir ___), cert denied, 372 US 943 ( ); Garrison v. General Motors Corp., 213 F Supp 515 (SD Cal 1963).

Under the control group test, the attorney-client privilege attaches only when the corporate employe is in a position to control or have substantial effect on a decision about any action which the corporation may take upon the advice of an attorney. This group includes, and may be limited to, the director and executive officers of the corporation. Recent case law elsewhere would extend the privilege to a broader range of personnel. Upjohn Co. v. United States, 49 US Law Week 4093 (January 13,1981) (responses of foreign managers to questionnaire sent out as part of internal investigation conducted by general counsel of corporation, concerning matters within scope of employes' duties and for purpose of giving legal advice to upper-echelon management, held privileged under federal common law). However, the Legislative Assembly concurs with the further commentary to the Alaska Rules of Evidence:

> "No definition of 'representative of the client' will be perfect, but the best approach to corporate privilege developed to date is the 'control group' test as adopted in Alaska Rule 503(a)(2). See City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp 483, 485 (ED Pa 1962). The 'control group' test is admittedly restrictive and has been criticized by some courts. See, e.g., Harper & Row Publishers, Inc. v. Decker, 423 F2d 487, 491-492 (7th

Cir 1970), aff'd by an equally divided court per curiam, 400 US 348, 27 LEd 2d 433 (1971). However, the restrictive view brings the corporate privilege more in line with the privilege available to unincorporated business concerns. Business organizations should not receive different treatment on evidence questions in courts of law merely because of differences in financial structure.

"If, for example, A runs a taxi service as a sole proprietorship with several employees, and one employee driver is involved in an accident for which A is sued, the employee's statements to A's attorney are not within the attorney-client privilege, even though A may order his employee to talk with the lawyer. [A's report to the attorney, based on information from the driver, would be privileged.] If A incorporates, the ruling should not change. It should be sufficient that A and other corporate officers having the capacity to seek legal advice and to act on it can claim the benefits of the privilege for private communications with counsel. A more permissive privilege would result in suppression of information conveyed to attorneys by employees who are more like witnesses than clients and who have no personal desire for confidentiality."

It is unclear how far Oregon courts would have gone in recognizing the lawyer-client privilege in the case of cummunications between an attorney and a client's representative. The privilege was applied to communications between an appraiser hired by a client and the client's attorney. Brink v. Multnomah County, 224 Or 507, 356 P2d 536 (1960). In that case, the court declared that "a communication by any form of agency employed or set in motion

by the client is within the privilege." 224 Or at 516. As for a corporate client, Oregon courts would probably recognize as privileged communications between an attorney and the corporation's officers, board members or registered agent.

Paragraph (e). The definition of "representative of the lawyer" is consistent with present Oregon law. It recognizes that in rendering legal service, a lawyer may use advisors and assistants in addition to those employed in the process of communicating. The definition includes an expert who is hired to assist in rendering legal advice or to help in the planning and conduct of litigation, but not one employed to testify as a witness. A physician making a physical or mental examination under ORCP 44 is also expressly excluded. The definition does not limit a "representative of the lawyer" to an expert. Whether the representative is compensated by the lawyer or by the client is immaterial.

Subsection (2). This subsection sets forth the lawyer-client privilege, using previously defined terms.

The lawyer-client privilege extends to communications (a) between the client or the client's representative and the lawyer or the lawyer's representative, (b) between the lawyer and the lawyer's representative, (c) by the client or the lawyer to a lawyer representing another person in a matter of common interst, (d) between representatives of the client or between the client and a representative of the client, and (e) between lawyers representing the client. All these communications must be specifically for

the purpose of obtaining legal services for the client; otherwise the privilege does not attach.

In a case in which lawyers represent different clients who have a common interest, Rule 503 allows each client a privilege as to the client's own statements. Thus, in "joint defense" or "pooled information" situations, if all clients resist disclosure, none will occur. However, if for some reason one client wishes to disclose the client's own statements made at a joint conference, the person is permitted to do so. No privilege applies where there is no common interest to be promoted by a joint consultation, and the parties, therefore, meet on a purely adversary basis.

In the past, substantial authority has allowed an eavesdropper to testify to overheard privileged conversations and has admitted intercepted privileged letters. The evolution of ever more sophisticated techniques of recording and interception calls for the abandonment of that position. Accordingly, ORE 503 allows the client to prevent "any other person" from disclosing a privileged communication.

The privilege stated in this subsection agrees with the privilege in ORS 44.040(1)(b), which is repealed, although the latter statute did not set forth specific types of communications to be protected. Rule 503 is also consistent with Oregon case law, which has tended to set the boundaries of the lawyer-client privilege by implication--excluding certain communications from the privilege--rather than by express declaration. See Baum v. Denn, 187 Or 401, 211 P2d 478 (1949) (communications made to attorney for purpose of dealing with third persons not privileged because they are not confidential); Minard

v. Stillman, 31 Or 164, 49 P 476 (1897) (when all parties are represented by one attorney, communications made during settlement negotiations for the information of all are not privileged in dispute between parties themselves).

Subsection (3). This subsection does not change existing Oregon law. The lawyer-client privilege belongs, of course, to the client, to be claimed by the client or the client's guardian or conservator or personal representative. Bergsvik v. Bergsvik, 205 Or 670, 291 P2d 724 (1956) (privilege intended to benefit only client, and not available to others); Booker v. Brown 173 Or 464, 146 P2d 71 (1944) (implying that privilege survives death of client and may be asserted by personal representative). Because the privilege is for the protection of the client, it is not limited merely to the protection of parties, but will also protect a client who is called as a witness. Bergsvik, supra; Bryant v. Dukehart, supra. The successor of a dissolved corporate client may claim the privilege. California Evidence Code, section 953; New Jersey Evidence Rule 26(1).

The lawyer may not claim the privilege on the lawyer's own behalf. However, the lawyer may claim it on behalf of the client--indeed, it is assumed that the lawyer will do so except under most unusual circumstances. An Oregon attorney is prohibited by the ethics of the profession from divulging a client's secrets or confidences. The attorney would therefore be bound to claim the privilege on behalf of the attorney's client if called to testify. See DR 4-101(2) and 7-102(B) of the American Bar Association Code of Professional Responsibility; Canon 37 of the American Bar Association Canons of Professional Ethics.

Subsection (4). The exceptions to the lawyer-client privilege are well established.

Paragraph (a). The privilege does not extend to advice in aid of future wrongdoing. 8 Wigmore, Evidence, section 2298 (McNaughton rev 1961); State v. Phelps, 24 Or App 329, 545 P2d 901 (1976). The wrongdoing need not be that of the client. However, the client must know or have reason to know of the criminal or fraudulent nature of the act. This requirement is designed to protect a client who is erroneously advised that a proposed action is within the law.

The law does not require a preliminary finding that there is sufficient evidence apart from the lawyer-client communication to warrant a finding that the legal services were sought to enable the commission of a wrong. See Clark v. United States, 289 US 1, 53 SCt 465, 77 LEd 993 (1933). While any general exploration of what transpired between attorney and client would of course be inappropriate, it is feasible, either at the discovery stage or during trial, to focus the inquiry by specific questions to avoid any broad intrusion upon the attorney-client relation. Numerous cases reflect this approach.

Paragraph (b). Normally the lawyer-client privilege survives the death of the client and may be asserted by the client's representative under subsection (3) of this rule. When there is a will contest, however, the identity of the person entitled to claim the privilege remains undetermined until the conclusion of the litigation. The choice is between allowing both sides or neither to assert the privilege, with authority and reason favoring the latter view. McCormick, Evidence, section 94 (2d ed 1972); California Evidence Code,

section 957; Kansas Code of Civil Procedure, section 60-426(b)(2); New Jersey Evidence Rule 26(2)(b); Tanner v. Farmer, 243 Or 431, 414 P2d 340 (1960) (attorney not prohibited from testifying about execution of will in litigation between parties claiming under will of client).

Paragraph (c). The breach of duty exception is required by considerations of fairness and policy. It will generally arise when there is a controversy over attorney's fees, a claim of inadequate representation, or charges of professional misconduct. McCormick, Evidence, section 91 (2d ed 1972); California Evidence Code, section 958; New Jersey Evidence Rule 26(2)(c). There is no reported decision on the existence of this exception in Oregon.

Paragraph (d). When a lawyer acts as an attesting witness, the approval of the client to the lawyer's doing so may safely be assumed, and waiver of the privilege as to any relevant lawyer-client communication is a proper result. California Evidence Code, section 959. There is no current authority supporting the existence of this exception in Oregon.

Paragraph (e). Communications for the mutual information of joint clients are not confidential, and hence not privileged in a subsequent dispute between the clients. McCormick, Evidence, section 91 (2d ed 1972); California Evidence Code, section 962; Kansas Code of Civil Procedure, section 60-426(b)(4); New Jersey Evidence Rule 26(2); Minard v. Stillman, 31 Or 164, 49 P 476 (1897). The situation with which this provision deals is to be distinguished from the case of clients with a common interest who retain different lawyers, which is covered under paragraph (2)(c) of this rule.

Oregon law recognizes two other exceptions to the lawyer-client privilege--an exception for assets left with the attorney, State ex rel Hardy v. Gleason, 19 Or 159, 23 P 817 (1890), and an exception for the fact of employment and name and address of the client, Cole v. Johnson, 103 Or 319, 205 P 282 (1922); In re Illidge, 162 Or 393, 91 P2d 1100 (1939). By the adoption of Rule 503, the Legislative Assembly does not intend to affect these latter exceptions.

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Oregon Rule of Evidence 504

SECTION 33. Rule 504. Psychotherapist-patient privilege. (1) Definitions. As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication not intended to be disclosed to third persons except: Persons present to further the interest of the patient in the consultation, examination or interview; persons reasonably necessary for the transmission of the communication; or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) "Patient" means a person who consults or is examined or interviewed by a psychotherapist.

(c) "Psychotherapist" means a person who is licensed, registered, certified or otherwise authorized under the laws of any state to engage in the diagnosis or treatment of a mental or emotional condition, or reasonably believed by the patient so to be, while so engaged.

(2) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential

communications made for the purposes of diagnosis or treatment of the patient's mental or emotional condition among the patient, the patient's psychotherapist or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(3) Who may claim the privilege. The privilege created by this section may be claimed by the patient, by a guardian or conservator of the patient, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. The psychotherapist's authority so to do is presumed in the absence of evidence to the contrary.

(4) General exceptions. [(a) For the purpose of a civil commitment hearing held pursuant to ORS 426.005 to 426.395, there is no privilege under this section for communications and observations relevant to diagnosis and treatment of an allegedly mentally ill person during a prehearing detention period authorized by ORS 426.070 (5) or 426.175 to 426.215.]

[(b)] (a) If the judge orders an examination of the mental, physical or emotional condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

[(c)] (b) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient

relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(5) Exception for certain examinations. Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of mental examination performed under ORCP 44.

COMMENTARY

Oregon Rule of Evidence 504 is based on proposed Rule 504 of the Federal Rules of Evidence, which was prescribed by the United States Supreme Court and submitted to Congress, but not enacted. Aside from minor changes made to conform the rule to the form and style of Oregon statutes, the only differences between this and proposed Federal Rule 504 lie in the exceptions.

Subsection (1). Paragraph (a). "Confidential communication" is defined in terms conformable to those of the lawyer-client privilege, with appropriate changes for the different circumstances. Oregon follows the general rule that the burden of establishing the conditions that give rise to a privilege against disclosure is on the party asserting the privilege. Groff v. S.I.A.C., 246 Or 557, 426 P2d 738 (1967).

Paragraph (b). Oregon courts have not yet given a definition of "patient" for purposes of the psychotherapist-patient and physician-patient privilege, but there should be little controversy surrounding the definition except for

persons who are subjects of medical research. The definition of "patient" in Rule 504 and 504-1 does not include a person submitting to examination for scientific purposes. This limitation agrees with the current Oregon requirement that a physician be consulted for treatment in order that the physician-patient privilege attach. State v. O'Neill, 274 Or 59, 545 P2d 97 (1976).

Paragraph (c). The rule defines "psychotherapist" as a person authorized or thought to be authorized by the patient to engage in, while in fact engaged in, the diagnosis or treatment of a mental or emotional condition. The definition is broad enough to include not only psychiatrists and psychologists but other professionals who also treat mental and emotional conditions. In appropriate circumstances such persons may be medical doctors, nurses or clinical social workers. The definition seeks to avoid needless refined distinctions concerning what is and what is not the practice of psychiatry. The Legislative Assembly intends to exclude, from the definition of "psychotherapist," a person who is consulted for the specific problem of drug or alcohol dependency.

With regard to psychiatrists, this paragraph does not change existing Oregon law. Psychiatrsts are included within the term "regular physician or surgeon" under ORS 44.040(1)(d). Hampton v. Hampton, 241 Or 277, 405 P2d 549 (1965). However, the implied definition of psychologist is more expansive than the one in ORS 44.040(1)(h), in that it extends the privilege to a psychologist licensed under the laws of any state rather than a person licensed to practice psychology under the provisions of ORS chapter 675. Because of the continuing requirement under chapter 675 that any person

practicing psychology in this state must be licensed under the chapter, however, the difference in definition should have little practical effect.

No Oregon court has decided whether the psychotherapist-patient privilege would apply when a patient reasonably but falsely believes the person consulted is a psychotherapist.

Subsection (2). The general rule of privilege is that a patient may refuse to disclose, and prevent anyone else from disclosing, any confidential communication to a psychotherapist made for the purposes of diagnosis or treatment. This applies to any proceeding except in the circumstances listed in subsections (4) and (5) of this rule.

Subsection (2) changes Oregon law in two ways. First, it limits the psychotherapist-patient privilege to communications made for the purpose of diagnosis or treatment, i.e., consultation which is not a part of diagnosis or treatment is not privileged. This represents a narrowing of the current psychologist-patient privilege, which applies to "any communication made . . . in the course of professional employment." ORS 44.040(1)(h). It represents a broadening of the current psychiatrist-patient privilege that courts have read into the physician-patient privilege; the latter applies only to "information acquired [by the physician] . . . which was necessary to enable the physician . . . to prescirbe or act for the patient." ORS 44.040(1)(d); Hampton v. Hampton, 241 Or 277, 405 P2d 549 (1965). Second, subsection (2) establishes the psychotherapist-patient privilege in all proceedings. This is the extent of the present psychologist-patient privilege. However, the psychiatrist-patient relation has been subject to the physician-patient rule that the

privilege does not apply in a criminal case. State v. Betts 235 Or 127, 384 P2d 193 (1963).

Subsection (3). Subsection (3), like subsection (2), draws upon the lawyer-client privilege for its phrasing. See ORE 503(2), (3). This subsection does not change Oregon law. The physician (psychiatrist)-patient privilege is not terminiated by the death of the patient. Woosley v. Dunning, 268 Or 233, 520 P2d 340 (1974). Although there is no rebuttable presumption in Oregon that the physician or psychologist may claim the privilege on behalf of the patient, the courts have declared that the privilege is intended to benefit the patient and normally cannot be invoked by another person. Hampton v. Hampton, 241 Or 277, 405 P2d 549 (1965). There are good policy reasons for allowing a psychotherapist to claim the privilege on behalf of the patient.

Subsection (4). The exceptions to the psychotherapist-patient privilege differ substantially from those to the attorney-client privilege, reflecting the basic differences in the relationships. While it has been argued convincingly that the nature of the psychotherapist-patient relationship demands complete security against legally coerced disclosure, the Legislative Assembly finds that there are some instances in which the need for disclosure is sufficiently great to justify the risk of impairing the relationship. These exceptions are incorporated in subsection (4) of this rule.

Paragraph (a). The relationship between psychotherapist and patient in a court-ordered examination is likely to be at arm's length, although not necessarily so. An exception is needed, in any event, if this important procedure is to be used effectively. It will be observed that the exception

deals with a court-ordered examination, not with a court-appointed psychotherapist or physician, and is only effective to the extent of the purpose for which the examination is ordered. This exception changes existing Oregon law insofar as it erases the distinction between communications made to psychologists and communications made to physicians and psychiatrists during such examinations. See commentary to subsection (2) of this rule, supra.

Paragraph (b). An exception applies whenever the mental or emotional condition of the patient is put in issue. In a criminal proceeding this means that there is no privilege if a defendant raises the defense of not responsible by reason of mental disease or defect, or the mitigating defense of extreme emotional disturbance. It a civil action, it means there is no privilege in a will contest in which the soundness of the testator's mind is challenged. See Rule 511.

NOTE: This subsection also originally provided that there is no privilege in a civil commitment hearing as to communications and observations made during the pre-hearing detention period. The Governor's Task Force on Mental Health, which recommended this provision, pointed out that the relationship between an allegedly mentally ill person and hospital medical staff during a period of involuntary pre-hearing detention is more likely to be adversarial than therapeutic, and, therefore, that the policy reasons for the privilege are not as compelling as in an ongoing treatment relationship. Notwithstanding the argument, the Legislative Assembly wished to preserve present Oregon law, which does not exempt communications at any phase of a commitment proceeding from a claim of privilege.

Subsection (5). This subsection retains the exception for communications made in the course of a physical or mental examination performed under ORCP 44.

* * *

A number of other statutes currently affect the operation of the physician-patient and psychologist-patient privilege. Except as noted below, these statutes remain in force:

Under ORS 44.040(1)(j), a licensed physician or local health official shall not be examined as to the existence or contents of any records of a person examined or treated for an infectious venereal disease without the consent of the person unless the public interest clearly requires disclosure. This provision is repealed by section 98 of this Act as unnecessary. With regard to the local health authority officer or employe, it duplicates the privilege created under ORS 434.055. With respect to the physician, it is unneeded in civil actions because of the existence of the physician-patient privilege. The only unique feature is its application of the physician-patient privilege to criminal cases in which treatment for venereal disease is a relevant issue. The Legislative Assembly does not believe there is sufficient justification for extending the physician-patient privilege to a very limited number of criminal cases.

Under ORS 107.600(2), all communications between spouses and from spouses to counselors, the court, attorneys, doctors or others engaged in conciliation

proceedings, made during the proceedings, are confidential within the meaning of ORS 44.040(1)(e). This section is amended by section 88 of this Act.

Under ORS 146.750(1), except as required in subsection (3) of Rule 504 (relating to child abuse), any physician having reasonable cause to suspect that a person brought for examination or treatment has been injured with a deadly weapon by other than accidental means shall report the fact to the appropriate medical examiner as soon as possible.

Under ORS 161.735, a court may order a psychiatric examination of a person convicted of a felony to determine whether the person is suffering frm a severe personality disorder indicating a propensity toward criminal activity. Subsection (4) of ORS 161.735 declares that no statement made by a defendant under the section shall be used against the defendant in any civil proceeding or in any other criminal proceeding.

Under ORS 418.750, all public or private officials have a duty to report possible cases of child abuse, except that psychiatrists, psychologists, clergymen and attorneys are not required to report the privileged communications of adults. ORS 418.775 also provides that the physician-patient privilege is not a ground for excluding evidence in court proceedings on child abuse. Thus, even though the psychologist and psychiatrist have similar duties with regard to reporting possible child abuse, the psychiatrist (whose privilege is founded upon the physician-patient privilege) may be compelled to testify at trial. The psychologist, in contrast, may not be required to testify in a child abuse proceeding as there is no mention of the psychologist-patient privilege in ORS 418.775 which abolishes certain

privileges in those proceedings. Section 95 of this Act amends ORS 418.775 and thereby abolishes this distinction.

Under ORS 434.055, no local health official shall be examined as to the existence or contents of records of a person examined or treated for an infectious venereal disease without the consent of the person. This is the same privilege as the one described in ORS 44.040(1)(j), without the exception for public interest. It is noteworthy that it extends the physician-patient privilege to criminal cases in the context of venereal disease communications.

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Oregon Rule of Evidence 504-1

SECTION 33a. Rule 504-1. Physician-patient privilege. (1) Definitions. As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication not intended to be disclosed to third persons except: Persons present to further the interest of the patient in the consultation, examination or interview; persons reasonably necessary for the transmission of the communication; or persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) "Patient" means a person who consults or is examined or interviewed by a physician.

(c) "Physician" means a person authorized and licensed or certified to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a physical condition. "Physician" includes [Christian Science Practitioners and] licensed or certified naturopathic and chiropractic physicians.

(2) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications in a civil action, suit or proceeding, made for the purposes of diagnosis or treatment of the patient's physical condition, among the patient, the patient's physician or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

(3) Who may claim the privilege. The privilege created by this section may be claimed by the patient, by a guardian or conservator of the patient, or by the personal representative of a deceased patient. The person who was the physician may claim the privilege but only on behalf of the patient. Such person's authority so to do is presumed in the absence of evidence to the contrary.

(4) General exceptions. If the judge orders an examination of the physical condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(5) Exception for certain examinations. Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of a physical examination performed under ORCP 44.

COMMENTARY

Oregon Rule of Evidence 504-1 provides for a physician-patient privilege. It is styled after Rule 504 of the Federal Rules of Evidence, relating to psychotherapists, which was proposed by the Supreme Court but never adopted. The federal Advisory Committee recommended against enactment of a physician-patient privilege rule in light of the many exceptions that have been carved from it to obtain information required by the public interest or to avoid fraud. The Legislative Assembly considered that the exceptions in Oregon are not so many as to rob the privilege of meaning. It therefore continued, in greater detail, the privilege which was expressly recognized under ORS 44.040(1)(d).

Rule 504-1 closely parallels Rule 504; the Advisory Committee on Evidence Law Revision recommended in fact that the two concepts be merged in a single rule. The Legislative Assembly retained the statutory distinction between communications relating to a physical condition and communications relating to a mental or emotional condition in light of the historical differences in the scope of the applicable privilege. Except where noted below, however, the commentary to Rule 504 shall be taken to apply to Rule 504-1.

Subsection (1). Paragraph (a). The definition of "confidential communication" in paragraph (1)(a) of the rule does not change Oregon law. Currently, the physician-patient privilege in Oregon includes a physician's examination as well as laboratory tests and X-ray pictures. Also covered are oral and written communications intended to convey information as well as the physician's records. Neilson v. Bryson, 256 Or 179, 477 P2d 714 (1970).

Paragraph (b). See commentary to paragraph (1)(b) of ORE 504.

Paragraph (c). The term "physician" includes persons who hold M.D. degrees and are licensed or certified to practice medicine. ORS 677.100 et seq.; Hampton v. Hampton, 241 Or 277, 405 P2d 549 (1965). The definition also includes faith healers, chiropractors and naturopaths. ORS 44.040 was amended in 1979 to provide a testimonial privilege in civil actions for a "naturopathic physician licensed under ORS chapter 685 . . . as to any information acquired in attending the patient, which was necessary to enable [the physician] to act for the patient." The definition of phyician is not limited, as is the definition of psychotherapist, to a person authorized to practice a medical profession under the laws of one of the United States. A physician duly authorized under foreign law is within the privilege.

Subsection (2). Unlike the privilege between psychotherapist and patient, the physician-patient privilege may only be invoked in civil proceedings. It does not apply in criminal cases. ORS 44.040(1)(d); State v. Betts, 235 Or 127, 384 P2d 193 (1963).

Subsection (3). See commentary to subsection (3) of ORE 504.

Subsection (4). See commentary to paragraph (4)(b) of ORE 504.

Subsection (5). See commentary to subsection (5) of ORE 504.

EVIDENCE CODE
Work Session
Text: March 12, 1981
Commentary: July 2, 1981

Oregon Rule of Evidence 504-2

SECTION 33b. Rule 504-2. Nurse-patient privilege. A licensed professional nurse shall not, without the consent of a patient who was cared for by such nurse, be examined in a civil action or proceeding, as to any information acquired in caring for the patient, which was necessary to enable the nurse to care for the patient.

COMMENTARY

Oregon Rule of Evidence 504-2 retains the privilege against disclosure in a civil action of necessary information acquired by a nurse in caring for a patient. This was formerly codified in ORS 44.040(1)(g).

EVIDENCE CODE
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Oregon Rule of Evidence 504-3

SECTION 33c. Rule 504-3. School employe-student privilege. (1) A certificated staff member of an elementary or secondary school shall not be examined in any civil action or proceeding, as to any conversation between the certificated staff member and a student which relates to the personal affairs of the student or family of the student, and which if disclosed would tend to damage or incriminate the student or family. Any violation of the privilege provided by this subsection may result in the suspension of certification of the professional staff member as provided in ORS 342.175, 342.177 and 342.180.

(2) A certificated school counselor regularly employed and designated in such capacity by a public school shall not, without the consent of the student, be examined as to any communication made by the student to the counselor in the official capacity of the counselor in any civil action or proceeding in which such student is a party concerning the past use, abuse or sale of drugs, controlled substances or alcoholic liquor. Any violation of the privilege provided by this subsection may result in the suspension of certification of the professional school counselor as provided in ORS 342.175, 342.177 and 342.180. However, in the event that the student's condition presents a clear and imminent danger to the student or to others, the counselor shall report this fact to an appropriate responsible authority or take such other emergency measures as the situation demands.

COMMENTARY

Oregon Rule of Evidence 504-3 preserves two evidential rules regarding communications made by an elementary or secondary school student to school staff. These were formerly codified in ORS 44.040(1)(i) and (k).

Subsection (1). Subsection (1) prohibits any school staff member from disclosing, in a civil action, information learned from a student that would tend to damage or incriminate the student or the student's family. The rule is actually more in the nature of a prohibition than a privilege. A true privilege can be waived. The rule does not designate a holder with that power.

Subsection (2). Subsection (2) prohibits the disclosure in either a criminal or a civil proceeding of information concerning past use of controlled substances or alcoholic liquor communicated by a student to a school counselor. This privilege may be waived by the student and is also subject to an exception in the event of clear and imminent danger to the student or to others.

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Text: March 12, 1981
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Oregon Rule of Evidence 504-4

SECTION 33d. Rule 504-4. Clinical social worker-client privilege. A clinical social worker registered by the State Board of Clinical Social Workers shall not be examined in a civil or criminal court proceeding as to any communication given the clinical social worker by a client in the course of noninvestigatory professional activity when such communication was given to enable the registered clinical social worker to aid the client, except:

(1) When the client or those persons legally responsible for the client's affairs give consent to the disclosure;

(2) When the client initiates legal action or makes a complaint against the registered clinical social worker to the board;

(3) When the communication reveals the intent to commit a crime or harmful act;

(4) When the information reveals that a minor was the victim of a crime, abuse or neglect; or

(5) When the registered clinical social worker is a public employe and the public employer has determined that examination in a civil or criminal court

proceeding is necessary in the performance of the duty of the social worker as a public employe.

COMMENTARY

Oregon Rule of Evidence 504-4 retains the privilege against disclosure of any information given by a client to a clinical social worker in the course of non-investigatory professional activity. This was formerly codified in ORS 44.040(1)(L).

EVIDENCE CODE
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Text: March 12, 1981
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Oregon Rule of Evidence 505

SECTION 34. Rule 505. Husband-wife privilege. (1) Definitions. As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication by a spouse to the other spouse and not intended to be disclosed to any other person.

(b) "Marriage" means a marital relationship between husband and wife, legally recognized under the laws of this state.

(2) Privilege as to confidential communications. In any civil or criminal action, a spouse has a privilege to refuse to disclose and to prevent the other spouse from disclosing any confidential communication made by one spouse to the other during the marriage. The privilege created by this subsection may be claimed by either spouse. The authority of the spouse to claim the privilege and the claiming of the privilege is presumed in the absence of evidence to the contrary.

(3) Privilege as to testimony. In any criminal proceeding, neither spouse, during the marriage, shall be examined adversely against the other as to any other matter occurring during the marriage unless the spouse called as a witness consents to testify.

(4) Exceptions. There is no privilege under this section:

(a) In all criminal actions in which one spouse is charged with bigamy or with an offense or attempted offense against the person or property of the other spouse or of a child of either, or with an offense against the person or property of a third person committed in the course of committing or attempting to commit an offense against the other spouse; or

(b) As to matters occurring prior to the marriage.

COMMENTARY

Oregon Rule of Evidence 505 establishes two privileges in connection with the marital state: a privilege as to confidential communications and a privilege as to adverse testimony. The rule is original. It is very different from proposed Rule 505 of the Federal Rules of Evidence, which only recognizes a privilege in criminal cases and there makes the accused the holder. The Legislative Assembly did not adopt the federal rule because it believes that the privilege against disclosure of confidential communications is an aspect of the marital privilege that merits continuation.

Four common law rules of evidence have evolved around the marriage relationship: (1) the incompetency of one spouse to testify for the other; (2) the privilege of one spouse not to testify against the other; (3) the privilege of one spouse not to have the other testify adversely; and (4) the privilege against disclosure of confidential communications between spouses. With the end of disqualification of parties and other persons for interest,

the rule of spousal incompetency has virtually disappeared from both civil and criminal actions. McCormick, Evidence, section 66 (2d ed 1972). ORE 505 gives it no recognition. However, this rule does preserve elements of the other three aspects of the marital privilege.

The current Oregon statutes relating to the marital privilege are ORS 44.040(1)(a) and ORS 136.655. At present it is unclear whether the privilege set forth in ORS 44.040 applies to criminal prosecutions. State v. Suttles, 287 Or 15, 597 P2d 786 (1979). Rule 505 replaces ORS 44.040(1)(a), and clearly governs both civil and criminal actions. ORS 136.655 allows a spouse who is charged with a crime to prevent the other spouse from testifying as to any matter with certain exceptions. Section 89 of this Act amends that statute to conform with Rule 505, thereby eliminating the privilege to prevent spousal testimony except as to confidential communications. Other changes are detailed below.

Subsection (1). Paragraph (a). "Confidential communication" is defined in terms of intent. Intent may be inferred from the circumstances, e.g., the taking or failing to take of precautions. A communication made in public or meant to be relayed to outsiders can scarcely be considered confidential. Unless intent to disclose is apparent, a communication between husband and wife is confidential.

By defining "confidential communication" and allowing the privilege only as to such a communication, this paragraph changes Oregon law. Until now, a privilege apparently has applied to all marital communications, whether or not considered confidential. Pugsley v. Smyth, 98 Or 448, 194 P 686 (1921).

Paragraph (b). The privilege as to confidential communications and the privilege as to adverse testimony may only be claimed by persons whose marriage is recognized under the laws of this state. This category includes persons who are validly married in Oregon according to the appropriate statutes, and persons whose marriage is recognized by the courts of Oregon although the marriage would not have been valid had it been solemnized in this state. Examples of the latter are a marriage between first cousins and a common law marriage. Huard v. McTeigh, 113 Or 279, 291, 232 P 658 (1925); Wadsworth v. Brigham, 125 Or 428, 444, 259 P 299, 266 P 875 (1926); Boykin v. S.I.A.C., 224 Or 76, 81-82, 355 P2d 724 (1960). A proxy marriage solemnized in this state is also a marriage for the purposes of this rule. State v. Anderson, 239 Or 200, 396 P2d 558 (1964). There is no "marriage," under paragraph (1)(b), if the marriage was a sham or if the parties have been divorced.

Subsection (2). Subsection (2) states the marital "communications" privilege. It allows the privilege to be applied in both civil and criminal actions, but restricts its scope to confidential communications made during the marriage. This subsection is the only relic of the common law rule that allowed one spouse to prevent the other spouse from testifying in an adverse manner.

Either spouse may claim the "communications" privilege. The last sentence of the subsection presumes that both spouses in fact will do so. This provision prevents the taking of testimony of one spouse when the other is absent and does not know that a situation appropriate for a claim of privilege is presented, e.g., in a proceeding before a grand jury. If the privilege is not claimed by the testifying spouse, the protection of Rule 512 is available.

Subsection (3). This subsection deals with the testimony of a spouse concerning his or her nonconfidential observations and communications with the other spouse during their marriage. In criminal cases one spouse may not prevent the other from testifying, but the spouse called as a witness must consent to testify and may not be compelled. Trammel v. United States, 100 SCt 906 (1980).

The traditional justification for a double privilege--not to testify and not to be testified against by one's spouse--has been the prevention of marital discord and the preservation of the marital union. However, the Legislative Assembly believes that the testifying spouse should determine whether the marriage can or should be preserved. It leaves the decision to testify as to matters other than confidential communications, therefore, to the witness. This is a change in the law. Under present ORS 136.655, with certain exceptions, the consent of both spouses is required before a spouse can testify in a criminal case in which the other spouse is the party accused.

It should be noted that the privilege not to testify regarding "other matters" ceases upon termination of the marriage. In contrast, the privilege as to confidential communications made during the marriage applies to any action or proceeding either during or after the marriage.

Subsection (4). Subsection (4) contains two exceptions to the privilege against spousal testimony. The need to avoid grave injustice in the case of an offense against the other spouse or a child of either can scarcely be denied. The first exception therefore disallows any privilege against spousal testimony in that situation. This provision eliminates the possibility of suppressing testimony by marrying a witness. The second exception declares

that there is no marital privilege for matters occurring before the marriage. In this respect Rule 505 differs from the result in State v. Anderson, supra, which held that the defendant's wife could not testify even though the crime for which he was tried had occurred and the defendant had been imprisoned before the marriage.

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Oregon Rule of Evidence 506

SECTION 35. Rule 506. Clergyman-penitent privilege. (1) Definitions. As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) "Member of the clergy" means a minister of any church, religious denomination or organization or accredited Christian Science Practioner who in the course of the discipline or practice of that church, denomination or organization is authorized or accustomed to hearing confidential communications and, under the discipline or tenets of that church, denomination or organizaiton, has a duty to keep such communications secret.

(2) General rule of privilege. A member of the clergy shall not, without the consent of the person making the communication, be examined as to any confidential communication made to the member of the clergy in the member's professional character.

COMMENTARY

Oregon Rule of Evidence 506 states the privilege for confidential communications between a clergyman and penitent. The privilege allows and encourages individuals to fulfill their religious, emotional or other needs by protecting confidential disclosures to religious practitioners.

Rule 506 is intended to restate existing Oregon law. Except for the definition of "confidential communication" and a reorganization for clarity into subsections and paragraphs, the language of the rule is identical to former ORS 44.040(1)(c). The clergyman-penitent privilege has not been construed by an appellate court in this state. State v. Forsyth, 20 Or App 624, 533 P2d 176 (1975).

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Oregon Rule of Evidence 508a

SECTION 36. Rule 508a. Stenographer-employer privilege. A stenographer shall not, without the consent of the stenographer's employer, be examined as to any communication or dictation made by the employer to the stenographer in the course of professional employment.

COMMENTARY

Oregon Rule of Evidence 508a states the privilege for communications of an employer to a stenographer in the course of professional employment. It is designated 508a to distinguish it from proposed Federal Rule of Evidence 508, concerning trade secrets.

This rule is identical to ORS 44.040(1)(f), and by adopting it the Legislative Assembly intends to retain the stenographer-employer privilege as it has been interpreted by the courts of this state. As under current law, the privilege applies only to a person's stenographic duties and not to other professional duties handled by the person. State v. Gengston, 230 Or 19, 367 P2d 366 (1961). Furthermore, the privilege applies only to communications received from the employer rather than those received in the employer's course

of business. Thus, communications received from persons with whom the employer deals are not privileged under this rule.

* * *

NOTE: The Legislative Assembly did not enact a counterpart privilege to Federal Rule 507, on political votes.

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Oregon Rule of Evidence 509

SECTION 37. Rule 509. Public officer privilege. A public officer shall not be examined as to public records determined to be exempt from disclosure under ORS 192.500.

COMMENTARY

Oregon Rule of Evidence 509 states the privilege of a public officer not to be examined as to the existence or contents of exempt public records. The rule is identical to and replaces ORS 44.040(1)(e). It protects against compelled disclosure in the courtroom of information which is exempt from disclosure in an administrative setting. When the privilege is invoked, the subject records are examined in camera and the court determines whether the exemption is valid. Papadopoulos v. State Board of Higher Education, 8 Or App 445, 492 P2d 260 (1972). A similar rule exists in a number of other states. 8 Wigmore, Evidence, section 2378 (McNaughton rev 1961).

The public officer privilege has existed in some form in Oregon since 1862. General Laws of Oregon, section 702 at 325 (Deady 1845-1862). Originally it extended to communications made to a public officer in official

confidence whose disclosure would harm the public interest, and was applied to both oral and written communications. State v. Morrow, 158 Or 412, 75 P2d 737, 76 P2d 971 (1938); State v. Ayer, 122 Or 532, 259 P 427 (1927); State v. Yee Guck, 99 Or 231, 195 P 363 (1921). In time, inconsistencies in the scope of privilege developed between ORS 44.040 and ORS 192.030, the precursor of ORS 192.500. See Papadopoulos v. State Board of Higher Education, supra. This was one of the reasons for legislation in 1973 which replaced 192.030 and other statutes which preserved the confidentiality of records with ORS 192.410 to 192.500, and resolved the statutory conflict by amending ORS 44.040 to refer directly to exempt documents under ORS 192.500. 1973 Or Laws chapter 794. There have been no cases interpreting the privilege since.

ORS 192.500(1) is a list of public records that are exempt from disclosure unless the public interest requires disclosure in the particular instance. ORS 192.500(2) is a list of records that are exempt without qualification. The privilege in Rule 509 applies to both sets of records. In the latter case, however, it will only be sustained if the public interest, a term undefined by the statute, does not require disclosure.

The courts employ a balancing test to determine the public interest in disclosure of a record. As stated in Papadopoulus v. State Board of Higher Education, supra, citing MacEwan v. Holm, 226 Or 27, 359 P2d 413 (1961):

> ". . . [T]he scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference . . . . The citizen's predominant interest may be

> expressed in the terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records sought should not be furnished . . . .
>
> "Ultimately, of course, it is for the court to decide whether the explanation is reasonable and to weigh the benefits accruing to the agency from nondisclosure against the harm which may result to the public if such records are not made available for inspection." 8 Or App at 458.

Accord, Turner v. Reed, 22 Or App 177, 538 P2d 373 (1975); see also ORS 192.490(1).

Oregon's public records law spells out the procedure by which a citizen can seek administrative disclosure of exempt documents. ORS 192.450 to 192.490. It does not deal with admissibility of evidence, however, and thus would not clearly operate in litigation either as a privilege or as a rule of exclusion. Without the present rule, there is no privilege a public officer can invoke to parry questions as to exempt documents on the witness stand or in discovery. It would appear that if the contents of a written record were in issue, the officer would not have to testify unless the document was disclosed and introduced as evidence. ORE 1002. However, exceptions to the best evidence rule might still compel the officer's testimony as permissible secondary evidence on the ground that a writing is in the custody of an adverse party who has failed to produce it after reasonable notice, ORE 1004(3), or that an original document cannot be obtained by any available judicial process, ORE 1004(2). The public officer might then seek a

protective order from the court. This would require a case-by-case determination of what "justice requires" under ORCP 36C, however, and possibly lead to judicial frustration of legislative intent against disclosure.

For the above reasons, the Legislative Assembly believes it is advisable to retain the privilege formerly codified in ORS 44.040(1)(e). It is significant that the privilege has been kept, despite numerous and substantial revisions of Oregon public records law, for 119 years. While it has rarely been applied or interpreted by the courts, on those occasions when it has been exercised it has proved a workable tool for the protection and determination of the public interest. Its codification as Rule 509 provides the public officer with a clear indication of the officer's own role in disclosing information in the context of litigation.

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Oregon Rule of Evidence 510

SECTION 38. Rule 510. Identity of informer. (1) As used in this section, "unit of government" means the federal government or any state or political subdivision thereof. [(1) The state or a political subdivision thereof]

(2) A unit of government has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

[(2)] (3) The privilege created by this section may be claimed by an appropriate representative of the [state or political subdivision] unit of government if the information was furnished to an officer thereof.

[(3)] (4) No privilege exists under this section:

(a) If the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the [state] unit of government.

(b) If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the [state or political subdivision] unit of government is a party, and the [state or political subdivision] unit of government invokes the privilege, and the judge gives the [state or political subdivision] unit of government an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the [state or political subdivision] unit of government elects not to disclose the identity of the informer, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. In civil cases, the judge may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the [state or political subdivision] unit of government. All counsel and parties shall be permitted to be present at every stage of proceedings under this paragraph except a showing in camera, at which no counsel or party shall be permitted to be present.

(c) If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satifsied that the information was received from an informer reasonably believed to be reliable or credible, the judge may require the identity of the

informer to be disclosed. The judge shall, on request of the [state or political subdivision] unit of government, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this paragraph except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the [state or political subdivision] unit of government.

COMMENTARY

Oregon Rule of Evidence 510 states the privilege of any unit of government to refuse to disclose the identity of an informer who has furnished information relating to a possible violation of law. The rule is modeled on proposed Rule 510 of the Federal Rules of Evidence. Any changes in text are to conform the rule to the style of Oregon statutes or to reflect that the rule will be used in state court proceedings.

The Legislative Assembly believes that the adoption of Rule 510 will not change the law in Oregon relating to an informer's privilege. See ORS 135.855; State v. Evans, 1 Or App 489, 463 P2d 370 (1970); State ex rel Kerns v. Read, 11 Or App 48, 501 P2d 82 (1972); 266 Or 382, 514 P2d 1160 (1973).

Subsection (1). This subsection defines "unit of government" for the purposes of the rule. It was inserted to make the substantive text less

cumbersome. The definition includes the federal government as well as any state or political subdivision thereof, in view of the fact that the United States may be a party in state proceedings and there is frequently federal-state or interstate cooperation in criminal investigations.

The Legislative Assembly adopts the commentary of the federal advisory committee for the remainder of Rule 510.

"The rule recognizes the use of informers as an important aspect of law enforcement, whether the informer is a citizen who steps forward with information or a paid undercover agent. In either event, the basic importance of anonymity in the effective use of informers is apparent, Bocchicchio v. Curtis Publishing Co., 203 F Supp 403 (ED Pa 1962), and the privilege of withholding their identity was well established at common law. Roviaro v. United State, 353 US 53, 59, 77 SCt 623, 1 LEd 2d 639 (1957); McCormick, Evidence, section 111 (2d ed 1972); 8 Wigmore section 2374 (McNaughton rev 1961).

"[Subsection (2).] The public interest in law enforcement requires that the privilege be that of the government, state, or political subdvision, rather than that of the witness. The rule blankets in as an informer anyone who tells a law enforcement officer about a violation of law without regard to whether the officer is one charged with enforcing the particular law. The rule also applies to disclosures to legislative investigating committees and their staffs, and is sufficiently broad to include continuing investigations.

"Although the tradition of protecting the identity of informers has evolved in an essentially criminal setting, noncriminal law enforcement situations involving possibilities of reprisal against informers fall within the purview of the considerations out of which the privilege originated. In Mitchell v. Roma, 265 F2d 633 (3d Cir 1959), the privilege was given effect with respect to persons informing as to violations of the Fair Labor Standards Act, and in Wirtz v. Continental Finance & Loan Co., 326 F2d 561 (5th Cir 1964), a similar case, the privilege was recognized, although the basis of decision was lack of relevancy to the issues in the case.

"Only identity is privileged; communications are not included except to the extent that disclosure would operate also to disclose the informer's identity. The common law was to the same effect. 8 Wigmore section 2374, at 765 (McNaughton rev 1961). See also Roviaro v. United States, supra, 353 US at 60, 77 SCt 623; Bowman Dairy Co. v. United States, 341 US 214, 221, 71 SCt 675, 95 LEd 879 (1951).

". . . .

"[Subsection (3).] Normally the "appropriate representative" to make the claim will be counsel. However, it is possible that disclosure of the informer's identity will be sought in proceedings to which the government, state, or subdivision, as the case may be, is not a party. Under these circumstance effective implementation of the privilege requires that other representatives be considered "appropriate." See, for example, Bocchicchio v. Curtis Publishing Co., supra, a civil action for libel, in which a local police officer

not represented by counsel successfully claimed the informer privilege.

". . . .

"[Subsection (4).] deals with situations in which the informer privilege either does not apply or is curtailed.

"[Paragraph (a).] If the identity of the informer is disclosed, nothing further is to be gained from efforts to suppress it. Disclosure may be direct, or the same practical effect may result from action revealing the informer's interest in the subject matter. See, for example, Westinghouse Electric Corp. v. City of Burlington, 122 US App DC 65, 351 F2d 762 (1965), on remand City of Burlington v. Westinghouse Electric Corp., 246 F Supp 839 (DDC 1965), which held that the filing of civil antirust actions destroyed as to plaintiffs the informer privilege claimed by the Attorney General with respect to complaints of criminal antitrust violations. While allowing the privilege in effect to be waived by one not its holder, i.e., the informer himself, is something of a novelty in the law of privilege, if the informer chooses to reveal [the informer's] identity, further efforts to suppress it are scarcely feasible.

"The exception is limited to disclosure to 'those who would have cause to resent the communication,' in the language of Roviaro v. United States, supra, 353 US at 60, since disclosure otherwise, e.g., to another law enforcing agency, is not calculated to undercut the objects of the privilege.

"If the informer becomes a witness for the [unit of] government, the interests of justice in disclosing [the informer's] status as a source of bias or possible support are believed to outweigh any remnant of interest in nondisclosure which then remains. See Harris v. United States, 371 F2d 365 (9th Cir 1967), in which the trial judge permitted detailed inquiry into the relationship between the witness and the government. Cf. Attorney General v. Briant, 15 M & W 169, 153 Eng Rep 808 (Exch 1846). The purpose of the limitation to witnesses for the [unit of] government is to avoid the possibility of calling persons as witnesses as a means of discovering whether they are informers.

"[Paragraph (b).] The informer privilege, it was held by the leading case, may not be used in a criminal prosecution to suppress the identity of a witness when the public interest in protecting the flow of information is outweighed by the individual's right to prepare [a] defense. Roviaro v. United States, supra. The rule extends this balancing to include civil as well as criminal cases and phrases it in terms of 'a reasonable probability that the informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case.' Once the privilege is invoked a procedure is provided for determining whether the informer can in fact supply testimony of such nature as to require disclosure of [the informer's] identity, thus avoiding a "judicial guessing game" in the question. United States v. Day, 384 F2d 464, 470 (3d Cir 1967). An investigation in camera is calculated to accommodate the conflicting interests involved. The rule also spells out specifically the

consequences of a successful claim of privilege in a criminal case; the wider range of possibilities in civil cases demands more flexibility in treatment . . . .

"[Paragraph (c).] One of the acute conflicts between the interest of the public in nondisclosure and the avoidance of unfairness to the accused as a result of nondisclosure arises when information from an informer is relied upon to legitimate a search and seizure by furnishing probable cause for an arrest without a warrant or for the issuance of a warrant for arrest or search. McCray v. Illinois, 386 US 300, 87 SCt 1056, 18 LEd 2d 62 (1967), rehearing denied, 386 US 1042. A hearing in camera provides an accommodation of these conflicting interests. United States v. Jackson, 384 F2d 825 (3d Cir 1967). The limited disclosure to the judge avoids any significant impairment of secrecy, while affording the accused a substantial measure of protection against arbitrary police action. The procedure is consistent with McCray and the decisions there discussed."

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Oregon Rule of Evidence 511

SECTION 39. Rule 511. Waiver of privilege by voluntary disclosure. A person upon whom sections 32 to 42 (Rules 503 to 514) of this Act confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication. Voluntary disclosure does not occur with the mere commencement of litigation [but rather at] or, in the case of a deposition taken for the purpose of perpetuating testimony, until the [holder's] offering of the [holder] deposition as [a witness] evidence [and testifying on direct examination as to the subject matter of the confidential matter or communication]. Voluntary disclosure does occur, as to psychotherapists in the case of a mental or emotional condition and physicians in the case of a physical condition, upon the holder's offering of any person as a witness who testifies as to the condition.

COMMENTARY

Oregon Rule of Evidence 511 states the conditions under which a privilege conferred by Article V of the Oregon Evidence Code is waived. Briefly, a

privilege is lost when the reason for it ceases to apply. As the commentary to Federal Rule 511 explains:

"The central purpose of most privileges is the promotion of some interest or relationship by endowing it with a supporting secrecy or confidentiality. It is evident that the privilege should terminate when the holder by [the holder's] own act destroys this confidentiality. McCormick, Evidence, sections 93, 103 (2d ed 1971); 8 Wigmore sections 2242, 2327-2329, 2374, 2389-2390 (McNaughton rev 1961).

". . . .

"By traditional doctrine, waiver is the intentional relinquishment of a known right. Johnson v. Zerbst, 304 US 458, 464, 58 SCt 1019, 82 LEd 1461 (1938). However, in the confidential privilege situations, once confidentiality is destroyed through voluntary disclosure, no subsequent claim of privilege can restore it, and knowledge or lack of knowledge of the existence of the privilege appears to be irrelevant. California Evidence Code section 912; 8 Wigmore section 2327 (McNaughton rev 1961)."

Disclosure of the substance of a confidential communication. The first two sentences of the rule are identical to proposed Rule 511 of the Federal Rules of Evidence. They state a waiver rule of general application. If the holder has voluntarily disclosed or consented to the disclosure of any significant part of a privileged communication, then the entire communication may be inquired into. Furthermore, the privilege in question is waived as to

other communications on the same subject with the same person, and communications on the same subject with other persons. 8 Wigmore section 2327 (McNaughton rev 1961); State ex rel Calley v. Olsen, 271 Or 369, 532 P2d at 230 (1975); Triplett v. Bd. of Social Protection, 19 Or App 408, 528 P2d at 563 (1974). The rule indicates that waiver occurs as soon as a "significant" part of a communication is disclosed. It is not necessary that the holder or other person testify to every detail for waiver to be effective. Bryant v. Dukehart, 106 Or 359, 210 P 454 (1922); Gerlinger v. Frank, 74 Or 517, 145 P 1069 (1915).

Waiver by disclosure of part or all of a privileged communication can occur in any situation, within or without the context of a lawsuit. The rule makes clear that the mere commencement of litigation does not constitute disclosure. Neilson v. Bryson, 257 Or 179, 477 P2d 714 (1970) (physician-patient privilege not waived by filing personal injury action). Thereafter, however, waiver can occur during discovery or at trial, either on direct or cross-examination. McCormick, Evidence, section 93 (2nd ed 1972).

The one exception to the foregoing principle involves a deposition taken for the purpose of perpetuating testimony. Under the rule, the effect of any waiver of privilege that occurs in such a deposition is delayed until the deposition is offered as evidence by a party at trial. The Legislative Assembly added this provision to address the frequent problem where a party, which does not wish to disclose ahead of time the testimony of its expert and waive the privilege as to other experts consulted, must nevertheless do so because the expert whose testimony it wishes to use will not be available for trial. Counsel should be guided by professional responsibility, reinforced if necessary by the courts, in using this exception for its intended purpose.

Testimony on the subject of a confidential communication. ORE 511 replaces the waiver provisions of ORS 44.040(2). That statute indicated that when the holder of a privilege voluntarily testifies on a subject, any communications the holder may have had with any other person on the subject cease to be privileged. See Patterson v. Skoglund, 181 Or 167, 276 P 248 (1947); Fowler v. Phoenix Insurance Co., 35 Or 559, 57 P 421 (1899). Taken literally, this would allow the prosecution to call defense counsel as a witness as soon as the accused finishes taking the stand. The rule is obviously phrased too broadly, and for this reason there is inconsistency among Oregon cases whether testimony on the same subject will waive a privilege, or whether it is necessary that there be testimony as to a particular privileged communication. Stark Street Properties, Inc. v. Teufel, 277 Or 649, 658 Note 12, 562 P2d 531 (1977), citing Bryant v. Dukehart, supra, and McNamee v. First Nat. Bank of Roseburg, 88 Or 636, 172 P 801 (1918).

Rule 511 resolves the present uncertainty by adopting a restrictive view of waiver. A person, merely by disclosing a subject which the person has discussed with an attorney or spouse or doctor, does not waive the applicable privilege; the person must disclose part of the communication itself in order to effect a waiver. As McCormick points out:

> "By the prevailing view, which seems correct, the mere voluntary taking the stand . . . and testifying to facts which were the subject of consultation . . . with counsel is no waiver of the privilege for secrecy of the communications to [one's] lawyer. It is the communication which is privileged, not the facts." McCormick, Evidence, section 93 (2nd ed 1972).

The one exception to the foregoing principle is contained in the final sentence of the rule. Where the holder of a privilege offers any person as a witness who testifies on the subject of the holder's physical, mental or emotional condition, all privileges that might protect communications on that subject between the holder and a physician or psychotherapist, as the case may be, are waived. A simple example of this would be a case in which a party indicates that on a certain day the party was absent from work because of illness. This testimony waives the physician-patient privilege, allowing the opposing party to inquire of the person's doctor as to the person's medical condition. Another example would be a criminal case in which defense counsel considers the use of a pyschiatric defense or partial defense. The defendant, at the request of the attorney, may see a number of psychiatrists before finding one who will testify that the defendant was suffering from a mental disease or defect at the time of the crime. If the latter testifies at trial that the defendant was not responsibile, under ORE 504 there is no psychotherapist-patient privilege as to any psychotherapist because the mental condition of the defendant is in issue. The non-testifying psychiatrists are still protected by the attorney-client privilege, however, as they are "representatives of the lawyer" under ORE 503. The last sentence of ORE 511 would waive this (and any other) privilege to the extent of permitting the state to inquire of all medical personnel whom the defendant has seen regarding their findings.

EVIDENCE CODE
Work Session
Text: March 12, 1981
Commentary: July 2, 1981

Oregon Rule of Evidence 512

SECTION 40. Rule 512. Privileged matter disclosed under compulsion or without opportunity to claim privilege. Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was:

(1) Compelled erroneously; or

(2) Made without opportunity to claim the privilege.

COMMENTARY

Oregon Rule of Evidence 512, regarding compelled or otherwise involuntary disclosure of privileged matter, is identical to proposed Rule 512 of the Federal Rules of Evidence.

The Legislative Assembly adopts the commentary of the federal advisory committee:

"Ordinarily a privilege is invoked in order to forestall disclosure. However, under some circumstances consideration must be

given to the status and effect of a disclosure already made. Rule 511, immediately preceding, gives voluntary disclosure the effect of a waiver, while the present rule covers the effect of disclosure made under compulsion or without opportunity to claim the privilege.

"Confidentiality, once destroyed, is not susceptible of restoration, yet some measure of repair may be accomplished by preventing use of the evidence against the holder of the privilege. The remedy of exclusion is therefore made available when the earlier disclosure was compelled erroneously or without opportunity to claim the privilege.

"With respect to erroneously compelled disclosure, the argument may be made that the holder should be required in the first instance to assert the privilege, stand [the holder's] ground, refuse to answer, perhaps incur a judgment of contempt, and exhaust all legal resources in order to sustain [the] privilege. [Citations omitted.] However, this exacts of the holder greater fortitude in the face of authority than ordinary individuals are likely to possess, and assumes unrealistically that a judicial remedy is always available. In self-incrimination cases, the writers agree that erroneously compelled disclosures are inadmissible in a subsequent criminal prosecution of the holder, Maguire, Evidence of Guilt 66 (1959); 8 Wigmore section 2270 (McNauaghton rev 1961), and the principle is equally sound when applied to other privileges. The modest departure from usual principles of res judicata which occurs when the compulsion is judicial is justified by the advantage of having one

simple rule, assuring at least one opportunity for judicial supervision in every case.

"The second circumstance stated as a basis for exclusion is disclosure made without opportunity to the holder to assert [the holder's] privilege. Illustrative possibilities are disclosure by an eavesdropper, by a person used in the transmission of a privileged communication, by a family member participating in psychotherapy, or privileged data improperly made available from a computer bank."

There is no prior judicial or legislative authority in Oregon for the principles set forth in this rule. However, there is no reason to believe that the courts in Oregon would not follow them.

EVIDENCE CODE
Work Session
Text: March 12, 1981
Commentary: July 2, 1981

Oregon Rule of Evidence 513

SECTION 41. Rule 513. Comment upon or inference from claim of privilege.

(1) The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn from a claim of privilege.

(2) In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(3) Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

COMMENTARY

Oregon Rule of Evidence 513 prohibits any comment upon a claim of privilege, and mandates procedures to avoid any inference by a jury based on such a claim. The rule is identical to proposed Rule 513 of the Federal Rules of Evidence.

The Legislative Assembly approves the following note of the federal advisory committee:

"[Subsection (1).] In Griffin v. California, 380 US 609, 614, 85 SCt 1229, 14 L Ed 2d 106 (1965), the Court pointed out that allowing comment upon the claim of a privilege "cuts down on the privilege by making its assertion costly." Consequently it was held that comment upon the election of the accused not to take the stand infringed upon [the accused's] privilege against self-incrimination so substantially as to constitute a constitutional violation. While the privileges governed by these rules are not constitutionally based, they are nevertheless founded upon important policies and are entitled to maximum effect. Hence, [this subsection] forbids comment upon the exercise of a privilege, in accord with the weight of authority. 8 Wigmore sections 2243, 2322, 2386; McCormick, Evidence section 76 at 156 (2d ed 1972) [citations omitted].

"[Subsection (2).] The value of a privilege may be greatly depreciated by means other than expressly commenting to a jury that it was exercised. Thus, the calling of a witness in the presence of the jury and subsequently excusing [the witness] after a sidebar conference may effectively convey to the jury the fact that a privilege has been claimed, even though the actual claim has not been made in their hearing. Whether a privilege will be claimed is usually ascertainable in advance and the handling of the entire matter outside the presence of the jury is feasible. Destruction of the privilege by innuendo can and should be avoided. [Citations omitted.] 6 Wigmore section 1808 at 275-276. This position is in

accord with the general agreement of the authorities that an accused cannot be forced to make [the] election not to testify in the presence of the jury. 8 Wigmore section 2268 at 407 (McNaughton rev 1961).

"Unanticipated situations are, of course, bound to arise, and much must be left to the discretion of the jury and the professional responsibility of counsel.

"[Subsection (3).] Opinions will differ as to the effectiveness of a jury instruction not to draw an adverse inference from the making of a claim of privilege. See Bruton v. United States, 389 US 818, 88 SCt 126, 19 L Ed 2d 70 (1968). Whether an instruction shall be given is left to the sound judgment of counsel for the party against whom the adverse inference may be drawn. The instruction is a matter of right, if requested . . . .

"The right to the instruction is not impaired by the fact that the claim of privilege is by a witness, rather than by a party, provided an adverse inference against the party may result."

This rule changes Oregon law relating to comments upon and inferences from a claim of privilege that is not constitutionally guaranteed. Nearly all the cases involve the husband-wife privilege in a criminal trial.

In Oregon, the prosecution has been able to call the spouse of the defendant as a witness and thus require the defendant to assert the marital privilege in the presence of the jury. After the privilege is claimed, the

court has not been required to instruct the jury not to draw any inference, and the prosecution has been allowed to comment upon the privilege claim. State v. Inman, 8 Or App 180, 492 P2d 804 (1972); State v. Hixon, 237 Or 402, 291 P2d 388 (1964).

Citing State v. Johnson, 243 Or 532, 431 P2d 383 (1966), the Inman court did imply that if the prosecution is aware that a spouse intends to refuse to testify based on the Fifth Amendment privilege against self-incrimination, it cannot call the spouse as a witness. Early case law also suggested that it is improper for an attorney to comment upon an examining physician's refusal to testify. Kelly v. Highfield, 15 Or 277, 14 P 744 (1887).

EVIDENCE CODE
Work Session
Text: March 12, 1981
Commentary: July 2, 1981

Oregon Rule of Evidence 514

SECTION 42. Rule 514. Effect on existing privileges. Unless expressly repealed by section 98 of this Act, all existing privileges either created under the [statutes] laws of the State of Oregon or developed by the courts of Oregon are recognized and shall continue to exist until changed or repealed according to law.

COMMENTARY

Oregon Rule of Evidence 514 is a new provision adopted to retain all privileges currently recognized under the constitution, statutes or case law of Oregon.

The Legislative Assembly recognizes that the eleven privileges adopted under Rules 503 to 510 are not, and should not be, the only testimonial privileges granted in Oregon. There are others in effect as a result of statute or judicial decision. The adoption of Rules 503 to 510 is not intended to affect any of thoses privileges with the exception of those repealed by section 98 of this Act. Similarly, the Legislative Assembly does not intend that Article V affect the discovery statutes of Oregon or decisional law relating to the work product of attorneys.

A partial list of testimonial privileges currently recognized in Oregon, and not repealed by the 1981 enactment of the Oregon Evidence Code, includes:

(1) Records and testimony before a hospital or professional medical committee charged with the training, supervision or discipline of physicians. ORS 41.675.

(2) Unpublished information, and the source of any information, obtained by a media person in the course of gathering, receiving or processing information for any medium of communication to the public. ORS 44.510 to 44.540.

(3) Information designated confidential by a person as to a matter before the Legislative Counsel Committee. ORS 173.230.

(4) Income tax returns. ORS 314.835.

(5) Juvenile court records and proceedings. ORS 419.567.

(6) Venereal disease records. ORS 434.055.

(7) Nervous disorder reports filed with the Motor Vehicles Division. ORS 482.141.

(8) A voter's choice at an election. State ex rel Heath v. Kraft, 20 Or 28, 23 P 663 (1890).

House Judiciary Committee
HB 2030, Exhibit FFF
July 6, 1981 - 1:30 p.m.
1-page
Presented by Allison Smith

Proposed amendment to HB 2030, by the Oregon District Attorneys Association, July 2, 1981.

On page 26, after line 9, insert:

"Section 79a. As used in this act, "signature" includes any symbol executed or adopted by a party with present intention to authenticate a writing."

The above definition is adopted from the Uniform Commercial Code, ORS 71.2050(39), which reads:

"'Signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing."

House Judiciary Committee
Exhibit GGG, HB 2030
6-page exhibit
July 6, 1981 - 1:30 p.m.
presented by staff

Rule 609-List

OFFENSES OF DISHONESTY OR FALSE STATEMENT

Offenses Against State & Public Justice

f 162.015 - Bribe giving
f 162.025 - Bribe receiving
f 162.065 - Perjury
m 162.075 - False swearing
m 162.085 - Unsworn falsification
m 162.195 - Failure to appear II
f 162.205 - Failure to appear I
f 162.265 - Bribing a witness
f 162.275 - Bribe receiving by witness
f 162.285 - Tampering with witness
m 162.295 - Tampering with physical evidence
m 162.305 - Tampering with public records
f 162.325 - Hindering prosecution
m 162.355 - Simulating legal process
m 162.365 - Criminal impersonation
m 162.375 - Initiating a false report
m 162.425 - Misuse of confidential information
m 162.465 - Unlawful legislative lobbying

Offenses Against Persons

f 163.515 - Bigamy
m 163.605[1] - Criminal defamation--"false" matter

Offenses Against Property

m,f 164.015(2) - Theft--by failure to restore known lost property
m,f 164.015(4) - Theft--by deception
m,f 164.015(5) - Theft--by receiving stolen goods
m,f 164.125(1)(a)[3] - Theft of services--by deception
m,f 164.125(1)(b) - Theft of services--by exercising control to divert labor/materials
f 164.135(1)(b) - Unauthorized use of vehicle--diversion while being repaired/used
m 164.___ -- Defacing identification number (HB 2766)

Offenses Involving Fraud or Deception

m 165.007 - Forgery II
f 165.013 - Forgery I
f 165.017 - Criminal possession of forged instrument II
f 165.022 - Criminal possession of forged instrument I
f 165.032 - Criminal possession of forgery device
m 165.037 - Criminal simulation
m 165.042 - Fraudulently obtaining a signature
m 165.047 - Unlawfully using slugs
m,f 165.055 - Fraudulent use of credit card

m,f 165.065 - Negotiating bad check
f 165.070 - Possession of fraudulent communication device
m 165.080 - Falsifying business records
f 165.085 - Sports bribery
f 165.090 - Sports bribe receiving
m 165.095 - Misapplicaton of entrusted property
m 165.100 - Issuing false financial statement
m 165.102 - Obtaining execution of documents by deception
m 165.485 - Wrongful alteration of telegraphic message
m 165.490 - Use of information contained in message
m 165.805 - Misrepresentation of age
m 165.825 - Sale of drugged horse

Offenses Against Public Order; Firearms

m 166.065(1)(c) - Harassment--false report of death/injury (SB 312A)
f 166.450 - Obliteration/change of identification mark on firearm

Offenses Against Public Health & Decency

f 167.212 - Tampering with drug records
m 167.820 - Concealing birth of infant

Income Taxation Generally

m 314.075 - Income tax evasion

Higher Education Generally

m,f 351.___ - Sale of assignments (HB 2513)

Alcoholic Liquors Generally

m 471.135 - False age statement for identification card

Controlled Substances

m,f 475.992(3) - Creation/delivery of counterfeit substance

Rule 609 - Supplemental list A

OFFENSES OF DISHONESTY OR FALSE STATEMENT - Relating to age or capacity

Offenses Against Persons

f	163.355	Rape III - intercourse with female under 16
f	163.365	Rape II - intercourse with female under 14/incapable of consent
f	163.375(1)(b)	Rape I - intercourse with female under 12
f	163.375(1)(c)	Rape I - intercourse with sister/daughter under 16
f	163.385	Sodomy III - deviate intercourse with person under 16
f	163.395	Sodomy II - deviate intercourse with person under 14/incapable of consent
f	163.405(1)(b)	Sodomy I - deviate intercourse with person under 12
f	163.405(1)(c)	Sodomy I - deviate intercourse with sister/daughter/brother/son under 16
m	163.415(1)(b)	Sexual Abuse II - sexual contact with person under 18/incapable of consent
f	163.425(1)(a)	Sexual Abuse I - sexual contact with person under 12
m	163.435	Contributing to sexual delinquency of a minor, by person over 18
m	163.445	Sexual misconduct - intercourse with person under 18
f	163.483	Using child under 16 in obscene sexual performance
m	163.575	Endangering welfare of a minor - sex, controlled substances, gambling, tobacco, smoking device (HB 2422)
f	163.___ §2(1)(b)	Sexual penetration III - person incapable of consent (HB 2586)
f	§2(1)(c)	Sexual penetration III - person under 16
f	§3(1)(b)	Sexual penetration II - person incapable of consent and dangerous weapon or injury
f	§3(1)(c)	Sexual penetration II - person under 14
f	§4(1)(b)	Sexual penetration I - person incapable of consent and deadly weapon or injury
f	§4(1)(c)	Sexual penetration I - person under 12

Offenses Against Public Health and Decency

m	167.065	Furnishing obscene materials to minor
m	167.070	Sending obscene materials to minor
m	167.075	Exhibiting obscene materials to minor
m	167.080	Displaying obscene materials to minor
m	167.830	Employment of minor in place of public entertainment

Alcoholic Liquors Generally

m	471.410	Delivery of liquor to person under 21

Controlled Substances

f	475.995(1)(2)(5)	Distribution of Schedule I-III substance to minor
m	475.995(3)(4)	Distribution of Schedule IV-V substance to minor

Rule 609 - Supplemental list B

OFFENSES OF DISHONESTY OR FALSE STATEMENT Relating to invasion of privacy

Arrest & Related Procedures

m	133.992(2)	Interception of communications

Offenses Including Fraud or Deception

m	165.505	Opening telegraphic message
m	165.510	Learning telegraphic contents
m	165.515	Bribery to disclose contents
m	165.520	Opening/learning letter contents
m	165.540	Interception of communications

Rule 609 - Supplemental list C

OFFENSES OF DISHONESTY OR FALSE STATEMENT - Relating to trespass

Offenses Against Property

f	164.215	Burglary II--enter premises when not open to public, with criminal intent
f	164.225	Burglary I--enter premises when not open to public, with criminal intent and tool/weapon
m	164.235	Possession of tools to facilitate forcible entry
m	164.243	Criminal trespass II/guest--remain in transient lodging
m	164.245	Criminal trespass II--enter premises unlawfully
m	164.255	Criminal trespass I--enter dwelling unlawfully

Rule 609 - Supplemental list D

OFFENSES OF DISHONESTY OR FALSE STATEMENT - Relating to theft

Offenses Against Property

m,f	164.015(1)	Theft--take property from owner thereof
m,f	164.015(3)	Theft by extortion--take property by instilling fear
m,f	164.125(1)(a)[1][2]	Theft of services--by force, threat
f	164.135(1)(a)	Unauthorized use of vehilce--take without consent
f	164.135(1)(c)	Unauthorized use of vehicle--retain beyond period
f	164.395	Robbery III--theft with threat/use of force
f	164.405	Robbery II--theft with threat/use of deadly force
f	164.415	Robbery I--theft with dangerous/deadly weapon
m	164.815	Unlawful transportation of hay--20 bales without certificate
m	164.825	Unlawful transportation of conifers--5 without bill of sale
m	164.863	Unlawful transportation of meat animal carcasses--without certificate
m	164.865	Unlawful sound recording--reproduce without owner consent
m	164.875	Unlawful videotape recording--reproduce without owner consent

Offenses Involving Fraud or Deception

m	165.107	Failing to maintain metal purchase record
m	165.109	Failing to maintain cedar purchase record

Enforcement of Wildlife Laws

m,f	496.992	Taking of game out of season

HOUSE COMMITTEE ON JUDICIARY

Conference Committee

August 1, 1981 7:30 p.m. 354 State Capitol

Members Present:	Representative Tom Mason, Chairperson Representative Bill Rutherford Senator Jan Wyers Senator Ted Kulongoski
Staff:	Stephen L. Griffith, Legal Counsel Kris LaMar, Legal Counsel, Senate Justice Pearl Bare, Committee Assistant
Witnesses:	Jim McCandlish, Oregon Criminal Defense Lawyers Association Allison Smith, Oregon District Attorneys Association Bill Gary, Solicitor General
Measures:	HB 2030 - Relating to evidence HB 2479 - Relating to crime
Tapes:	H-81-JUD-584, Sides A and B H-81-JUD-585, Sides A and B

Tape 584 - Side A

003 CHAIRPERSON MASON opened the meeting.

004 HB 2030 - Relating to evidence

020 MR. GRIFFITH stated that the issues in Rule 801 were in the text and in the commentary (Exhibit A, HB 2030). The House adopted the position of the Oregon State Bar Ad Hoc Committee. The Senate restored the limitations found in the federal rule. In the commentary, the Senate was under the impression that its rule would exclude statements made before a grand jury; this is not the case under the federal rule.

046 SEN. WYERS stated that the Senate wanted to recede from the position in the commentary that grand jury statements could not be used. There was a misunderstanding about that in testimony.

056 MR. McCANDLISH, Oregon Criminal Defense Lawyers Association, stated that he supported the federal rule.

097 MR. GRIFFITH stated that this applied more to criminal cases than to civil. Oregon law has not admitted prior inconsistent statements as substantive evidence. The House version is a further departure from Oregon practice than is the Senate.

154 ALLISON SMITH, Oregon District Attorneys Association, stated that he agreed to the federal rule that was adopted by the Senate.

159 MOTION: CHAIRPERSON MASON moved to adopt the Senate version.

164 MOTION PASSED: There were no objections.

165 MR. GRIFFITH stated that the next issue was Rule 101(4)(b) (Exhibit B, HB 2030).

194 MOTION: SEN. WYERS moved to amend ORS 132.320 to have language stating that the Oregon Rules of Evidence apply; to have a statement in the Code that grand juries are excepted, with the exceptions listed; and to take the Senate position on disavowing State v. McDonald.

211 MR. GRIFFITH stated that would be in line 3, ORS 132.320, after "the" to insert "Oregon Evidence Code shall apply to proceedings before the" and to end the sentence after "grand jury".

245 SEN. KULONGOSKI had no problem with that.

246 REP. RUTHERFORD stated he thought this would place an undue burden on the grand jury. He would like the least amount of change in existing law as possible.

287 HB 2479 - Relating to crime

288 MOTION: SEN. WYERS moved to adopt the conference committee report excluding the word "sex".

290 MOTION PASSED. Aye - Kulongoski, Mason, Rutherford, Wyers.

293 HB 2030 - Relating to evidence

315 MOTION: CHAIRPERSON MASON moved adoption of the House version of Rule 101(4)(b).

320 SEN. WYERS stated that he wanted to disavow State v. McDonald.

334 MR. McCANDLISH stated that he would support the other way around.

335 BILL GARY, Solicitor General, stated that he would not.

336 ALLISON SMITH, representing the Oregon District Attorneys Association, stated the he would not. He would support the Senate version.

348 The committee agreed to adopting the Senate version of Rule 101(4)(b).

356 SEN. WYERS stated that on Rule 101(4)(e) (Exhibit C, HB 2030), the Senate wanted Gagnon v. Scarpelli referenced and a brief statement in the commentary as to what the case says.

363 MR. GRIFFITH stated that would be a brief statement of the holding and a neutral statement of what the dictum in footnote 5 applies.

375 The committee agreed to the suggestion of Sen. Wyers.

384 MR. GRIFFITH stated that the next issue was the commentary to Rule 309(2) (Exhibit D, HB 2030).

393 SEN. WYERS stated that the Senate was willing to have the judge comment if the commentary can refer to Linde, specially concurring. He would like it left to court decision.

442 The committee agreed, pending the assent of Sen. Kulongoski.

448 MR. GRIFFITH stated the next issue was Rule 606(1) (Exhibit E, HB 2030).

Tape 585 - Side A

049 MOTION: REP. RUTHERFORD moved the House version.

051 SEN. WYERS stated that he wanted to say that Oregon case law should be followed, but the Blanton case should be modified.

056 MR. GRIFFITH stated that was the next issue: under what circumstances can a verdict be impeached. A verdict can be impeached either by testimony of a juror or a non-juror. The question is would the deletion of "except when called as a witness" prohibit a juror from being called to impeach a verdict. He did not believe it would.

070 The committee agreed to the House version, pending Sen. Kulongoski's assent.

072 MR. GRIFFITH stated that Rule 606(2) (Exhibit F, HB 2030) is impeachment of jury verdict.

There is a general consensus among counsel and other interested persons that Oregon case law would attempt to impeach a verdict in a greater number of cases than the federal rule.

103 SEN. WYERS stated that he wanted the Senate version with reference to Blanton, but have it modified to be based on evolving case law and that there be a slightly broader interpretation of misconduct. He wanted a drunk juror, extreme racism and a total refusal to follow the judge's instructions included in the commentary.

113 The committee agreed, pending assent of Sen. Kulonogski.

145 MR. GRIFFITH stated that there were four issues in Rule 609 (Exhibit G, HB 2030).

178 MR. SMITH stated that the district attorneys were willing to go with either the federal rule or the advisory rule.

181 MR. GARY stated that the Attorney General preferred the advisory committee proposal but could probably live with the federal rule.

187 MR. McCANDLISH stated that between the Senate version and the House version, he favored the Senate version. The federal rule would be preferable to what exists now.

200 MR. GRIFFITH presented the committee with the lists (Exhibit H, HB 2030) that the House passed. The House version is closest to the federal rule.

The federal rule has felonies where the probative value outweighs the prejudice to the defendant.

214 MS. LaMAR stated that would be different in each case.

225 SEN. WYERS stated that case law has interpreted the federal rule as just crimes of false statement.

231 MR. GRIFFITH stated that the House version has a list of crimes which are strictly dishonest.

238 SEN. WYERS stated that the advantage of both the House and the Senate version is that less mini-trials are created.

240 MR. GRIFFITH stated that the House version allows the fact of conviction to be gone behind, and would therefore involve mini-trials.

249 SEN. WYERS stated that with both the House and the Senate version it could be argued that additional crimes should be let in.

He would like to take the Senate approach of the crimes of false statement, not go behind the conviction to the facts of the crime, and, perhaps add some more crimes to the list that are really crimes of false statement.

395 REP. RUTHERFORD stated that the committee agreed as to the first part about false statement and agreed to not adopt the second part about probative value outweighing prejudicial effect. The issue remaining is what crimes of false statement are.

411 MR. GRIFFITH stated that with the exception of some crimes in the final list, it could be argued that any of the crimes on these lists are crimes of false statement.

Tape 584 - Side B

014 REP. RUTHERFORD stated that he could agree to just crimes of false statement, if dishonesty means false statement according to the case interpretations.

020 SEN. KULONGOSKI stated that he disagreed with the list concept.

075 MR. GRIFFITH stated that the lists go into areas that he did not think there was federal case law on.

080 SEN. WYERS stated that the federal rule is tighter on crimes of false statement but looser on crimes that require the balancing test of probative value.

102 REP. RUTHERFORD suggested moving toward the federal rule.

117 MR. GRIFFITH stated that he believed the federal rule did allow going behind the facts of the case.

129 MR. McCANDLISH presented the committee with ORE 609 federal approach commentary (Exhibit I, HB 2030).

133 SEN. WYERS stated that he liked the first part of the federal rule as to crimes of false statement. He did not like the balancing test because it brings about mini-trials. He did not think it was as good as the Senate version.

148 REP. RUTHERFORD stated that he did not like the Senate version.

He felt both versions were coming at the federal rule, and therefore felt it would be simpler to adopt the federal rule which already has case law to back it up.

157 SEN. WYERS asked if Rep. Rutherford would be willing to just use crimes of false statement from the federal rule.

161 REP. RUTHERFORD agreed.

207 SEN. WYERS stated that he wanted dishonesty eliminated in the first part of the test.

209 REP. RUTHERFORD wanted dishonesty included in the commentary.

210 SEN. KULONGOSKI did not want that with the broad definition given by the House version. He felt that every crime could be included in this definition.

229 SEN. WYERS wanted the first list (Exhibit H, HB 2030) to be illustrative of crimes of false statement, and the other crimes could be brought in with the balancing test.

261 SEN. KULONGOSKI stated that the Senate just wanted the first part of the list because the crimes go to the person's veractiy.

284 SEN. WYERS stated that the federal rules does not allow impeachment for all felonies.

295 MR. GRIFFITH suggested meeting the prosecutorial concerns by including felonies with the balancing test and then limiting the other crimes to crimes of false statement and indicate that false statement is the limited lists (Exhibit I, HB 2030).

310 REP. RUTHERFORD agreed with that.

314 SEN. WYERS stated that many judges would allow felonies in.

315 REP. RUTHERFORD stated that there are some good safeguards in the tests.

327 SEN. WYERS stated that he wanted a 10-year limit on impeachable offenses. He also wanted it so that the facts of the crime could not be gone behind for proving it was a crime of false statement.

337 REP. RUTHERFORD stated that could be put in the commentary.

398 SEN. WYERS stated that he thought most judges would oppose going behind the elements anywhere in this rule. It would greatly expand the time a judge would have to spend listening to lawyers arguing.

409 REP. RUTHERFORD stated that the four-factor test would have to be applied (Exhibit I, HB 2030) if the judge is going to apply the balancing test.

He suggested that the committee say false statement under part one of the federal test and have the commentary say that it encompasses dishonesty. Part two would be the balancing test and the commentary would say that generally the elements would not be looked behind, but if they are, the four-factor test would be applied.

Tape 585 - Side B

016 MR. GRIFFITH stated that federal case law has interpreted dishonesty to mean false statement.

025 SEN. WYERS suggested adding to the proposed commentary (Exhibit I, HB 2030), on page 1, paragraph 2, "The Legislative Assembly has eliminate the term "dishonesty." after "courts." Under the balancing test, all other felonies could be considered by the court, and the four rules could be applied.

041 REP. RUTHERFORD stated that he would accept that.

044 MR. GRIFFITH stated that the committee had to decided whether the portion about looking behind the elements of the crime applied to crimes of false statement and/or applied to felonies.

057 SEN. WYERS stated that he wanted both. That would limit the scope of mini-trials and eliminate the biggest criticism of the federal rule.

082 The committee agreed, pending assent of Sen. Kulongoski.

083 MR. GRIFFITH stated that he needed specific direction that the commentary shall be filed with the Secretary of State as the official commentary to the Oregon Evidence Code, reflecting the joint opinion of the conferees.

087 The committee agreed.

096 MR. GRIFFITH stated that as a logical consensequence of the decision made at this meeting, the final sentence of Rule 403 will be reworked to say that it still holds true if it is a crime of false statement.

115 MOTION: SEN. WYERS moved to delete the public meetings amendment (Exhibit J, HB 2030).

116 MOTION PASSED: There were no objections.

120 MR. GRIFFITH stated that the textual issues on 609 had not been decided as to whether it is evidence of conviction, prior guilty plea or finding of guilt.

123 SEN. WYERS stated that he wanted the Senate approach which is present Oregon law.

125 MR. GRIFFITH stated that it is also federal law. The crime has to have reached the stage of conviction.

176 CHAIRPERSON MASON and REP. RUTHERFORD wanted the plea of guilty.

190 SEN. WYERS agreed to the House version on this point.

239 SEN. KULONGOSKI agreed to all of Rule 609 except the plea of guilty. He wanted conviction.

To him, it was the finality of a conviction. It makes it much more orderly for administration.

285 The committee agreed to make it conviction.

286 SEN. KULONGOSKI agreed to the committee's other decisions.

300 MOTION: CHAIRPERSON MASON moved HB 2030 as amended to the floors with a do pass recommendation.

305 MOTION PASSED: Aye - Kulongoski, Rutherford, Mason, Wyers.

306 CHAIRPERSON MASON adjourned the meeting.

Submitted,

Pearl Bare

Pearl Bare
Committee Assistant

EXHIBITS

Exhibit A, HB 2030 - Rule 801(4)(a)(A)
Exhibit B, HB 2030 - Rule 101(4)(b)
Exhibit C, HB 2030 - Rule 101(4)(e)
Exhibit D, HB 2030 - Rule 309(2)
Exhibit E, HB 2030 - Rule 606(1)
Exhibit F, HB 2030 - Ruel 606(2)
Exhibit G, HB 2030 - Rule 609
Exhibit H, HB 2030 - Rule 609 lists
Exhibit I, HB 2030 - Proposed commentary
Exhibit J, HB 2030 - Section 97d

House Judiciary Committee
Exhibit A, HB 2030
August 1, 1981 - 7:30 p.m.
presented by staff
1-page

Rule 801(4)(a)(A)
(prior inconsistent statements
as substance evidence)

HOUSE	SENATE
text allows all prior inconsistent statements of a witness in as substantive evidence	text limits prior inconsistent statements, used as substantive evidence, to those made under oath and subject to the penalty for perjury
commentary does not exclude inconsistent statements made before a grand jury	commentary indicates that the text would exclude statements before a grand jury

House Judiciary Committee
Exhibit B, HB 2030
August 1, 1981 - 7:30 p.m.
1-page, presented by staff

Rule 101(4)(b) - Commentary
(application of Code to grand jury proceedings)

HOUSE

adopts State v. McDonald which held that ORS 132.320 (applying the rules of evidence to grand jury proceedings, with exceptions for expert reports and affidavits from unavailable witnesses) is admonitory only

SENATE

disavows State v. McDonald, i.e., the requirements of ORS 132.320 are mandatory

the grand jury. When there is a total failure of endorsement, or the failure to endorse a sufficient number of named persons to support a verdict of guilty if found (e.g., where corroboration is required to sustain a conviction), a presumption immediately arises that the grand jury has indicted from bias or mere caprice and not upon competent evidence as required by statute. Such a showing overcomes the presumption of regularity of the proceedings and the statute directs a dismissal of the indictment.

The defendant also assigns as error the refusal of the trial court to sustain his motion to quash the indictment upon which he was tried because the grand jury had heard hearsay evidence when the prior indictment was returned which it could not be expected to ignore, and, further, because of the publicity surrounding the matter, the grand jury could not act in an impartial manner.

4. The defendant construes ORS 132.320, which we heretofore quoted, in its strict literal sense. It should be remembered that a grand jury is an investigating and accusatory body consisting, not of lawyers and jurists, but of laymen who have no power to determine the guilt of an accused, and we cannot, therefore, believe it was the intention of the legislature to require that the grand jury should hear only such testimony as would be competent in a court of law. We doubt that there are many grand juries which have not been subjected to hearsay testimony during their investigations. This statute is admonitory in character only, not mandatory, advising the grand jury to disregard incompetent evidence in returning an indictment and to consider evidence only of such character that it may be used in the trial to support a conviction of the accused.

GRAND JURY PROCEDURES

132.310 Inquiry into crimes; presentation to court. The grand jury shall retire into a private room and may inquire into crimes committed or triable in the county and present them to the court, either by presentment or indictment, as provided in ORS 132.310 to 132.390. [Amended by 1973 c.836 §45]

132.320 Consideration of evidence. (1) Except as provided in subsections (2) and (3) of this section, in the investigation of a charge for the purpose of indictment, the grand jury shall receive no other evidence than such as might be given on the trial of the person charged with the crime in question.

1973 (2) A report or a copy of a report made by a physicist, chemist, medical examiner, physician, firearms identification expert, examiner of questioned documents, fingerprint technician, or an expert or technician in some comparable scientific or professional field, concerning the results of an examination, comparison or test performed by him in connection with a case which is the subject of a grand jury proceeding, shall, when certified by such person as a report made by him or as a true copy thereof, be received in evidence in the grand jury proceeding.

1975 (3) An affidavit of a witness who is unable to appear before the grand jury shall be received in evidence in the grand jury proceeding if, upon application by the district attorney, the presiding judge of the circuit court of the county in which the grand jury is sitting authorizes such receipt after good cause has been shown for the witness' inability to appear. An affidavit taken in another state or territory of the United States, the District of Columbia or in a foreign country must be authenticated as provided in ORS 45.125 before it can be used in this state.

(4) The grand jury is not bound to hear evidence for the defendant, but it shall weigh all the evidence submitted to it; and when it believes that other evidence within its reach will explain away the charge, it should order such evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses. [Amended by 1973 c.836 §46; 1975 c.576 §1]

House Judiciary
Exhibit C, HB 2030
August 1, 1981 - 7:30 p.m.
1-page
presented by staff

Rule 101(4)(e) - Text
(application of Code to the
adjudicatory phase of probation
violation proceedings)

HOUSE

evidence rules apply only where the Constitution requires their observance

SENATE

evidence rules apply (1) where the Committee requires their observance and (2) upon request of either party, except hearsay is admissible when witness' attendance would impose unreasonable hardship

(dispositional phase of
probation violation proceedings)
House and Senate agree that only ORS 137.090 applies

137.090 Proof of circumstances; presentence investigation. The circumstances which are alleged to justify aggravation or mitigation of the punishment shall be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken out of court at such time and place, and upon such notice to the adverse party, and before such person authorized to take depositions, as the court directs. The court may consider the report of presentence investigation conducted by probation officers pursuant to ORS 137.530 or any other person designated by the court. [Amended by 1965 c.400 §1; 1973 c.836 §259]

House Judiciary
Exhibit D, HB 2030
August 1, 1981 - 7:30 p.m.
1-page
presented by staff

Rule 309(2) - Commentary
(comment on permissible
inference in criminal case)

HOUSE

states that the judge may instruct the jury as to an inference which, in a civil case, would constitute a presumption

SENATE

forbids judge from commenting on evidence that would support an inference against the defendant

Linde, specially concurring:

Nevertheless, it has long been the law in this state that a jury may infer that a gun used to threaten a victim is in fact loaded, assuming, as the Court points out, that there is evidence from which a jury could find beyond a reasonable doubt that it was a real gun. It does not follow that the prosecution is entitled to have the trial judge instruct the jury on making such an inference, or that the judge ought to do so. On other recent occasions we have said that the inferences which may or may not be drawn from evidence can normally be left to argument without any instruction, *State v. Stilling,* 285 Or 293, 590 P2d 1223 (1979); *State v. McCormick,* 280 Or 417, 571 P2d 499 (1977). However, no constitutional obstacle has been shown to

forbid letting the jury draw the inference in the manner stated in the instruction in this case. I therefore concur in the Court's decision.

Lent, J., joins in this concurring opinion.

House Judiciary, Exhibit E, HB 2030
August 1, 1981 - 7:30 p.m., 1-page
presented by staff

Rule 606(1) - ORCP 59C
(juror testifying)

HOUSE	SENATE
Deletes the reference in ORCP 59C indicating that a juror may communicate private knowledge or information of the matter in controversy to other jurors "when called as a witness"	retains reference to juror acting as a witness

SECTION 49. Rule 606. Competency of juror as witness. (1) A member of the jury may not testify as a witness before that jury in the trial of the case in which the member has been sworn to sit as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(2) Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by a juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

C.(6) Juror's Use of Private Knowledge or Information. A juror shall not communicate any private knowledge or information that the juror may have of the matter in controversy to other jurors[,] except when called as a witness,] nor shall the juror be governed by the same in giving his or her verdict.

House Judiciary
Exhibit F, HB 2030
August 1, 1981 - 7:30 p.m.
1-page
presented by staff

RULE 606(2) - TEXT
(impeachment of jury verdict)

HOUSE

includes subsection (2), from the federal rules;

the federal rule generally limits impeachment of a verdict to cases of "extraneous information" or "outside influence"

SENATE

deletes subsection (2), i.e., adopts Oregon case law;

Oregon law generally allows impeachment of a verdict in cases of severe misconduct by a juror ("fraud, bribery, forcible coercion, obstruction of justice" - Blanton v. Union Pacific), as well as cases of extraneous or outside influence upon the jury

House Judiciary
Exhibit G, HB 2030
August 1, 1981 - 7:30 p.m.
1-page
presented by staff

Rule 609 - Text and Commentary
(impeachment by evidence of prior conviction)

HOUSE	SENATE
text allows impeachment by evidence of guilty plea and finding of guilt, as well as by evidence of conviction	text limits impeachment to evidence of conviction
text allows impeachment by crimes of dishonesty as well as crimes of false statement	text limits impeachment to crimes of false statement
commentary allows impeachment by evidence that the commission of a crime involved deception, as a factual matter	commentary limits impeachment to crimes on the list and crimes whose elements are substantially equivalent to the elements of crimes on the list
commentary allows impeachment by crimes on core list, of consent, of privacy or privilege, of trespass, and of theft	commentary limits impeachment to crimes on core list

House Judiciary
Exhibit H, HB 2030
August 1, 1981 - 7:30 pm
6-pages
presented by staff

Rule 609-List

OFFENSES OF DISHONESTY OR FALSE STATEMENT

Offenses Against State & Public Justice

f 162.015 - Bribe giving
f 162.025 - Bribe receiving
f 162.065 - Perjury
m 162.075 - False swearing
m 162.085 - Unsworn falsification
m 162.195 - Failure to appear II
f 162.205 - Failure to appear I
f 162.265 - Bribing a witness
f 162.275 - Bribe receiving by witness
f 162.285 - Tampering with witness
m 162.295 - Tampering with physical evidence
m 162.305 - Tampering with public records
f 162.325 - Hindering prosecution
m 162.355 - Simulating legal process
m 162.365 - Criminal impersonation
m 162.375 - Initiating a false report
m 162.425 - Misuse of confidential information
m 162.465 - Unlawful legislative lobbying

Offenses Against Persons

f 163.515 - Bigamy
m 163.605[1] - Criminal defamation--"false" matter

Offenses Against Property

m,f 164.015(2) - Theft--by failure to restore known lost property
m,f 164.015(4) - Theft--by deception
m,f 164.015(5) - Theft--by receiving stolen goods
m,f 164.125(1)(a)[3] - Theft of services--by deception
m,f 164.125(1)(b) - Theft of services--by exercising control to divert labor/materials
f 164.135(1)(b) - Unauthorized use of vehicle--diversion while being repaired/used
m 164.___ -- Defacing identification number (HB 2766)

Offenses Involving Fraud or Deception

m 165.007 - Forgery II
f 165.013 - Forgery I
f 165.017 - Criminal possession of forged instrument II
f 165.022 - Criminal possession of forged instrument I
f 165.032 - Criminal possession of forgery device
m 165.037 - Criminal simulation
m 165.042 - Fraudulently obtaining a signature
m 165.047 - Unlawfully using slugs
m,f 165.055 - Fraudulent use of credit card

m,f 165.065 - Negotiating bad check
f 165.070 - Possession of fraudulent communication device
m 165.080 - Falsifying business records
f 165.085 - Sports bribery
f 165.090 - Sports bribe receiving
m 165.095 - Misapplicaton of entrusted property
m 165.100 - Issuing false financial statement
m 165.102 - Obtaining execution of documents by deception
m 165.485 - Wrongful alteration of telegraphic message
m 165.490 - Use of information contained in message
m 165.805 - Misrepresentation of age
m 165.825 - Sale of drugged horse

Offenses Against Public Order; Firearms

m 166.065(1)(c) - Harassment--false report of death/injury (SB 312A)
f 166.450 - Obliteration/change of identification mark on firearm

Offenses Against Public Health & Decency

f 167.212 - Tampering with drug records
m 167.820 - Concealing birth of infant

Income Taxation Generally

m 314.075 - Income tax evasion

Higher Education Generally

m,f 351.___ - Sale of assignments (HB 2513)

Alcoholic Liquors Generally

m 471.135 - False age statement for identification card

Controlled Substances

m,f 475.992(3) - Creation/delivery of counterfeit substance

Rule 609 - Supplemental list A

OFFENSES OF DISHONESTY OR FALSE STATEMENT - Relating to age or capacity

Offenses Against Persons

f	163.355	Rape III - intercourse with female under 16
f	163.365	Rape II - intercourse with female under 14/incapable of consent
f	163.375(1)(b)	Rape I - intercourse with female under 12
f	163.375(1)(c)	Rape I - intercourse with sister/daughter under 16
f	163.385	Sodomy III - deviate intercourse with person under 16
f	163.395	Sodomy II - deviate intercourse with person under 14/incapable of consent
f	163.405(1)(b)	Sodomy I - deviate intercourse with person under 12
f	163.405(1)(c)	Sodomy I - deviate intercourse with sister/daughter/brother/son under 16
m	163.415(1)(b)	Sexual Abuse II - sexual contact with person under 18/incapable of consent
f	163.425(1)(a)	Sexual Abuse I - sexual contact with person under 12
m	163.435	Contributing to sexual delinquency of a minor, by person over 18
m	163.445	Sexual misconduct - intercourse with person under 18
f	163.483	Using child under 16 in obscene sexual performance
m	163.575	Endangering welfare of a minor - sex, controlled substances, gambling, tobacco, smoking device (HB 2422)
f	163.___ §2(1)(b)	Sexual penetration III - person incapable of consent (HB 2586)
f	§2(1)(c)	Sexual penetration III - person under 16
f	§3(1)(b)	Sexual penetration II - person incapable of consent and dangerous weapon or injury
f	§3(1)(c)	Sexual penetration II - person under 14
f	§4(1)(b)	Sexual penetration I - person incapable of consent and deadly weapon or injury
f	§4(1)(c)	Sexual penetration I - person under 12

Offenses Against Public Health and Decency

m	167.065	Furnishing obscene materials to minor
m	167.070	Sending obscene materials to minor
m	167.075	Exhibiting obscene materials to minor
m	167.080	Displaying obscene materials to minor
m	167.830	Employment of minor in place of public entertainment

Alcoholic Liquors Generally

m	471.410	Delivery of liquor to person under 21

Controlled Substances

f	475.995(1)(2)(5)	Distribution of Schedule I-III substance to minor
m	475.995(3)(4)	Distribution of Schedule IV-V substance to minor

Rule 609 - Supplemental list B

OFFENSES OF DISHONESTY OR FALSE STATEMENT Relating to invasion of privacy

Arrest & Related Procedures

m	133.992(2)	Interception of communications

Offenses Including Fraud or Deception

m	165.505	Opening telegraphic message
m	165.510	Learning telegraphic contents
m	165.515	Bribery to disclose contents
m	165.520	Opening/learning letter contents
m	165.540	Interception of communications

Rule 609 - Supplemental list C

OFFENSES OF DISHONESTY OR FALSE STATEMENT - Relating to trespass

Offenses Against Property

f	164.215	Burglary II--enter premises when not open to public, with criminal intent
f	164.225	Burglary I--enter premises when not open to public, with criminal intent and tool/weapon
m	164.235	Possession of tools to facilitate forcible entry
m	164.243	Criminal trespass II/guest--remain in transient lodging
m	164.245	Criminal trespass II--enter premises unlawfully
m	164.255	Criminal trespass I--enter dwelling unlawfully

Rule 609 - Supplemental list D

OFFENSES OF DISHONESTY OR FALSE STATEMENT - Relating to theft

Offenses Against Property

m,f	164.015(1)	Theft--take property from owner thereof
m,f	164.015(3)	Theft by extortion--take property by instilling fear
m,f	164.125(1)(a)[1][2]	Theft of services--by force, threat
f	164.135(1)(a)	Unauthorized use of vehilce--take without consent
f	164.135(1)(c)	Unauthorized use of vehicle--retain beyond period
f	164.395	Robbery III--theft with threat/use of force
f	164.405	Robbery II--theft with threat/use of deadly force
f	164.415	Robbery I--theft with dangerous/deadly weapon
m	164.815	Unlawful transportation of hay--20 bales without certificate
m	164.825	Unlawful transportation of conifers--5 without bill of sale
m	164.863	Unlawful transportation of meat animal carcasses--without certificate
m	164.865	Unlawful sound recording--reproduce without owner consent
m	164.875	Unlawful videotape recording--reproduce without owner consent

Offenses Involving Fraud or Deception

m	165.107	Failing to maintain metal purchase record
m	165.109	Failing to maintain cedar purchase record

Enforcement of Wildlife Laws

m,f	496.992	Taking of game out of season

House Judiciary
Exhibit I, HB 2030
August 1, 1981 - 7:30 p.m.
5-pages
presented by Jim McCandlish

Oregon Criminal Defense Lawyer's Association
July 23, 1981

Commentary to ORE 609 (Federal Approach)

Oregon Rule of Evidence 609 indicates the circumstances in which a witness may be impeached by evidence of a prior conviction. The rule is identical to Rule 609 of the Federal Rules of Evidence. The Legislative Assembly specifically adopts the Commentary accompanying Federal Rule 609. However, several policy matters have arisen in the interpretation of Federal Rule 609 which require comment.

The phrase "false statement or dishonesty" has troubled the federal courts. A number of federal circuits have concluded from the legislative history of the federal rule that the terms are synonymous. See e.g. United States vs. Ortega, 561 F2d 803 (9th Cir. 1977). The Legislative Assembly specifically adopts this conclusion.

The federal Commentary is silent on the approach or test the trial court must use to determine the admissibility of a prior felony conviction which does not involve an element of crimens falsii. Prior to the adoption of the Federal Rule of Evidence, then Judge Burger formulated a four-factor test for determining whether the probative value of admitting the conviction outweighs its prejudicial effect on the defendant. Gordon v. United States, 383 F2d 936 (D.C. Cir 1967). These factors were:

1. The nature of the crime. This factor requires the court to analyze the prior crime in terms of relevance to credibility. The elements of a smuggling conviction are more probative than, for example, an assault. If the prior crime rates highly on a veracity scale, then this factor favors admissibility.

2. Time of conviction and subsequent criminal history of the witness.

A recent conviction is more probative and favors admissibility, particularly if there is a pattern of repeated recent criminal convictions. For example, a prior conviction which occurred six months before trial is more probative than one which occurred six years earlier. However, the probative value of the conviction which occurred six years earlier becomes greater if the witnesses's subsequent record establishes a pattern of continuing criminal conduct.

3. Similarity to crime charged. This factor relates to prejudicial impact on the accused. If the elements of the prior conviction are similar to those of the crime charged, then the analysis under this factor favors exclusion of the prior conviction. Strong reasons arise for excluding those prior convictions which are for the same or a similar crime, because of the inevitable pressure on lay jurors to use it as substantive evidence of guilt, even though not admissible as such under ORE 404(3). As a general guide, these convictions

should be used sparingly, if at all. For example, in a robbery case, the D.C. Circuit excluded a prior conviction for receiving stolen goods as both crimes involved the element of theft. United States v. Bailey, 426 F2d 1236 (D.C. Cir. 1970).

4. The importance of the defendant's testimony. If the testimony of the accused is crucial to a fair determination of the issues, as it would be for example in an assault/self-defense case without independent witnesses, then this factor tends to favor exclusion. The more central the issue of credibility is to a fair determination of guilt, the more desirable it is to encourage the accused to testify.

The Legislative Assembly adopts the four-factor test with caveats.

(1) In determing the importance of the testimony of the accused, the court need not take the testimony of the accused. In the interest of judicial efficiency, the court may make this determination based upon a summary of the accused's testimony as presented by defense counsel. Additionally, the court may take into consideration other remarks made by respective counsel about the nature of the case, and all evidence already introduced, if any. It is contemplated that the admissibility of prior convictions will usually be determined by pretrial motion.

(2) The Legislative Assembly specifically rejects inquiry into the facts of a prior conviction to weigh the "nature of the crime" factor. In

United States vs. Hayes, 553 F2d 824 (2d Cir. 1977), the court noted that in the prior conviction for importing cocaine, the defendant had testified and was disbelieved by the jury. Even though analyzing the facts of a prior conviction may well be helpful in some cases, it is very time-consuming and leads to uncertainty. Therefore, inquiry shall be limited to the elements of the prior crime.

ORE 403 governs exclusion of relevant evidence on grounds of prejudice. Prejudice to the defendant therefore encompasses more than "similarity to the crime charged.". Unfair prejudice, in the context of ORE 609, also means an undue tendency to suggest decisions on an improper basis. See the Commentary accompanying ORE 403.

COMPANION AMENDMENT

In the Commentary to ORE 403, page 12, delete the last sentence.

/tp

Oregon Criminal Defense Lawyer's Association
Proposed Amendment to A-Engrossed House Bill 2030
July 13, 1981

ARTICLE VI

Rule 609 - Impeachment By Prior Convictions

(1) On Page 16 of the A-Engrossed House Bill, Line 13, after "has" delete the rest of the line and insert "been".

On Line 14, delete "trier of fact or".

(2) On Page 16, Line 15, delete "dishonesty or".

Proposed July 23, 1981

(3) On Line 16, after the period, insert "Crimes involving false statement include, but are not limited to, the crimes specifically listed in the Commentary to this rule .".

House Judiciary
Exhibit J, HB 2030
August 1, 1981 - 7:30 p.m.
1-page
presented by staff

SECTION 97d - TEXT
(burden of proof in change
of violation of open meetings law)

HOUSE	SENATE
no provision, i.e., burden of persuasion rests on plaintiff throughout proceeding	burden of persuasion shifts to public body upon plaintiff's showing of prima facie case

Page 1

TAPE 1(A)C.P.

007 MEETING WAS CALLED TO ORDER BY SENATOR JAN WYERS, CHAIRPERSON AT 8:45 A.M.

MEMBERS PRESENT: Senator Walt F. Brown
Representative Ted Bugas
Senator Kenneth Jernstedt
Senator Ted Kulongoski
Representative Ben Lombard
Representative Tom Mason
Representative Norm Smith
Senator Robert F. Smith
Representative Bill Rutherford, Co-Chairman
Senator Jan Wyers, Co-Chairman

EXCUSED: Representative Margie Hendriksen

SENATOR WYERS introduced Don McEwen, Chairman of Council on Court Procedures and Fred Merrill, Executive Director of the Council on Court Procedures.

042 DON McEWEN said the council met an average of once a month or a little better throughout the past year. In the course of the year the council adopted promulgated rules on judgment vacation, judgment on provisional process, referees and those matters. In addition, you will recall, Senator Wyers, the direction of this committee at the conclusion of the last session. The council was specifically to study class actions and to promulgate a rule to clarify pleading practice relating to recovery of attorney fees. The council did those things, we met in each of the four judicial districts and had public meetings pursuant to the requirements of statutes. We did a lot of housekeeping, in changing language, clarifying matters that had developed in the first two years of practice under the rule. I think those are the matters before the committee this morning. I don't believe there is anything controversial in any of the amendments.

062 SENATOR WYERS said one of the members had asked him to ask you to describe briefly what kind of practice your firm is involved in - sort of for a prospective on the ideas that come in to the proposed codes, and rules.

071 DON McEWEN responded that his firm represents Equitable Savings and Loan Association, Standard Insurance Company, a number of other insurance companies who primarily are in lending activities. They did not represent any casualty insurance carriers, they did not do any defense work for casualty care. They are the local council for a fair number of substantial maximum companies - Safeway stores, John Deere, Mortgage Loan Department, travel insurance company. They have a broad general practice with a great deal of tax work. They occasionaly have a plaintiff's case, but not too many. His own activities are devoted almost exclusively to litigation.

084 SENATOR WYERS asked for a brief comment on the council members who were most active during this last interim in the rule making process.

096 DON MCEWEN said that of the lawyers on the council, he would say the bulk of them are active and in constant attendance, some of the judges are not quite as

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much - the circuit court judges, Judge Dale and Judge Tompkins, most of them are active - they are at nearly all the meetings.

102 SENATOR WYERS said it sounded as if the answer is that they are all active.

104 DON McEWEN responded that they are all active - there have been some shades of activities - some are more active than others.

107 SENATOR WYERS said it was not a committee where three or four people have been dominate.

109 DON MCEWEN responded no, Mr. Merrill keeps careful minutes - he reflects the people in attendance each time. I don't think we have ever had a meeting of 23 committee members where there were less than 12 or 13 there and I would say the average would be 18 or 19 and the same people are not consistently absent. I think almost without exception, the overwhelmingly bulk of these people, about all of them, have contributed a great deal of time and are dedicated to the proposition that this is an appropriate way to promulgate rules of civil procedure to govern the courts of this state and have, at some sacrifice to their own time, made a significant contribution. It certainly is not a committee where three or four people dominate, carry and do all the work.

120 SENATOR WYERS asked if they had a subcommittee.

121 DON MCEWEN said when the council first organized itself, they had subcommittees on discovery, trial practice, judgments, divisions of process, class actions, third party practice, summary judgments and possibly one or two more. In the promulgation of the first rules, 1 through 64, the Senate rules that were submitted to the Legislature at the first session, that went into effect January 1, 1980; the subcommittee procedure basically produced those rules, made the recommendation, the council then approved, disapproved or modified. Professor Merrill and his staff then came back with a draft of the rule. That is basically the way the rules were put together. The subcommittees were significant.

137 SENATOR WYERS commented that he had heard it said that the Council on Court Procedures was to take the politics out of the rule-making procedures. There is a line of reasoning that politics is everything and those of us that have read the book, 'The Brethren', about the Supreme Court, now think, if we didn't before, that there is politics in the Supreme Court. So the different people on this council have different kinds of vested interest, just as other people do. I wonder if you could comment on the salubriousness of the politics of a council like this as opposed to the legislative kinds of politics.

158 DON McEWEN responded that everyone whose practice is primarily devoted to a particular area, as an example, personal injury, is aware of what he or she visualizes as procedural problems that particularly affect the type of cases that they are filing and trying. Their efforts are devoted to amendments or to promulgate the rules that solve those particular problems that they encounter on a more frequent basis due to the specialty of their practice. I suppose to an extent that is true of all of us. I try a wide range of cases - I don't have any problem with procedure that is particularly applicable to one type of case. It is my opinion that most of the members on the council advocate the adoption of a rule they believe is on balance for the legal profession, the judicial system and the litigants in the State of Oregon. For example, I think there is a

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substantial dissatisfaction with third party practice, primarily by lawyers who specialize in the prosecution of plaintiffs, in personal injury cases. Their reasons for dissatisfaction are perhaps twofold basically, but the one where I think they have a legitimate cause for concern is that third party practice frequently delays the trial and the deposition of those personal injury cases, particularly where parties defendent are permitted to implead additional third party defendents a substantial length of time after the case has been filed. It happens with some degree of regularity. Speaking frankly, I think many of the trial judges or circuit court judges are opposed to third party practice for perhaps the same reason. I think the second reason plaintiff personal injury lawyers do not like, in all cases, third party practice is that they feel in some cases it develops issues that detract the jury from the view of the injury plaintiff and his liability case. Obviously the converse is true in a great many cases. It simply has two or more parties defendent, third party defendent who are the real contestants and all the plaintiff has to do is sit there and ride it to the end while they fight it out among themselves. I think those two things are very traditional issues, they didn't contemplate it, it makes the case more complex and it is a delay. A lot of people are at fault on the delay: the defense bar is at fault, where that delay exists in a great many cases,and the judges or the courts are at fault and there are some cases where no one is at fault. He gave further examples of third party cases and explanations regarding a motion passed and retracted concerning third party practices. Explained they still have third party practice, they haven't changed the rules. He said it was a controversial subject and one that has a substantial impact on both the trial judges and a great many lawyers; where the action of the council really reflects maturity and consideration of overall problems of litigation and not simply the interest of the particular practitioner, his specialty or area of practice.

261 REPRESENTATIVE BUGAS announced he had just heard on his way to the meeting that the plane with all 52 hostages had just taken off.

270 SENATOR WYERS said he wanted to ask a couple of these threshold questions because there are some questions rattling around these halls about the role of the Council on Court Procedures and whether we should have the rule of the statutes that permits whatever the council does to go into effect unless there is a bill introduced and passed that overturns it. I thought it would be appropriate at the beginning to ask the chairman a couple of these questions although the more controversial parts of the rules, to do with class actions, won't come up until the last one of our meetings, when we will go over these with Fred Merrill and other witnesses that come in. He then asked if anyone wanted to ask any questions before they got into the rules.

286 REPRESENTATIVE SMITH begged the question if the council were comfortable with the program or policy, that their work is sufficient for it to become statute if there is no further action taken by the legislature in the following session.

292 DON MCEWEN said it is and that it insures a more responsible performance and places a greater burden on the council.

299 REPRESENTATIVE BUGAS asked if there was anything besides Class Action the council deemed to be a controversial section.

308 DON MCEWEN said the recommendation which started with the subcommittee on class action, and the council as a whole, adopted subcommittee recommendations in toto

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without any changes would be the only matter in his opinion that is controversial at this time.

313 SENATOR SMITH commented there was always an expressed concern about the cost of litigation and was there anyone on the committee who raised the point from time to time with respect to adoption of these proposed rules and procedures.

321 DON McEWEN said there wasn't any one in particular, but it was a constant expression from the people on both sides of the council table. It is a sad fact of life that litigation just continues to get more and more expensive and cost litigation is a constant concern to the overwhelming bulk, if not all the members of the council. The federal rules are suppose to be the salvation of the world, and I practice a great deal in federal court and am very comfortable with those rules, but in all candor they have made litigation about five times as expensive as it used to be.

339 SENATOR SMITH commented regarding battle on federal rules when they were produced in total and asked how the council was balanced on federal rules.

362 DON McEWEN said he didn't think there was much of a balance if you looked at the composition of the members. Mr. Pozzi, Chuck Paulson, Mike King and I all had a substantial trial practice in the federal courts. If you had to quantify it, the trial practice of the composition of council would be that 80 to 85 percent of the experience would be in state court. Everyone, with one or two exceptions has had some experience in the federal court and everybody was specifically aware of the federal rules on civil procedure and their impact on litigation. The council has done two basic things that tend to prevent or at least make litigation less expensive. One is the scope of the inquiry and discovery as restricted to the material as measured by the claims rather than relative to the subject matter. Secondly in retaining essentially fact pleading we have reduced the cost of litigation. We have not as yet permitted discovery that is available in federal courts in two areas, that also adds to the cost of litigation. One, interrogatories, are permissable under rule 33 of the federal rules. We have also had considerable controvery over whether expert testimony is a subject of discovery. The council overall has been opposed to that, even proposals to require or permit an inquiry to obtain the identity of some of these experts. Primarily, I think, because the plaintiffs and medical malpractice cases appeared as very experienced competent council with experience in that area and said that if you pass this rule it will be like it was in 1949; it will be impossible to obtain a medical expert, because once you have to go public on who our witness, is there will be a great deal of peer pressure brought upon the doctor and he will find some reason why he cannot testify. Further comments were made on federal rules and courts in relationship to cost of litigation.

444 SENATOR BROWN arrived at this point.

Tape 2(A)C.P.

028 SENATOR KULONGOSKI asked Fred Merrill if he felt the Supreme Court had the inherent power to adopt rules of civil procedure, constitutionally.

032 FRED MERRILL said yes, subject to overriding control of the legislature.

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033 SENATOR KULONGOSKI asked if Mr. Merrill thought the legislature had that control and MR. MERRILL responded that he believed so. SENATOR KULONGOSKI explained his reasons for asking that question was because he had been amazed in talking to members of the bar of their attitude towards sunset review and the role of the legislature in reviewing the bar association and some people have told me "well, we are not going to roll over and play dead, are we". In other words, they don't think the legislature has any role in dealing with the bar association and I was wondering about the continued argument on the inherent power of the court to do all these things and I was wondering if, in fact the court has the inherent power to adopt uniform rules of civil procedure. The reason I ask that is it gets to the question in my opinion, that the Chairman asked of whether in fact we should review the process we are going through at this particular time for modification in which we have the council having this particular power of coming to the legislature and have the legislature pass on it or not, it goes into effect after the session adjourns. I am interested in that because I think it is a selling point that the bar should be aware of if the court doesn't have the inherent power to adopt uniform rules and understand the give and take with the legislature that is required in all the different areas if in fact, if the profession wants to deal with lawyers in the legislature and wants to deal with the legislature fairly they have to understand that it is a two-way street.

054 FRED MERRILL said the one qualification that he would put on that is that he had the nasty feeling that the court had the power if it said it did. It has in other states, but he didn't know about the relationship to the sunset review, but when this came up in the last biennium he took the occasion to investigate the pronouncements on rule-making power of the court relating to civil procedure and the case law at the present time indicates the court does have the inherent power to make rules but subject to the overriding control of the legislature and by custom it has been left to the legislature to promulgate. It wasn't until 1977 when they indicated they wanted separate agencies .

061 SENATOR KULONGOSKI asked if the council had looked at promulgating uniform rules for administrative practice due to the expanding practice in the administrative law area, by looking at the different agencies to see if there was some consistency or if there should be some consistency, evidentiary rules or what ever we are doing. He commented that their practice was one of basically administrative law and it was extremely complex in dealing with different agencies, that have different rules and so he had wondered if the council had looked at consolidating that someway and have a uniform administrative law procedure.

083 DON MCEWEN responded that they had not given that any consideration and thought that under the act that created the council they were limited to rules of civil procedures in courts.

077 SENATOR KULONGOSKI asked Fred Merrill if he thought there was a need for a separate council on administrative law, if that was something the legislature should look at.

078 FRED MERRILL responded that he did but that he wasn't sure it should be this council.

085 SENATOR KULONGOSKI commented that the answer was similar to what Senator Smith has said - he was concerned about the increased cost of litigation. He recalled

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that one of the great arguments for administrative government was the fact that we could take this out of the court and it would be much cheaper, the citizens would have the availability of some procedures which would litigate rights and responsibilities of people. But it appears what has happened is the administrative law procedure has become extremely expensive.

100 REPRESENTATIVE BUGAS questioned that in establishing the council did the legislature erect the procedure whereby the rules become effective unless we take positive action to delete or modify them.

112 DON MCEWEN said that was the way the original bill was.

114 SENATOR WYERS said that was enacted in 1977, the major work on that was done in the House Judiciary Committee.

123 REPRESENTATIVE RUTHERFORD explained the background on the establishment of the council on court procedures.

160 SENATOR JERNSTEDT arrived at this point

161 REPRESENTATIVE BUGAS explained that he had been a member of the committee at the time the council was established, and remembered the problems the committee had had in trying to get a group of lawyers together to mandate a settlement, but he was finding now that the practitioners at home were not to happy with this procedure, he felt that the practicing attorneys here were doing what the practicing attorneys wanted but he had gotten readings last session and already some this session to be careful on various rules and not to forget they have contrived this strange procedure whereby they're law now. I always thought we left it up to the lawyers and I am wondering how much conversation about these goes on at the bar meeting.

185 FRED MERRILL responded that they had had some controversy about the amount of information transmitted to the bar last biennium. We stood on our heads to begin dealing with the organized bar, and the bar committees from the very beginning on the subject they are dealing with. They promulgated the rules on September 6, deciminated the information about them, made copies of the tenative rules which are almost identical to what was enacted. They held four public hearings, a number of attorneys showed up, and they commented in writing. It was my impression that class actions of course being controversial, there are a number of people that are dissatisfied with what happened. But he did not get any readings at the end of these hearings, and the actions of the council, that anything else the council had done was dissatisfying any substantial elements of the bar. He thought people were relatively satisfied, that complaints about tenative rules resulted in changes and he thought everybody was relatively happy.

200 DON McEWEN added that he was not aware of a significant feeling in the bar that this was not the way to promulgate rules on civil procedure. You find a great many lawyers who are unhappy with a particular provision in some rule, because they think it presents some particular problem.

204 FRED MERRILL said he thought there was substantial satisfaction with the joint work product of the committee in the legislature in the last session. The people that he had talked to, including judges that have to administer them, are amazed

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that we have as few problems with these rules that were developed as we in fact have, and that they are as well put together and well working as they are

212 REPRESENTATIVE SMITH said he heard a fair amount of grousing within the practicing bar about changing any of the rules, mainly because most have gotten used to them and they can stop looking at the statutes then and just go about their daily practice, now this forces them to go back and be a little more mechanical and make sure they are following procedure. He thought until people become comfortable with this there will be that grousing, regardless of which way you turn on any given rule.

226 SENATOR KULONGOSKI said he would like to know if, in fact, there is sentiment on the committee that they should pursue reviewing whether the council should remain and have that authority to submit changes like it does in the session.

232 SENATOR WYERS said the first item on the agenda of the Senate Justice Committee scheduled for this afternoon was to discuss whether or not the committee wanted to introduce as a committee bill, a bill that has been introduced at the request of the Oregon Banker's Association, which would reverse the authority of the Council on Court Procedures. Also there are others who are interested in that, some of whom are here today. We will have an opportunity to discuss that at that time.

249 SENATOR KULONGOSKI said he wanted to make sure that if the committee had a feeling for that, the two gentlemen here should be made aware of it from the beginning.

251 SENATOR WYERS said that Mr. McEwen and Professor Merrill were aware that there was such a bill drafted. He explained his reservations were that this was the giving over of some of the legislative prerogatives and that in 1977, when it hit the Senate Judiciary, he, as a freshman member, did not want to give up anything and he still had some of those feelings. He respected very much what Representative Rutherford was saying about what it was like in the House Judiciary Committee. But in the Senate Judiciary they had not had a problem in not being able to get their work done. He did not mean that to be critical in any way, because he understood the way the House Judiciary and Senate Judiciary work, has been different. He thought a lot of that was because the House had sifted a lot of the issues before they had come to us and there were a lot of good reasons for that.

270 SENATOR KULONGOSKI questioned Fred Merrill if in looking at the big picture of what was going on, when the Chairman introduced the bill, it would be because of the class action amendment that had come in.

274 FRED MERRILL said that would be his guess, which was a very small portion of the work done. He said that he had been amazed over the past four years by the willingness of the council to put in work, to put aside their personal interests as lawyers and address the question as to what was the best rule. He also felt strongly that the imput of people that had to live with the rules, practicing attorneys and judges, was incredibly good at developing a good set of rules.

296 SENATOR SMITH expressed some of his concerns regarding the procedure they were taking and questioned if the important time may be over, the bulk of the heavy work being done. If that was so, the romance of serving on the council may

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diminish, and if it did it might be subject to a special interest or partisanship of excessive weight of one side or the other of philosophy regarding law. He questioned what the council had in mind for future activities.

316 FRED MERRILL responded that the bulk of the separate rules of civil procedures were done. There was a tremendous amount of civil procedure still scattered all the way from one end of the ORS to the other. Along with the budget documents, they also submitted a list of areas that had not been looked at, and deserved some attention, for example the third party practice area. He said his interpretation was that the council decided they couldn't make any changes without really running it past the bar and getting more imput and that will be a subject of heavy consideration next biennium. He also listed other areas that needed attention. He felt there was a lot of work left to be done and not only on the rules of civil procedure. On those rules, the council, at least to this date, had demonstrated a great deal of sensitivity to problems with them and making adjustments to reflect things that have come up - that should be a continuing process. The strength of a rule-making as an ongoing body is that it can recognize problems as they come up and develop reasonable solutions and make changes. That is not an unimportant function.

346 SENATOR WYERS said he had heard it argued that the council had made one report which has been slightly modified and adopted by the legislature and that this is the second one and they should make one more and maybe after that the major work would be done. He then asked if Mr. McEwen could agree to that.

351 DON MCEWEN responded that he thought the major work had been done but he thought that the things Professor Merrill just mentioned should be done.

355 SENATOR WYERS said that would be the report that would come to the 1983 session, did they think there might be an arguement that after this coming biennium, it might be an appropriate time, from the point of view of those who support the council, to consider taking it back to the legislature, as opposed to after we adopt this or before we adopt this.

360 DON MCEWEN responded that there were two questions there - insofar as time, it might be an appropriate time, whether that is the philosophic method of providing rules of civil procedure for the courts of Oregon, that is the second question. He said he appreciated the responsibility of the legislature, that had been touched on, it seems though where the legislature has the authority to either defeat entirely or nulify any action of the council in promulgation of the rules that would otherwise go into effect or to modify it, responsive to what the legislative members believe is necessary for the people, that they have not in any way abdicated any responsibility toward the people of the state or in the legislature. You have simply found a more effective means of dealing with it. Certainly in confining the answer to the time he thought itwas reasonable to predict at this time that by that time these other areas, that have not as yet been addressed, will have been addressed and considered and a report submitted.

Tape 1(B.) C.P.

003 SENATOR KULONGOSKI asked if the major work of the council will, in fact, be completed by the 1983 session.

009 DON MCEWEN said that in a sense that a complete and comprehensive set of rules to govern civil procedure and almost every conceivable existing form of action will have been accomplished. He did not intend to reflect by that response that in his opinion the need for a council had dissipated.

013 SENATOR KULONGOSKI commented that he felt the biggest problem they were going to have argued to the Legislature was convincing them that there was a need for the council to exist after the 1983 session. He felt that the council was going to have to come up with an arguement if they wanted to exist beyond 1983 - an arguement that there was a need for the council, that there was something the legislature couldn't handle because that was what he understood the Chairman was getting at, that he thought there wasn't that much that you people were going to have to do and the legislature could do whatever else that needed doing in that area.

019 FRED MERRILL said he felt that was about the time the council was going to pay out. The problems presented by having the legislature deal with the rules of civil procedure is the periodic nature, where you have various interest groups coming in and tinkering around with what basically is a system. If there is the council, there you have an ongoing group of people that are continually making objective evaluations and bringing in those evaluations for changes. With the federal rules it has seemed that the rule-making power pays out more over the years, with the flexibility to identify and make problems and changes.

028 SENATOR KULONGOSKI said he found it interesting how it had turned because he remembered last session, it was the plaintiff's bar who objected primarily to the council and it now appeared that with the enactment of the bill by the Bankers' Association it was the plaintiff's bar that will be defending the council because of the class action. This was what he understood the council was most concerned about, that that type of action would go on constantly and if the council were removed those people would be having a field day trying to get the legislature to move one way or another on their issues instead of going to this uniform body, at least initially, and then coming in and everybody doing battle on a given battlefield.

041 SENATOR WYERS announced that he had just learned that the Oregon Supreme Court had declared the death penalty inititive unconstitutional here in Oregon.

053 FRED MERRILL introduced the 'Summary of Amendments to Rules 1-64 (except 32) and New Rules 65-66'. SEE EXHIBIT C. He explained that he was not going to go through all the amendments, but he would like to pick out about three or four of the amendments that would be of the most interest and explain them to the committee. Most of the amendments resulted from suggestions, comments and questions raised by members of the bar of judges in putting the rules into effect. These are rules that were adopted as amended by the legislature, they were a joint product, as the committee remembers there were a lot of changes made. He said that Rule 7 was one of the changes he wanted to call to the attention of the committee. There were a number of changes in Rule 7, none of them particularly controversial. In the green book, 'Oregon Rules of Civil Procedure and Amendments', page 147 and 148 there is a recommended statutory amendment, relating to service of summons. SEE EXHIBIT A. Oregon Rules of Civil Procedure and Amendments promulgated by Council on Court Procedures, December 13, 1980.

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100 SENATOR WYERS questioned if the council had discussed that the whole problem was that people were not aware that their licenses were suspended. He said there were a cluster of problems there, that people did not change their drivers license address when they moved, particularly younger, more mobile people so when the DMV was served, actual notice did not go to them. Just as when the notice was sent out to people that their license has been suspended, because it was sent to the address of their last drivers license. And that was adequate notice even if it came back unserved. Those are three problems, that all relate to the business of using the Department of Motor Vehicles as a place to let people know something. In the case of driving while suspended, it can end up with a felony on one week-end when you get two tickets on the same week-end and in the case of service on DMV you can get a default judgment without knowing you are being sued. This, again can take the privilege of driving away. Were those discussed in connection with each other?

117 FRED MERRILL said the last biennium there was a fair amount of discussion on the question of whether serving summons by mailing it to an address that DMV had was an effective way of getting notice out given the problems with the correctness of that address. He said the question is whether you also make a record of that with the DMV so that people that are interested have access to that record. The one thing I would add to that is that this procedure was not promulgated by the council at all. The rules as promulgated by the council did not provide for any special service in Motor Vehicle cases, this was added by the legislature, if you remember, as a result of some testimony received in the last biennium. We talked about it then. The second amendment of substantial importance in the summary is on page 2, Rule 26 B. See EXHIBIT C.

162 REPRESENTATIVE RUTHERFORD questioned if the process was completed would there be a judgment against the partnership assets. He received an affirmative answer. He then asked if a judgement was wanted, not against the partnership assets or in addition to the partnership assets or a judgment against the individual partners, what then.

164 FRED MERRILL responded you join the individuals you wish to get the judgment against or all of them as individual defendents. You would name them as individuals and as a partnership. You would have both of those alternatives instead of just the one.

170 SENATOR KULONGOSKI questioned if the law had been changed, in relation to labor organization, in or about 1967.

179 FRED MERRILL said there was a special statute that provided that they could be sued. They had not touched the statute relating to labor organization.

183 SENATOR WYERS asked what type of schedule the council was planning in the next month or so about coming up and being available to prepare some of us before they came in here.

187 FRED MERRILL responded that he would be happy to talk to anybody at any time, in fact he would come around and talk to people. He would be very happy to come at any time if someone had a question about anything. He added that he had submitted and would leave in Felicia Gniewosz's office, a complete legislative history of this material that includes all of the minutes showing the votes and

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the testimony received, and all the drafts of these rules, all of the committee reports, everything they have, were in four volumes.

200 FRED MERRILL called to the committee's attention, page 3 of the summary (Exhibit C), Rule 39 F relating to depositions and explained the changes.

226 DON McEWEN commented on the rule in federal courts and he didn't think one person in a hundred ever exercised the privilege unless some lawyer recommends it to him.

FRED MERRILL commented on the two new rules. (See Summary, page 4; EXHIBIT C.). Regarding the rule on referees, he said the policy issue was that it may liberalize the use of referees, which he thought was a good thing, but it puts pretty strict controls so the judges can abuse them, if a judge was so disposed. The other rule is almost never used, but is a necessary rule relating to submitting without pleadings. It would be a money saving thing if more attorneys would engage in it.

242 SENATOR WYERS adjourned the meeting at 10:00 A.M.

Respectively Submitted,

Glenda Harris

Glenda Harris, Committee Assistant

EXHIBITS:

A. Oregon Rules of Civil Procedure and Amendments promulgated by Council on Court Procedures, December 13, 1980. (Oversize Exhibit)

B. Oregon Rules of Civil Procedure promulgated by Council on Court Procedure, January 1, 1980. (Oversized Exhibit)

C. Summary of Amendments to Rules 1-64 (except 32) and new rules 65-66

D. Witness Registration, 1/20/81

HOUSE COMMITTEE ON JUDICIARY

Joint Meeting of House Judiciary Subcommittee 2 and Senate Justice Committee

January 27, 1981 8:40 a.m. 350 State Capitol

Members Present:	Representative Bill Rutherford, Chairperson Senator Jan Wyers, Co-Chairperson Senator Walter Brown Representative Ted Bugas Senator Ted Kulongoski Representative Tom Mason Senator Ken Jernstedt Representative Kip Lombard Representative Norm Smith
Excused:	Representative Margie Hendriksen Senator Robert Smith
Staff:	Linda Zuckerman, Legal Counsel, House Judiciary Felicia Gniewosz, Legal Counsel, Senate Justice Ellen Rogers, Committee Assistant, House Judiciary
Witnesses:	Fred Merrill, Council on Court Procedure Jim Tate, Member of Council on Court Procedure
Measure:	Oregon Civil Procedure Rules 65-73
Tapes:	HB-81-JUD-24 HB-81-JUD-25

TAPE 25
SIDE A

000 CHAIRPERSON RUTHERFORD opened the public hearing on Civil Procedure Rules 65-73.

008 Fred Merrill, Council on Court Procedure, stated that he would start with rule 65-73 of Oregon Rules of Civil Procedure (Exhibit A, Civil Procedure).

043 REP. SMITH asked in Rule 67 when law and equity are merged if it was for all purposes and if there was no remaining distinction.

046 FRED MERRILL explained that it was for procedural purposes. The remedies of law and equity remain as they always were, subject to the same conditions.

047 REP. SMITH explained in construction lien cases there is still a statute on the books which allows you to try the case to the judge

first on equitable principles and then if you loose you can go to a jury in question of law and fact. He stated that he was finding things in the statutes that maintain the old rules.

052 FRED MERRILL stated when you talk about jury trials the council or legislature could not effect that because it is a constitutional right.

074 SENATOR BROWN asked if in Rule 67, the prayer was for $1000 general and $10,000 punitive with $11,000 maximum if the limitation within that $11,000 figure could be reapportioned. He didn't feel that the rule spoke to that.

082 FRED MERRILL felt that if you ask for $1000 general and $10,000 punitive you cannot get more than that.

085 SENATOR BROWN stated that a certain maximum figure has been asked for and it sounds like the rule provides for the contrary.

086 JIM TATE, practicing attorney and member of Council on Court Procedure, replied that the court would not allow, under the circumstances, any amount less than the specific damages. They wouldn't allow a crossover between general and special damages.

108 MR. MERRILL explained that Rule 68 was one of the most important rules in the sequence. The Council received the direction from the Senate Judiciary Committee and requests from various attorneys and a couple of opinions to come with a uniform method for pleading and proving attorneys fees. Under the present system there are 200 plus statutes providing for recovery of attorney fees incident to an action.

162 JIM TATE stated that in his experience nobody has ever asked for a jury trial on the issue of attorneys fees. He didn't know if it was constitutional for the judge to set attorneys fees in all cases.

172 SENATOR WYERS stated that he had received some positive comments from an attorney in Portland and he thought in some cases he wanted the jury to decide.

185 SENATOR KULONGOSKI asked if the attorneys fees would be submitted in a cost bill and passed on through the procedure by the judge.

191 FRED MERRILL replied that was correct.

192 SENATOR KULONGOSKI asked how the attorneys fees would be handled in Class Actions.

195 FRED MERRILL explained that the amendment to Rule 32 has a detailed provision allowing the court to regulate the fee arrangement between

the plaintiff's and the defendant's attorney. He thought that the assesment would be done through the cost bill.

209 JIM TATE explained that there were three ways to have attorneys fees in a case. 1) You can have damages so you can sue and get back your attorneys fees for defending yourself in a lawsuit. 2) You can have a statute or case law that states under certain circumstances if you are successful you can get attorneys fees. 3) You can have a contract.

He felt that Rule 68 made since because it is all handled afterwards and there is no longer a trap for somebody who is unwary.

247 JIM TATE stated that there are some statutes that say the right to attorneys fees doesn't accrue until a certain amount of time has passed. Under Rule 68 you could file a lawsuit and ask for attorneys fees before you have the right to receive them and then you wouldn't have to go in and amend the pleadings.

303 SEN. WYERS asked that if this wouldn't undermind the policy behind the law of trying to bring about settlements because it does generate a cost to file the complaint.

310 JIM TATE, replied that arguement could be made. He assumed that people would know about the rule and that if someone is filing lawsuits rather than sending a letter they are simply doing the wrong thing.

319 SEN. KULONGOSKI asked if pre-judgment interest from the time of accrual of the cause of action and the attorney fees is made part of the judgment, would be part of the interest payment.

329 FRED MERRILL replied that he didn't think so. Under the procedure the attorneys fees cost and disbursments are a seperate part of the judgment. They may be entered at the same time or they may be filled in later. He didn't feel that it would apply to those particular summons.

349 CHAIRPERSON RUTHERFORD asked about the effect of interest on the attorneys fees for those that are rendered as a judgment.

356 JIM TATE replied that you would get interest because it is a judgment.

374 SEN. WYERS pointed out that many tort actions do not provide for attorneys fees and there wouldn't be any attorneys fees in the judgment.

402 CHAIRPERSON RUTHERFORD asked, in pleading damages, if you had to plead the amount of the attorneys fees.

412 FRED MERRILL replied that the rule requires you to indicate the bases upon which you claim in the statute contract and then it says that a claim for a reasonable amount of attorneys fees is sufficiant. The plaintiff is entitled to a reasonable amount of attorneys fees based on ORS 20.080 without specifying the amount.

TAPE 25
SIDE A

008 FRED MERRILL stated that Rule 68 clears up an ambiguity in the present law. It is not clear now when you get attorneys fees whether you also get the prevailing cost.

014 REP. SMITH asked if a case could be made for a statute providing for prevailing attorneys fees for most matters. He felt that they were a form of leverage to bring about settlement.

There are many smaller claims that are not covered by statute that result in greater litigation cost than it is worth proceeding for.

025 MR. MERRILL responded that the council was looking into a uniform statute relating to prevailing attorneys fees.

He felt that it could have a tremendous effect on litigation on distribution of damages. He didn't think that any state had an overall transfer saying that the prevailing party can always recover attorneys fees.

104 FRED MERRILL went on to explain Rule 68 (Exhibit A, Civil Procedures).

135 REP. LOMBARD asked where the limitation came from in Rule 68A. (2), page 16 (Exhibit A, Civil Procedures).

139 FRED MERRILL replied that it came out of the statutes.

147 CHAIRPERSON RUTHERFORD felt that there was some confussion over when the cost of depositions are going to be taxed.

156 FRED MERRILL replied that there was a problem because under the deposition procedure you just notice the deposition. You don't get a court order to perpetuate. That doesn't indicate why you are taking it so the only way to tell if it is a perpetuation deposition or a discovery deposition is to look back to see if it was ever used in the case.

171 CHAIRPERSON RUTHERFORD was concerned with why, if you are entitled to recover your costs, you can't recover all of them.

178 FRED MERRILL thought that under the federal system all depositions and all discovery costs are recoverable.

189 CHAIRPERSON RUTHERFORD brought up the problem of all counties doing things differently as far as costs and foreclosures.

213 FRED MERRILL went on with his testimony explaining Rule 69 (Exhibit A, Civil Procedures).

260 REP. LOMBARD expressed his concern with the differences around the state dealing with the notice where the plaintiff knows that the defendant is represented by an attorney but the attorney has not filed an appearance. He felt that the rules differ in various circuits as to whether or not a plaintiffs attorney has an obligation to provide prior written notice of intent to take default.

281 REP. SMITH asked if Rep. Lombard would rather see a requirement that a 10 day notice be served on opposing counsel where counsel has actual knowledge.

295 REP. LOMBARD stated that was done in some counties. He thought that it should be uniformed state-wide.

337 FRED MERRILL explained Rule 70 (Exhibit A, Civil Procedures).

409 CHAIRPERSON RUTHERFORD asked what happens in a situation like Marion County being so far behind in their filings.

411 FRED MERRILL stated that the rule requires that the judgment be entered in 24 hours. He referred to a case in Multnomah County, Charco, Inc. v. Cohn , in which the court clerk received a sizable amount of damages because of an error in not entering a judgment properly that resulted in civil liability on the part of the clerk.

TAPE 24
SIDE B

011 FRED MERRILL went on to explain Rule 70 (Exhibit A, Civil Procedure).

022 REP. LOMBARD stated that in simple judgment cases there was going to be an automatic 5 day delay in the date obtaining the judgment and effective date of the judgment.

035 FRED MERRILL replied that the counsel did discuss that and decided that if there was an unusual situation that required immediate action they would put in the rule "unless otherwise ordered by the court".

045 JIM TATE responded that he didn't feel that the rule was very clear.

062 REP. RUTHERFORD suggested changing the language to say "one ordered by the court".

066 FRED MERRILL explained Rule 71 (Exhibit A, Civil Procedure).

125 In answering Sen. Brown's question on the rationale for holding in abeyance the course action during the appeal, FRED MERRILL stated that the existing statutes and standard jurisdiction of provisions for appellate and circuit courts say that during a pendency of an appeal the circuit court has no jurisdiction over the case and cannot do anything other than some fairly narrowly defined statutory duties to effectuate the appeal.

The policy reason is that a trial judge who did not like to be reversed who was faced with an appeal could frustrate the appeal by changing the judgment all the time. He stated that Caveny v. Asheim is the leading Oregon case distinguishing the nunc pro tunc changing the record to conform with what actually happened instead of going back and changing the judgment.

165 REP. LOMBARD asked if B(1) Rule 71, (Exhibit A, Civil Procedure) was existing statutory language under 18.160. He wanted to know if it was referring to a personal representative or the party's attorney.

169 FRED MERRILL replied that it was referring to an exsecutor or representative. He stated that the language came out of Federal Rule 60.

180 JIM TATE pointed out that Rule 71 B (1), where it says that a motion for reasons shall be accompanied by a pleading or motion under Rule 21 A, is a substantial change from the prior practice in this state.

214 JIM TATE stated that the words "meritorious defense" are not used in Rule 71. It was the intent of the Council not to change the requirement that there be a meritorious defense as a prerequisite to setting aside a default judgment.

270 FRED MERRILL explained Rule 72 and Rule 73 (Exhibit A, Civil Procedure).

356 Hearing no further discussion the meeting was adjourned at 10:04 a.m.

Submitted

Ellen Rogers
Committee Assistant

EXHIBIT

Exhibit A , Civil Procedure - Oregon Rules of Civil Procedure

(For Exhibit A; See State Archives Exhibit File; Civil Procedure)

Chairperson:
SEN. JAN WYERS
Vice-Chairperson:
SEN. ROBERT SMITH

Staff:
FELICIA M. GNIEWOSZ
KRISTENA A. LaMAR
Legal Counsel
HARRIET CIVIN
Chief Committee Assistant
GLENDA HARRIS
VERA J. MOISEVE
Committee Assistants

Members:
SEN. WALT BROWN
SEN. EDWARD FADELEY
SEN. JIM GARDNER
SEN. KENNETH JERNSTEDT
SEN. TED KULONGOSKI

SENATE COMMITTEE ON JUSTICE

Room 347, State Capitol
SALEM, OREGON 97310
(503) 378-8833

Joint Meeting of the House Judiciary Subcommittee 1 and Senate Justice Committee

January 29, 1981 3 p.m. Room 350

HOUSE BILL 2030 PROPOSED EVIDENCE CODE

MEMBERS PRESENT:
Senator Walter Brown
Representative Joyce Cohen
Representative Peter Courtney
Senator Jim Gardner
Senator Edward Fadeley
Senator Ken Jernstedt
Senator Ted Kulongoski
Senator Ben (Kip) Lombard
Senator Bill Rutherford
Senator Robert Smith
Representative Dick Springer
SENATOR JAN WYERS, CO-CHAIRPERSON
REPRESENTATIVE TOM MASON, CO-CHAIRPERSON

Staff Present:
Stephen Griffith, Legal Counsel, House Judiciary
Kristena A. LaMar, Legal Counsel, Senate Committee on Justice
Harriet G. Civin, Chief Committee Assistant, Senate Justice

Witnesses:
James McCandlish, Metropolitan Public Defender's Office
Allison Smith, District Attorney's Association
Bruce Smith, Oregon State Bar Ad Hoc Committee
Elliott Lynn, Oregon Trial Lawyers Association

MEASURE: HB 2030 - Relating to Evidence Law (ARTICLE I, Sections 1, 2, 3, 4, 5, 6 and 6a).

Tapes: Senate Justice (Evidence) - 1A,1B; 2A, 2B.

MINUTES

SENATE COMMITTEE ON JUSTICE AND HOUSE JUDICIARY SUBCOMMITTEE 1
PROPOSED EVIDENCE CODE

January 29, 1981 — 3 p.m. — Room 350

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Senator Jim Gardner
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Senator Ben (Kip) Lombard
Senator Bill Rutherford
Senator Robert Smith
Representative Dick Springer
SENATOR JAN WYERS, CO-CHAIRPERSON
REPRESENTATIVE TOM MASON, CO-CHAIRPERSON

TAPE 1A

005 Meeting was called to order at 3:05 p.m. by CHAIRPERSON TOM MASON. He said that this is formally a meeting on HOUSE BILL 2030. It is more appropriately an informal but joint hearing on the Proposed Evidence Code revision.

013 FIRST ORDER OF BUSINESS WOULD BE ADOPTION OF A PROCEDURE FOR THE EVIDENCE CODE IN REFERENCE TO THE COMMENTARY.

STEPHEN GRIFFITH, Legal Counsel, House Committee on the Judiciary. SEE EXHIBIT D.

057 CHAIRPERSON MASON said he would also note in the proposed procedure (Exhibit D) amendments to the commentary will be required to be submitted in writing. He said this was a suggested amendment to Exhibit D.

MR. GRIFFITH said that if there is a proposed amendment to the text of the code, the committee would expect that proposed commentary be prepared to the amendment indicating the purpose behind it.

077 MOTION:
REPRESENTATIVE LOMBARD MOVED THE ADOPTION OF THE PROCEDURE. NO OBJECTION AND THE PROCEDURE WAS ADOPTED.

080 ARTICLE I. General Provisions. (Exhibit A, PROPOSED OREGON EVIDENCE CODE, Report of the Legislative Interim Committee on the Judiciary, December 1980).

CHAIRPERSON called attention to page 1 of Exhibit A. CHAIRPERSON MASON called attention, also, to a summary he had which outlined where a controversy existed. (EXHIBIT E).

093 SECTION 1. Rule 100. No controversy and the Chair moved adoption of ARTICLE 1, SECTION 1, Rule 100. No objection and it was so adopted.

ARTICLE 1. SECTION 2. Rule 101. Applicability of Oregon Evidence Code. THE CHAIR noted the only area of controversy regarding this particular section was whether or not this was applicable to preliminary hearings.

Professor Kirkpatrick has suggested an amendment that (4)(g),(Exhibit A, p.1), after the phrase recognizance there be added "and to preliminary hearings." THE CHAIR explained this would make the Evidence Code inapplicable to preliminary hearings. (EXHIBIT C, "Reforming Evidence Law in Oregon", OREGON LAW REVIEW,

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, vol. 59, Number 1, 1980, University of Oregon).

THE CHAIR next called attention to proposed amendments from the Oregon Criminal Defense Lawyers Association. (EXHIBIT F). THE CHAIR also called attention to proposed amendments submitted by the Ad Hoc Committee on Proposed Code of Evidence, Oregon State Bar. (EXHIBIT G). THE CHAIR then called attention to proposed amendments submitted by the Oregon District Attorneys Association. (EXHIBIT H).

132 JIM McCANDLISH, Metropolitan Public Defender's Office, Portland, Oregon. Represented the Oregon Criminal Defense Lawyers Association. The amendment proposed dealt with Rule 101(3) and (4). (EXHIBIT F). The effect of the numbering as done by the drafters, even though unintended, would be in proceedings which are exempted from the Evidence Code specifically enumerated privileges would apply -- doctor-patient, lawyer-client, etc. -- but those that are not specifically enumerated would not apply. MR. McCANDLISH thought there were a great many possibilites where there actually might be subsequent problems if that were to happen. He did not think this had been the intent of the Interim Committee on the Judiciary or the Advisory Committee. Judge Jones, at the last meeting of this body, had agreed it had simply been a drafting error. (See minutes, House Committee on the Judiciary, January 22, 1981).

THE CHAIR stated that Mr. McCandlish had suggested that in our text, SECTION 2, Rule 101(3), Rules of Privilege which states 32 to 41 (Rules 503 to 513), that phrase be changed by the deletion of the numerals 513 and inclusion of the numerals 514.

MR. McCANDLISH said that was correct.

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170 MOTION:
SENATOR SMITH MOVED THE ADOPTION OF THE PROPOSED AMENDMENT.

SENATOR WYERS asked about line 22, p. 1, House Bill 2030, "41" would have to be changed to "42".

SENATOR BROWN called attention to the fact that there presently is a SECTION 42 in the Proposed Evidence Code.

MR. McCANDLISH explained it would be the same with respect to the other suggestion he had made. The section numbers have not been changed by the proposed amendment.

SENATOR SMITH accepted the amendment made by Senator Wyers.

NO OBJECTION AND THE PROPOSED AMENDMENT WAS ADOPTED.

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193 Rule 101(4) Rules Applicable.

THE CHAIR called attention once again to Exhibit F. He said Mr. McCandlish had suggested that on line 24, p. 1 of the printed bill HB 2030 the numerical phrase "514" be deleted and insert the numerical phrase "601". He asked Mr. McCandlish to explain it and to explain whether a change was necessary "78" which appears right before that.

200 MR. McCANDLISH said he believed it was the same problem. He said he had not changed the section number either and that would be appropriate.

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204 KRISTENA A. LaMAR, Legal Counsel, Senate Committee on Justice. She believed the section change should be "42" to "43" rather than "78" to "79". MR. McCANDLISH agreed.

MR. McCANDLISH explained the purpose of his amendment. In this particular section what they are saying is that Rule 514 does not apply in the following situations and it lists eight or so situations. It is the last section in the privileges section. MR. McCANDLISH said he believed the intent was that privileges apply regardless.

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231 MOTION:
SENATOR SMITH MOVED THAT IN SUBNUMERAL PARAGRAPH (4) the numerical phrase "42" be deleted and the numerical phrase "43" be included and the numerical phrase "514" be deleted and the numerical phrase "601" be included.
NO OBJECTION AND THE AMENDMENT WAS ADOPTED.

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237 ALLISON SMITH, 100 State Office Building, Salem, Oregon. Represented the Oregon District Attorney's Association. (EXHIBIT H).

In response to the question from the CHAIR as to whether he had any suggested language on Rule 101(4)(c) which Mr. McCandlish's next suggested amendment addressed. (Exhibit F) MR. ALLISON SMITH said his association had no objection to that. It could be inserted in the manner suggested by Mr. McCandlish.

241 BRUCE SMITH, represented the Oregon State Bar Ad Hoc Committee on Evidence, attorney, Eugene, Oregon. (EXHIBIT G). MR. SMITH had no comment on this section.

243 CHAIRPERSON MASON then read the amendment proposed in Exhibit F which was that on page 1 of the bill, line 29, delete the period and insert ", except as required by ORS 133.743 to 133.857.". At the request of the Chair, Mr. McCandlish explained the proposed amendment. (See Exhibit F). If this amendment were adopted, it would then be consistent with the immediately preceeding paragraph (b) (line 28, p. 1, HB 2030). He felt it would be more consistent to put the statutory section in.

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267 MOTION:
THE CHAIR MOVED THE AMENDMENT. NO OBJECTION AND THE AMENDMENT WAS ADOPTED.

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272 <u>RULE 101(4)(d) Sentencing</u>

THE CHAIR called attention to the proposed amendment put forth by Mr. McCandlish (Exhibit F, p.2). The proposed amendment would on page 2, line 1, HB 2030, delete the period and insert ", except as required by ORS 137.090.".

287 MR. McCANDLISH said that again this proposed amendment was consistent with the two prior paragraphs with respect with specifically referring to the statute that places a limitation on the Rules of Evidence. (See Exhibit F). If interpreted literally, either the statute or this proposed rule if the rule included a specific reference to ORS 137.090, could create some problems in making sentencings burdensome. MR. McCandlish said that the Association he represented felt that that is not of particular practical concern because only those very damaging, either mitigating or aggravating, circumstances that are brought in by hearsay that anybody is going to object to. They believe the practice will continue as it stands. In a very

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difficult sentencing you bring in people to testify. Often you simply summarize as counsel for either the state or the defense that which you think the judge should hear and nobody objects. If there is an objection ORS 137.090 requires that it be done either if the witness is available, by testimony or in the event the witness is not available,by some other adequate means.

324 ALLISON SMITH said he was not familiar with the particular statute and so he could not comment on it. He did agree with what Mr. McCandlish had said except when the particular statute was cited because Mr. Smith repeated he was not familiar with it. He did agree with the principal.

329 BRUCE SMITH took no particular position on the proposed amendment.

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331 MOTION:
SENATOR WYERS MOVED THE ADOPTION OF THE AMENDMENT AS STATED BY THE CHAIR. NO OBJECTION AND THE AMENDMENT WAS ADOPTED.

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341 RULE 101(4)(e) Granting or revoking probation.

THE CHAIR said that Mr. McCandlish's group was suggesting the deletion of the text "Granting or revoking probation and in lieu of that deletion the following phrase be inserted, "The dispositional phase of a probation violation proceeding, except that testimony in aggravation or mitigation of the punishment shall be presented in the manner provided by ORS 137.090.". (EXHIBIT F, p. 3).

367 MR. McCANDLISH discussed his proposed amendment. (See pp. 2-3, Exhibit F). The witness said there should be a distinction between the dispositional phase and the adjudicatory phase because the dispositional phase descends it. Even at sentencing because of the extreme consequences just as in sentencing on the original crime the limitations of ORS 137.090 so far as how you present aggravating or mitigating circumstances should apply also.

REP. SPRINGER said he felt a little uncomfortable addressing something as sensitive as the sentencing and moving beyond that to the granting or revoking probation without really having an opportunity to discuss this with someone who can speak for the Bench in this regard.

436 ALLISON SMITH stated he had some misgivings about this concept. He said he thought Mr. McCandlish was probably right in that most judges follow the Rules of Evidence in determining whether or not they should revoke probation. He said that he knows of a great many instances where as a practical matter it is quite an imposition among the people involved. This is particularly true when it is an employer for a different part of the state. MR. SMITH said he had seen this happen a lot in eastern Oregon. Often the probation officer will be at the hearing but because of the distance it is very difficult to get some employer down there. He felt there were other instances where there should be some kind of a relaxed rule. ALLISON SMITH said this concept had not been discussed in his Association's legislative meetings and therefore he was not prepared to answer the question as fully as he should.

461 BRUCE SMITH stated that his committee had taken no position on this.

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SENATOR WYERS asked Mr. McCandlish whether he had discussed this with Judges Unis and Jones or raised it previously.

MR. McCANDLISH responded that they had talked about it but not with the specific language and they generally agreed with that concept. He said that he had raised it at the last meeting when the Judges were present and even though neither of them spoke in support, neither of them objected to the statements he was making about his perception about what most judges do.

MR. McCANDLISH continued and said that over the course of the interim the issue has been addressed and he said he could represent to the committee that he knew of no objection that Judge Jones and Judge Unis has. He repeated that they had not seen the proposed language.

TAPE 2A

027 MOTION:
SENATOR WYERS MOVED THE ADOPTION OF THE AMENDMENT PROPOSED BY MR. McCANDLISH. (Exhibit F, p. 3).

028 SENATOR SMITH said that in deference to the objections that have been raised in the committee and in all courtesy to those who object there ought to be an opportunity to hear from others on this point.

REPRESENTATIVE SPRINGER said he objected to Senator Wyers' motion.

SENATOR WYERS withdrew his motion.

046 MOTION:
SENATOR BROWN MOVED THE McCANDLISH AMENDMENT. (Exhibit F, p. 3). SENATOR BROWN said it seemed to him a very important question when you have a question as to whether you have somebody committed or not as part of a revocation proceeding the Rules of Evidence should apply. He felt it was a very central issue and well taken.

SENATOR BROWN said he was not calling for a vote at this time. He did not know what the procedural method would be but he felt the committee should not move on without the amendment at least having been made.

THE CHAIR said there was no amendment on the floor to Rule 101(4)(e). THE CHAIR said it would remain as it is for adoption with the total rule.

068 RULE 101(4)(g) Proceedings under ORS chpater 135 relating to conditional release, security release or release on personal recognizance.

THE CHAIR explained that Professor Kirkpatrick had submitted a relatively simple amendment which would merely add to the end of the sentence in Rule 101(4)(g) by deleting the period and adding "and to preliminary hearings.".

Bruce Smith of the Oregon State Bar has submitted what the Chair assumed to be an amendment in the form of The American Law Institute's "Model Code of Pre-Arraignment Procedure (TENT. Draft. No. 5, April 25, 1972). (EXHIBIT G).

BRUCE SMITH (see above) said that EXHIBIT G has been submitted as a proposed amendment. He explained that the "discussion" or "commentary" followed the proposed amendment in EXHIBIT G.

MR. BRUCE SMITH asked to clarify what his position here is. He explained that he is the chairman of an ad hoc committee of the Oregon State Bar on the Proposed

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Evidence Code. He explained the committee consisted of five members. It was specially appointed during the spring of 1980 to study the Evidence Code and have input into the legislative process. MR. SMITH made it clear he was speaking here only on behalf of the committee and not on behalf of the Oregon State Bar or the Board of Bar Governors of the Bar.

MR. BRUCE SMITH said he thought Exhibit G, the proposed amendment, is a fairly complex amendment. What it really says is that the Rules of Evidence will apply in preliminary hearings except that the rule may be relaxed with respect to Hearsay under a couple of situations. One would be if it is necessary and two if there is some assurance of reliability of the hearsay testimony. The rule in Oregon is unclear at this point with some courts following one procedure and some another. This would provide a bit more flexibility than the rigid rule of requiring all the Hearsay Rules be applied in preliminary hearing.

100 MR. McCANDLISH explained that he was looking at EXHIBIT G, the proposed amendment, for the first time. It seemed to him that the approach suggested by the Oregon District Attorney's Association at the last meeting of this committee is a sound approach. (EXHIBIT H).

STEPHEN GRIFFITH, House Legal Counsel, said it was. Allison Smith's submitted proposal (Exhibit H) would be added to the commentary.

MR. McCANDLISH said he had not seen Allison Smith's proposal for changes in the commentary. However, he believed that from comments Allison Smith had made at the last meeting would lead him to believe that the Bar's position has the same desired goal. The Bar approaches it from a different way. MR. McCANDLISH expressed the opinion that the Bar's position had some disadvantages. He then described how preliminary hearings are handled in Multnomah County.

MR. McCANDLISH suggested to the committee that specific exceptions be worked out. If it is an affidavit of an out-of-state witness, then that is what it is. So that trial courts will know. Otherwise, this approach of the Bar (EXHIBIT G) would require a foundation be laid by the police officer who is testifying, or whomever is testifying at the preliminary hearing, as to how reliable it is. MR. McCANDLISH felt it would take up more time than it would save.

168 ALLISON SMITH, District Attorney's Association, said he was inclined toward the Oregon State Bar Ad Hoc Committee proposal in preference to the one he had put forth. (EXHIBITS G and H). He felt that the Bar proposal provided the kind of guidance that the various judges handling those matters need. It is spelled out in the statute under the Bar proposal without going to commentary.

He said he was a bit concerned when general inapplicability of the rules of evidence to a lot of things is talked about. He said that "(a)-(g) are listed and it seems to be saying that these rules do not apply except in these limited statutory exceptions that are put out. (p.1, lines 16-29, p.2, lines 1-5, HB 2030). Perhaps we are missing the point in that the Rules of Evidence apply to most parts of those proceedings. By saying "just inapplicable" may be doing a disservice down the road. There could easily be a misreading of the Code in the future if it is kept in this form. He wondered whether the whole SECTION should not be rethought. He did not think it would be a particular thing for the police officer to lay the foundation in this particular thing or a problem for the police officer to do so.

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198 MOTION:
SENATOR WYERS MOVED THE AD HOC COMMITTEE'S PROPOSED AMENDMENT AS AN ADDITION TO (d) Rule 101, SECTION 2.

BRUCE SMITH explained he thought it might better be a separate paragraph.

MR. GRIFFITH pointed out another problem that this has not been accurately drafted according to the framework of the Code which is that the "Rules do not apply in the following situations" and it gives a list in which they do not apply. The EXHIBIT G uses the phrase "shall apply."

SENATOR WYERS ASKED THEN TO MAKE HIS MOTION CONCEPTUALLY WITH THE UNDERSTANDING IT WOULD BE BROUGHT BACK LATER FOR FINAL APPROVAL.

HIS CONCEPTUAL MOTION WAS ACCEPTED.

REPRESENTATIVE LOMBARD suggested that this is phrased in the positive, it might more appropriately be placed (2) as an addition to that subparagraph. This might be better than trying to rephrase it in the negative and slip it in as one of the lettered subparagraphs.

SENATOR WYERS ACCEPTED THAT AS AN AMENDMENT TO HIS MOTION. HE WONDERED WHETHER IT COULD BE SHORTENED UP SOME WAY AND HAVE PART OF IT IN THE COMMENTARY. HE ASKED THAT COUNSEL LOOK INTO THAT.

LEGAL COUNSEL LaMAR explained that it was Counsel's opinion that limitations on evidence in preliminary hearings be placed as amendments to the Criminal Code rather than as a part of the Evidence Code.

SENATOR BROWN shared Counsel's concern that this is a positive statement and should not be incorporated into the list of exclusions.

CHAIRPERSON MASON explained that because of that exact factor Representative Lombard had suggested that it be put in subparagraph 2 with a positive statement.

REPRESENTATIVE LOMBARD added that he would, however, feel more comfortable if committee counsel had an opportunity to look at it and came back with a recommendation.

REPRESENTATIVE MASON said that the conceptual motion should be to adopt the policy decision which the committee made today and leave it to committee counsel for correct placement.

NO OBJECTION TO THE CONCEPTUAL AMENDMENT AND IT WAS ADOPTED.

288 MOTION:
THE CHAIR MOVED THE ADOPTION OF RULE 101 AS AMENDED.

NO OBJECTION AND RULE 101 WAS ADOPTED AS AMENDED.

303 SECTION 3. Rule 102. Purpose and construction. (p.2, HB 2030; p. 5 EXHIBIT A).

318 MOTION:
THE CHAIR MOVED THE ADOPTION OF SECTION 3, Rule 102.
NO OBJECTION AND it was ADOPTED.

324 SECTION 4. Rule 103. Rulings on evidence. (p. 5, EXHIBIT A; p.2, HB 2030).

THE CHAIR advised the committee that Professor Kirpatrick had suggested that the following be added to Rule 103(1) following the phrase "right of the party is affected," (line 12, HB 2030) "and evidentiary error is not presumed to be prejudicial.". (EXHIBIT C).

LEGAL COUNSEL apprised the committee of the reasons set forth by Professor Kirkpatrick for the addition. He argues that in the commentary to the rule, the advisory commentary, this is not meant to overrule present Oregon law but there is a suspicion because of the difference in the line of cases upon which the rule is based it might be interpreted to, in fact, change law.

SENATOR BROWN'S initial reaction was that it was not good law. He said it seemed to him there was a line of Supreme Court cases where a court has held that certain types of evidentiary areas that have a constitutional basis or have presumptively harmful effect. SENATOR BROWN felt it was too broadly stated and MS. LaMAR agreed. He said he was not sure it would do any good even to state it.

LEGAL COUNSEL GRIFFITH pointed out that this was an area where Judges Jones and Unis indicated that the committee did have discretion and wished to exercise it to overrule the Meyer v. Harvey Aluminum case. (EXHIBIT A, p. 7).

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415 MOTION:
REPRESENTATIVE SPRINGER MOVED THE ADOPTION OF PROFESSOR KIRKPATRICK'S LANGUAGE. (See above).

SENATOR GARDNER said he favored changing the rule but he was not sure that the phraseology was exactly the way to do it.

CHAIRPERSON MASON agreed with Senator Gardner.

LEGAL COUNSEL GRIFFITH said the suggestion of the Judges had been that if the committee wished to adopt that position, that it could be taken care of in commentary. In effect it would be commentary to Rule 103(1). The commentary would indicate that the legislature, in passing the rule, had taken the position that the holding of Meyer v. Harvey Aluminum was no longer effective.

REPRESENTATIVE SPRINGER said that with that understanding in the commentary he would WITHDRAW HIS MOTION. HE WITHDREW HIS ORIGINAL MOTION AND MOVED THAT IT BE INCLUDED IN THE COMMENTARY AS STATED BY MR. GRIFFITH.

443 REPRESENTATIVE RUTHERFORD asked if it was being suggested that if the language is left the way it presently is, that the legislature would have overruled the Harvey v. Meyer Aluminum case provided that it is so stated in the commentary.

THE CHAIR said he believed that was the intention.

SENATOR WYERS said he recalled the testimony from the Judges also. He felt that if the motion to leave the language alone now is adopted, it would give the committee a week to get written comments for additions to the commentary. Plus the two Judges might be present to express their views. However, the Judges had said case law could be changed by so stating in the commentary.

Page 9

1B 014 SENATOR GARDNER said the safer thing to do if we wanted to change the laws is to spell it out in the rules.

THE CHAIR reviewed the topic for the committee. Professor Kirkpatrick's language is meant to overrule the Meyer case but does not really say that. Representative Springer's position is that it should be in the commentary overruling the Meyer case. Senator Gardner's position is that perhaps it should not only be in the commentary overruling the Meyer case but also put down in black and white in the rules. The policy decision remains as to whether or not the Meyer case should be overruled. THE CHAIR thought that was what the vote should be on.

REPRESENTATIVE RUTHERFORD wanted to align himself with Senator Gardner's position.

SENATOR SMITH said he would like to do so also.

In response to a question from SENATOR BROWN, COUNSEL GRIFFITH said that it simply says that there is no presumption of harm in a civil case. The Meyer case says the opposite. The rule would say there is no presumption of harm in a civil case.

THE CHAIR asked if there was any objection to the proposition of a conceptual amendment of overruling Meyer v. Harvey Aluminum, 263 Or 487, as it applies to this particular situation.

SENATOR WYERS said that he had not read the case and therefore could not vote on that.

COUNSEL GRIFFITH pointed out the motion could be phrased without reference to the Meyer v. Harvey Aluminum case. The concept could be put into the motion.

THE CHAIR RESTATED THE MOTION. THE PROPOSITION WAS MADE THAT THE COMMITTEE OVERRULE THE RULE OF THE HOLDING WHICH STATES THAT THERE IS ERRONEOUS ADMISSION OF EVIDENCE IN A CIVIL CASE.

COUNSEL LaMAR explained that Professor Kirkpatrick did not anticipate that there would be an official commentary. If the committee is not inclined to keep changing the Code provisions per se, then the adoption of an official commentary spelling it out more clearly than could be achieved in potential amendments to the rule might be the way to handle the situation.

NO OBJECTION AND IT WAS ADOPTED.

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077 THE CHAIR ASKED MR. SMITH FROM THE DISTRICT ATTORNEY'S ASSOCIATION IF HE HAD ANY OBJECTION TO SECTION 4. RULE 103 and he had none. The same question was posed to MR. SMITH OF THE AD HOCK COMMITTEE and MR. McCANDLISH of the PUBLIC DEFENDERS. THEY HAD NO OBJECTION.

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081 MOTION:
THE CHAIR MOVED THE ADOPTION OF SECTION 4, RULE 103 AS AMENDED.
NO OBJECTION AND IT WAS ADOPTED.

SECTION 5. Rule 104. Preliminary questions. (p. 7, EXHIBIT A; p. 2, HB 2030).

No proposed amendments were put forth from the witnesses present.

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089 MOTION:
THE CHAIR MOVED THE ADOPTION OF SECTION 5, RULE 104.
NO OBJECTION AND IT WAS ADOPTED.

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094 SECTION 6. Rule 105. Limited admissibility. (p. 10, EXHIBIT A; p. 2, HB 2030).

No objection or proposed amendments from witnesses present.

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098 MOTION:
CHAIR MOVED THE ADOPTION OF SECTION 6. RULE 105.
NO OBJECTION AND IT WAS ADOPTED.

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120 SECTION 6a. ORS 41.880 is amended to read:
41.880. Rule 106. When part of transaction proved, whole admissible. (p. 10, Exhibit A; p. 3, HB 2030).

124 ELLIOTT LYNN, Represented Oregon Trial Lawyers Association. (EXHIBIT I). His association proposed that at line 3, page 3 of HB 2030 the language ", the whole," be deleted and ", all relevant portions of the whole," be inserted.

MR. LYNN said this had been discussed at the last meeting of the committee. He said he thought Judge Jones had wanted to adopt Federal Rule 106. (SEE EXHIBIT B - archives oversized exhibits). The advisory committee rejected that rule.
MR. LYNN said that when SECTION 6a had been discussed during the interim Judge Unis had raised a potential problem. (p. 10, EXHIBIT A). JUDGE UNIS stated that in Black v. Nelson, a March 1967 case, the Supreme Court said that the statute which is almost identical to SECTION 6a was not to be interpreted literally.

JUDGE UNIS said that SECTION 6a would create a problem that would hit Black v. Nelson head on. That is why MR. LYNN was proposing the change. (EXHIBIT I). Under his proposal only relevant portions of evidence would be admitted by the trial court. This would eliminate the problem which Judge Unis had pointed out regarding SECTION 6a.

THE CHAIR called attention to a statement made by Mr. McCandlish in his prepared testimony. (EXHIBIT F, p. 3).

SENATOR GARDNER said the change is exactly the same language that has been construed by the court and the court has said it is not to be interpreted literally. Specifically, it is not to be interpeted to include oral conversations. By simply reiterating that language and assuming the committee wanted to, how would it be made applicable to oral conversations.

MR. LYNN said that if he understood the Senator correctly, the SEnator was saying that the Oregon Supreme Court states that oral testimony. . . .

SENATOR GARDNER said he had not read the Black v. Nelson case.

MR. LYNN read from Black v. Nelson: "Statute providing(ORS 41.880) tha t when a part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other party not to be given literal interpretation." In Black v. Nelson the defense wanted to get in some self-serving, irrelevant statements. They were in writing. The statute says to let in the whole thing. Under the present proposal, only relevant evidence would be allowed and that would be determined by the judge.

In response to a question from Senator Gardner, the witness said he read the case as qualifying it to "relevant" materials.

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SENATOR FADELEY wanted to know whether this change would make the rule the same as the case holding and the response from the witness was that he believed it would. In Black v. Nelson the Supreme Court used the language concerning evidence to be let in "to be competent must be material." MR. LYNN said he had said "relevant" basically because the Proposed Code proposes doing away with the distinction between "relevance" and "materiality" because most judges and attorneys do not know the difference anyway.

SENATOR FADELEY said that what the witness was saying was to make it so it did not change the law but then would make it more acceptable to retain it.

SENATOR FADELEY said he liked the amendment being proposed.

THE CHAIR said he would accept a motion for the Senate side.

COUNSEL GRIFFITH advised the Chair that a vote could be taken of all those present it can be brought up for reconsideration by a quorum of House members.

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251 SENATOR FADELEY MOVED THE PROPOSED AMENDMENT PUT FORTH BY MR. LYNN. (EXHIBIT I, SECTION 6a. Rule 106).

NO OBJECTIONS AND IT WAS ADOPTED.

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266 MOTION:
THE CHAIR MOVED POSSIBLE ADOPTION AND FUTURE ADOPTION OF Rule 106.

NO OBJECTION BY THE SENATE MEMBERS PRESENT. NO OBJECTION BY THE THREE HOUSE MEMBERS PRESENT WITH THE UNDERSTANDING IT WILL TAKE A FOURTH VOTE FOR A FINAL VOTE.

COUNSEL LaMAR said that although the Chair had indicated that Professor Kirkpatrick favored the adoption of the Federal Rule, amendment to ORS 41.880 will allow much more extensive elaboration of acts, declarations and conversations than the Federal Rule which deals only with specific writings of the court of the statements admitted. Professor Kirkpatrick's argument suggests that if the jury is going to see a part of a written statement, they should be allowed to the entire thing as modified by our court in cases it has dealt with writings only. The court has felt those other portions in writing should be relevant. The representation of Black v. Nelson as has been presented to the committee is certainly accurate but we do not have in this state a development as to the extent to which acts and occurrences and conversations would also be admissible.

She felt the testimony had mixed "apples and oranges." One of them is limiting the statute of proponent rule to relevant evidence. The second half of the question is to the extent to which we want to allow total episodes to come in at that point which may or may not be disruptive rather than an elucidating element in that portion of the trial.

SENATOR FADELEY asked whether it wasn't true that the Code of Evidence was a Code of Evidence as opposed to a Code directing the judge at all points about what the order of proof or the order of presentation will be. It talks more about what can be admitted more than it talks about when and how. It is not an order of control of the trial as far as he could see.

COUNSEL LaMAR said she thought that was true in general.

SENATOR GARDNER that the change that might make rise to the problem Counsel had referred to was that the committee was saying or using the words "at that time" and

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they were being added to the language. He felt Counsel LaMar was making a valid point.

SENATOR BROWN pointed out that that language was in the Federal Rules.

SENATOR GARDNER said that the Federal Rules were limited to written. They are a lot less time consuming to present.

REPRESENTATIVE RUTHERFORD said that the statute does not say it has to be heard at that time. The statute says it "may".

SENATOR GARDNER said he did not know what that meant when it said "may at that time be inquired into by the other." SENATOR GARDNER read that as giving him a right to inquire into it at that time. He has the right to inquire at that time and the other side does not.

COUNSEL LaMAR then discussed another problem that was not addressed or cured by the proposed amendment. (Exhibit I). Theoretically there could be conversation, portions which were privileged, which although be relevant, would not be admissible.

REPRESENTATIVE RUTHERFORD said that if the concern was as to who had the discretion, perhaps the language should be used "may at the discretion of the court."

COUNSEL GRIFFITH responded to SEnator Gardner's and Representative Rutherford's concern. He said the commentary of the Judiciary Committee indicates that permissive language does not affect the judge's control over the order of presenting evidence. (EXHIBIT A, p. 10).

SENATOR GARDNER said that the language of the rule says that you may inquire into it at that time. The sequence is preserved.

REPRESENTATIVE RUTHERFORD said this returned to a concern of his as well as Senator Gardner's and that was putting things into the commentary which are really meant to be part of the statute.

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417 MOTION:
SENATOR GARDNER MOVED RECONSIDERATION OF THE ELLIOTT LYNN AMENDMENT (Exhibit I). NO OBJECTION TO THE MOTION TO RECONSIDER.

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428 MOTION:
SENATOR GARDNER MOVED THE FEDERAL RULE (Exhibit A, p. 11).

This would change the law in Oregon according to Senator Gardner.

SENATOR FADELEY then elaborated and said it would change the law so that the present statute which the subcommittee wanted to retain would be repealed and replaced. It would be replaced by a statute that only allowed proof of a document but not concerning any kind of oral communication.

SENATOR GARDNER said that would be at the time the other side's case was being presented. You can always come back during your own case. Since the language has been added "at that time" to the earlier statute, what it is addressed to is being able to require your opponent to put in the entire part of a document, conversation, or whatever.

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SENATOR FADELEY asked whether the reason for adoption of the Federal Rule was because those who wanted the Federal Rule did not want anything like the statute that had been in effect in Oregon all these years concerning oral things to be covered by the Rule.

SENATOR GARDNER said he was not sure that the Oregon law has been interpreted -- has not had the language "at that time" in it to require the judge to let the evidence in during the opponent's case.

MR. LYNN did not know. He said that Federal Rule 106 said the same thing "may require in" at that time. It narrows the categories. It does say that an adverse party may require and that means may require the judge to do something. Under the present statute ORS 41.880, there is no requirement that the judge do that. Under the proposed SECTION 6a, there is no requirement that the judge allow the presentation at that time.

COUNSEL GRIFFITH said that certainly the way it is written on the face, it indicates that a party (and it is not a direction to a judge) may do something at a certain time. It could be construed to give that party the right to do it. It may or may not exercise the right.

SENATOR WYERS said it was very hard to appeal a case on an evidence point. In evidence case law, the judge has very wide discretion in these matters. He felt that unless a very strong word such as "shall" or "require," "may" means that the person can ask out. He did not feel strongly about whether it was going to be extended to oral statements.

Ms. LaMAR said that the judge did have some degree of latitude under the Federal Rule because he has to make some preliminary determination as to whether fairness would allow immediate introduction of the remainder of the writing be important. The party is afforded the right and they can demand that right but there has to be a preliminary determination.

For explanation, the CHAIR explained that the present motion was to adopt the Federal Rule which is for writings or recordings.

REPRESENTATIVE RUTHERFORD said he was talking about SECTION 6a on p. 10 of the Proposed Code (Exhibit A).

He was told that that included oral conversations already.

The motion does not include oral statements. Past Oregon law did.

SENATOR FADELEY wanted to know what the purpose was in restricting Oregon practice.

SENATOR GARDNER said it eliminated a potential for some disruption. You are attempting to deal with the order of proof rather than what is to be proven.

SENATOR GARDNER WITHDREW HIS MOTION AND THE ORIGINAL RULE REMAINED UNAMENDED.

Meeting was adjourned.

Respectfully submitted,

Harriet Civin, Chief Committee
Assistant, Senate Justice Committee

SEE NEXT PAGE FOR LIST OF EXHIBITS

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EXHIBITS:

Exhibit A - PROPOSED OREGON EVIDENCE CODE, December, 1980. Report of the Legislative Interim Committee on Judiciary. Filed with Archives (1981 session) Senate Justice Committee Oversized Exhibits.

Exhibit B - FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES (Effective July 1, 1975 -- As Amended to April 1, 1979). Filed with Archives (1981 session) Senate Justice Committee Oversized Exhibits.

Exhibit C - OREGON LAW REVIEW "Reforming Evidence Law in Oregon". Volume 59, Number 1. University of Oregon. 1980. Laird C. Kirkpatrick. Filed with Archives (1981 session) Senate Justice Committee Oversized Exhibits.

Exhibit D - Committee Procedure for Evidence Code. Prepared by staff.

Exhibit E - Outline prepared by staff.

Exhibit F - Oregon Criminal Defense Lawyers Association. James McCandlish, Metropolitan Defender's Office.

Exhibit G - Oregon State Bar Ad Hoc Committee on Proposed Code of Evidence. Bruce Smith, Eugene, Oregon.

Exhibit H - Allison Smith, Oregon District Attorney's Association.

Exhibit I - Oregon Trial Lawyer's. Elliott Lynn.

Exhibit J - Witness Registration

SENATE JUSTICE AND HOUSE JUDICIARY COMMITTEE ON CIVIL PROCEDURE

PUBLIC HEARING - MINUTES

February 3, 1981 8:30 A.M. Casette Tapes 3-4 (C.P.) 350 State Capitol

MEMBERS PRESENT: Senator Walt F. Brown
Representative Ted Bugas
Senator Kenneth Jernstedt
Representative Ben Lombard
Representative Tom Mason
Representative Norm Smith
Senator Robert F. Smith
Senator Jan Wyers, Co-Chairman

EXCUSED: Representative Margie Hendriksen
Senator Ted Kulongoski
Representative Bill Rutherford, Co-Chairman

STAFF PRESENT: Felicia Gniewosz, Legal Counsel
Glenda Harris, Committee Assistant

WITNESSES AND BILLS:

Tape 3A C.P. OREGON RULES OF CIVIL PROCEDURE AND AMENDMENTS promulgated by Council on Court Procedures, December 13, 1980.

OREGON CIVIL PROCEDURE RULES 78 - 85

008 Fred Merrill, Executive Director, Council on Court Procedure

147 Judge John Buttler, Oregon Court of Appeal

Tape 3B C.P. WORK SESSION - RELATING TO RULE 7 - MOTOR VEHICLES

044 Dwight Apple, Administrative Rules and Hearings Manager, Motor Vehicles Division

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TAPE 3A C.P.

003 MEETING WAS CALLED TO ORDER BY SENATOR BOB SMITH, CHAIRPERSON AT 8:40 A.M.

MEMBERS PRESENT: Senator Walt F. Brown
Representative Ted Bugas
Senator Kenneth Jernstedt
Representative Ben Lombard
Representative Tom Mason
Representative Norm Smith
Senator Robert F. Smith
Senator Jan Wyers, Co-Chairman

EXCUSED: Representative Margie Hendriksen
Senator Ted Kulongoski
Representative Bill Rutherford, Co-Chairman

OREGON CIVIL PROCEDURE RULES 78 - 85

008 FRED MERRILL, Executive Director, Council on Court Procedure, introduced Judge John Buttler, Oregon Court of Appeal and then gave a summary of Oregon Civil Procedure Rules 78 - 85. SEE EXHIBIT D.

074 MR. MERRILL explained under Rule 83, if you are simply seeking to hold the property so it can be used to satisfy the judgment, then the proper procedure to follow, to get the order, is to seek a provisional process order from the court, which then authorizes a restraining order. That would replace the provisional process procedure in chapter 29. He continued explanation of Rule 79.

113 SENATOR WYERS asked if any distinction was made between civil action for damages as opposed to probate court where you are trying to prevent the personal representative from squandering the assets.

123 MR. MERRILL said he thought that would fall under the provisional process procedure, in Rule 83. Stopping the executor from squandering the assets of the estate would fall under Rule 79. MR. MERRILL continued explanations of Rule 79, section D.

147 JUDGE BUTTLER said they had attempted to conform to the federal rules. Under the state rules, it wasn't very clear the distinction between the temporary restraining order and a preliminary injunction. The federal rules make that clear and so does the revised rules. The T.R.O is generally without a hearing.

154 FRED MERRILL continued summary, with Rule 80. He explained why the council had decided not to anything, generally with post-judgment, garnishment, execution, but only to deal with matters up through the entry and rendition of the judgment as a general rule and to leave the enforcement of judgments in Chapter 23 as ORS sections, rather than as Oregon Rules of Civil Procedure.

215 REPRESENTATIVE MASON arrived at this point.

218 FRED MERRILL explained the provisional process had to be separated from other provisional remedies: receivership, preliminary injunctions and provisional process all fall under the heading of provisional remedies. They codified,

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clarified and put a lot of new provisions into injunctions and receiverships. He did not feel it was particularly politically sensitive in the provisional process area.

233 JUDGE BUTTLER gave background, on provisional process, regarding 1973 legislation, which was a complete revamp of attachment and garnishment, and what the council had done. MR. MERRILL added that the changes had been made in response to problems that existed.

257 REPRESENTATIVE BUGAS arrived at this point.

271 FRED MERRILL commented on the bankers association's draft of a bill that would make some changes in garnishment. MR. MERRILL continued with summary of Rule 80.

294 SENATOR BROWN arrived at this point.

303 FRED MERRILL continued summary with Rule 81.

377 SENATOR WYERS asked where it was mentioned in rule 81, section D., Adverse Claimants, about getting into court quickly. MR. MERRILL replied it wasn't exclusively provided, but the point is you can make a motion to do this rather than waiting for the trial to come up and determination of the judgment. Perhaps something should be added here setting a time limit or requiring a hearing on this motion within a fixed period of time.

399 SENATOR JERNSTEDT asked who would pay for costs incurred, for third party. MR. MERRILL responded he would have to do some research to decide if the court could allow costs to the claimant party. Perhaps there should be an explicit provision for that.

426 SENATOR SMITH said he was curious and concerned regarding redemption - that persons are counciled or directed to consult an attorney, at some cost to that person, where previously they could have satisfied the requirement in some cases by going to the court house and determining, without costs, that their property was exempt, in fact. Is there anyway a person can determine his exemption without the cost of going to an attorney.

TAPE 4A (C.P.)

008 FRED MERRILL replied the statute now said that all exemptions must be listed, but it doesn't say what they are. The only other way is that in the rule itself, list all the exemptions and what it should say relating to the exemption procedure and where to get the form.

020 JUDGE BUTTLER said they had tried four proposals on this - one was to list them all. The second solution they thought of, was to select the ones they thought were the most important. The third proposal was to leave it as it now is. He explained the problems with these. SENATOR SMITH and JUDGE BUTTLER discussed the solutions and problems.

052 SENATOR SMITH asked to note this question and have the staff take a look at the possibility of some alternative to this point and report back at work session. He did not want it stated that a lawyer should be consulted - the point is that

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if there are no situations that have caused concern, then why is it being changed.

065 MR. MERRILL said the debate in the council did not address this in terms of advantages to attorneys, but the trial judges indicated they had seldom, if ever seen anyone who was capable of taking all the complicated steps for an exemption procedure and usually the average recepient of an attachment would not be, and most of the exemptions successfully filed were filed by legal aid.

080 JUDGE BUTTLER said they did have several different provisions, one of which was a very limited statement as to what might be available.

085 SENATOR BROWN and FRED MERRILL discussed possible exemptions.

112 FRED MERRILL continued summary with Rule 82 - relating to bonds and undertakings.

173 REPRESENTATIVE LOMBARD asked if approval applied to probate bonds. MR. MERRILL responded - to the extent that there would not be some specific provisions in the probate statute setting special rules. The rules would apply in any procedure, including probate to the extent there isn't any specific provision. REPRESENTATIVE LOMBARD said there was a provision of approval by clerk. MR. MERRILL said the only time a clerk could approve is when it is not otherwise required to be approved by a judge.

188 SENATOR WYERS asked if they had had some controversy about surety bonds. MR. MERRILL said no.

202 FRED MERRILL continued summary - Rules 83, 84 and 85. These were almost verbatim from the ORS. They are the provisional process rules.

220 SENATOR WYERS questioned if rule in ORS 29.070 was being repealed. MR. MERRILL replied they were superseding it. SENATOR WYERS asked a general question regarding economic problems - if the economy gets worse, was there anything about the law that needed to take that into account - are the rules on provisional process, for example, flexible enough for an economic shock, if a lot of people default on their consumer credit.

266 JUDGE BUTTLER said they had not discussed it. They did not want to make any significant changes in the 1972 legislation. It was carefully worked out, in the light of the Supreme Court decision, requiring an opportunity for a hearing prior to any attachment. They had carefully followed that with the exception noted. SENATOR WYERS and JUDGE BUTTLER and FRED MERRILL discussed the possibilities of problems if there was an economic shock.

318 JUDGE BUTTLER said the only specific suggestion they had received was on claim and delivery - it came from legal aid - it was to not prevent the plaintiff, once he has gotten the property back, - prohibit him from dismissing the lawsuit for thirty days. The purpose being to give the defendent, whose property has been taken, an opportunity to come in with some counterclaims, rather than have to file a separate lawsuit. They had adopted that suggestion in Rule 84.

340 FRED MERRILL continued explanation of changes in Rules 83 - 85.

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399 SENATOR WYERS questioned if there had been any changes in the process of getting a judgment in district court and then having to pay an additional filing fee to transfer that to circuit Court. Comments were made on consolidation of courts.

406 MR. MERRILL said no, and explained why he didn't think they could make changes in that area.

421 REPRESENTATIVE MASON questioned if there was any contemporary reason why district court should not get involved in real property. MR. MERRILL said he didn't think so, his understanding was that district court when originally enacted, in Multnomah County was viewed as a substitute for the Justice Court.

446 SENATOR WYERS suggested to Legal Counsel, Felicia Gniewosz, that later a bill might be prepared to address this and other small problems, if it doesn't look as if consolidation was moving.

TAPE 3B (C.P.)

022 FRED MERRILL concluded his summary with Rule 85.

WORK SESSION - RELATING TO RULE 7 - MOTOR VEHICLES

044 DWIGHT APPLE, Administrative Rules and Hearings Manager, Motor Vehicles Division. H e introduced his Administrative Assistant Nita Wood. Proposed Rule 7 on summons is specifically intended to change back to the existing procedure prior to the 1979 session. The legislature repealed ORS 15.190, which was a portion of Motor Vehicles Miscellaneous Statute. They have several major problems with the proposed Rule 7. Specifically, there are a number of questions that are unanswered and there are a number of problems based on the statutory changes, particularly Ballot Measure No. 1, which passed in the May primary which affected fee and fee records.

058 REPRESENTATIVE MASON asked what Ballot Measure Number 1 was.

058 MR. APPLE replied it was the constitutional amendment to the constitution regarding dedicated highways. SJR 7. On a number of specific programs, Motor Vehicles had to go through several legal opinions to determine if the division could legally support them any longer. They had to go through program by program to determine whether a program in effect was carrying its own weight or whether it could stand self-sufficient and that it was not being a drain on the highway fund. He was against the recommended statutory amendment. He said it was going to reinvolve Motor Vehicles Division on the issue in the service of that summons. The Legislature in 1979 repealed ORS 15.190, which got Motor Vehicles out of that process. The Division wants to stay out. There is a cost impact and there are specific problems with regard to the involvement. That service has been done under current law without Motor Vehicles being involved in it, and in addition, some of the services could no longer be provided the way they are identified in this rule.

085 SENATOR BROWN asked if they were happy with the rule as currently enforced. MR. APPLE replied they currently had no involvement in the summons process. SENATOR BROWN asked if they would be involved in the proposed change of Rule 7. He asked if the division would be physically required to have personal services? MR. APPLE said they would be engaged in the service again, in that they would

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have to maintain a record, which attorneys could call upon. They would be reinvolved in the process. MR. APPLE said these were actions specifically arising out of accidents, collisions or liabilities in motor vehicle statute. SENATOR BROWN inquired if the Motor Vehicles Division would be the object of service. MR. APPLE said that required a number of actions. He gave illustrations of those actions and commented on address of record. He explained their administrative rule that the official address of record is the driving record.

133 SENATOR WYERS asked if they had any proposals to improve notice to people who are not trying to play games, people in good faith, probably young and mobile, who do not comply with the law that they are to change their address within thirty days. People in good faith who do not get the job done.

139 MR. APPLE explained most of the services must go, under law, by certified mail. They honor those situations where there is a valid reason. It is a constant problem for the Division in keeping the records and for those of the public who use the records

156 SENATOR WYERS commented on the problems he had run into in his practice, people who are in good faith but they don't change their license. Under the current law, the old law and the council's proposed change, a person can still get a judgment against them without getting actual notice. He said it would be a service to everyone if they could find some way to dramatize the address change more.

170 MR. APPLE explained past legislature authorized the Division to put pre-addressed labels, with change of address cards, so people did not have to come into the DMV office to change their address. He said that had gone into effect last October and it was helping.

186 SENATOR SMITH asked what the penalty was for failure to notify DMV on change of address. MR. APPLE replied he thought it was a misdemeanor. COMMITTEE MEMBERS discussed penal ies for various driving violations.

204 SENATOR WYERS said the legal consequence of not changing the address was in itself rather minor, but the possible effect of getting a judgment against you, without knowing you are being sued, is major. Then you can have a 10-year suspension on your license.

207 MR APPLE said the unsatisfied judgments in small claims courts are major problems, because the individual very often can get those on his driving record, without his knowledge.

212 SENATOR WYERS asked Mr. Apple if he saw Rule 7 as improving or having effect one way or another on actual notice to people. MR. APPLE replied he did not see it as a direct improvement. SENATOR WYERS asked if Rule 7 required DMV to notify people when service has been made on them. He said it required the plaintiff to.

MR. APPLE listed the problems. He said they were not required to notify the defendant that service had been made on them. SENATOR WYERS and MR. APPLE discussed procedure under old rule.

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279 MR MERRILL explained that the Council, when they originally promulgated the rules, had no special provision for Motor Vehicles at all. After testimony, it was suggested that there be a special service provision for Motor Vehicles. They could see no logical reason why there had to be service on the DMV, so it was taken out. During th last biennium, they had received comment from attorneys, who suggested three possible problems. One, the existing rule is ambiguous as to when your thirty days starts to run, when you are serving under this statute, by mail. Two, the defense insurance attorneys said it was very advantageous to have some service on the DMV because they could keep checking up to the statutes of limitations and they knew there had been no service. As it is, they don't know whether a party has ever been served. The plaintiff's attorneys indicated the service on DMV gave them a set place for satisfaction of statutes of limitations, where now they are arguing about when the mail service was effective for limitations purposes. The difference between the prior system is that it now requires the DMV to receive and keep a record of the summons - under the prior law the DMV had a responsibility to mail itself notice to the defendent. The Council did not want to get them into that. As far as the obligation to furnish addresses go, this doesn't change that at all - the existing law requires them to furnish a certain fixed address and this provision makes no change in that whatsoever. The only addition is the necessity of them receiving and keeping a record and providing added stations and getting subpenaed into court occasionally. There is a fee provided for it, but it may not offset the fiscal impact.

315 SENATOR WYERS said he was very interested in getting some help to solve the problem of people who move, not trying to hide, and do not get actual notice.

MR. APPLE said he hoped their new system would solve some of the problems.

338 SENATOR WYERS adjourned the meeting at 10:00 A.M.

Respectfully Submitted,

Glenda Harris

Glenda Harris, Committee Assistant

EXHIBIT A - OREGON RULES OF CIVIL PROCEDURE AND AMENDMENTS, December 13, 1980.

EXHIBIT D - Summary of ORCP 78-85

EXHIBIT E - Witness registration

EXHIBIT F - Witness registration

HOUSE COMMITTEE ON JUDICIARY

Joint Meeting of House Judiciary Subcommittee 2 and Senate Justice Committee

February 10, 1981 8:40 a.m. 350 State Capitol

PUBLIC HEARING

Members Present:	Representative Bill Rutherford, Chairperson Senator Jan Wyers, Co-Chairperson Senator Walter Brown Representative Ted Bugas Senator Ted Kulongoski Representative Margie Hendriksen Senator Ken Jernstedt Representative Norm Smith Senator Robert Smith
Excused:	Representative Tom Mason Representative Kip Lombard
Staff:	Linda Zuckerman, Legal Counsel, House Judiciary Felicia Gniewosz, Legal Counsel, Senate Justice Ellen Rogers, Committee Assistant, House Judiciary
Witnesses:	Fred Merrill, Council on Court Procedure Laird Kirkpatrick, Council on Court Procedure Don McEwen, Council on Court Procedure Austin Crow, Council on Court Procedure William M. McAllister, Associated Oregon Industries, Oregon Retail Council and United States National Bank William Dale, Council on Court Procedure John Gibson, private citizen N. Robert Stoll, private citizen Jeff Tolbert, private citizen Diana Godwin, Oregon Savings League, Oregon Bankers Assoc., and First National Bank
Measure:	Oregon Civil Procedure Rule 32 (Class Actions)
Tapes:	HB-81-JUD-56 HB-81-JUD-57

TAPE 56
SIDE A

001 CHAIRPERSON RUTHERFORD called the meeting to order at 8:40 a.m.

PUBLIC HEARING

Rule 32 - Class Actions

014 FRED MERRILL, Council on Court Procedures, introduced the other members of the Council present.

MR. MERRILL explained the changes in Rule 32 (Exhibit A, Civil Procedure, Pages 125-127).

059 LAIRD KIRKPATRICK, Council on Court Procedures, explained why the Council had come about proposing the amendments for Class Actions. Last session Senator Cook asked the Council for their input. The legislature had not decided on what action should be taken so they wanted the Council to look at the issue, deal with the criticisms that had been made of the existing Class Action procedure and make some recommendations regarding changes that should be made.

MR. KIRKPATRICK explained that Fred Merrill did extensive research on action taken at the federal level in other states. The Council held hearings on this issue and a lot of witnesses showed up for those hearings and through listening to and considering what those people wanted the Council made the changes by a 15-5 full vote of the Council.

He pointed out that the Council viewed the considerations as a moderate or intermediate viewpoint. The changes do not go as far as the legislation that had been proposed to the legislature in the 1975, 1977, and 1979 Legislatures. He gave some examples of proposals that the Council had turned down.

101 SEN. SMITH asked if by eliminating the prohibition against fluid recovery, the Council wasn't authorizing it.

103 MR. KIRKPATRICK didn't think that fluid recovery was directly addressed in the former bill. What was addressed was a second notice provision where members of the class had to file claim forms.

105 SEN. SMITH stated that the Council has eliminated all impediments to fluid class recovery.

106 MR. KIRKPATRICK replied that it would be possible for a court to consider that as a possible remedy but the Council is taking no position on whether that should be done.

109 SEN. SMITH felt that since they had eliminated any impediment against, therefore, the Council authorized it.

111 MR. KIRKPATRICK stated that the claim form is eliminated so it is now possible for a court to consider the fluid class recovery.

119 SEN. SMITH asked if there was any doubt in Mr. Kirkpatrick's mind that if it is not eliminated from the Council's report by a bill passed by the legislature, there will be fluid class recoveries.

124 MR. KIRKPATRICK replied there were very few situations where it can be feasibly implemented. There are some, but it is a complicated issue and the Council felt that if the legislature wants to decide who the money is going to they could address that.

134 MR. KIRKPATRICK went on with giving examples of provision that had been proposed in the passed that the Council had turned down.

He stated that a number of the protections that were put in the 1973 Legislation are untouched and are entirely retained in Rule 32. He gave some examples of provision that were retained.

174 SEN. SMITH understood that the statute provides that the Council will produce only procedural kinds of issues, not substantive.

182 DON MCEWEN replied that the rule making authority of the Council is devoted to matters which are procedural in nature. Sometimes there is a significant question of whether it is procedural or substantive. There is at least one provision in Rule 32 that is substantive and that is the provision which permits the court to hold a hearing pendente lite in prior to the trial of the merits and on the basis of the determination there, shift the cost to the defendant. Some of those cases are somewhat substantial.

The Council included the provision whereby the trial judge can hold a hearing on the basis of his conclusion. Concluding that liability is probable can then require the defendant to pay the costs incurred in giving notice and other costs which are sometimes quiet substantial. He explained that the change was on page 117, F(4), (Exhibit A, Civil Procedure) or on page 2, (7) of Fred Merrill's summary (Exhibit B, Civil Procedure).

211 SEN. SMITH asked if Mr. McEwen thought it was substantive, was it sufficient to violate the charge of the Council and therefore should be eliminated, revised or withdrawn.

213 MR. MCEWEN replied that if the Legislature thinks that it is substantive then it would require a bill because the procedure will go into effect automatically if the rule is not changed.

227 MR. MCEWEN stated that with regards to the fluid class recovery he didn't think that the amendment actually authorizes a fluid recovery. They simply eliminate the requirement that the member of the class does anything.

252 SEN. SMITH asked Mr. McEwen if he believed that there will be fluid class recovery if that provision should become the rule in Oregon.

255 MR. MCEWEN replied that he didn't know what a trial judge may do, but if you don't have any claim and you have so much money that is supposed to go to so many people and you haven't given any notice, you may go through an awful lot of preparation with mailing checks when it is all going to come back.

Another practical problem with the elimination of the notice requirement if the claim is less than $100 is you can't determine, at that stage of litigation, what those claims are going to be. He felt that when you start the mailing process you are only going to get half of it back.

The other thing is if you wait long enough, there are less people you have that you may have to pay.

297 AUSTIN CROW, Council on Court Procedure, stated that his understanding of the practice of the judges has been very conservative in the application of the Class Action statute. He thought that in both the state and federal courts the judges are very restrictive in using their discretion broadly in this particular area.

298 SEN. SMITH asked if what Mr. Crow was saying was that they were taking what has been a prohibition and allowing the judge to make the determination whether or not there will be fluid class recovery in Oregon.

301 MR. CROW replied that when the legislature asked the Council to come up with a more practical approach to the Class Action Rule, what they tried to do, based on a representative group from the state, was to say that if you are going to authorize class actions you might as well have a statute that can be worked effectively and give the judge more discretion.

313 SEN. SMITH replied that it was not the Legislature that asked the Council to make the recommendation. It was the chairman of the Interim Judiciary Committee that asked. He stated that the Legislature had spoken on this matter at least three times.

317 MR. CROW stated that there was a letter written to them asking the Council to look at the problem because of the inability to come up with some sort of compromise in the past (Exhibit C, Civil Procedure).

247 WILLIAM M. MCALLISTER, representing Associated Oregon Industries, Oregon Retail Council and United States National Bank, gave history on class actions.

MR. MCALLISTER didn't feel that the changes proposed by the Council on Court Procedures are that much different than the ones proposed in 1975, 1977 and 1979. He thought that Mr. Kirkpatrick was wrong in

saying that various people have come and asked for changes in the law. The same changes have been proposed in every single legislature since 1973 and those are changes to wipe out the safeguards that were put in to balance the opt-out provisions in the original law.

TAPE 57
SIDE A

001 MR. MCALLISTER felt that the provision that states if the claim is under $100 you do not need to be notified in person ran contrast to hundreds of years of constitutional history and common law history that a person who is party to a lawsuit needs to be notified. He saw some administrative problems with that provision.

MR. MCALLISTER felt that the fluid recovery provision was a substantive change. He felt that the only procedural change, other than the ones that were very minor, is that change eliminating the claim form. He felt that it should be left in.

014 He felt that before you change laws that have been in effect and doing a good job there needs to be a demonstrated need. The Council gave no examples of inequities, injustices or oppressions that were being committed as a result of the existing law.

022 MR. MCALLISTER felt that the cost of notice could easily eliminate class actions or make them much easier. What the Council has done is to say that you can have an interim hearing to determine whether or not you can assess the cost of notice against defendants. In any big class action that interim hearing is going to take place. He said that if he was a defendant he would make that hearing into the trial because the costs may run into thousands of dollars. He felt that it would be exhilarating the time for the main hearing.

044 SEN. WYERS asked what was wrong with exhilarating to determine the merits of the case.

046 MR. MCALLISTER felt that it imposed an additional burden upon the court. Before you get to the time of trial, you have to have a trial. Also, the trial is without a jury which you are constitutionally entitled to have.

055 SEN. WYERS felt that if the plaintiff lost at the first trial stage it may save the court time and expense later and get the defendant off the hook.

058 MR. MCALLISTER felt that the judges have different philosophies about whether that has to be a trial. Some judge may interpret the language to mean that it is not consistent with the ordinary preponderance of the evidence that may prevail in the trial.

081 SEN. KULONGOSKI asked Mr. McAllister to go back to whether it is substantive or procedural on the notice required.

MR.MCALLISTER thought that the constitutional requirement is if a person can be notified in person the person has to be notified in person.

087 REP. HENDRIKSEN asked if that would be notice to the defendant.

087 MR. MCALLISTER replied that it would be if they were class action defendants but the plaintiffs are involved in the case so in order to be a party to litigation, which has certain responsibilities as well as certain rights, they have to be given notice also.

MR. MCALLISTER stated that the proposals are saying that people who never receive notice are going to be subject to a judgment in a circuit court saying you no longer have any rights against the defendant on this claim. Later they will come in and file a class action on behalf of all the people who didn't get notice on the first class action and sue again.

107 SEN. KULONGOSKI asked if Mr. McAllister had authority for the position that was just stated as to notification to plaintiffs. He asked if it was substantive rather than procedural.

110 MR. MCALLISTER replied that Diana Godwin had a memorandum that sights authority (Exhibit C, Civil Procedure). He sighted International vs Shoe case.

120 SEN. KULONGOSKI asked, other than the argument that notice required is a substantive issue rather than procedural, if he disagreed with the notice required section proposed by Council on Court Procedure.

124 MR. MCALLISTER replied that he did because it becomes a very difficult process to determine whose claim is over $100.

MR. MCALLISTER spoke on the pressure on business with inflation problems and the burden on the courts now. He read a few lines from the daily Oregon Journal dealing with the increased litigation in Portland. He felt that now is the wrong time for the Legislature to say that they were going to change the balance that has existed in class actions for the last six years and put a bigger burden on the courts.

204 REP. HENDRIKSEN commented that if you don't have that kind of access there will be cumulative costs which they will have no redress for and no incentives for businesses to clean up their act.

228 SEN. WYERS asked what the effect would be if you could prevail on the argument that some of the changes are substantive.

229 MR. MCALLISTER replied that the Legislature needs to do something because if they do nothing and the proposals are adopted then it comes out that it is substantive and the courts may consider that the Legislature is ratifying the changes.

242 SEN WYERS asked who would be the arbiter of that issue.

242 MR. MCALLISTER replied that it would have to be arbitrated in court.

275 SEN. SMITH felt that in listening to Mr. McEwen that F. (4), Rule 32, (Exhibit A, Civil Procedures) was a major issue that the committee should address. He didn't want the Council's position jeopardized because someone argues that they are enacting substantive legislation rather than procedural. He felt that it was the type of issue that would give fuel to the fire for those who believe that the Council should not remain in existence in its present form.

312 JOHN W. GIBSON, private citizen, testified in favor of Rule 32 (Exhibit D, Civil Procedures).

415 N. ROBERT STOLL, private citizen, spoke in favor of the proposals made by the Council. He felt that the question whether any of the changes are substantive rather than procedural was resolved by both the subcommittee on class actions and also by the Council itself in favor of finding that the changes are procedural.

TAPE 56
SIDE B

008 MR. STOLL stated that not all of the cases are less than $100. His office has been involved in a number of large, sometimes national anti-trust and security cases involving price fixing.

He felt that the changes recommended were good and necessary in some instances. With reference to Mr. McAllister's statement that no examples have ever been shown where there should be a shift of the cost of notice or where there should be no indivdual notice required, he gave an example of the need for the changes proposed regarding a case with the garbage collectors. There was no money ever returned to the people who were over charged by the price fixing activity. His office had considered bringing class actions on this suit but the cost of getting notice to the households by plaintiff would have been excessive. He felt that if the notice was given by the defendants in their regular mailings of their bills to their customers, that case could have proceeded.

052 MR. STOLL stated, with respect to the issue of so called fluid class recovery, he thought that the old shibboleth that the wrongdoer should not be able to keep the benefit is an accurate one. He didn't feel that the wrongdoer should keep that money simply because the

class members do not file claims. MR. STOLL told the committee about a case that had come before Judge Dale regarding a nursing home.

MR. STOLL felt that the changes regarding notice in cases less than $100 were good ones. He told the committee about another case which involved a consumer milk company. Instead of mailing a notice to each household in the area, they printed a notice on the outside of their milk cartons advising the class members of the pendency of the action.

He did not agree with Mr. McAllister in that Eisen v. Carlisle & Jacquelin says that notice is a substantive issue changing from individual mailed notice to some other type of notice. He suggested that when you have cases where a large number of the claims are going to be under $100 and there is no question that there has been wrongdoing there is no excuse for not returning that money to the class members.

117 REP. SMITH stated that the issue was raised that notice not given may open up a separate class action for another. He asked, without such notice, if a judgment would be resjudicata as to all persons or only the persons notified.

119 MR. STOLL didn't feel that there was a question about it. He stated that he was unaware of any case ever being filed anywhere on behalf of so called people who didn't get notice. He gave examples of cases where people said that they didn't get notice.

In a sugar case he represented a class of businesses in the Northwest that were overcharged on the sales of sugar. Notice was mailed to a number of people and other people they didn't have proper addresses so notice was published in various newspapers. After the case settled and the claim time had expired, some class members came forward and said that they were in the class and they didn't get individual notice. The court ruled that not withstanding the fact, those people were not on the mailing list and they were forever barred from resjudicata as far as their claims were concerned. He gave another case example regarding social security checks.

MR. STOLL felt that there were ways of satisfying the constitutional requirements for resjudicata and bringing a finality to the litigation.

159 REP. SMITH asked if that finality is present in all cases because Mr. McAllister seemed to infer strongly that he fears subsequent class actions on the same matter.

161 MR. STOLL replied that he had never seen that happen.

175 MR. STOLL explained that the mailing record information usually comes from the defendant.

217 MR. STOLL pointed out that in the so called mini-hearing the burden of proof is on the plaintiff, not the defendant. He stated that he had not seen any trial judges be really liberal on granting class actions.

231 JEFF TOLBERT, private citizen, spoke in favor of the proposals for Rule 32. He felt that without the rule changes, class actions would not be able to be carried through by many lawyers. He explained that he was a plaintiff in a non-sufficient fund case that involved First National Bank. He felt that it was very important that Oregon citizens do have some action to express any grievances no matter how small.

290 MR. TOLBERT, in referring to Mr. McAllisters comment on cost, didn't feel that it was a valid comment in that if they were not doing wrong to the people in the first place, then they wouldn't have to worry about the money that it would cost them.

369 SEN. GARDNER asked if the Council had considered or if there was any indication of the fiscal impact of the provision on the cost of operating the courts or any impact on the state general fund.

370 MR. DALE, Council on Court Procedure, replied that neither one of those things were considered by the Council.

385 SEN. GARDNER wanted to see the fiscal impact statement.

400 SEN. WYERS felt that a fiscal impact was very important and he also felt that the committee should look for ways to help get back substantive information rather than probabilities or contengencies

404 DIANA GODWIN, representing Oregon Savings League, Oregon Bankers Association and First National Bank, spoke in opposition of the proposals by the Council regarding Class Actions. She pointed out to the committee that the Council had stated they were asked last session to look at class actions and make recommendation. She stated that what they have proposed are not recommendation. They will become law unless the Legislature assumes the burden of affirmatively acting to reverse the rule. She felt that it has been a defective procedure to put those rules in with other procedural changes such that the burden has now been shifted to the Legislature.

438 REP. BUGAS asked if last session, the Class Action Rule was peeled out from the rest of the procedure.

443 MS. GODWIN replied that her understanding was that last session the class action rule had no amendments made to it from existing statutes. The only change was that it got a rule number rather than an ORS number. She stated that on the Senate side last session there was Senate Bill 904 which raised many of the same issues raised by the Council on Court Procedure.

TAPE 57
SIDE B

021 SEN. WYERS asked Ms. Godwin if she was questioning whether Sen. Cook intended for the Council to do what they did.

028 MS. GODWIN replied that at best, it was ambiguous and that if it had to be decided one way or another whether this was going to come in as recommendations or come in as an actual rule that had the force and effect of law, the decision of the Council should have come down on the other side. She felt that the letter that Sen. Cook wrote was asking for a recommendation (Exhibit C, Civil Procedures).

034 SEN. WYERS stated that the word, "recommendation" was not in the letter. He agreed that findings and proposals could be variously interpreted. He didn't feel that Sen. Cook expected anything different than what happened. He felt that if Ms. Godwin was putting into question whether this is what the committee thought was going to happen or what the chairman thought was going to happen when he sent that letter it should be checked in to. He asked Ms. Godwin if she was questioning that.

041 MS. GODWIN replied that she was questioning it. She felt that several of the changes proposed by the Council make logical and positive changes. Going through the issue of the deletion of the pre-litigation requirement, under existing law, class action plaintiffs cannot bring a suit unless they can demonstrate to the court that they have given a 30-day period notice to the defendant which would allow the defendant then to identify potential class members and attempt to correct the alleged wrong. That pre-litigation requirement is being deleted. She felt that it would remove an opportunity by the defendant to clear up the problem without having a class action suit filed. There has been no demonstrated problem about this notice and she didn't see any point in deleting it. Once the class action is filed it is very difficult and timely to then compromise and dismiss the suit.

064 REP. BUGAS noticed the material handed out by the Council (Exhibit B, Civil Procedures) says that the subcommittee felt that it may contain potential for abuse. He asked what abuse was anticipated.

072 FRED MERRILL explained that they had received testimony from the Attorney General that there is some abuse of this by having use of blackmail to encourage the prospective defendant to buy off somebody who is threatening to sue.

085 DIANA GODWIN stated that she didn't see that as any different than a routine demand letter in any civil case.

MS. GODWIN felt that one of the key issues was whether or not plaintiffs who have claims under $100 are going to be entitled to the

best possible notice under the circumstances. The current law provides that individual notice shall be given to all members who can be identified through reasonable effort. That is being deleted in the proposals and they are setting an arbitrary dollar amount on plaintiffs rights to due process. She knew of nowhere in the constitution that says that your due process rights can be abridged based upon the dollar value of your claim.

The new proposed notices provide for personal or mailed notice to the persons who have claims over $100 if the identity can be ascertained by the excercise of reasonable deligence. For those persons under $100 they only get that notice calculated to apprise them of the pendency of the action. It may include newspaper, television or radio. This differs from the Federal Rule 23, which specifically says that this notice may include personal or mailed notice. That was deleted by action taken by the Council.

She felt that the Eisen case (Exhibit C, Civil Procedures) stated that individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.

117 REP. HENDRIKSEN asked if it wouldn't be against the client's interest if they have to bear the cost.

119 MS. GODWIN replied that they were not conceding that the defendant can be properly assessed the cost of notice prior to any adjudication that the defendant is liable to anyone. She thought that it was logical to move on to who bears the cost of notice and whether or not that is a substantive rather than a procedural issue addressed by the Council.

She felt that entering a judgment against a defendant for the cost of notifying maybe a 100,000 plaintiffs prior to an adjudication and a finding of liability does effect the substantive rights of the defendant. He is being assessed a tremendous amount of money without having had liability found against him.

138 MS. GODWIN submitted a letter to the committee dated 2/9/81 (Exhibit C, Civil Procedure).

141 Hearing no further discussion or objection the meeting was adjourned at 10:10 a.m.

Submitted

Ellen Rogers
Committee Assistant

Chairperson:
SEN. JAN WYERS
Vice-Chairperson:
SEN. ROBERT SMITH

Staff:
FELICIA M. GNIEWOSZ
KRISTENA A. LaMAR
Legal Counsel
HARRIET CIVIN
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Members:
SEN. WALT BROWN
SEN. EDWARD FADELEY
SEN. JIM GARDNER
SEN. KENNETH JERNSTEDT
SEN. TED KULONGOSKI

SENATE JUSTICE SUBCOMMITTEE AND HOUSE JUDICIARY SUBCOMMITTEE 2 ON CIVIL PROCEDURES

PUBLIC HEARING - MINUTES

February 17, 1981 8:30 A.M. Cassette Tapes 5-6 (C.P.) Room 350

MEMBERS PRESENT: Senator Walt F. Brown
Representative Ted Bugas
Senator Ken Jernstedt
Representative Kip Lombard
Representative Norm Smith
Senator Robert Smith
Representative Bill Rutherford, Co-Chairperson
Senator Jan Wyers, Co-Chairperson

EXCUSED: Representative Margie Hendriksen
Senator Ted Kulongoski
Representative Tom Mason

STAFF PRESENT: Felicia Gniewosz, Legal Counsel, Senate Justice
Linda Zuckerman, Legal Counsel, House Judiciary
Glenda Harris, Committee Assistant, Senate Justice

WITNESSES AND MEASURES:

Tape 5A — OREGON RULES OF CIVIL PROCEDURE AND AMENDMENTS promulgated by Council on Court Procedures, December 13, 1980

023 — Fred Merrill, Executive Director, Council on Court Procedure

115 — Dwight Apple, Division of Motor Vehicles

Tape 5B

079 — Tim Bowles, Oregon Trial Lawyers Association

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TAPE 5A

004 MEETING WAS CALLED TO ORDER BY REPRESENTATIVE BILL RUTHERFORD, CHAIRPERSON, AT 8:40 A.M.

MEMBERS PRESENT: Senator Brown
Representative Bugas
Senator Jernstedt
Representative Lombard
Representative N. Smith
Senator Smith,
Representative Rutherford, Co-Chairperson
Senator Wyers, Co-Chairperson

EXCUSED: Representative Hendriksen
Senator Kulongoski
Representative Mason

014 FELICIA GNIEWOSZ, Legal Counsel, Senate Justice Committee, explained RULE 7 was in the Oregon Rules of Civil Procedure and Amendments. EXHIBIT A.

023 FRED MERRILL, Executive Director, Council on Court Procedures explained the reasons for the changes in Rule 7. It was to provide a record, so that an insurance company that has an insured that has had an accident, can keep checking to be sure within the limitations period, that no summons has been served. They had received suggestions that under the existing system, with the mailing going to the insured, if the insured doesn't get it, which is somewhat likely with this kind of service, or doesn't report it, then the insurance company never knows that there was a suit filed until there is an attempt to collect after the judgment. Plaintiffs attorneys were somewhat in favor of this form of service because it did provide them a place where they can make service within the state and argue that they had satisfied the limitations period. The problem with the mailing is that it is not effective until it gets there. This way the Department of Motor Vehicles (DMV) within the 60-days after the time runs can say that completes the service. He explained the problems came up the last day to serve - they file, they try to serve.

051 REPRESENTATIVE RUTHERFORD clarified that under the proposed rule there is actual service as opposed to service by mail.

060 SENATOR BROWN asked if the service mentioned on page 148 D.(4)(a)(ii) was the basic service mentioned in civil case. He clarified that attempted personal serviceplus mail, under the current system - insurance companies never find out about it - so this would say in addition to that process, you must mail or leave with the DMV a copy of the summons and complaint and they must make a record of it. All this adds to the current system is the additional mandatory service on the DMV. The DMV is not required to forward it - it will still be the independent responsibility on the part of the plaintiff to track a personal service, if they can't make mailed service to the best known address.

115 DWIGHT APPLE, Division of Motor Vehicles. He listed the problems DMV had with the proposed rule. One is that they do receive a lot of summons under the old law 15.190 before it was repealed, by simply mailing them in. The current new

Page 2

language says leaving one with the Division. Perhaps some additional clarification is needed as far as what constitutes, if you go with the proposed rule, leaving it with the Division. Secondarily, there is confusion between the divisions records - between the official address of record, which they have an administrative rule for (drivers record); and the vehicle registration. They are not one and the same - they are not tied together. The language needs to be more specific to what is the most current address of record for the division, because that is a time consuming process. The reason they got into an official address of record on the drivers license was due to a number of court cases this last year. They really do not have a similar court case on the vehicle registration system side. He did not know what the most current address of record is.

140 SENATOR WYERS arrived at this point.

140 REPRESENTATIVE RUTHERFORD asked if they wanted clarification on the most recent address furnished by the defendent to the Administrator - whether it was the drivers license. MR. APPLE said they would prefer it if it were the license. REPRESENTATIVE RUTHERFORD asked Mr. Apple if the DMV had suggested language that would accomplish that.

154 REPRESENTATIVE LOMBARD clarified that if a person had filed the SR20 form after an accident, that might be interpreted to be the most recent address given by the defendent. MR. APPLE replied that was correct. REPRESENTATIVE LOMBARD said it sounded like what was intended was the last address as it appears on the driver registration. MR. MERRILL said the intent was the last registration address and the address given at the time of an accident. There was discussion on what the intent actually was, and if it were the address in which the motor vehicle was registered.

182 MR. APPLE said if they wanted to effect service they need to constitute something as a specific official address of record. The drivers license address would be more reasonably calculated to reach the defendent. It is the one specifically required by law to be most current. He said the DMV's administrative rule now recognizes it as the official address of record.

MR. APPLE explained the technical details of what would be required of the division with the proposed rule.

231 FELICIA GNIEWOSZ said there was a concern with the fee that would be paid by the plaintiff.

239 SENATOR JERNSTEDT arrived at this point.

240 COMMITTEE MEMBER asked if this method of service apply for an out of state defendent, who has caused an accident in this state. Is there a need to include qualifiers in the rule.

251 MR. MERRILL said they had taken the language right out of 15.190. The only thing different was that they added the part about any other address known to the defendent.

262 MR. APPLE questioned how long the records were to be maintained by the Division. He said his fourth concern was the actual fee regarding the handling. He proposed a fee somewhere between $10 and $15.

Page 3

309 REPRESENTATIVE SMITH asked what happened if they received an alias summons and did they process an alias summons the same way. MR. APPLE said they handled them very much the same way.

326 REPRESENTATIVE RUTHERFORD said they needed a definition of 'leaving'. MR. MERRILL said 'leaving' meant personal service. MR. APPLE and MR. MERRILL discussed personal service.

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370 REPRESENTATIVE LOMBARD suggested the clarification occur in the last line on page 147. He made a motion to insert 'personal' before service so it would read "..may be served with summons by personal service upon the Department .."

406 REPRESENTATIVE SMITH raised a question regarding the section on foreign corporation maintaining a registered agent - would it be necessary to include 'personal service' on page 148, D.(4)(a)(ii). REPRESENTATIVE LOMBARD clarified this.

MOTION ADOPTED

TAPE 6A

020 COMMITTEE MEMBERS discussed what fee should be set.

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030 REPRESENTATIVE LOMBARD moves the fee as shown in D.(4)(a)(ii) and D.(4)(a)(iii) be changed from $2.00 to $12.50.

033 MOTION ADOPTED.

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036 FRED MERRILL reminded the Committee that this particular area was not promulgated by the Council on Court Procedures.

041 REPRESENTATIVES LOMBARD, FRED MERRILL AND DWIGHT APPLE discussed the length of time the DMV should be required to maintain the records. MR. APPLE said he felt four years would be practical; they do keep the original document. The COMMITTEE MEMBERS discussed the use of microfilm.

077 FELICIA GNIEWOSZ said Legal Counsel would check on whether a time limit should be included in the statute.

082 REPRESENTATIVE SMITH said Section 2 made this effective January 1, 1982; would some other date be more appropriate, such as an emergency clause at end of session.

FRED MERRILL explained the reason that date was used.

106 RULE 70 C - SUBMISSION OF FORMS OF JUDGMENT

Page 4

110 FELICIA GNIEWOSZ explained the proposed amendment was due to the question arising as to whether it applied to any simple judgment. With the amendment, it would only be necessary in those cases where a proposed form of judgment was needed. SEE EXHIBIT A (page 28) and D.

119 REPRESENTATIVE SMITH asked if this is the situation after a trial or hearing - the court makes its findings, then directs one counsel of one of the parties to prepare a judgment order and this merely would say that the proposed order must be served five days in advance on opposing counsel before submitting it to the court, so that person has an opportunity to object. FELICIA GNIEWOSZ said yes, but the question had come up as to whether a proposed order was necessary in every case - in a simple judgment a proposed order isn't needed.

132 FRED MERRILL said the intent was there always be service unless the court ordered otherwise, the problem was that delayed the effective date of the judgment five days. He said his understanding was that it should be reversed so that they didn't have to submit the proposed form unless the court said to.

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143 REPRESENTATIVE RUTHERFORD moved the proposed amendments be adopted.

MOTION ADOPTED.

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149 RULE 69B(2) - DEFAULT - BY THE COURT

151 FELICIA GNIEWOSZ explained the proposed amendments to Rule 69 B (2). SEE EXHIBIT D. She said the question had come up - what if there had been actual notice, even if they had not appeared in the action. She said the suggested language in the commentary was to deal with that.

178 FRED MERRILL commented on the above.

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223 REPRESENTATIVE RUTHERFORD moved the amendatory language, which is 'knows' be changed to 'has received notice'.

225 MOTION ADOPTED

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258 REPRESENTATIVE LOMBARD moves the word 'presently' be deleted from the amendatory language and after the word 'attorney', add the words ' in the pending proceeding'.

265 MOTION ADOPTED.

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270 REPRESENTATIVE SMITH asked if the reference in rule 9B was to service by mail. FRED MERRILL said 9B was informal service rather than personal.

278 CHAIRPERSON RUTHERFORD moved the amendatory language as amended on paragraph B.(2), including the deletion of the words 'such party'.

282 MOTION ADOPTED.

286 RULE 46A - AWARD OF EXPENSE OF MOTION.

288 LINDA ZUCKERMAN, Legal Counsel, House Judiciary Committee, explained the proposal and said it had been sent to the committee by Peter Sorenson. SEE EXHIBIT E.

337 FRED MERRILL explained the reason the word 'may' was used instead of 'shall' was due to the Oregon Statutes saying 'may' instead of 'shall'. In 1977, in the House Judiciary committee, it was decided to not go with the Federal language. He recommended if changes were made, not to change the last paragraph.

358 REPRESENTATIVE SMITH said he was opposed to making any changes in this section. He would prefer to leave it as it is.

367 FRED MERRILL explained Mr. Sorenson's arguement for wanting the change.

There were no motions on Rule 46A.

402 RULE 68 - DISBURSEMENTS.

403 FELICIA GNIEWOSZ explained the five alternatives in the proposed amendments on Rule 68. SEE EXHIBIT A (page 16) and EXHIBIT F.

TAPE 5B

023 REPRESENTATIVE SMITH asked if this had come from the Council and REPRESENTATIVE RUTHERFORD said it had been his suggestion; legal counsel had worked out the proposals.

033 REPRESENTATIVE SMITH expressed his concerns regarding depositions: that it was difficult to know how much of a deposition should be allowed; that a judge would not be in a position to determine which part of a deposition was of value and which was not.

049 REPRESENTATIVE RUTHERFORD explained his reason for proposing this was because of the case where you undertake the representation and you get a judgment on behalf of the person, then you hand them a large bill for the depositions you got - they are not made whole. They get their judgment, they get their recovery, but they are stuck with the cost of the depositions.

066 FRED MERRILL explained the problems he saw with the proposals.

079 TIM BOWLES, Oregon Trial Lawyers Association. He said they were not in favor of any rewording which would be interpreted as a substantive change in the law. He said there were two problems with this. One, was the language which would

Page 6

eliminate the discretion of judges to limit the recovery of expenses. The second problem would be allowing recovery of expenses for purposes other than perpetuation of testimony. He said he had been through the alternatives. The problem from the plaintiff's bar point of view was that the insurance companies had the resources to jack up pre-trial expenses through costs of depositions and in a close case, this could be leverage against a plaintiff wanting to go to trial, because of the threat of a large recovery on behalf of the defendent. The problems he saw with Alternative One were that it allows a deposition which could have been taken merely for the purpose of discovery records. There was no particular purpose to have the witness in that deposition testify at the trial - it was merely for other discoveries. He said Alternatives Two and Three were very overbroad and would be a major substantive change in the law. The problem here is how would a judge interpret what is "introduced and received into evidence". Alternative Four probably is not much of a substantive change in the law - it seems to be fairly close to what we have now. REPRESENTATIVE RUTHERFORD said this would broaden it to include discovery, where the court felt that was appropriate. MR. BOWLES said it really came down to the practice of the courts.

125 REPRESENTATIVE SMITH commented in regard to Rep. Rutherford's earlier statement about the client not being made whole, that no person would ever be made whole, because there were always costs - none ever recovered 100%

140 REPRESENTATIVE RUTHERFORD said there were cases where attorneys fees were recovered - in those case they still end up with deposition costs, even if they win the case.

145 TIM BOWLES said the problems with Alternative Five were in class action suits, necessary parties could be quite numerous. There again the defense bar could have better leverage of jacking up the numbers and expenses of depositions.

No action was taken on Rule 68.

158 RULE 7 - SUMMON - MOTOR VEHICLES.

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163 REPRESENTATIVE RUTHERFORD said Mr. Apple had submitted proposed language which is on page 148 of EXHIBIT A. This should read, rather than the 'most recent address', 'the address as shown by the Motor Vehicles Division's drivers records'. This would provide language that would communicate with the DMV and get a response that makes some sense. THE CHAIR moved this amendment.

228 MOTION ADOPTED.

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241 REPRESENTATIVE RUTHERFORD said this would be incorporated into one bill.

263 RULE 81D - PROCEDURE FOR RELEASE OF ATTACHMENT.

273 FRED MERRILL explained Rule 81D. SEE EXHIBIT A (page 58) and EXHIBIT G. He said this sets a time limit to require an expeditious hearing and secondly provide that if there should be a summary release that it can make the plaintiff, the

seizing person, pay the owner, the claimant who is trying to get the property back, attorneys fees and costs.

290 FELICIA GNIEWOSZ said the time deadline was taken care of in Sub. D(1).

309 There was no action taken on Rule 81D.

327 RULE 80F(1) - RECEIVORS - REQUIRED NOTICE

327 FRED MERRILL explained that Judge Buttler had wanted two things to be called to the attention of the committee. SEE EXHIBIT H.

360 RULE 7 - MOTOR VEHICLES DIVISION

372 ROLL CALL VOTE OF THE SENATE ON RULE 7 AS AMENDED.

Senator Brown Aye

Senator Jernstedt Aye

Senator Smith Aye

Senator Wyers Aye

Excused: Senator Kulongoski

387 REPRESENTATIVE RUTHERFORD adjourned the meeting at 10:02 a.m.

Respectively Submitted,

Glenda Harris

Glenda Harris, Committee Assistant

EXHIBITS:

Exhibit A - Oregon Rules of Civil Procedure and Amendments promulgated by Council on Court Procedures, December 13, 1980. (Oversize Exhibit)

Exhibit D - Proposed amendments to Rule 70C

- Proposed amendments to Rule 69B(2)

Exhibit E - proposed amendments to Rule 46A

Exhibit F - Proposed amendments to Rule 68

Exhibit G - Proposed amendments to Rule 81D

Exhibit H - Proposed amendments to Rule 80F.(1)

Exhibit I - Witness Registration

HOUSE COMMITTEE ON JUDICIARY

Joint Meeting of House Judiciary Subcommittee 2 and Senate Justice Committee

February 24, 1981 8:45 a.m. 350 State Capitol

PUBLIC HEARING & WORK SESSION

Members Present:	Senator Jan Wyers, Chairperson Representative Bill Rutherford, Co-Chairperson Representative Ted Bugas Senator Ted Kulongoski Representative Kip Lombard Representative Norm Smith Senator Robert Smith
Excused:	Representative Tom Mason Representative Margie Hendriksen Senator Walter Brown Senator Ken Jernstedt
Staff:	Linda Zuckerman, Legal Counsel, House Judiciary Felicia Gniewosz, Legal Counsel, Senate Justice Ellen Rogers, Committee Assistant, House Judiciary
Witnesses:	Diana Godwin, Oregon Saving League, First National Bank, U.S. National Bank and Oregon Bankers Assoc. Fred Merrill, Council on Court Procedure
Measure:	Oregon Civil Procedure Rule 32 (Class Actions)
Tapes:	HB-81-JUD-90 HB-81-JUD-91

TAPE 90
SIDE A

000 CHAIRPERSON WYERS called the meeting to order at 8:45 a.m. and explained to the committee that the Attorney General felt that there should be a look at Rule 32 for a possible fiscal impact.

PUBLIC HEARING

043 DIANA GODWIN, Oregon Savings League, Oregon Bankers Association, First National Bank and U.S. National Bank, submitted written testimony and explained it (Exhibit E, Civil Procedures).

249 REP. BUGAS stated that if the class actions segment remains in the rewrite, the only alternative is to attack the whole procedure. He

stated that he was prepared to try to take class actions separately because just the argument of substantive and procedural is enough to raise questions.

He felt that it would be jeopardizing the existence and the continuation of the Council.

286 DIANA GODWIN suggested that the committee pull Rule 32 out of the report and consider it separately. The procedure that the committee might do is to have a bill drafted which would reverse every change made in Rule 32. The committee could then work with that bill.

346 MS. GODWIN felt that if the Legislature passed a bill affirmatively effecting the substantive rights of the parties it would not be an issue as to whether or not the Council had the power to do it. The Legislature would be taking the Council out of that decision making process and would be putting themselves back in.

362 REP. BUGAS asked if there is a piece of legislation already drafted to do what Ms. Godwin wants to do.

365 MS. GODWIN explained that she had talked with Legislative Counsel regarding the proper procedure. It would be a mechanical drafting problem and it could be done quickly.

MS. GODWIN explained that there is another bill that the Senate Justice Committee introduced as a committee bill regarding this issue.

396 REP. RUTHERFORD asked, if nothing passed with respect to Rule 32 and the rule remained the same, what would be the position of the proponents and the opponents of the amendments.

403 MS. GODWIN stated that the opponents of the amendments from the Council on Court Procedure get into litigation and appeal on whether or not the Council, under its enabling legislation, can do what they have done.

She didn't feel that the current Rule 32 has been an impediment to class actions nor has it required an inordinate amount of judicial time to sort out. The opponents to the changes proposed would be satisfied if no changes occurred.

MS. GODWIN explained that to date, there is no testimony of major problems in bringing a class action under todays rule except the practical problem to the plaintiffs of coming up with the cost of notice.

TAPE 91
SIDE A
008 CHAIRPERSON WYERS explained that he had just noticed a fiscal impact statement (Exhibit F, Civil Procedure) which states that they are unable to ascertain the fiscal impact on this issue.

017 SEN. KULONGOSKI felt that the most important part of that impact statement was on the last paragraph which comments on the three states that have implimented the same rule. They have noticed no fiscal impact.

021 DAVID FROHNMEYER, Department of Justice, stated that because the measure is in the form of a court rule change, the Dept. of Justice, until recently, had no idea that it may potentially have a fiscal impact on the Departments operations. He couldn't say that it would, but he suggested that it is possible that a change in class actions procedure could effect the Department of Justice both positively and negatively. They are attempting to determine whether there will be a fiscal impact based upon the fact that they do a substantial defense of state agencies, officers and employees in civil rights cases.

044 REP. BUGAS asked what would be an illustration of a class action against a public official that may have to be defended.

046 MR. FROHNMEYER gave an example of a civil rights class action.

WORK SESSION

075 MOTION: REP. RUTHERFORD moved to separate Rule 32 out from the rest of the procedures to expeditiously handle the other issues.

080 CHAIRPERSON WYERS asked if the motion was in concept or did Rep. Rutherford want to make it a bill that would start out by stating the law as it now is in Rule 32.

086 REP. RUTHERFORD felt that the committee should work for the status quo and work towards any changes in the existing Rule 32.

097 The committee had discussion on exactly what procedure they needed to follow.

100 SEN. KULONGOSKI felt that it was a good polical move, by the Council, to put class actions in because it requires an affirmative action on the Legislatures part. He stated that he was opposed to taking class actions out of the procedure.

118 REP. RUTHERFORD felt that in order to reverse the rule promulgated on class actions, the bill would have to carry with it a repealer of the proposed rules.

122 FRED MERRILL, stated that the rules go into effect unless accepted, modified or rejected by the Legislature. All the committee would have to do is pass a bill stating that the Legislature rejects Rule 32.

127 REP. RUTHERFORD clarified his motion by stating that he wanted to take the procedural steps necessary to reject the rule.

131 The committee had some discussion on what procedure would be best to effect what they wanted to do.

169 SEN. KULONGOSKI clarified that by not taking any action on Rule 32 the Legislature would be, in effect, accepting the Rule.

179 REP. RUTHERFORD explained that the reason he didn't want to go the modification route is because it is not as clear technically as rejecting it. He felt that it should be rejected and then build a new rule from there. He didn't want to delay the other rules because the procedures would get very confusing.

190 REP. BUGAS stated that he was not willing to see Rule 32 pass without affirmatively rejecting it on the floor unless the new bill that rejects Rule 32 goes through both Houses first.

204 REP. RUTHERFORD moved two motions: One, the introduction of a bill to reject Rule 32, proposed by the Council on Court Procedure, after which he moved to introduce a bill which is in the form of existing Rule 32 so the committee can start building from there.

211 REP. SMITH asked what the timeline was before the proposed rules become operative.

212 FRED MERRILL replied that it would become law 90 after adjournment of the 1981 Legislature. He explained that the Council is asking that for the total package of the rules, the omnibus bill that is going to be put in will make all of the changes and will also have a provision that sets the effective date for the changes for January 1, 1982.

FRED MERRILL asked that the committee pull Rule 32 out so that it would not hold the other proposed rules up.

233 REP. LOMBARD felt that they would have to have a bill anyway because they have amended the other rules. He stated that there will be an omnibus bill. In that omnibus bill there could be a rejection of Rule 32.

249 SEN. KULONGOSKI stated that the Legislature is bound by the amendments proposed by the Council on Court Procedure. The bill has to be introduced the way they presented it to the Legislature. He felt that if a bill is introduced rejecting Rule 32, it still hasn't taken it out of the Councils omnibus bill. If the Council's omnibus bill passes last, it will supersede the prior provision that was introduced. He felt that it would have to be taken out affirmatively.

276 CHAIRPERSON WYERS explained that the bill which Rep. Rutherford proposed would make certain changes that the Legislature wants, most of which are fairly minor, outside of Rule 32. The bill would not be the Councils bill, it would be the committees bill and it would only cover those areas that the committee wants to modify.

295 MOTION: REP. RUTHERFORD moved to introduce a bill to reject promulgated Rule 32.

REP. RUTHERFORD explained that the committee, by its action, is not criticizing the Council. The committee is saying that they want to treat the issue discreetly from the other and they do not want to hang up those other rules.

320 Hearing no further discussion, the committee assistant called the roll. Voting Aye: Rep. Bugas, Rep. Lombard, Rep. Smith and Sen. Smith. Voting Nay: Sen. Kulongoski and Sen. Wyers. Excused: Sen. Brown, Rep. Hendriksen, Sen. Jernstedt and Rep. Mason. The motion failed.

336 MOTION: REP. RUTHERFORD moved that the House members go into a work session to vote on his previous motion of introducing a bill rejecting Rule 32.

344 Hearing no discussion the Committee Assistant called the roll. Voting Aye: Rep. Bugas, Rep. Lombard, Rep. Smith and Rep. Rutherford. Excused: Rep. Hendriksen and Rep. Mason. The motion passed the House Judiciary subcommittee two.

351 REP. BUGAS explained that he is prepared to try and prevent the passage of the entire rewrite, rather than have the bill pass with the Class Actions Rule. He felt that it could be done on the House side.

378 MOTION: REP. RUTHERFORD moved to introduce a bill which would be present Rule 32, which they can either work to amend or not.

397 Hearing no further discussion, the committee assistant called the roll. Voting Aye: Rep. Bugas, Rep. Lombard, Rep. Smith and Rep. Rutherford. Excused: Rep. Hendriksen and Rep. Mason. The motion
TAPE 90 passed.
SIDE B
002 SEN. KULONGOSKI stated that he supports the Council on Court Procedure, but he is very unhappy as far as the process is concerned as to the position that the committee has been placed into.

026 Hearing no further business to come before the committee it was adjourned at 9:45 a.m.

Submitted

Ellen Rogers

Ellen Rogers
Committee Assistant

EXHIBITS

Exhibit E, Civil Procedure - Testimony presented by Diana Godwin
Exhibit F, Civil Procedure - Fiscal Impact presented by Kay Hutchinson

Chairperson:
SEN. JAN WYERS
Vice-Chairperson:
SEN. ROBERT SMITH

Staff:
FELICIA M. GNIEWOSZ
KRISTENA A. LaMAR
Legal Counsel
HARRIET CIVIN
Chief Committee Assistant
GLENDA HARRIS
VERA J. MOISEVE
Committee Assistants

SENATE COMMITTEE ON JUSTICE
Room 347, State Capitol
SALEM, OREGON 97310
(503) 378-8833

Members:
SEN. WALT BROWN
SEN. EDWARD FADELEY
SEN. JIM GARDNER
SEN. KENNETH JERNSTEDT
SEN. TED KULONGOSKI

SENATE SUBCOMMITTEE ON JUSTICE AND HOUSE JUDICIARY SUBCOMMITTEE 2 ON CIVIL PROCEDURES

TUESDAY, March 3, 1981 MINUTES 8:30 A.M. - Room 350

MEMBERS PRESENT: Senator Walt F. Brown
Representative Ted Bugas
Senator Ken Jernstedt
Senator Ted Kulongoski
Representative Kip Lombard
Representative Norm Smith
Senator Robert F. Smith
Senator Jan Wyers, Co-Chairperson
Representative Bill Rutherford, Co-Chairperson

EXCUSED: Representative Margie Hendriksen
Representative Tom Mason

STAFF PRESENT: Felicia Gniewosz, Legal Counsel, Senate Justice
Linda Zuckerman, Legal Counsel, House Judiciary
Glenda Harris, Committee Assistant

WITNESSES:

Tape 8A 072 Fred Merrill, Council on Court Procedures

METER READINGS GIVEN FOR INITIAL TESTIMONY OF EACH WITNESS. ADDITIONAL TESTIMONY OFTEN FOLLOWS:

MINUTES WERE RECORDED ON 60-MINUTE CASSETTE TAPES.

Page 1

7A

000 MEETING WAS CALLED TO ORDER BY REPRESENTATIVE BILL RUTHERFORD, CHAIRPERSON

MEMBERS PRESENT: Senator Walt F. Brown
Representative Ted Bugas
Senator Kenneth Jernstedt
Senator Ted Kulongoski
Representative Kip Lombard
Representative Norm Smith
Senator Robert F. Smith
Senator Jan Wyers, Co-Chairperson
Representative Bill Rutherford, Co-Chairperson

EXCUSED: Representative Margie Hendriksen
Representative Tom Mason

020 LINDA ZUCKERMAN, Legal Counsel, House Judiciary explained the costs and fees established by statute. Number 1 is the prevailing party costs. SEE EXHIBIT D.

032 SENATOR SMITH asked how those costs were distributed. LINDA ZUCKERMAN responded they were prevailing costs.

035 SENATOR BROWN questioned what costs were to be covered. REP. RUTHERFORD said they were suppose to cover the costs for taking the appeal to the supreme court and at the time this was first done, (about 1855) it might have covered those costs. The $75 was just because the case had been won, but it was a meaningless amount.

069 LINDA ZUCKERMAN continued explanations on costs and fees, numbers 2, 3, and 4 on Exhibit D.

100 REPRESENTATIVE KIP LOMBARD comments on bill he had just seen and asked if the witness fees referred to the jury fees rather than the witness mileage - takes out any reference unless the county sets the amount, that is just jury? REPRESENTATIVE RUTHERFORD said yes, and there was one that lets them set the amount and he thought there was one that raises jury fees.

106 LINDA ZUCKERMAN continued explanation of costs and fees with number 5, title reports - Exhibit D.

117 REPRESENTATIVE SMITH commented on the importance of costs for title and if there is any inconsistency in that he would like to see the costs recovered.

123 REPRESENTATIVE RUTHERFORD directed discussion to number 1, prevailing party costs.

124 REPRESENTATIVE SMITH asked what the original intent of prevailing party costs were - were they intended to be actual reimbursement or are they purely symbolic. What does the $75 do once you get to the Supreme Court with a $2-$3,000 brief. FRED MERRILL, Council on court procedures, said it was intended to be an indemnity for attorney's fees, according to statements given at the time; at that time it was a reasonable allowance for attorney fees, but it eroded away over time.

Page 2

SENATOR SMITH said if for no other reason than public relations, the prevailing fees should be wiped out - the cost is provided in the cost bill anyway. FRED MERRILL said the argument would be that the cost bill, if it was only disbursements, did not always pick up all out of pocket disbursements and this would help in some cases.

152 REPRESENTATIVE RUTHERFORD asked if the federal cost bill allowed more things than Oregon. MR. MERRILL said the federal courts would allow the discovery depositions on a finding that they are necessary.

181 REPRESENTATIVE SMITH said he would like to get rid of these costs and be more realistic about what can go into the cost bill, including actual discovery costs. He would like to see a single statute outlining what items in a cost bill are recoverable and including in those certain discovery costs which are not now allowed under Oregon law.

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212 REPRESENTATIVE SMITH moves that under the memorandum on costs and fees (exhibit D) ORS 20.070 sections one, two and three be rescinded or repealed, relating to supreme court prevailing party fees.

REPRESENTATIVE RUTHERFORD asked if the intention was to move on to costs and disbursements as a way of remedying that.

REPRESENTATIVE LOMBARD added his support to that because he thought it made more sense to go to one rule.

241 REPRESENTATIVE BUGAS arrived at this point.

REP. RUTHERFORD asked the committee assistant to call the roll.

VOTING AYE: Senator Brown, Rep. Bugas, Senator Jernstedt, Rep. Lombard, Rep. Smith, Senator Smith, Rep. Rutherford

EXCUSED: Rep. Hendriksen, Senator Kulongoski, Rep. Mason, Senator Wyers

MOTION CARRIED

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260 REPRESENTATIVE SMITH moved to repeal ORS 20.100, costs on motion. He realized the council on court procedures has made a superceding recommendation to the committee. FRED MERRILL said the council had received numerous suggestions that the council develop a rule that provides for substantial payment of costs on the part of people that win frivolous motions for the purposes of delay and expand this rule which in a sense provides a cost factor of $5.00 for people losing motions.

288 REPRESENTATIVE SMITH said his experience was the judges were loath to call anything frivolous.

Representative Rutherford asked for a roll call vote:

Page 3

VOTING AYE: Senator Brown, Rep. Bugas, Senator Jernstedt, Senator Kulongoski, Rep. Lombard, Rep. Smith, Senator Smith, Rep. Rutherford

EXCUSED: Representative Hendriksen, Representative Mason, Senator Wyers

MOTION CARRIED

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330 REPRESENTATIVE SMITH MOVES TO REPEAL ORS 20.110

333 REP. RUTHERFORD asked the committee assistant to call the role:

VOTING AYE: Rep. Bugas, Senator Jernstedt, Senator Kulongoski, Rep. Lombard, Rep. Smith, Senator Smith, Rep. Rutherford

EXCUSED: Senator Brown, Rep. Hendriksen, Rep. Mason, Senator Wyers

MOTION CARRIED

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351 REPRESENTATIVE SMITH said he felt these should be used as subjects of a comprehensive cost bill statute.

REPRESENTATIVE RUTHERFORD said implicit in Rep. Smith's motion was that the committee will introduce a bill that will be an omnibus cost and disbursements bill which will deal with these matters.

374 SENATOR JERNSTEDT asked if they were putting in one bill that would take care of a great many increase in cost. REP. RUTHERFORD said cost disbursements would be in one and fees and witnesses and mileage of witnesses in another.

403 REPRESENTATIVE SMITH said in civil cases the prevailing party would have advanced costs for mileage and witness fees and are those currently recoverable as part of the cost bill. If so they need to be maintained. REP. RUTHERFORD said the mileage of witnesses has a fiscal impact on the counties as it arises in criminal cases. REP. SMITH recommended a comprehensive statute on civil costs and disbursements, which would allow for the recovery of payment of witness fees and mileage and then a criminal statute directing how much a witness is to be paid.

440 COMMITTEE MEMBERS discussed different fees and mileage rates for civil and criminal witnesses, and the fiscal impact.

TAPE 8A

022 REPRESENTATIVE SMITH said his recommendation was to separate the two so there would be a guideline for recovery on cost bill - have such a statute for civil cases and similar class related criminal cases be located elsewhere. REP. LOMBARD said the issue now is whether or not in these statutes to tell how much witnesses are entitled to - whether or not we are going to propose to increase those fees and mileage. REP. SMITH said the direction to committee counsel is to go ahead and include in the comprehensive bill the recovery of costs of witness

Page 4

fees in civil cases; the actual amount that the witness is to receive is proscribed by statute.

052 COMMITTEE MEMBERS discussed the reimbursement for witness fees and mileage; and compensating for lost salary.

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084 REPRESENTATIVE LOMBARD MOVES ORS 44.410 BE AMENDED TO INCREASE THE WITNESS FEE FROM $5.00 to $15.00 IN CIVIL CASES.

MEMBERS discussed whether they could lawfully differentiate between witnesses and how much they could pay them.

104 REPRESENTATIVE RUTHERFORD asked for a roll call vote:

VOTING AYE: Senator Brown, Rep. Bugas, Rep. Lombard, Rep. Smith, Senator Smith, Rep. Rutherford

VOTING NAY: Senator Jernstedt, Senator Kulongoski, Senator Wyers

EXCUSED: Representative Hendriksen, Representative Mason

MOTION FAILED

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128 MEMBERS discussed mileage of witnesses.

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160 REPRESENTATIVE SMITH MOVED TO INCREASE MILEAGE RATE TO 17¢ PER MILE IN ORS 44.430 - IN CIVIL CASES.

174 ROLL CALL VOTE:

VOTING AYE: Senator Brown, Rep. Bugas, Senator Jernstedt, Senator Kulongoski, Rep. Lombard, Rep. Smith, Senator Smith, Senator Wyers, Rep. Rutherford

EXCUSED: Rep. Hendriksen, Rep. Mason

MOTION CARRIED

179 FELICIA GNIEWOSZ asked Rep. Rutherford if that would be an amendment in that statute; it would be left at 8¢ a mile for criminal cases and then amend it to 17¢ for civil cases. He indicated yes.

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186 COMMITTEE MEMBERS discussed issue #6 dealing with Title reports (for liens on real property). REPRESENTATIVE SMITH moved the language include 'for all title reports required for preparing and foreclosing the lien'. COMMITTEE MEMBERS had further discussion regarding the cost of title reports.

267 REPRESENTATIVE RUTHERFORD restated the motion: "to provide that ORS 87.386 have added to it the language for all title reports required for preparing and foreclosing the lien.

283 SENATOR SMITH questioned if the intent was to make whole the title cost. REPRESENTATIVE SMITH answered that it was more of a directive, it is one of the ordinary and necessary cost of litigation and they would like it reimbursed. REPRESENTATIVE LOMBARD said if the philosphy is that the foreclosing party ought to be able to recover the cost of the foreclosure reports then there is no harm in clarifying this by statute. SENATOR SMITH and REPRESENTATIVE SMITH discussed recovery of costs, the comment on exhibit D, item 6 regarding judges having been inconsistent. REPRESENTATIVE RUTHERFORD said that comment was due to information being reported to him by attorneys; he said the language 'reports required' allowed the courts to have discretion.

361 REPRESENTATIVE RUTHERFORD reread the suggested amended language: For title reports required for preparing and foreclosing the lien.

372 REPRESENTATIVE SMITH said it was a virtual necessity to filing that kind of law suit that you have that kind of report - if you have to have it, then if you prevail you ought to be able to recover the costs of that necessary item.

381 REPRESENTATIVE RUTHERFORD ASKED FOR A ROLE CALL VOTE:

VOTING AYE: Senator Brown, Rep. Bugas, Senator Jernstedt, Senator Kulongoski, Rep. Lombard, Rep. Smith, Senator Smith, Senator Wyers, Rep. Rutherford

EXCUSED: Representative Hendriksen, Representative Mason

MOTION ADOPTED

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390 SENATOR KULONGOSKI asked counsel to look at the wording and see if it is redundant the way we have amended it, it looks as if we are saying it twice. COMMITTEE MEMBERS discussed the wording and the statutory $10. fee for preparing the lien which is a fee separate and apart from any other preparation not attorney fees. SENATOR WYERS said that $10. fee should be abolished.

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442 SENATOR WYERS MOVED THE STATUTE RELATING TO FEE ALLOWED FOR PREPARATION OF MECHANICS LIEN BE DELETED.

A ROLL CALL VOTE WAS TAKEN:

VOTING AYE: Senator Brown, Representative Bugas, Senator Jernstedt, Senator Kulongoski, Representative Smith, Senator Smith, Senator Wyers, Representative Rutherford

VOTING NAY: Representative Lombard

Page 6

EXCUSED: Representative Hendriksen, Representative Mason

MOTION CARRIED.

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019 SENATOR KULONGOSKI asked if all the changes, alternatives 1-5 were to get at the issue of depositions, attempting to compensate the prevailing parties for the cost of depositions in some form or another. FELICIA GNIEWOSZ replied that was correct.

035 FELICIA GNIEWOSZ explained Rule 68 Disbursements, Alternatives I - V.(SEE EXHIBIT E)

072 FRED MERRILL said the federal rules are quite close to the language of the Oregon statute, but generally without absolute agreement in the circuits, the federal courts have interpreted the rule as allowing discovery depositions when in the courts opinion they are necessary to the successful prosecution of the case, but not all discovery depositions - it is pretty much at the court's discretion.

089 SENATOR BROWN and FELICIA GNIEWOSZ discussed Alternative V., regarding depositions and witnesses not testifying at trial.

114 SENATOR WYERS stated the Senate members would like the House members to take the lead on this item.

SENATOR KULONGOSKI said he was not willing personally to open this area up. He asked if the council had debated this. He said he was willing to keep it like it is.

137 REPRESENTATIVE RUTHERFORD said in representing plaintiffs he had been in the position of giving the client the award and then telling the client they couldn't recover the deposition expenses.

142 REPRESENTATIVE LOMBARD said to clarify the statute, you could take alternative 5 and remove the phrase 'and expense of taking depositions of necessary parties' to clarify it, remove the word 'necessary' and insert the phrase 'where the witness does not testify at trial and the deposition is admitted at trial'. REPRESENTATIVE SMITH said the concerns were that in small cases (under 15,000 potential award) the cost of prosecuting the case frequently are equal to or greater than the amount that is possibly recoverable. REPRESENTATIVE RUTHERFORD asked about limiting it to cost of deposition of parties rather than all depositions, just those related to the parties in the case. COMMITTEE MEMBERS responded to Rep. Rutherford's suggestion. REPRESENTATIVE LOMBARD said he was interested in clarifying the word 'necessary expenses'.

230 FELICIA GNIEWOSZ directed their attention to Alternative I.

244 MEETING ADJOURNED AT 10:02 A.M.

Respectively Submitted,
Glenda Harris
Glenda Harris, Committee Assistant

EXHIBIT D - Costs & Fees

EXHIBIT E - Rule 68, Disbursements

HOUSE COMMITTEE ON JUDICIARY

Joint Meeting of House Judiciary Subcommittee 2 and Senate Justice Committee

March 17, 1981 8:50 a.m. 350 State Capitol

Members Present:	Senator Jan Wyers, Chairperson Representative Bill Rutherford Senator Ted Kulongoski Representative Ted Bugas Senator Kenneth Jernstedt Representative Kip Lombard Senator Walter Brown Representative Norm Smith Representative Tom Mason
Excused:	Representative Margie Hendriksen Senator Kenneth Smith
Staff:	Felicia Gniewosz, Legal Counsel Ellen Rogers, Committee Assistant
Witnesses:	Fred Merrill, Council on Court Procedures
Tapes:	H-81-JUD-153 H-81-JUD-154

TAPE 153
SIDE A

000 CHAIRPERSON WYERS called the joint meeting to order at 8:50 a.m.

014 FELICIA GNIEWOSZ, Legal Counsel, went through the minor amendments on Rule 80 F(1) and Rule 82 D(1). These are minor changes that Judge Butler noticed as to two technical problems with the Rules.

In Rule 80 F(1), notice could not be given to persons whose existence is unknown. Judge Butler changed the language to "actually or constructively known to be claiming".

The second change on 82 D(1) the language wasn't clear. The existing rule presently is being retained because the net worth of one surety, or any combination of sureties, must be twice the sum specified (Exhibit G, Civil Procedures).

024 Hearing no further discussion or objections on the the amendments explained by Legal Counsel they were so ordered.

026 MS. GNIEWOSZ explained the proposed amendments for Rule 81 D, (Exhibit G, Civil Procedures).

044 MOTION: SEN JERNSTEDT moved the amendments explained by Legal Counsel.

071 Hearing no discussion or objections the motion was adopted.

072 MS. GNIEWOSZ explained that the present statute, ORS 23.665, has a list of exemptions in it. A form was suggested by John Van Landingham (Exhibit G, Civil Procedures). There is a list of exemptions prepared by Professor Lacy and used by the Council in some of their discussions. There was also a list of exemptions from the Banker's bill.

095 CHAIRPERSON WYERS expressed that he preferred Professor Lacy's list.

110 MS. GNIEWOSZ clarified the fact that the current law does not have a list. It just requires a list beyond the form.

119 REP. SMITH felt that there has always been a problem of having a complete listing anywhere in the statutes on the exemptions. He felt that it would be a good idea to have a reference or at least a cross-reference section.

132 CHAIRPERSON WYERS asked if there was a way to use a list, such as Fred Merrill put together on page 57, (Exhibit A, Civil Procedures), that mandates that such a list be included in a form and served on the debtor without setting forth in ORS.

143 FRED MERRILL, Council on Court Procedures, stated that he went through and compared the three lists suggested. He felt that Professor Lacy's is the most complete. The problem is that when you start looking at them they are two different dimensions. One is categorization. For example, Lacy has a list of 15 or so different public pension benefits where the other lists just carry under a listing of public and private pensions.

Another problem is depth of description. Lacy says "homestead", the other lists say "homestead exemption up to a certain amount of dollars". He felt that the more detailed the list is the more danger that you are inaccurate.

165 SEN. KULONGOSKI asked what was wrong with the current way it is being done and why the change was suggested.

167 MR. MERRILL explained that the existing statute does not incorporate any list. It says that you must set forth a list and you must describe the procedure for claiming the exemption and you must tell them where to get the forms. The biggest problem is that everybody is unsure that the Stevens-Ness form or any other form actually contain all of the necessary exemptions.

184 SEN. KULONGOSKI stated that if a list is needed, the obligation to make that list has to be on someone. He didn't feel that the

Legislature can practice law for the attorneys and draw pictures for them. He didn't feel that the answer is to give an all inclusive list with statutory cites. He did feel that someone should have the responsibility to provide that information if that was the way the committee decided to go.

219 MR. MERRILL explained the existing language, on page 144, under 29.178 (Exhibit A, Civil Procedures). He suggested putting a word in that section in (2)(c) that would state something to the effect of "a list of all or substantially all".

234 SEN. KULONGOSKI felt that if Professor Lacy can make a list he didn't see why the Bar couldn't put one together.

246 REP. MASON felt that either there be a comprehensive list or no list at all. He didn't see a rhyme or reason to some of the exemptions on the list.

264 REP. RUTHERFORD stated that he liked the approach taken by the Council which is set forth on page 57 (Exhibit A, Civil Procedures) telling everybody that there may be exemptions and they had better check their rights. He didn't feel that an accurate list could be put together.

291 SEN. KULONGOSKI felt that if the purpose of notice is for the defendant who is a nonattorney, and you are trying to key that person in on the idea that if he owns property it may not be subject to execution. There should be some type of a list even if it isn't all inclusive so that the individual can look at it and generate an idea.

366 REP. MASON felt that if a list was going to be presented, it should be statutory and there should be language to say that there may be other exemptions the ones listed are just specific exemptions. He wanted to avoid a situation where some ambitious attorney is going to try and knock some creditor out of the box for failing to give notice. He felt that there has to be a list or no requirement for a specific list.

400 SEN. KULONGOSKI directed the committee's attention to the letter and the list from Mr. Van Landingham (Exhibit G, Civil Procedures). He pointed out that on the bottom of the exemption list there was a statement to the effect of what Rep. Mason had just suggested. He didn't feel that every exemption should be enunciated in the statutes.

TAPE 154
SIDE A

005 CHAIRPERSON WYERS suggested that the Council contact the Sheriffs Association and the Bar and let them know that the forms need to be updated.

040 SEN. KULONGOSKI moved to keep the original statute and delete that portion dealing with the exemption lists proposed by the Council.

059 Voting Aye: Sen. Brown, Rep. Bugas, Sen. Jernstedt, Sen. Kulongoski, Rep. Mason, Rep. Smith, Rep. Rutherford and Rep. Wyers. Excused: Rep. Hendriksen, Rep. Lombard and Sen. Smith. The motion passed.

084 MS. GNIEWOSZ explained that there was a question in the cost statutes of how long Motor Vehicles should keep their records. She checked with the State Archivist and with Motor Vehicles and neither one thought that it should be in the statute, but Motor Vehicles would appreciate Legislative intent as to how long they should keep their records. They keep them now for four to five years.

She explained the changes on mileage of witnesses and the proposed amendments on costs in foreclosures and cost of preparing lien notice (Exhibit G, Civil Procedures).

126 REP. RUTHERFORD explained that the committee amended the wrong section at the last meeting and he suggested that the committee rescind that motion and approve an amendment to 87.386.

143 REP. MASON asked what the proposal was on the different mileage fees between criminal and civil witnesses. He felt that if anything the criminal witness should be paid more.

144 CHAIRPERSON WYERS explained that they raised it to seventeen cents a mile for civil witnesses and they left the criminal at eight cents.

148 REP. MASON felt that two different witness fees was absurd.

155 REP. SMITH explained that part of the rational on that was that you have a duty to preform as a witness and if the state requires you to be there that is part of your duty as a citizen of the state, whereas in a civil proceeding, it is more of an imposition and it is at the descretion of a third civilian part and not the state itself. The whole increase in the fiscal impact would be lost if the counties are impacted with over 100% increase in their witness fee cost.

192 REP. MASON felt that the witness fees should not be raised then.

255 MOTION: REP. MASON moved that if the committee has adopted a seventeen cents a mile standard for a civil witness fee, that action be rescinded and the law be left at the uniform eight cents standard.

273 Voting Aye: Sen. Jernstedt, Rep. Mason and Sen. Wyers. Voting Nay: Sen. Brown, Rep. Bugas, Sen. Kulongoski, Rep. Smith and Rep. Rutherford. Excused: Rep. Hendriksen, Rep. Lombard and Sen. Smith. The motion failed.

284 MOTION: REP. MASON moved that the bill be amended in ORS 44.430 by deleting subparagraph 2, and in subparagraph 1, delete eight and substitute seventeen. This would make the witness mileage fees equal in both civil and criminal cases.

315 Voting Aye: Sen. Wyers and Rep. Mason. Voting Nay: Sen. Brown, Rep. Bugas, Sen. Jernstedt, Sen. Kulongoski, Rep. Smith and Rep. Rutherford. Excused: Rep. Hendriksen, Rep. Lombard and Sen. Smith. The motion failed.

327 MS. GNIEWOSZ explained the cost of forclosures and the cost of preparing a lien. The committee amended the wrong section and they need to recind the adoption of ORS 87.386, as amended, and in its place, amend ORS 87.060 (4), which would accomplish the recovering cost of title reports for construction liens.

336 MOTION: REP. RUTHERFORD moved that the committee rescind its action taken at the last meeting that the Legal Counsel just explained.

346 Hearing no discussion or objection the motion was adopted.

377 MS. GNIEWOSZ pointed out that in Exhibit I, Civil Procedures, the effective date should read Jan. 1. 1982 not 1981.

She explained that the committee needed to decide if they wanted to make any changes in the area of disbursements (Exhibit G, Civil Procedures).

402 SEN. KULONGOSKI didn't feel that depositions should be included in disbursements of any kind.

413 REP. MASON felt that there were too many depositions taken.

427 REP. RUTHERFORD felt that the purpose for it was to allow recovery for depositions.

433 REP. SMITH stated that one of the concerns was the reverse of that. Some parties were able to buy off the other side through litigation and extensive protractive costs.

TAPE 153
SIDE B

011 MS. GNIEWOSZ explained that one of the questions that came up was that whether attorneys should know, ahead of time, which ones are being paid for. Alternative IV (Exhibit G, Civil Procedures) wouldn't let you know ahead of time.

018 MOTION: REP. MASON moved Alternative IV, (Exhibit G, Civil Procedures).

021 The motion failed.

034 Hearing no further business to come before the committee it was adjourned at 10:00 a.m.

Submitted

Ellen Rogers
Committee Assistant

EXHIBIT

Exhibit G, Civil Procedures - Packet presented by Staff

Tape 280, Side B

026 SEN. BROWN, asked if there was a definition of mental or emotional condition in the bill. JIM NASS, replied that there was not. SEN. BROWN, asked what a psychotherapist is. JIM NASS, replied that a psychotherapist is defined on page 9, lines 38-40.

048 KRISTENA LaMAR, stated that the interim committee deleted the phrase including drug addiction from the advisory committee's rule and the House did not put that back in. There is nothing to say that it can apply but there is no specificity that it does. Inferentially you could say that if they didn't adopt the phrase "including drug addiction" that they meant to exclude it.

071 JIM NASS, stated that the House deleted "exception 4a" from HB 2030. It is in SB 426 but not in the House Bill. He strongly urged that the exception be put back in the bill.

080 KRISTENA LaMAR, stated that it was taken out because of arguments presented by Mr. Nass and Mr. McCandlish.

086 JIM NASS, stated that under current law privilege bars the use of confidential information in a commitment hearing. The Governor's Task Force on Mental Health did much work in this area. They were of the view that there were a fair number of mentally ill people who were not getting the help that they needed because relevant medical information could not be used in these hearings. The Task Force recommended that only the information acquired during a prehearing hold be used during a commitment hearing. It would not let all the previous confidential communications between the patient and therapist or physician be used. It was that information that they thought was most probative of the person's mental status.

124 THE CHAIRPERSON, SEN. WYERS, recessed the meeting at 8:21 a.m.

125 The meeting resumed at 8:23 a.m.

140 REP. TOM MASON, District 9 testified that he had no problem with using the federal rule or the advisory proposal for rule 609.

159 REP. MASON, stated that he thought that a prior inconsistent statement is substantive evidence.

174 SEN. WYERS, asked if there were any other major issues. REP. MASON, replied that there were not.

182 KRISTENA LaMAR, presented the House amendments to HB 2030. See exhibit B. They were LC draft of 7/9/81 HB 2030-5.

188 KRISTENA LaMAR, stated that the probationary case hearings issue had not been resolved.

201 SEN. WYERS, asked if they couldn't say counties over so many thousand. RURAL COUNTIES had said that it would be hard to get the right people there but in at least Multnomah county the people were required to be there.

217 SEN. WYERS, directed the preparation with counsel to prepare an amendment that says "in counties over x-number thousand which would thereby include the Willamette Valley counties, the major Willamette Valley counties, Lane, Benton, Marion, Multnomah, Clackamas, Washington, that in the judicatory phase that if either side objects there has to, they have to comply with the rules of evidence." That probably already comports with present practice anyway.

247 KRISTENA LaMAR, stated that because of lack of presedent anywhere else the waiver of privilege by by voluntary disclosure would be an issue. This is on page 13 of the A-Eng. HB 2030. The civil defense bar was interested in having voluntary disclosure upon the taking of a deposition either for the perpetuation of testimony or for discovery. Lines 33-36 of page 13 list the cases of primary interest. This would clarify that the filing of the suit itself does not waive the privilege.

281 KRISTENA LaMAR, stated that the taking of the deposition was limited to those taken for the purposes of perpetuation testimony. That might result in some games-playing bu the person taking the deposition designating at the outset of the taking of the deposition that it is for perpetuating testimony while in effect it might be more of a discovery technique. It leaves open a deposition that is voluntary disclosure may occur upon the taking of the discovery deposition. The federal rule is nonexistent.

312 SEN. WYERS, asked what was done in regards to hearsay.

315 KRISTENA LaMAR, replied that it was article 8. The major one was the taking out of the requirement that the prior consistent statements be made under oath in a deposition. This is on page 18 of A-Eng. HB 2030, lines 34 and 37. The interim committee added "and was given under oath at a trial hearing or in deposition if the party against whom the testimony is now offered or predesessor in interest had an opportunity and similar motive to develope the testimony by direct cross or redirect examination."

339 SEN. WYERS, stated that that was what the defense lawyers really wanted but would settle for just saying it under oath.

334 SEN. WYERS, returned to rule 609 and asked if the defense lawyers objected to the person calling a witness being able to bring out that they had a prior conviction.

358 JIM McCANDLISH, replied that that was their suggestion.

431 KRISTENA LaMAR, stated that there were some other statutes that needed to be repealed. In chapters 42 and 43 and more of the present statutes in chapter 44 needed to be repealed. They were waiting til it got to the Senate to do it all at one point.

Tape 281, Side B

029 KRISTENA LaMAR, stated that ORS 135.185 had been amended and was now section 88C in the bill.

040 SEN. WYERS, stated that this will mean that they can use hearsay evidence but they have to consider the quality of it and decide that there will probably be adaquate nonhearsay evidence to prove the case at the trial.

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rely on what was submitted in the application; they did go to the Parole Board and ask for copies of the file, which included psychic reports.

250 WYERS asked Oliver what his recommendation had been on the commutation.

OLIVER said he would normally have to reply that that was privileged information; however the Governor had indicated to the media in the past that Oliver's recommendation was to not grant the commutation.

260 GARDNER asked if it would be considered attorney/client privilege if Gardner asked if the Governor had ever told Oliver why he granted the commutation. Gardner said the Governor had said something to the media about the Viet Nam syndrome.

OLIVER said he had taken a different approach than the Governor, in considering it. He said he had applied a more mechanical, legalistic test on the application, comparing it with a normal rule of thumb (severity of crime vs. how soon a person could be credited with rehabilitation). That was what his recommendation was based on. He said he felt he could advise the Governor on legal matters, but he didn't think he could be of much help in advising on psychological evidence, since he did not have any psychological training.

270 GARDNER asked if Oliver knew if Samples' wife was employed.

OLIVER replied that the last he had heard, she was employed as a consultant for the Pihas Schmidt Westerdahl Firm, an advertising firm.

290 WYERS said he had not anticipated whether they needed to do something about the public being able to see the commutation file before the action was taken. He said that seemed to be the crucial period.

These bills were put aside to be heard later in the hearing.

335 HOUSE BILL 2030A - Relating to Evidence

356 JUDGE ROBERT E. JONES, Multnomah County Circuit Court and a member of this commission since its inception said he and Judge Unis had been attending all of the House hearings on the measure.

366 WYERS said a short recess would be taken.

372 SENATE BILL 957 - Relating to District Attorneys

372 MOTION: SENATOR FADELEY moved Senate Bill 957 to the Senate Floor with a Do Pass recommendation.

377 SENATOR JERNSTEDT arrived at this point.

WYERS said there had been no amendments moved or adopted. He said there were two provisions that now talked about the district attorney participating in a justice of the peace court. One said "he may" and the other said "he shall". The ORS to be repealed here is the one that said

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TAPE 292 side B

area, it seems that the forest service will be the lead agency in any federal act.

060 MOTION: SENATOR SMITH moved the amendments which would delete the current body of HJM 15 and substitute the language submitted by Rep. Bauman (Exhibit D) and on line 15 of page 1, moved to add "s" to transportation.

MOTION ADOPTED without objection.

WYERS directed Rep. Bauman to notify the requestors of the original HJM 15.

080 MOTION: Chair moved that he would be empowered to make adjustments by writing the Secretary of the Senate about sponsors.

MOTION ADOPTED without objection.

MOTION: SENATOR SMITH moved HJM 15 as amended to the floor of the Senate with a do pass recommendation.

ROLL Call vote: Voting aye: Senators Fadeley, Gardner, Jernstedt, Smith, Wyers. Excused: Senator Brown and Kulongoski.

104 HOUSE BILL 2768 - Relating to Logger's Lien

105 GIL FRENCH, Oregon Log Truckers Association, stated that this measure would restore an oversight. In 1975 when the lien bill for filing liens for transporting logs and working in the woods was amended, it was left out that the lien would attach to the proceeds.

115 MOTION: SENATOR SMITH moved HB 2768 to the Senate Floor with a Do Pass recommendation.

ROLL CALL VOTE: Voting aye: Senators Fadeley, Gardner, Jernstedt, Smith, Wyers. Excused: Senators Brown and Kulongoski.

140 HOUSE BILL 2030A - Relating to Evidence

ROBERT E. JONES, Multnomah County Circuit Judge, submitted written testimony addressing Rules 609 and 801. (Exhibit E) He said Judge Unis was in agreement with all the positions he was stating.

GARDNER stated that he liked what Judge Jones had proposed. He asked if the other judiciary committee said "only crimes involving dishonesty or false statements" and did Judge Jones version differ from that in that he said "all felonies and crimes involving false statements" JUDGE JONES said that was the original Oregon Evidence Revision Advisory Proposal.

271 FADELEY asked for an explanation of how false statements would be determined.

JUDGE JONES said that would be misdemeanors which would include false swearing in court, unsworn falsifications, tampering with a witness,

simulating legal process, criminal inpersonations, etc., etc. He said there would be very few misdemeanors that would be used because they rarely ran into those offenses.

305 FADELEY asked if a crime which had been committed in another state would be usable for impeachment and if so, since that section number of another state's statute was not listed in the commentary, how would it be decided that it involved false statement.

JONES said a determination would have to be made of what the ingredients in a crime were.

WYERS stated that he liked the approach to the misdemeanors, but the thing about the felonies, based on what had been done in the interim and on what the house had done, there seemed to be some movement in the legislature toward the idea of having some limitation on the admission of impreachment by felony convictions; so he had some tendancy to try and find someway to limit impeachment on felonies. That was why he like the federal rule approach, although he saw in Exhibit E that Judge Jones opposed that. He said what he liked about it was that it seemed to push a trial court judge into looking straight on at the question of trying to balance the search for truth against the . . .

JONES discussed this with Wyers.

SENATOR BROWN arrived at 4:07.

462 JONES explained an amendment proposed by Stephen Jones, Privileges Section, which dealt with the waivor section on Rule 511, page 13 of the A-engrossed bill. It would delete the provision "or in the case of a deposition taken for the purpose of perpetuation of testimony"; then have waivor position patient privilege take place at that time. Jones said he had been convinced that would be a step in the right direction and would follow what had been done in Rule 703.

TAPE 293A

HOUSE BILL 3139 - Relating to Juvenile Corrections.

039 REP. KIP LOMBARD, stated that the bill originally started in the House as a bill to extend a practice enacted in the 1979 legislature whereby, under Chapter 337, of the 1979 Oregon Laws, the juvenile courts were given the authority to order a child, aged fourteen, to be placed in a detention facility for a specific period of time, not to exceed eight days, (in addition to time they might already had spent in the facility), after the child had been found to be within the jurisdiction of the juvenile courts, due to committing an act which would be a crime or where the child, under that subsection, had been found to have violated a condition of probation. In 1979, that authority had been given to the juvenile courts as a treatment or disposition or punishment mode, that could be used which was stricter than probation, but less strict than sending them off to the ranches, Hillcrest or MacLaren. He said juvenile directors and juvenile court people had reported to him that they found it a very useful dispositional alternative and had requested amendments

to continue the law (it had a sunset provision) and to reduce the age limit to age twelve.

He said Jerry Gabay, Oregon Council on Crime and Delinquency, proposed a series of amendments (EXHIBIT F) to the bill, dealing with the detention and holding of children in those counties that did not have juvenile detention facility. He said Gabay's proposal had met with a great deal of opposition among juvenile court judges and juvenile court directors. LOMBARD stated that after some negotiations, a delicate resolution of everyone's concerns was reached; those were in the proposed amendments to House Bill 3139. He stated that he resisted amendments that were going to be offered by Mr. Gabay. He recommended, due to the compromise that had been reached on the House side and for the sake of the bill, that it stay in its current form and be passed out that way. He further stated that he was in agreement with the amendments that were made on the House side.

150 LOMBARD said that he had spoken with Rep. Cohen, the chairperson of the House Judiciary subcommittee which the bill had gone through, and she had agreed with him on the delicacy of the compromise. He said part of the Gabay amendments had changes in substances, duties and functions and that was where some of the local juvenile people would raise objections.

155 SENATOR GARDNER commented that they looked like legitimate suggestions. LOMBARD pointed out the additional record keeping aspect of Gabay's amendments.

232 LOMBARD restated that the original purpose of the bill was to continue the 1979 law and change the feature of dropping the age from fourteen to twelve, to conform to the jurisdictional age for Hillcrest and MacLaren. SENATOR WYERS and LOMBARD discussed the areas that did not have juvenile facilities.

290 HOUSE BILL 2030 - Relating to Evidence

293 JUDGE RICHARD UNIS, 4th Judicial District, Multnomah County. He said in regards to rule 609 there were three alternatives - the advisory committee commentary, the examples, or the federal rules, which would increase the cost of trials, which was a factor he felt should be considered. The third proposal was the one submitted from the House, which was a very complicated list. He strongly recommended if it was a choice between the three, they take the advisory committee commentary.

In rule 801 he advised they go back to the federal rules.

WYERS and UNIS discussed the support of Rule 609.

TAPE 294A

012 UNIS said if they adopted the federal rule of evidence 609 which then gave the judge discretion as to felonies which were not veracity related crimes, he thought it essential that they put in the legislative history at least three factors the judge should consider which would help make more consistency. Those factors were 1) the impeachment value of the

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prior crime, 2) the point in time of the conviction and the witnesses subsequent history, 3) the similarity between the past crime and the charge crime. Those three factors could be weighed and the judge would have framework.

UNIS stated that he felt the advisory committee rule had simplicity in operation, it would prevent a lot of appeals, it would be quicker results, and be more consistent. The federal rule of evidence 609, if adopted with that criteria, would be a little more complicated, there might be a little less consistency but on the other hand there was more liklihood of impreachment with crimes that were related to the trait for truth telling which was really the relavancy of impeachment.

044 GARDNER asked if under the federal rule they would keep more impeachment testimony out than under the advisory committee approach. UNIS said they probably would, because under the advisory committee approach any felony would go in. GARDNER said it might make it more complicated, but lawyers in Oregon who practiced in both state and federal court would have one set of evidence rule to learn on that issue. UNIS agreed, but said he was suggesting that not in the federal rules history had any of the criteria that trial judges used. UNIS added that while there would be some inconsistency, it would be a livable rule.

FADELEY listed some examples of crimes and asked Eunis for discussion on how those would be handled.

144 WYERS asked if degrees of similarity made it more prejudicial. UNIS replied that the similarity between past crimes and the charge crimes related to the prejudicial effect it had upon the defendent. He read " when the prior crime charged and the charge crime are similar in nature the danger obviously increases".

WYERS asked if they were going to consider adopting the federal rule which would make it harder in some cases for the state to get a felony conviction in (than if they adopted the advisory committee) would there be any way in the commentary to make it easier to get in substantive evidence under rule 404, subsection 3. He said it seemed that the case law might be too tight on it.

200 WYERS said he wondered if they adopted the federal rule 609 as to felonies, but then in the commentary write a more logical, an easier to get prior convictions rule in when there was a great similarity between the crime committed.

UNIS replied that the similarity was the one thing that kept it out; if they wanted to keep it in, they might as well go to the advisory commentary which said that all felonies came in. He suggested if it be the determination to go with the federal rule of evidence 609, then he hoped they would delete the word "dishonesty" as it appeared in the federal rules.

HOUSE BILL 3139 - Relating to juvenile corrections.

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007 SENATOR WYERS asked if this bill passed, and the funding did not pass, would people then lobby the Governor to veto this bill. Money was not required for the bill?

GARDNER said this bill stood on its own - it made it much more of a manageable system.

ROLL CALL VOTE: Voting Aye: Senators Fadeley, Gardner, Jernstedt, Smith. Voting No: Senators Kulongoski, Wyers. Excused: Senator Brown. MOTION CARRIED.

037 HOUSE BILL 2030 - Relating to Evidence

040 MOTION: SENATOR FADELEY moved section 16, dealing with burden of proof be amended, which would have the effect of putting a bill into the evidence code. (See EXHIBIT H, dated 6/25/81)

060 ROLL CALL VOTE: Voting Aye: Senators Brown, FAdeley, Gardner, Jernstedt, Kulongoski, Wyers. EXCUSED: Senators Smith.

067 HOUSE BILL 2385 - Relating to Criminal Penalty (Governor's Pardon)

068 MOTION: SENATOR WYERS moved the vote by which HB 2385 was moved out of committee be reconsidered.

ROLL CALL VOTE: Voting Aye: Senators Brown, Fadeley, Gardner, Jernstedt, Kulongoski, Wyers. EXCUSED: Senator Smith.

082 CHAIRPERSON WYERS moved an amendment (EXHIBIT I) making the perspective as to the requirement that the procedural safeguards be followed as to notice; and that the bill be removed from the table.

HEARING NO OBJECTION, THE MOTION WAS ADOPTED.

088 CHAIRPERSON WYERS moved HB 2385, as amended, to the floor with a do pass recommendation.

ROLL CALL VOTE: Voting Aye: Senators Brown, Fadeley, Gardner, Kulongoski, Wyers. Voting No: Senator Jernstedt. Excused: Senator Smith. MOTION CARRIED

092 SENATE JOINT RESOLUTION 24 - Proposing Amendment to Oregon Constitution (Governor's Pardon)

095 MOTION: Senator Brown moved to remove SJR 24 from the table. The motion was adopted without objection.

Senator Kulongoski left at 4:22.

0115 SENATOR WYERS explained the amendment to SJR 24, dated 7/20/81. (EXHIBIT J)

MOTION: SENATOR GARDNER moved the amendments (Exhibit J) be adopted.

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ROLL CALL VOTE: Voting Aye; Senators Brown, Fadeley, Gardner, Jernstedt, Wyers. Voting NO: Senator Kulongoski. Excused: Senator Smith. MOTION CARRIED.

140 MOTION: CHAIRPERSON Moved HJR 24, as amended to the Senate floor with a do pass recommendation.

152 MOTION: SENATOR BROWN moved that a comma be added to the amendments (Exhibit J) on line 16, after the word "commutation" and before the word "in". MOTION ADOPTED.

174 ROLL CALL VOTE on the motion to send SJR 24 to the floor: Voting Aye: Senators Brown, Fadeley, Gardner, Wyers. Voting No: Senators Jernstedt, Kulongoski. EXCUSED: Senator Smith. MOTION CARRIED.

200 KULONGOSKI returned at 4:26. Senator Kulongoski asked to be recorded as voting "no" on all motions relating to SJR 24. (The roll call votes above were so changed.)

224 HOUSE BILL 2030 - Relating to Evidence.

225 GARDNER said the issue of impeachment was left and the advisory committee of the criminal defense lawyers bar point of view was rather harsh, but it was a clean rule in the sense that it would avoid a lot of unnecessary litigation. On the other hand, the federal rule would give lawyers the same standard when they practiced in state court and federal court; it was a more moderate approach. He thought he would prefer that approach.

WYERS said he was troubled by the added litigation of the federal rule, but it seemed as if something was wanted where felonies were not just admitted automatically.

KULONGOSKI stated that he disagreed very strongly with what the House did on that issue.

WYERS said the House had not made any distinction between felonies and misdemeanors. He asked for opinions on limiting admission of felonies.

270 DAVE FROHNMAYER, Attorney General, Department of Justice, said they had received copies of a lengthy set of unanticipated amendments by the Oregon Criminal Defense Lawyers Association. He said they had prepared a detailed reply in response to and by and large rejecting most of those proposals.

With respect to impeachment, ideally from the standpoint of the Association and from the Department, they did not adopt the House position either. They preferred a different approach which he would like for Allison Smith, to explain to the committee.

285 ALLISON SMITH said they had felt the advisory committee proposal was the only viable alternative to the present law and it was fairly obvious the present law was not going to be retained. He said the arguments advanced by Judge Jones, recently, put it very well. With the federal rule, with the balance of prejudicial value versus prohibitive value test, there

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would be uneven application of the rule, from courtroom to courtroom; additional time within the trial court setting, as well as appellate work. They urged that not be adopted.

297 SENATOR FADELEY left at 4:30.

299 FROHNMAYER said he had served on the interim committee which had helped to hammer out the code, and that process melted together many viewpoints and called upon the widest variety of experts in the law of evidence, the law of impeachment, medical expertise, etc. to consider those issues. He felt the proposals which that advisory committee had come up with balanced the equities in terms of reaching a fair compromise.

314 GARDNER asked A.G. Frohnmayer if he agreed with the Interim Judiciary committee approach.

FROHNMAYER said he did not agree with all of it.

GARDNER said they were discussing that issue right now; impeachment by evidence of conviction for a prior crime - on which they had all worked together. He again asked A.G. Frohnmayer if he had agreed with the Interim Judiciary's approach and solution to that issue.

FROHNMAYER said he had not been that unhappy with Oregon law the way it was.

GARDNER said that wasn't the issue, they were discussing the integrity of the legislative process, and specifically of the Interim Committee's process leading to a recommendation to the legislature and he wantd to be clear as to what they were talking about. Was it the recommendations of the Interim Judiciary Committee that Frohnmayer was saying ought to be respected.

330 FROHNMAYER said he believed that the Interim Judiciary Committee ought to have adopted the advisory committee's standpoint. He knew the Advisory Committee worked for about four years on the process.

341 FROHNMAYER stated that he felt the Advisory Committee had adopted an appropriate compromise and it had been departed from to a considerable degree by subsequent permutation. He said he did not like the notion of distinquishing between certain kinds of crimes and the balancing kinds of tests which led to different results from judicial circuit to judicial circuit.

BROWN said he did not see the advisory committee position as a compromise. It went back to the position of the federal rule and then worked more conservatively or more towards a district attorney's position. At least under the federal rule where the prejudice outweighed the probative value, the judge did not let it in. The advisory position was that any felony commission went in. It was away from any compromise between the prosecutors and the defense bar.

FROHNMAYER stated that he was trying to avoid something along the liberal versus conservative spectrum, or prosecutors versus defense bar. He saw

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nothing wrong with the idea that D.A.s preferred it, to say it was automatically wrong. He would hope there would be some presumption that they were trying to do their job and it was a relevant tool in law enforcement and prosecution. He said the reason Mr. Smith's point made considerable sense was if there was an absolute line that was being drawn, then there was no argument about it, as opposed to the balancing test. If they looked at the judicial economies that had to be obtained, there would be endless arguments about probative value versus prejudicial effect in the trial court and there would not be consistency from judicial district to judicial district. Those were two considerations about the process of judicial administration and its costs which led him to favor the earlier approach.

398 GARDNER quoted Judge Unis as saying that it did not make sense to distinquish between misdemeanors or felonies for purposes of impeachment - one crime was more serious, but as to whether that crime indicated untruthfullness on the part of a witness - there was no logical point of distinguishing between misdemeanors and felonies. He asked for response to that point.

409 FROHNMAYER replied that there was no intellectual distinction, that carried force all the way through. The difference between felony and misdemeanor was ultimately what the tag end of a sentence was.

ALLISON SMITH said legislature had made that distinction as to how serious a crime was, as to what tag they put on it and that had a direct bearing on any defendants self interest in presenting a picture to the tryer of fact which would get him off the hook.

WYERS asked if Mr. Smith felt that way about that distinction, would he be willing to support going through and finding the Class C felonies which were clearly not of a serious nature compared to other felonies - such as any damage to a public utility.

FROHNMAYER asked if that was really as serious a problem as Senator Wyers was trying to make it - if someone damaged a utility pole was their testimony not to be believed?

465 WYERS said all the federal rule allowed was for the judge to allow some discretion - in a few limited cases the judge would probably rule that a felony conviction could be brought up. He said the only way the discretion ran was to the advantage of letting the defendant talk, in the few cases where the judge ordered it. It was not a discretion which swings back and forth on both sides of the issue.

TAPE 307A

024 GARDNER said he thought there was a value to having a consistent standard between the federal and state judicial system and did not really think it worked to the prejudice of federal prosecutors. Sid Lezak had one of the best conviction rates going. He asked A.G. Frohnmayer if his only qualm was his concern about the inconsistency and the added time of the motions and arguments of admissability.

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FROHNMAYER said he wasn't quite as taken with the argument made by Senator Gardner about the consistency between state and federal court.

GARDNER asked about the vagueness of application of the federal. . .

FROHNMAYER replied, the consistency, the predictability, the knowing if you had it,it was something you could use, if you didn't, you couldn't, for whatever it was worth - a rule which had some objective predictability and was efficient, both in the use of counsel time and court time.

GARDNER said that was the strongest argument against it - it would mean litigation and some uncertainty.

045 WYERS said he felt the strongest argument was the cost part, the uncertainty didn't bother him and if the discretion granted to the judge was to in some cases make it harder on the defendant, the two witnesses would not then impose the vagurity (sp).

GARDNER said it was more prosecution oriented than the House passed version.

FROHNMAYER said many times the prosecution may be calling witnesses who were in some way co-conspirators or were at least not very nice people. It was not fair to say this was only a prosecution tool.

WYERS said the whole debate had been about whether if you avoid impeachment in some cases, it would increase the probability of the search for truth that criminal defendants would testify. The judges who had testified last week had said that. He thought that was the main issue.

FROHNMAYER said, for the record, when he had been a member of the interim committee it was his position and he did advocate the advisory committee approach.

070 GARDNER asked that the three-part test language (from Judge Unis) be inserted in the commentary if they went federal rule route.

WYERS said he would agree.

WYERS explained, in answer to Senator Jernstedt's question, that Judge Jones and Judge Unis recommended that the committee follow the advisory committee position which was to allow all felony convictions in for impeachment. Judge Jones was stronger on staying with all felonies being let in for impeachment than Judge Unis was.

FROHNMAYER stated that they infinitely preferred the advisory committee position; if that did not pass, they would then reluctently accept the position articulated by Senator Gardner, as long as the test was put into the commentary. The least desirable was that of the interim committee and the House Judiciary committee

2 JIM McCANDLISH, Oregon Criminal Defense Lawyers Association, said the factors were time - how far away it was from the date of the crime being charged - it was less probative the longer it was. The relevance of the

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elements of the crime which a person was being impeached for to the issue of credibility and assault would not be as relevant as a . . . Embezzalment under the federal standard would be impeachable, because it contained an element of crimen falsi. WYERS and McCANDLISH discussed the federal standard/rules and the element of crimen falsi.

McCANDLISH stated the two elements that Judge Unis indicated that he would not want in which were presently part of the body of federal law were the importance of the defendants testimony, the centrality of the credibility issue. He said if they went the federal rule route, which was not their first choice, they should look at Rule 403. He read from the commentary, saying it would have to be changed. McCANDLISH said their position was, in terms of cost effectiveness, that the interim committee's approach was not any more costly than the approach suggested by the advisory committee. He said that was because there would not be any more litigation under crimin falsi standards.

148 STEVE GRIFFITH, Legal Counsel, House Judiciary Committee, said the issue being debated was how to treat felonies. He gave a brief legislative history on the issue. He said there were ways in which the mechanism of the list could be used and make it less the subject of litigation or appeals. Those would be to delete language of the commentary which suggested that you could go behind a certain judgment to look at the facts of an offense and if it involved dishonesty or false statement, then include that as an impeachable offense. Second the impeachable offenses could be limited to mere offenses of false statement.

205 WYERS stated that he would like to see if there was some way to salvage some of the work the House had done in this area; they had done a lot of hard work. It had been disagreed with both by the defense and the prosecution bar.

219 GRIFFITH said in principal there was no difference between what the House had done and what the interim committee had done. What had happened was that the sample list, had been lengthened.

244 ALLISON SMITH pointed out that the House Judiciary approach, incorporating a list of crimes which could be automatically used for impeachment, would be quite acceptable to prosecutors if there was a way to make that list a part of the law. But what they had done up to now was to have it in a commentary, which was not part of the law, and therefore, they were convinced it would not be binding upon any judge. It would leave them wide open as to what crimes could be used for impeachment.

GARDNER said he thought they could accomplish that, that would bind it down rather tight, but there could be a statement in the code itself which would say the only crimes which could be used for impeachment were those listed in the commentary - it wouldn't be a delegation to any subsequent action, it would simply incorporate by reference, or it could be spelled out in the code.

WYERS said that would eliminate any unnecessary litigation; he wondered if the prosecutors would buy that, because in part of the provision they had now was that others could be argued that weren't in the list.

GARDNER asked Mr. Smith if they had looked at Mr. Griffith's list and was that enough.

ALLISON SMITH replied that Mr. Griffith had gone through the criminal code quite thoroughly, although Mr. Griffith had conceded that he had not been able to go into other things. He said they would not want to take the position that those were all the crimes which could be used for impeachment, but it would cut down the amount of litigation if it was sure they could use those plus the relatively few others which weren't in the criminal code.

GARDNER said he thought they could accomplish that pretty solidly in the commentary.

FROHNMAYER was asked by SENATOR WYERS if the commentary wasn't pretty powerful in that sort of thing; FROHNMAYER replied he thought it would be pretty pursuasive legislative history, particularly if it was found not only in the commentary, but in statements of legislative record. But it was not the law and that could leave it in some question.

COUNSEL LaMAR directed the committee's attention to the commentary which listed the offenses. (Rule 609).

MR. GRIFFITH explained the list was an initial list, plus four supplemental lists and read from page 47. He gave some explanations to the members.

385 WYERS asked what it was the district attorneys wouldn't like about the list if they could be convinced that this would be a strong authority to argue to the judge.

ALLISON SMITH said they wouldn't have any objection to it if in fact the commentary which appeared on page 37, immediately before the first of the list, stayed in. He read from the commentary the area he wanted to stay in, adding that the commentary was not law.

GARDNER asked Mr. Smith if he had ever dealt with commentary of the UCC or Federal Evidence Code, or Federal Rules. SMITH replied in the negative and GARDNER said those commentaries had a very strong effect on the judges. GARDNER said they needed a prepatory section which said that this was official commentary and was to be given deference. He asked if there was anything like that in the code.

414 MR. GRIFFITH said that was an issue he wanted to raise to the committee - how did they either reference or incorporate by reference, the commentary. He said he was not sure how that was made a part of the law.

Members discussed the best way to make the commentary pursuasive authority.

TAPE 306B

J WYERS asked the Attorney General if the committee could convince the A.G.'s Office and the district attorneys that the commentary was really

strong authority, would they be interested in the list. FROHNMAYER replied in the affirmative. He clarified that Mr. McCandlish was saying that they could support, but they didn't want all the lists.

034 McCANDLISH referred to pages 37-41, saying they had a couple of problems in that list, but basically that was the list, which in their estimation could be used for impeachment. The rest of it had different rationales, going basically to the question of dishonesty and they had a great deal of difficulty with that.

046 GRIFFITH said he would agree that some did involve dishonestry. He said the commentary which followed was important because it pointed out which of those sub sets were justified on the basis of false statements and which on the basis of dishonesty. He said the defense bar wished to draw the line on page 41, just above offenses of dishonesty or false statement.

054 WYERS asked if they wouldn't want to let in statutory rape.

McCANDLISH replied absolutely not, and explained their rationale.

MCANDLISH said their position was that they would have no disagreement with the bill if basically that line was drawn, and went back to a stand of conviction as opposed to a stand of finding of guilt; the commentary reflected that they were not to go behind the elements of a crime to look at the facts, which was very costly and conceivably could expand the use of prior convictions to assault.

He said they had proposed amendments as to the list, which the district attorneys association had responded to.

WYERS asked how far apart they were on the list.

McCANDLISH said neither of them had liked the approach of the House Judiciary, but for different reasons. He said they felt the list was too great. He said the federal rule was preferable to the advisory committee rule and what the House had done.

115 GARDNER said he felt the Federal Rule was a reasonable compromise if they put the three-part test in.

120 COUNSEL LaMAR explained proposed amendments, which she had prepared. (EXHIBIT K)

136 MOTION: CHAIRPERSON WYERS Moved the amendments described above by Counsel be adopted. Hearing no objection they were adopted.

144 COUNSEL explained the amendmends suggested by the ODAA, dated July 2, which would define signature. She said it modeled on the Uniform Commercial Code. (EXHIBIT L)

144 MOTION: CHAIRPERSON WYERS moved ODAA amendments of July 2, 1981.

.8 McCANDLISH said they had no opposition to that change, but they had not analyzed how it fit into Rule 902.

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THERE WAS NO OBJECTION TO THE MOTION, AND IT WAS ADOPTED.

158 COUNSEL explained July 21, 1981 amendments prepared by Stephen Griffith. (EXHIBIT M).

161 GRIFFITH explained his amendments and changes which should be made to them. THERE WAS NO OBJECTIONS TO THE CHANGES EXPLAINED AND THEY WERE ADOPTED.

295 MOTION: GARDNER moved the amendments of 7/21/81 be adopted, with the changes which had been made. Hearing no objections, the motion was adopted.

300 SENATOR WYERS ADJOURNED THE HEARING AT 5:30 PM

Respectively submitted
Glenda Harris
Glenda Harris, Committee Assistant.

EXHIBITS:

A - LC amendments, 7/16/81 to HB 2010

B - ODAA amendments, 7/21/81; HB 2010A

C - LC amendments, 7/20/81; HB 2959A

D - Letter from Janet Mitchell, 7/14/81; HB 2848

E - Staff amendments to A HB 2848

F - Memo from Dennis Bromka in support of HB 2696

G - House minority Report to HB 2696

H - LC amendments, 6/25/81; HB 2030

I - LC amendments, 7/20/81; HB 2385

J - LC amendments, 7/20/81; SJR 24

K - Staff amendments to HB 2030

L - ODAA, 7/2/81; HB 2030

M - Stephen Griffith amendments, 7/21/81; HB 2030

bill. (With Mr. Fleissner was Scott Gallant, representing the Oregon Medical Association.)

MR. FLEISSNER said the language which was HB 2678 (Exhibit H) was language which had been introduced in 1977, 1979. In both cases it had passed the House, but had not had a hearing on the Senate side. He gave the legislative history and explained what the bill did.

335 MOTION: SENATOR JERNSTEDT moved the Oregon Association of Hospitals' amendments (Exhibit H) to HB 2443. Hearing no objection, the motion was adopted.

344 JERRY COOPER, Washington County District Attorney's Office, representing Oregon State District Attorney's Association, explained the proposed amendments to HB 2443, proposed by William J. Brady, State Medical Examiner, dated 7/22/81 (EXHIBIT I) would delete the word "saliva" out of the test for DUII. He presented a letter of explanation of the amendments from Dr. Brady. (EXHIBIT J)

433 MOTION: SENATOR JERNSTEDT moved the amendments (Exhibit I) be adopted. Hearing no objection, the motion was adopted.

447 MOTION: SENATOR BROWN moved HB 2443, as amended, to the Floor of the Senate, with a do pass recommendation.

ROLL CALL VOTE: Voting Aye: Senators Brown, Jernstedt, Kulongoski, Wyers. Members Excused: Senators Fadeley, Gardner, Smith. MOTION ADOPTED.

TAPE 311B

018 HOUSE BILL 2030 - Relating to evidence

022 REP. MARGIE HENDRIKSEN, House District 40, spoke to Rule 412, with respect to rape cases. She said she was happy with the way Rule 412 read now, and would like it kept the way it was. She gave some of the history on the victims shield law and evidence which had been allowable, which was currently allowable, and how Rule 412 would work.

BROWN and HENDRIKSEN discussed the details of this.

097 WYERS asked what "is otherwise constitutionally required to be admitted".

HENDRIKSEN said that had been a concern of hers, because she felt it was very open-ended and not defined at all. Essentially, she thought the defense could pull up anything and make a constitutional argument if the trial court would admit it. She felt the rape victim's shield law was being judicially eroded and there was no case law on it because those decisions never got reviewed by a higher court.

140 JIM McCANDLISH, representing Criminal Defense Lawyers Association, said one of the provisions Rep. Hendriksen was concerned about was putting out in a rule "unless otherwise constitutionally required". No one was disagreeing that was a standard which ran throughout the evidence code. He suggested that provision be buried in the commentary if they could get rid of the

provision for appeal by the state pretrial. He said there may be constitutional problem with the amendment as is now proposed. McCANDLISH said the constitutional question was whether the accused could be made to chose between their right to a speedy trial and their right to pursue a defense. The pursuit of a defense was introduction of evidence going to their view of the relevance of past sexual conduct. If the judge allowed it in, under the proposal the state would have the opportunity to decide to appeal or not to appeal. The testimony in the House was that this authority would be used very judiciously. Then the defendant was put in the position of withdrawing the offer of proof and going to trial or waiting for the six months or however long it would take for the appellate court to decide the admissibility and then to come back and do the trial. There was no parallel in Oregon law for this. He said they had submitted an amendment which would delete that extra language allowing for the appeal, but they would be willing to take the otherwise constitutionally required language out of the Rule and bury it in the commentary.

183 HENDRIKSEN said she couldn't see distinguishing the suppression of evidence from asserting your rights . . . She stated she felt the pretrial appeal was very important, because she didn't see any other way to maintain the integrity of the rape shield law.

228 WYERS asked if there was a fiscal impact out of this.

ALLISON SMITH said there had been testimony that any fiscal impact would be minimal, since there was already the pretrial suppresion of evidence orders. He said he didn't feel the constitutional question of openness of court had anything to do with this and explained why. He also said the purpose of the rape victim's shield law was to protect the victim from further public scrutiny of past sexual conduct and that could be completely lost.

293 SENATOR WYERS adjourned the hearing at 5:27 PM.

Respectively submitted,

Glenda Harris, Committee Assistant

EXHIBITS:

A - Rep. Kip Lombard, HB 3020

B - ACLU, HB 3272

C - A. G. Dave Frohnmayer, HB 2682

D - Motor Vehicles Division, HB 2017

E - Motor Vehicles Division, HB 2024

F - Motor Vehicles Division, HB 2447

G - William Van Vactor, Lane County Counsel, HB 3180

T. # 317A
010 MEETING WAS CALLED TO ORDER BY SENATOR JAN WYERS, CHAIRPERSON AT 3:00 PM.

MEMBERS PRESENT: Senator Walt F. Brown
Edward Fadeley
Jim Gardner
Ted Kulongoski
Jan Wyers, Chairperson

MEMBERS EXCUSED: Senator Ken Jernstedt
Robert Smith

019 WYERS explained to members the statutus of bills which had passed out of committee and discussed this with members.

152 HOUSE BILL 2030 - Relating to Evidence

153 WYERS commented on Rule 609.

175 JIM McCANDLISH, OCDA, submitted a mocked-up version of the commentary on rule 609 (EXHIBIT A) which he said had the lists prepared by House Judiciary Counsel, and which had his suggestions and also included a great deal of the work done by the House. He said they were basically suggesting that the first listing of 56 crimes, would be included. (This list had been prepared by Mr. Griffith for the House Judiciary Committee) Secondly, he would propose that the rule itself contain a reference to the commentary in response to A.G. Frohnmayer's remarks at an earlier hearing. At that time the A. G. had said he was concerned that the listing of crimes in the commentary would not be sufficient to guarantee that the courts would follow the direction of the legislature. The purpose of including that in the first paragraph of Rule 609 would be to make sure of the legislative intent. Bob Lundy of Legislative Counsel had told him that he didn't like doing that as a matter of purism in drafting; and that it would have very little effect unless an official commentary of some sort was filed with, for example, the Secretary of State's office. Mr. Lundy's point, McCandlish said, was that there could be several commentaries subsequent to the legislature adjourning.

200 WYERS asked if McCandlish had explored the possibility with Mr. Lundy of putting some language in the statute which said the commentary submitted to the Secretary of State's Office was the legislative commentary and should be given some preferential interpretation.

McCANDLISH said Mr. Lundy's suggestion had been not to do it, but if it was done, then file it with the Secretary of State at the end of session.

214 WYERS said if Mr. Lundy did not think a commentary should be adopted at all, then he wouldn't favor the idea of adopting a master list of crimes. McCANDLISH clarified that he had not talked about the idea of adopting a commentary with Mr. Lundy, they had assumed there was no official commentary and the question was about putting something in the rule which referred to commentary.

MCCANDLISH pointed out that the approach on Rule 609 had the same simplicity of administration that the original advisory committee approach had. If the federal rule was adopted, which was his second choice, there will be an increase in the number of decisions which the court would have to make. His first choice was what they were proposing in Rule 609.

258 WYERS clarified that McCandlish would like the advisory committee approach to misdemeanors be applied to both felonies and misdemeanors.

260 McCANDLISH said they had compromised from the interim report, which listed only six crimes and basically adopted the language of the federal rule. What they had adopted was Mr.Griffith's position which was eight times as many crimes, which would specifically be no argument on those crimes with respect to whether or not they fell into crimen falsi.

WYERS asked if it went only as to impeaching defendants.

McCANDLISH replied in the negative, saying the discretionary standard in the federal rule applied only in favor of the defendant. Prosecution witnesses did not get any benefits of the federal rule. This would apply to all witnesses.

GARDNER said he could go with the federal rule, with the three-part test, and the commentary.

McCANDLISH said as a secondary position, they would favor that. However, he would suggest a compromise to Judge Unis's position of eliminating one of the factors. The factor which he wanted to eliminate in deciding whether probative value outweighed prejudice was looking at the value of the defendant's testimony. He said they (OCDA) would propose a legislative commentary (they had drafted commentary to the federal rule approach) which said the legislature did not want the court to take testimony, only summaries of counsel and any evidence which had already been introduced would be taken into consideration and any comments of either counsel about the nature of the case.

McCANDLISH said he favored the approach they (OCDA) had proposed which was the basic interim approach with Mr. Griffith's modification. The reasons they favored the interim approach over the federal rule were: first, the federal rule required the exercise of discretion by the courts and was basically unreviewable; secondly, with respect to the federal rule, it would increase the amount of litigation to a certain extent. The approach they were suggesting was the cleanest in terms of judicial efficiency and balancing a defendant's rights.

408 WYERS asked if the federal rule allowed any felony whether it had a prejudicial effect or not, if it went to crimen falsi.

412 STEPHEN GRIFFITH, House Judiciary Counsel, said the federal rule was the House Judiciary approach plus all felonies where there was balancing. By adopting the federal rule, it was not simplifying, it added a set of crimes. WYERS clarified that Mr.Griffith's list and this approach would say anything that was crimen falsi would be allowed in. WYERS asked if the list of 56 were all crimes of false statement. GRIFFITH replied they were.

T. J 318A

036 McCANDLISH said there was a difference between the approach in the House Committee and the approach that most of the federal courts had taken on the federal rule in this proposal. The House Committee would allow going behind the facts of a particular conviction - that would be a mini-trial. This proposal and most of the interpretation and criticism of Rule 609 on the federal level, had been to not go behind the elements to the facts. He said that would be in the commentary. McCANDLISH said it was his opinion that the final commentary at the end of the session would be published in the same book as the rules are published in. COUNSELS LaMAR and GRIFFITH both indicated that they agreed.

082 ALLISON SMITH, ODAA, said he did not agree with most of what Mr. McCandlish had said. He did not think the proposal made by McCandlish, which cut down the number of crimes on the list and altered the commentary prepared on 609 by the House Committee, took care of all the factors which should be considered. He thought it omitted something essential in the truth-finding fact, because the judge or jury would not hear some things about a witness which it really should know to determine whether that person was being truthful. Another concern was the facts underlying the crime and the interpretation of that. He thought that should be the facts of the crime not the trial that came out of it. ALLISON SMITH said they wre concerned about the implications of the House Judiciary proposal. If those crimes were truly locked in, in a way that they had suggested in their commentary then he thought they could live with it, although they did think it would create some judicial problems in determining whether certain crimes should be admitted at the trial level and at the appellate level it would have to be rehashed, but there would eventually be some case law on it.

ALLISON SMITH said he thought the advisory committee proposal which was published along with the Interim Committee proposal in the bound book was the most acceptable; and their secondary position would be the federal rule. If they decided to adopt the federal rule, the criminal defense board would suggest the word "dishonesty" be taken out.

153 FADELEY stated that the federal rule probably fit in with the practice in the federal courts where the judges were permitted to comment on the evidence. Also, in the state court, he said what he called the mechanistic rule would fit the manpower better than the federal rule, because of the difference in the commentary and the whole flow of trial and the difference in ability.

WYERS asked if Senator Fadeley was calling the advisory committee recommendation the mechanistic rule.

FADELEY said with the specific examples of the crimes listed in the commentary rather than listed in the statutes, yes.

WYERS said the decision was between the federal rule, the advisory committee proposal (which the district attorney's association was advising and which Judge Jones had urged). He said the House Judiciary had drawn up a long list of crimes, some of which went to false statement and some of which went to dishonesty. Mr. McCandlish was suggesting that the committee

adopt just the part which went to false statement. The federal rule said any conviction of a felony which went to false statement was admissible.

218 MOTION: SENATOR WYERS moved to adopt the approach of using the list prepared by Counsel Griffith as to crimen falsi.

GARDNER asked if all agreed that the crimes listed were the best complete list at the present time of crimes involving false statements.

WYERS said it was his understanding that Mr. Smith was saying this was unacceptable, and they would rather have the federal rule if they couldn't get what they really wanted which was the advisory committee, which were all felonies.

FADELEY and ALLISON SMITH discussed the objections which Mr. Allison had.

344 MOTION RESTATED:SENATOR WYERS said his motion was to adopt the OCDLA amendments (Exhibit B). SENATOR GARDNER OBJECTED.

Further discussion on the various approachs.

TAPE 317B

065 ROLL CALL VOTE: Aye - Senators Brown, Fadeley, Kulongoski, Wyers. No - Senator Gardner. Excused - Senators Jernstedt, Smith. MOTION CARRIED.

1?? SENATOR WYERS adjourned the hearing at 4:10 PM.

Respectively Submitted,
Glenda Harris
Glenda Harris, Committee Assistant

EXHIBITS:

A - Kristena LaMar, HB 2030

B - Jim McCandlish, OCDLA, HB 2030

324A

010 MEETING WAS CALLED TO ORDER BY SENATOR JAN WYERS, CHAIRPERSON AT 3:06 PM.

MEMBERS PRESENT: Senator Walt F. Brown
Edward Fadeley
Jim Gardner
Kenneth Jernstedt
Ted Kulongoski
Robert F. Smith, Vice-Chairperson
Jan Wyers, Chairperson

010 HOUSE BILL 2030 - Relating to Evidence

025 KRISTENA LaMAR, Legal Counsel, explained that Rule 609's reference to Commentary might be a problem with the House. The problem was that the commentary was not being specifically adopted, and even if it was, it was only advisory - it was not law.

073 MOTION: SENATOR KULONGOSKI moved the deletion of the last line of subsection (1) of section 53, Rule 609. MOTION was adopted without exception.

084 JIM McCANDLISH, OCDLA, referred to Article VIII, ORE 801 and said they had submitted proposed amendments, dated 7/28/81 (EXHIBIT A). He said this amendment would adopt the federal version of prior inconsistencies. He stated that ODAA, OCDLA and Judge Jones had agreed upon this as an adequate compromise. He said the language which they were substituting was the federal rule language, but there were changes in the format. He suggested the Legislative Assembly adopt the commentary accompanying federal Rule 801 (d)(1).

105 MOTION: SENATOR SMITH moved the amendments proposed above be adopted. MOTION WAS ADOPTED WITHOUT OBJECTION.

110 SENATOR JERNSTEDT arrived at this point.

110 McCANDLISH proposed language on the commentary dealing with prior inconsistent statements and said it was consistent with current Oregon law to the extent that it prohibited use of all other prior inconsistent statements . . .

140 ALLISON SMITH, ODAA, said they were agreed to the Rule itself, but said they had not talked about the commentary, and he then spoke to that.

184 MOTION: SENATOR SMITH moved to adopt, in concept, Mr. McCandlish's proposed language to the commentary.

193 MR. McCANDLISH spoke to Rule 412, saying the House allowed the state, in a sex case, an appeal from a pre-trial order. He listed the areas of agreement and disagreement with that.

2 ALLISON SMITH responded to Rule 412. He said their position was not to have it amended.

COMMITTEE MEMBERS discussed Rule 412 - the appeal right and the areas of agreement/disagreement.

MCCANDLISH what they were proposing on Article I, ORE 101(4)(e).

ALLISON SMITH explained their position on this area.

TAPE 325A

028 McCANDLISH said he agreed with Mr. Smith in that it would really not change the law, but they wanted to put it in because a lot of people did not realize that there was a constitutional _____ in probation violation proceedings.

MOTION: SENATOR WYERS moved the public defender's amendment on this question. He explained what the amendment would do. MOTION ADOPTED WITHOUT OBJECTION.

057 WYERS asked what language would have to be added to the grand jury proceedings in order to include the defense attorney's presence in the grand jury. McCANDLISH said that would probably mean an amendment to Chapter 132.

WYERS suggested language in Chapter 132.090, presence of persons at sitings or deliberations of juries.

MOTION: SENATOR WYERS moved the above amendment, conceptually.

McCANDLISH said State vs. McDonald was questionable law at this point. If the committee decided not to disavow, an alternative position would be to state in the commentary that the legislature was taking no position on State vs. McDonald and let the court decide whether or not, by virture of having amended that statute twice already, that the legislature was not in fact saying that they meant business when they said that the grand jury was to only hear certain evidence. He said that would be amended in the commentary. He said his proposal would be to say that the Legislature Assembly took no position on the viability of state vs. McDonald. He said their first position would be to disavow.

113 MOTION: SENATOR WYERS moved that, in the commentary, State vs. McDonald be disavowed to show that the rules of evidence should be used in the grand jury proceedings. MOTION ADOPTED without objection.

141 MOTION: SENATOR WYERS moved, in concept, ORS 132.090, be amended to add "counsel for the accused" in (1) after "district attorney" and before "or a witness"

ALLISON SMITH stated he felt it was a mistake to tack it on the code of evidence and gave his objections.

WYERS explained that they were just reaffirming their support for existing Oregon law that evidence laws shall apply in grand jury, but in order to make it work, there needed to be some safeguards.

ALLISON SMITH said he thought they needed to change line 3 of page 2 of the bill. He asked how they proposed that the grand jury would be conducted when the accused's counsel did object to something which was being done.

After further discussion, Wyers withdrew his motion.

WYERS explained the motions which had been adopted.

213 McCANDLISH spoke to Rule 504, saying it was whether or not to include, in the definition of psychotherapist, psychotherapist privilege, the phrase in the federal rule "including drug addiction". McCANDLISH said Judge Jones was opposed to that because he had trouble getting reports when programs were treating someone on probation but the reason Judge Jones had trouble getting reports was the federal regulations which goverened the federal programs.

231 WYERS clarified that Mr McCandlish wanted to amend the House Commentary, paragraph C, to reverse their position of excluding psychotherapist, people who were consulted relating to drug or alcohol dependency.

Committee Members discussed the above issue.

COUNSEL LAMAR raised the question as to how material could be sorted out if a person with drug and alcohol dependency also had emotional problems. Members discussed this and decided drug and alcohol dependency which was interrelated to emotional problems could not be sorted out, so this was a non-issue. Mr. McCandlish agreed and withdrew his proposed amendments.

400 McCANDLISH addressed Rule 101 (4)(d), which governed sentencing.

TAPE 324B

020 KULONGOSKI said his understanding of McCandlish's testimony was that McCandlish expected the prosecutor to put out his argument on sentencing prior to the sentencing, so the defense attorney could look at it to see what was going to be said.

McCANDLISH said that was only in certain cases and gave examples.

KULONGOSKI and McCANDLISH discussed when and how that would happen.

ALLISON SMITH said it was their position that this change should not be made.

105 McCANDLISH addressed Rule 309, presumptions in criminal proceedings, gave the history on the rule, and the direction of the case law which they would like to have put in the commentary as an alternative. He said they were proposing a change in Rule 309; they would like to go back to "beyond a reasonable doubt".

KULONGOSKI discussed Rule 309 with McCandlish and Al Smith.

260 MOTION: SENATOR KULONGOSKI moved to amend the commentary on Rule 309. MOTION ADOPTED WITHOUT OBJECTION.

HOUSE BILL 3122 - Relating to Class Actions

274 MOTION: SENATOR SMITH moved to reconsider the motion by which HB 3122 was sent to the Senate Floor with a do pass recommendation.

ROLL CALL VOTE: Aye - Brown, Jernstedt, Kulongoski, Smith, Wyers. Excused - Fadeley, Gardner. MOTION CARRRIED.

287 MOTION: SENATOR SMITH moved the emergency clause in HB 3122 be deleted, and the effective date be set for January 1, 1982. MOTION ADOPTED WITHOUT OBJECTION. (Present were Senators Brown, Jernstedt, Kulongoski, Smith, Wyers.)

325 MOTION: SENATOR SMITH moved HB 3122, as amended, be sent to the Senate Floor with a do pass recommendation.

ROLL CALL VOTE: Voting Aye - Senators Brown, Jernstedt, Kulongoski, Smith. No - Senator Wyers. Excused _ Senators Fadeley, Gardner. MOTION CARRIED.

350 HOUSE BILL 2030 - Relating to Evidence

360 BROWN discussed "beyond a reasonable doubt" with Mr. McCandlish and Mr. Smith.

TAPE 325B

[illegible] COMMITTEE RECESSED FOR 15 MINUTES.

043 COMMITTEE RECONVENED. Members present were Senators Brown, Fadeley, Gardner, Kulongoski, Wyers.

047 HOUSE BILL 2506 - Relating to exemptions from executions.

047 MOTION: The Chair moved the vote be reconsidered by which HB 2506 was sent to the Senate Floor.

WYERS stated this was for conflict amendments. He explained HB 2506 was about opting out of the federal bankruptcy exemptions, and into the state; and raising the level of exemptions.

ROLL CALL VOTE: Aye - Senators Brown, Fadeley, Gardner, Kulongoski, Wyers. Excused - Senators Jernstedt, Smith. Motion Carried

066 WYERS stated it was his understanding that a bill with conflict amendments did not need 24-hour notice. He said this was the only type of situation where they were taking action on a bill which was not on the current agenda. (HB 2506 was not on the agenda.) COUNSEL LaMAR said that was her understanding from Maribel Cadmus, Secretary of the Senate. WYERS asked if anyone on the committee had contrary knowledge to that. There was no response to the Chairman's question.

SENATOR WYERS moved, in concept, the conflict amendments.

GARY ROBERTS explained the conflict amendments would make HB 2506 provisions the same as HB 2677 and/or SB 660 to make them consistent. That would be in the area of making the homestead exemption automatic and eliminate the necessity of filing a claim.

CONFLICT AMENDMENTS WERE ADOPTED WITHOUT OBJECTION.

080 SENATOR WYERS moved HB 2506 as amended, to the Senate Floor with a do pass recommendation.

ROLL CALL VOTE: Aye - Senators Brown, Fadeley, Gardner, Kulongoski, Wyers. Excused - Senators Jernstedt, Smith.

093 HOUSE BILL 3173 - Relating to Peoples' Utility Districts

090 MOTION: SENATOR KULONGOSKI moved HB 3173 be amended as shown on the amendments dated 7/28/81. (EXHIBIT B)

120 GARDNER stated he would vote for the amendments, but would not vote for the bill.

MOTION ADOPTED WITHOUT OBJECTION.

136 MOTION: SENATOR KULONGOSKI moved HB 3173, as amended, be sent to the Senate Floor with a do pass recommendation.

ROLL CALL VOTE: Aye - Senators Brown, Fadeley, Kulongoski, Wyers. No - Senator Gardner. Excused - Senators Jernstedt, Smith. MOTION CARRIED.

SENATOR KULONGOSKI said it was his understanding that to file a minority report, members had to be on the dissenting side and had to be present at the time the vote was taken.

MOTION: SENATOR KULONGOSKI moved that it be the ruling of the committee that a minority report would not be permitted by any two members who were not present to vote no at the time of final passage of the bill. That rule affirmed the committee's understanding of the existing Senate Rule.

ROLL CALL VOTE: Aye - Senators Brown, Fadeley, Gardner, Kulongoski, Wyers. Excused - Senators Jernstedt, Smith. MOTION CARRIED.

156 HOUSE BILL 2030 - Relating to Evidence

157 SENATOR WYERS said the remaining issue of controversy was that the defense lawyers suggested that by adopting the federal rule, as the House had done, it would not allow for jury disqualification evidence based upon certain actions/statements of jurors. (Example given). The amendment would be to put into the code and commentary that such evidence could be admitted - not evidence as to the effect it had on the jury, but only evidence that such statement or action had been taken in the jury room or during the jury deliberations.

MOTION: SENATOR WYERS moved the above amendment. MOTION ADOPTED WITHOUT OBJECTIONS. (Present were Brown, Fadeley, Gardner, Kulongoski and Wyers.)

Page 6

ALLISON SMITH stated his organization did not like the evidence code because of Rule 609 and would defeat it, if they could, because of that.

197 CHAIRPERSON WYERS moved HB 2030, as amended, to the Senate Floor, with a do pass recommendation.

ROLL CALL VOTE: Aye - Senators Brown, Fadeley, Gardner, Kulongoski, Wyers. Excused - Senators Jernstedt, Smith. MOTION CARRIED.

210 SENATOR WYERS adjourned the hearing and closed the committee at 5:00 PM.

Respectively submitted,

Glenda Harris, Committee Assistant

EXHIBITS:

A - Jim McCandlish, OCDLA, HB 2030

B - L.C. Amendments, Senator Kulongoski, HB 3173

EXHIBIT B, HB 2030
Senate Committee on Justice
July 13, 1981
12 page exhibit

07/09/81 (39) (44)

PROPOSED AMENDMENTS TO HOUSE BILL 2030

On page 1 of the printed bill, line 2, after "ORS" insert "17.250," and after "107.600," insert "135.185,".

In line 3, delete the third "and".

In line 9, before the period insert "and prescribing an effective date".

In line 15, delete "in all actions, suits and proceedings,".

In line 22, delete "41" and insert "42" and delete "513" and insert "514".

In line 24, delete "42" and insert "43" and delete "514" and insert "601".

In line 29, before the period insert ", except as required by ORS 133.743 to 133.857".

On page 2, line 1, before the period insert ", except as required by ORS 137.090".

In line 2, delete "Granting or revoking" and insert "Proceedings to revoke" and before the period insert ", except as required by ORS 137.090".

In line 4, delete "or" and insert a comma.

In line 5, before the period insert ", or preliminary hearings, subject to section 88b of this Act".

In line 11, before "Error" insert "Evidential error is not presumed to be prejudicial.".

In line 28, delete "it" and insert "the court".

On page 3, line 1, after the period delete the rest of the line.

In line 2, delete "41.880.".

In line 3, delete the second comma and after "subject" insert ", where otherwise admissible".

In line 5, delete the last comma.

In line 8, delete "13 (Rules 201 and 202)" and insert "12 (Rule 201)".

In line 9, delete "and" and insert ". Section 13 (Rule 202) of this Act governs judicial notice of".

In line 26, before the period insert "in favor of the prosecution".

In line 34, delete "public entity" and insert "state, territory or possession".

In line 35, delete "Records and".

In line 39, after "therefrom" insert ". As used" and delete the rest of the line and line 40.

On page 4, line 4, before the period insert "the party is asserting".

In line 20, delete "basic" and after "facts" insert "giving rise to the presumed fact".

In line 22, after "presumed" delete the rest of the line and insert "fact follows more likely than not from the facts giving rise to the presumed fact.".

In line 26, before "The" insert "(1)".

Delete line 27.

In line 28, delete "(2)" and insert "(a)".

In line 29, delete "(3)" and insert "(b)".

In line 30, delete "(4)" and insert "(c)".

In line 31, delete "(5)" and insert "(d)".

In line 32, delete "(6)" and insert "(e)".

In line 33, delete "(7)" and insert "(f)".

In line 34, delete "(8)" and insert "(g)".

In line 36, delete "(9)" and insert "(h)".

In line 38, delete "(10)" and insert "(i)".

In line 39, delete "(11)" and insert "(j)".

In line 40, delete "(12)" and insert "(k)".

On page 5, line 1, delete "(13)" and insert "(L)".

In line 2, delete "(14)" and insert "(m)".

In line 3, delete "(15)" and insert "(n)".

In line 4, delete "(16)" and insert "(o)".

In line 6, delete "(17)" and insert "(p)".

In line 7, delete "(18)" and insert "(q)".

Delete line 8 and insert:

"(r) A person is the same person if the name is identical.".

In line 9, delete "(20)" and insert "(s)".

In line 10, delete "(21)" and insert "(t)".

In line 11, delete "(22)" and insert "(u)".

In line 13, delete "(23)" and insert "(v)".

In line 14, delete "(24)" and insert "(w)".

In line 15, delete "(25)" and insert "(x)".

In line 16, delete "(26)" and insert "(y)".

In line 18, delete "(27)" and insert "(z)".

After line 20, insert:

"(2) A statute providing that a fact or a group of facts is prima facie evidence of another fact establishes a presumption within the meaning of this section.".

In line 25, delete the comma.

On page 6, line 25, after "section" insert a comma.

In line 26, after "specific" insert ", distinctive".

On page 7, line 11, after "(1)" insert "Except where lack of liability insurance is an element of an offense,".

In line 14, delete "proof of" and insert "proving" and after "ownership" delete the comma and after "bias" delete the rest of the line and insert ", prejudice or motive of a".

In line 24, after "section" insert a semicolon and delete "is" and insert:

"(b) Is evidence that:

"(A) Relates to the motive or bias of the alleged victim; or

"(B) Is necessary to rebut or explain scientific or medical evidence offered by the state; or

"(C) Is otherwise".

In line 25, delete "; or" and insert a period.

Delete lines 26 through 31.

In line 39, after "parties" insert a comma and before the period insert "through the office of the prosecutor".

On page 8, line 11, after the period insert "An order admitting evidence under this subsection may be appealed by the government before trial.".

On page 9, line 36, after the period delete the rest of the line and lines 37 through 39.

On page 10, line 1, delete "(b)" and insert "(a)".

In line 4, delete "(c)" and insert "(b)".

In line 19, delete "Christian Science Practitioners and".

In line 24, before the period insert ", including members of the patient's family".

In line 34, after the first period insert "Rule 504-2.".

In line 37, after the first period insert "Rule 504-3.".

On page 11, line 12, after the first period insert "Rule 504-4.".

On page 12, line 10, after "organization" insert "or accredited Christian Science practitioner".

Delete line 17 and insert:

"SECTION 36. Rule 508a. Stenographer-employer privilege. A stenographer shall not, without the consent of the stenographer's employer, be examined as to any communication or dictation made by the employer to the stenographer in the course of professional employment.".

In line 20, delete "The state or a political subdivision thereof" and insert "As used in this section, 'unit of government' means the Federal Government or any state or political subdivision thereof.

"(2) A unit of government".

In line 24, delete "(2)" and insert "(3)" and delete "state or".

In line 25, delete "political subdivision" and insert "unit of government".

In line 26, delete "(3)" and insert "(4)".

In line 29, delete "state" and insert "unit of government".

In line 32, delete "state or political subdivision" and insert "unit of government" and delete "state".

In line 33, delete "or political subdivision" and insert "unit of government" and delete "state or political subdivision" and insert "unit of government".

In line 37, delete "state or political subdivision" and insert "unit of government".

On page 13, line 1, delete "state or political subdivision" and insert "unit of government".

In line 7, delete "state or political subdivision" and insert "unit of government".

In line 12, delete "state or political subdivision" and insert "unit of government".

In line 18, delete "but rather at" and insert "or, in the case of a deposition taken for the purpose of perpetuating testimony, until" and delete "holder's" and delete "holder" and insert "deposition" and after "as" delete the rest of the line and line 19 and insert "evidence. Voluntary disclosure does occur, as to psychotherapists in the case of a mental or emotional condition and physicians in the case of a physical condition upon the holder's offering of any person as a witness who testifies as to the condition.".

In line 33, after the first "the" insert "Constitution or".

In line 39, after the third period insert "Subject to the provisions of section 59 (Rule 703) of this Act,".

On page 14, line 7, delete the period and insert "?".

In line 12, delete the period and insert "?".

In line 40, before "A" insert "(1)".

On page 15, after line 3, insert:

"(2) Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in

connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by a juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.".

In line 14, delete "impeached" and insert "attacked".

In line 15, after "witness" insert a period and delete the rest of the line and lines 16 and 17.

In line 26, after the period delete the rest of the line and lines 27 and 28.

In line 30, after "has" insert "entered a plea of guilty or" and after "been" insert "found guilty by the trier of fact or".

In line 31, after "record" insert a comma and delete the rest of the line.

In line 32, delete "cross-examination".

In line 33, after "if" insert a colon and begin a new paragraph and insert "(a)".

In line 35, delete the period and insert "; or

"(b) The conviction has been expunged by pardon, reversed, set aside or otherwise rendered nugatory.".

In line 37, delete "briefly" and after "explain" insert "briefly".

On page 16, line 9, after "attacking" insert "the".

In line 28, delete the second comma.

In line 30, delete "in" and insert "into".

In line 36, delete the first comma.

Delete lines 38 through 41.

On page 17, delete lines 1 through 9 and insert:

"SECTION 55a. Rule 613. Prior statements of witnesses. (1) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

"(2) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is not afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in section 62 (Rule 801) of this Act.".

In line 11, after "argument" insert a comma.

In line 21, delete the second comma.

In line 23, after training" delete the comma and after "education" delete the comma and after "testify" delete the comma.

Delete line 25 and insert:

"SECTION 59. Rule 703. Bases of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.".

In line 29, delete "The" and insert "An".

Delete lines 33 through 41.

On page 18, delete lines 1 through 9.

In line 22, delete "or at variance" and after "witness" insert a semicolon and delete the rest of the line and lines 23 and 24.

In line 26, delete the second "of" and insert "or".

In line 38, after "63" insert "(Rule 802)".

In line 39, after "(1)" delete the rest of the line and line 40 and insert "[Reserved.].

On page 19, line 6, after "of" insert "the".

On page 20, delete line 28 and insert:

"(18) Complaint of sexual misconduct. A complaint of sexual misconduct made by the prosecuting witness after the commission of the alleged offense. Such evidence must be confined to the fact that the complaint was made.".

In line 31, after "blood" delete the comma and insert "or" and after "adoption" delete the comma.

In line 39, delete "punishable by death or".

In line 40, delete "imprisonment in excess of one year".

On page 22, line 8, after "blood" delete the comma and insert "or".

In line 9, after "though" insert "the".

After line 13, insert:

"(e) Statement made in professional capacity. A statement made at or near the time of the transaction by a person in a position to know the facts stated therein, acting in the person's professional capacity and in the ordinary course of professional conduct.".

In line 14, delete "(e)" and insert "(f)".

In line 29, after "if" insert "the".

In line 31, delete "ORS 456.610" and insert "section 55a (Rule 613) of this Act".

On page 26, after line 19, insert:

"Section 85a. ORS 17.250 is amended to read:

"17.250. The jury, subject to the control of the court, in the cases specified by statute, are the judges of the effect or value of evidence addressed to them, except when it is thereby declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

"(1) That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;

"(2) That they are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds;

"(3) That a witness false in one part of [his] the testimony of the witness is to be distrusted in others;

"(4) That the testimony of an accomplice ought to be viewed with distrust, and the oral admissions of a party with caution;

"(5) That in civil cases the affirmative of the issue shall be proved, and when the evidence is contradictory, the finding shall be according to the preponderance of evidence;

"(6) That in criminal cases a person is innocent of a crime or wrong until the prosecution proves otherwise, and guilt shall be established beyond reasonable doubt;

"[(6)] (7) That evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,

"[(7)] (8) That if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.".

On page 27, after line 7, insert:

"SECTION 88a. Section 88b of this Act is added to and made a part of ORS chapter 135.

"SECTION 88b. The Oregon Evidence Code shall apply in any preliminary hearing under this chapter, except that hearsay may be admitted if the court determines that it would impose an unreasonable hardship on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing, and if the witness furnishes information bearing on the informant's reliability and, as far as possible, the means by which the information was obtained.

"Section 88c. ORS 135.185 is amended to read:

"135.185. If it appears from the preliminary hearing that there is probable cause to believe that a crime has been committed and that the defendant committed it, the magistrate shall make a written order holding the defendant for further proceedings on the charge. When hearsay evidence was admitted at the preliminary hearing, the magistrate, in determining the existence of probable cause, shall consider (a) the extent to which the hearsay quality of the evidence affects the weight it should be given, and (b) the likelihood of

evidence other than hearsay being available at trial to provide the information furnished by hearsay at the preliminary hearing.".

On page 32, after line 16, insert:

"SECTION 101. Effective date. This Act shall take effect on January 1, 1982. The Oregon Evidence Code shall apply to actions, cases and proceedings commenced after the effective date of this Act. The Oregon Evidence Code also shall apply to further procedure in actions, cases and proceedings then pending except to the extent that application would not be feasible or would work injustice, in which event former evidential principles shall apply.".

EXHIBIT E
7/16/81 - 5 pages - HB 2030A
Senate Justice
Judge Robert E. Jones

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

ROBERT E. JONES
JUDGE

July 14, 1981

ROOM 520
1021 S.W. FOURTH AVENUE
PORTLAND, OREGON 97204
248-3165

TO: Members of the Senate Justice Committee

FROM: Hon. Robert E. Jones

RE: Rule 609 and Rule 801

It has always been my position that the Legislature should allow impeachment for prior crimes on strictly the intellectual basis of crimes relevant to credibility which would restrict impeachment to those involving solely false statement; or in the alternative, adopt the Oregon Evidence Revision Commission proposal which allows impeachment for any felony and any crime which involves false statement. The House Judiciary proposal to include crimes of dishonesty in its true sense, and crimes of false statements would create, in my opinion, a legal mess.

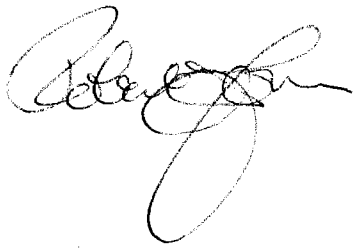
Since there is such strong feeling to include a great number of non-relevant-to-credibility crimes, I suggest that your committee and the Senate adopt the Advisory Committee proposal, a photocopy of which is attached. I strongly oppose the Federal Rule of Evidence Rule 609 because it gives the trial judge discretion to exclude certain crimes when the prejudicial effect outweighs the probative value. This will have the result of witnesses being treated completely differently from one courtroom to another depending upon the thoughts of the judge. Certainly judges have just as much divergence of feeling on this complex issue as have the members of the Legislature. If there is one thing we need its predictability, and the Advisory Committee proposal, by eliminating judicial discretion, provides such predictability.

TO: Members of the Senate Justice Committee
FROM: Judge Robert E. Jones
RE: Rule 609 and Rule 801

As to Rule 801, I recommend that your Committee adopt Federal Rule 801(d)(1).

> (1) Prior statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, . . .

Since many of us have worked on this Code since 1974, and we have lecture schedules to present the new Code to the Bar Associations throughout July and September, we believe it is of the utmost importance that the Committee pass this measure out immediately. I am confident the House will concur in the amendments suggested.



To Justice

OREGON STATE SENATE

SALEM, OREGON

97310

July 15, 1981

MEMORANDUM

To: Senator Jan Wyers

From: Senator Jack Ripper

Could you take a look at the enclosed letter concerning HB 2030? The bill is scheduled for a work session in your Justice Committee tomorrow afternoon.

The points that DA Burgett raises (concerning section 53 of the bill) seem pertinent and worth the committee's attention.

Jack

PAUL R. BURGETT
DISTRICT ATTORNEY
COOS COUNTY
STATE OF OREGON

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ASSISTANT DISTRICT ATTORNEYS
JON DUERST
JANE E. AIKEN
JOHN T. SEWELL
STEPHEN D. CAMPBELL

OFFICE MANAGER
RACHAEL PARKER

July 10, 1981

Sen. Jack Ripper
Rep. Bill Grannell
Rep. Bill Bradbury

Re: Proposed Oregon Rule of Evidence 609

Gentlemen:

My office strenuously opposes the proposed Oregon Rule of Evidence No. 609. This rule would change the common law rule that allows the credibility of a witness to be impeached with the conviction of any crime. The proposed statute would limit impeachment with crimes to convictions of crimes involving dishonesty or false statements. This would greatly impair and triple the prosecutor's ability to bring out prior conduct of a defendant that would indicate possible dishonesty.

I believe that any person convicted of a crime has expressed a willingness to violate the law by their former conduct. The only thing that makes witnesses tell the truth on the witness stand is the possibility that they will be charged with the crime of perjury if they give a false statement. By their former behavior they have exhibited a willingness to risk criminal penalties in their former violation of the law. I think that this should go to their credibility as a witness and the conviction of any crime should be admissible against them for impeachment purposes should they take the witness stand.

A prior conviction also gives a defendant a greater interest in the outcome of the case than he would otherwise have. In short, if the defendant suffers another conviction, the prior convictions will be used to stiffen the penalty that he will be subject to. It is a well known rule of law that a witness' interest in the outcome of a case can be used to explain bias or a liklihood to falsify testimony. Obviously, the existence of prior convictions will make the penalties that he would be likely to suffer in the present conviction more severe and

would create a liklihood for him to falsify his testimony.

I would greatly appreciate it if you would strenuously oppose Proposed Oregon Rule of Evidence No. 609.

Sincerely yours,

PAUL R. BURGETT
District Attorney

PRB:rp

cc: Allison Smith, ODAA

EXHIBIT H
Senate Justice Comm.
HB 2030 - 7/21/81 - 1 page

Legislative Counsel
HB 2030-3
06/25/81 (33) (44)

PROPOSED AMENDMENTS TO HOUSE BILL 2030

On page 4 of the printed bill, after line 12, insert:

"SECTION 16a. In any suit commenced under ORS 192.680 (1), the plaintiff shall be required to present prima facie evidence of a violation of ORS 192.610 to 192.690 before the governing body shall be required to prove that its acts in deliberating toward a decision complied with the law. When a plaintiff presents prima facie evidence of a violation of the open meetings law, the burden to prove that the provisions of ORS 192.610 to 192.690 were complied with shall be on the governing body.".

Prepared by Kristena A. LaMar
Legal Counsel

EXHIBIT K
Senate Justice Comm
HB 2030 - 7/21/81 - 2 pgs
Staff

PROPOSED AMENDMENTS TO HB 2030

On page 33 of the printed A-Engrossed bill, after line 27 insert:

"41.950, 41.960, 41.970, 41.980, 42.050, 42.060, 42.070, 42.080, 43.010, 43.020, 43.030, 43.040, 43.050, 43.060, 43.070, 43.080, 43.110, 43.120, 43.210, 43.310, 43.320, 43.330, 43.340, 43.350, 43.360, 43.370, 43.380, 43.390, 43.400, 43.410, 43.420, 43.430, 43.440, 43.460, 43.470, 45.630, 44.010,".

In line 28, after "45.600" insert "45.610, 45.620,".

On page 34, after line 2 insert:

SECTION 102. Section 103 of this Act is added to and made a part of ORS chapter 432.

SECTION 103.

> (1) Each certificate provided for in ORS chapter 432, filed within six months after the time prescribed for its filing, shall be prima facie evidence of the facts stated. Data pertaining to the father of a child are evidence if the alleged father is, or becomes, the husband of the mother in a legal marriage. If not, the data pertaining to the father are not evidence in any civil or criminal proceeding adverse to the interests of the alleged father, his heirs, devisees or other successors in interest, if the paternity is controverted.
>
> (2) The contents, or part of the contents, and the due execution of any certificate on file in the Bureau of Vital Statistics, may be evidenced by a copy of the material in the certificate, as certified by the State Registrar of Vital Statistics. The certified copies shall be admitted as evidence the same as the originals.
>
> (3) The admissibility in evidence of a "delayed" or "altered" certificate, as defined in ORS 432.140, shall be subject to the discretion of the court, judicial or administrative body or official to whom that certificate is offered.

SECTION 104. ORS 161.735 is amended to read:

"161.735. (1) Whenever, in the opinion of the court, there is reason to believe that the defendant falls within ORS 161.725, the court shall order a presentence investigation and a psychiatric examination. The court may appoint one or more qualified psychiatrists to examine the defendant or may order that he be taken by the sheriff to a state hospital designated by the Mental Health Division for the examination.

(2) When the examination is conducted at a state hospital the superintendent shall notify the sheriff upon completion of the examination, and the sheriff shall return the defendant to the county in which he was convicted. The defendant shall remain in the custody of the sheriff subject to further order of the court. All costs connected with the examination shall be paid by the county in which the defendant was convicted.

(3) The psychiatric examination shall be completed within 30 days, subject to additional extensions not exceeding 30 days on order of the court. The psychiatrist shall file with the court a written report of his findings and conclusions, including an evaluation of whether the defendant is suffering from a severe personality disorder indicating a propensity toward criminal activity.

(4) No statement made by a defendant under this section or ORS 137.124, 137.320 or 423.090 shall be used against him in any civil proceeding or in any other criminal proceeding.

(5) Upon receipt of the psychiatric examination and presentence reports the court shall set a time for a presentence hearing, unless the district attorney and the defendant waive the hearing. At the presentence hearing the district attorney and the defendant may examine the psychiatrist who filed the report regarding the defendant.

(6) If, after considering the presentence report, the psychiatric report and the evidence in the case or on the presentence hearing, the court finds that the defendant comes within ORS 161.725, the court may sentence the defendant as a dangerous offender.

(7) In determining whether a defendant has been previously convicted of a felony, the court shall consider as prima facie evidence of the previous conviction:

(a) A copy of the judicial record of the conviction which copy is authenticated under [ORS 43.110 or 43.120] section 69 (Rule 902) of this Act;

(b) A copy of the fingerprints of the subject of that conviction which copy is authenticated under [ORS 43.330] section 69 (Rule 902) of this Act; and

(c) Testimony that the fingerprints of the subject of that conviction are those of the defendant.

(8) Subsection (7) of this section does not prohibit proof of the previous conviction by any other procedure.

Prepared by Stephen L. Griffith
Staff Proposal
July 21, 1981

EXHIBIT M
Senate Justice Comm
HB 2030 - 7/21/81
1 page
Stephen Griffith

M

A-ENGROSSED HOUSE BILL 2030

AMENDMENTS

161 On page 1 of the A-Engrossed bill, line 7, after "41.870," insert "41.880,".

In line 8, after "41.900," insert "41.980,".

In line 9, after "45.560," insert "45.610, 45.620,".

186 On page 6, line 16, delete "reputation" and insert "character".

On page 17, line 17, after "testimony" insert a comma.

On page 18, line 35, after "rebut" insert "an inconsistent statement or".

On page 20, line 18, delete "Statement" and insert "A statement".

In line 37, delete "18" and insert "18a".

On page 21, line 11, after "crime" insert "except a traffic offense".

In line 20, delete "offered as evidence of a material fact" and insert "relevant".

In line 28, delete "relevant and" and delete the first "to" and insert "of".

On page 22, line 38, after "party" insert "the intention to offer the statement and the particulars of it, including the name and address of the declarant," and after "hearing" insert ", or as soon as practicable after it becomes apparent that the statement is probative of the issues at hand,".

In line 39, after "it" delete the rest of the line and line 40 and insert a period.

On page 33, line 27, after "41.870," insert "41.880," and after "41.900," insert "41.980,".

In line 29, after "45.600," insert "45.610, 45.620,".

4

PROPOSED OREGON EVI. CE CODE

Prepared by Kr ena A. LaMar
July 23, 1981

Proposed Rule change	Proponent/Rationale	Opposition/Rationale
Rule 101(4)(b) Make grand jury proceedings come within Evidence Code	ORS 132.320 requires application of Evidence Code, except for scientific reports, affidavit of unavailable witness OCDA wants State v. McDonald, holding that proscription as only amonitory, to be repudiated	ORS 132.320 is admonitory only, and not binding, and therefore should not be the exclusive method for presenting evidence at the grand jury proceeding, which is basically an investigatory function.
Rule 101(4)(d) Change commentary to require witness to testify in person if requested in sentencing hearing Requires witness who testifies at sentencing to testify from personal knowledge, if requested by either party.	Reports of probation officers may include hearsay, and those reports are regularly admitted. However, if the defendant, after seeing report, wishes to rebut a report, the witness' presence should be required	The U.S. Supreme Court and the Oregon Supreme Court have approved the use of hearsay in presentence reports, and it is not constitutionally required.
Rule 101(4)(e) Allow party to request application of Evidence Code, except for unreasonable hardship on parties or witness, and informant's reliability is assured, in adjudicatory portion of hearing	OCDA wants application to the adjudicatory portion of the hearing which is more closely akin to fact-finding part of trial, if issue of fact is disputed	Courts now require reliable evidence for probation revocation, and amendments would change hearing from summary determination to more complicated form
Rule 309 Change standard for use in criminal cases of presumptions from "more likely than not" to "beyond a reasonable doubt"	OCDA proposes the higher standard for use of presumptions (which are not binding on jury in any event, but which may be relied on to fill in evidentiary void)	Supreme Court in Ulster decision held that Constitution does not require higher standard
Rule 412 Delete state's right to appeal from pre-trial order allowing prior sexual history of victim	OCDA says that this forced defendant to choose between speedy trial and right to confront witnesses or show motive/bias; may not be Constitutional	1) Victim will have no remedy if admitted 2) No way to rectify erroneous introduction 3) No other way to develop case law on topic 4) State will exercise right judiciously

EXHIBIT A
Senate Justice Comm.
7/24/81
Staff
HB 2030
3 pages

Proposed Rule change	Proponent/Rationale	Opposition/Rationale
Rule 504 Change commentary and rule to specifically include drug addiction to psycho-therapist-patient privilege	OCDA proposes that this privilege not be specifically disavowed as the commentary does, since many psychotherapists are treating drug addicts for emotional problems	District Attorneys defer to Judge Jones' view
Rule 609 (1) Delete entry of guilty plea or finding of guilt before sentence as basis for impeachment (2) Return to Advisory Committee approach to prior crimes impeachment (felony or misdemeanor; involving false statement)	OCDA contends that this subverts a witness' right to a motion for new trial, and causes problems in the scheduling of co-defendant's trials OCDA argues for the admissibility of only the crimes going to issue of credibility in testimony	By favoring the Advisory Committee proposal, District Attorney's Association apparently agrees District Attorneys favor the Advisory Committee approach, in allowing in all felonies and crimes involving false statement, regardless of the punishment
Rule 801 Allow prior inconsistent statements' use as substantive evidence only if made under oath with a similar opportunity and motive to cross-examine; otherwise, prior inconsistent statements could only be used for impeachment	OCDA believes that there is no inherent reliability in a prior inconsistent statement to remove it from the category as hearsay, unless it was under oath, and that such a proposal may encourage use of prior prepared statements as substantive evidence. In addition, juries cannot distinguish substantive from impeachment	District Attorneys say this type of change in the law would create "mini-trials" to determine circumstances under which statements are made, but would not object to the Federal Rule 801

Rule 606. Change competency and rule back to Interim committee and present Oregon law regarding limited inquiry into the validity of a jury verdict.

OCDLA proposes eliminating the proposed language in the rule which would prohibit all inquiry into matters or statements occurring in the jury room. State v. Gardner and State v. Imlah prohibit inquiry into effect of any matter on a juror's mind. Proposal would preserve this caselaw; but would preserve present right to inquire into matters which occur (e.g. juror became intoxicated).

ORE Rule Number 609 Impeachment by Evidence of Conviction of Crime

Provision	Federal Rule	Advisory Comm.	Interim Comm.	House version
Entered a plea of guilty	Not	Not	Not	Admissible
Found guilty before sentence	Not	Not	Not	Admissible
Conviction	Admissible	Admissible	Admissible	Admissible
Type of crime:				
Felony, regardless of elements	Not	Admissible	Not	Admissible
Felony, & probative value outweighs prejudice to defendant	Admissible	Not	Not	Not
Felony or misdemeanor, and element is false statement	Not	Admissible	Not	Not
Felony or misdemeanor, and element is dishonesty or false statement	Admissible	Not	Admissible	Not
Only allowed to impeach on cross-exam	Yes	Yes	Yes	No
More than 10 years since conviction	Inadmissible	Inadmissible	Inadmissible	Inadmissible
Conviction expunged by pardon, reversed, set aside or otherwise nugatory	Admissible	Admissible	Admissible	Inadmissible

EXHIBIT B
SENATE JUSTICE COMM.
HB 2030 - 7/24/81 - 6 pages
Jim McCandlish, OCDLA

EVIDENCE CODE
Work Session
Text: April 2, 1981
Commentary: July 6, 1981

Oregon Rule of Evidence 609

SECTION 53. Rule 609. Impeachment by evidence of conviction of crime. (1) For the purpose of attacking the credibility of a witness, evidence that the witness has ~~entered a plea of guilty~~ or been ~~, and guilty by the trier of fact~~ convicted of a crime in other than a justice's court or a municipal court shall be admitted if elicited from the witness or established by public record [during cross-examination], but only if the crime involved ~~dishonesty or~~ false statement. Crimes involving false statement include, but are not limited to the crimes specifically listed in the Commentary to this rule.

(2) Evidence of a conviction under this section is not admissible if [a]:

(a) A period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date[.]; or

(b) The conviction has been expunged by pardon, reversed, set aside or otherwise rendered nugatory.

(3) When the credibility of a witness is attacked by evidence that the witness has been convicted of a crime, the witness shall be allowed to [briefly] explain briefly the circumstances of the crime or former conviction.

(4) The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(5) An adjudication by a juvenile court that a child is within its jurisdiction is not a conviction of a crime.

COMMENTARY

Oregon Rule of Evidence 609 indicates the circumstances in which a witness may be impeached by evidence of a prior conviction, ~~or plea or finding of guilt~~. The rule is based on Rule 609 of the Federal Rules of Evidence. However, there are significant differences between the Oregon rule and both Federal Rule 609 and Oregon practice to date.

Subsection (1). The Legislative Assembly abandoned the traditional approach in both federal and state courts which allows impeachment by any prior felony conviction. It believes that the distinction between felonies and misdemeanors for the purpose of determining credibility is arbitrary. The relationship between crimes of violence and truth-telling is particularly tenuous. The assumption that these crimes are probative of credibility because a person convicted of assault is a bad person, and a bad person is a liar, is false, as Bentham demonstrated more than a century ago:

> "Two men quarrel; one of them calls the other a liar. So highly does he prize the reputation of veracity, that, rather than suffer a stain to remain upon it, he determines to rid his life, challenges his adversary to fight, and kills him. Jurisprudence, in its

(3)

> sapience, knowing no difference between homicide by consent, by which no other human being is put in fear--and homicide in pursuit of a scheme of highway robbery or nocturnal housebreaking, by which every man who has a life is put in fear of it--has made the one and the other murder, and consequently felony. The man prefers death to the imputation of a lie,--and the inference of the law is, that he cannot open his mouth but lies will issue from it. Such are the inconsistencies which are unavoidable in the applications of any rule which takes improbity for a ground of exclusion." 7 Bentham, Rationale of Judicial Evidence 406 (Brownings ed 1827).

Aside from the low probative value of some convictions, the divulgence of a criminal past exposes the witness to the hazard of jury prejudice. In one recent survey 98% of the attorneys polled, and 43% of the judges, indicated their belief that a jury is unable to follow an instruction to consider prior conviction evidence only for the purpose of evaluating credibility. "To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record," in 4 Col J Law and Soc Prob 213 (1968). To inform the jury in a rape case that the defendant has a prior rape conviction, and then to instruct the jury to consider the conviction only in evaluating the defendant's credibility, is to recommend "a mental gymnastic which is beyond, not only their power, but anybody else." Nash v. United States, 54 F 2d 106, 107 (2d Cir 1932) (L. Hand, J.).

For the reasons just expressed, the Legislative Assembly also abandoned Oregon's practice of allowing a witness to be impeached by evidence of any misdemeanor. ORS 45.600. Although there is authority for the view that violation of a city ordinance cannot be used to impeach, State v. Crawford, 58

(4)

Or 116, 113 P 440 (1911); Redsecker v. Wade, 69 Or 153, 164 134 P 5, 138 P 485 (1914), it seems clear that when the punishment may be incarceration even a violation has been admissible under Oregon law. State v. Bunse, 27 Or App 299, 555 P2d 1269 (1977).

Under subsection (1), convictions in an Oregon justice or municipal court, or in similar courts of other states, however designated, may not be used for impeachment. The offenses triable in these courts do not involve serious moral depravity. Furthermore, the proceedings are relatively informal, and often stray from the standards of a criminal trial in a court of record.

As for proceedings in a court of record, the Legislative Assembly intends that prior convictions be admitted for the purpose of impeaching a witness' credibility if--and only if--the conviction was for a crime involving ~~dishonesty or~~ false statement. The Legislative Assembly believes that ~~either~~ this type of crime is relevant to the propensity of a witness to testify truthfully.

Additionally, the Legislative Assembly departed from the text of the federal rule by eliminating the term "dishonesty". However, this is simply a recognition that as interpreted by the federal courts, "dishonesty" has not added substance to "false statement". See, e.g. United States V. Ortega, 561 F2d 803 (9th Cir 1977) (Shoplifting is not a crime involving false statement or dishonesty.).

(5)

Crimes of false statement involve some element of untruthfulness, falsification or deceit bearing on the witness' propensity to testify truthfully. The deceit involved is more than the mere effort of the criminal actor to hide the fact of crime or the identity of the actor from the authorities: by this reasoning all crimes would be crimes of deceit. Rather, the operative deceit must be of the crime victim. Depending on the crime, that may be a trier of fact, in the case of perjury; a storekeeper, in the case of negotiating a bad check; a family member, in the case of bigamy; a correspondent, in the case of alteration of a telegraphic message; or the general public, in the case of bribery. Deceit can be said to exist if the victim of the crime is not aware, at the time of its commission, either of its existence, or of its criminality, or of its full range of consequences to the victim. The deception may be affirmative, or it may take the form of allowing a person who is deceived to remain so.

Certain crimes involve ~~dishonesty or~~ false statement by their very nature. ~~Others involve dishonesty or false statement in their commission in a very high percentage of cases.~~ The Legislative Assembly has compiled a partial list of such crimes in Oregon. It intends that these, and their inchoate forms, see ORS 161.405 et seq., be admissible for impeachment purposes in every case. A trial court does not have discretion to exclude them.

OFFENSES OF ~~DISHONESTY OR~~ FALSE STATEMENT

Offenses Against State & Public Justice

f 162.015 - Bribe giving

f 162.025 - Bribe receiving

f 162.065 - Perjury

m 162.075 - False swearing

m 162.085 - Unsworn falsification

m 162.195 - Failure to appear II

f 162.205 - Failure to appear I

f 162.265 - Bribing a witness

f 162.275 - Bribe receiving by witness

f 162.285 - Tampering with witness

m 162.295 - Tampering with physical evidence

m 162.305 - Tampering with public records

f 162.325 - Hindering prosecution

m 162.355 - Simulating legal process

m 162.365 - Criminal impersonation

m 162.375 - Initiating a false report

m 162.425 - Misuse of confidential information

m 162.465 - Unlawful legislative lobbying--

Offenses Against Persons

f 163.515 - Bigamy

m 163.605[1] - Criminal defamation--"false" matter

Offenses Against Property

m,f 164.015(2) - Theft--by failure to restore known lost property

m,f 164.015(4) - Theft--by deception

EXHIBIT A
Senate Justice Comm
HB 2030 - 7/29/81 - 1 page
Jim McCandlish, OCDLA

Oregon Criminal Defense Lawyer's Ass'n
July 28, 1981
A-Engrossed HB 2030

Article VIII - ORE 801
(Amendment Supported
by OCDLA, ODAA & R. E.
Jones - federal rule)

On page 18 of the A-Engrossed bill, line 34, after "witness" insert ", and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition".

JEM/smm

HOUSE COMMITTEE ON JUDICIARY

Joint Meeting of House Judiciary Subcommittee 1 and Senate Justice Committee

January 22, 1981 3:15 p.m. 350 State Capitol

Members Present:	Senator Jan Wyers, Co-Chairperson Senator Walter Brown Representative Joyce Cohen Representative Peter Courtney Senator Jim Gardner Senator Ed Fadeley Senator Ken Jernstedt Senator Ted Kulongoski Representative Kip Lombard Representative Bill Rutherford Representative Norm Smith Representative Dick Springer
Excused:	Representative Tom Mason, Co-Chairperson
Staff:	Stephen Griffith, Legal Counsel, House Judiciary Felicia Gniewosz, Legal Counsel, Senate Justice Pearl Bare, Committee Assistant, House Judiciary
Witnesses:	The Honorable Robert E. Jones, Circuit Court Judge Fourth Judicial District The Honorable L. Unis, Circuit Court Judge Fourth Judicial District Elliott Lynn, Oregon Trial Lawyers Association Al Smith, Oregon District Attorneys Association Jim McCandlish, Oregon Public Defenders Association
MEASURE:	HB 2030 - Relating to evidence law (Article I and II, and Sections 21, 22 and 23 (Article IV)
Tapes:	H-81-JUD-17 HB-81-JUD-18

002 CHAIRPERSON WYERS called the meeting to order at 3:15 p.m.

009 HB 2030 - Relating to Evidence Law.

CHAIRPERSON WYERS stated that Articles I and II, and sections 21, 22 and 23 of Article IV would be heard.

Article I. General Provisions

024 THE HONORABLE ROBERT E. JONES, Circuit Court Judge, Fourth Judicial District, stated that the first sections in Article I deal with routine matters. He commended to the committee Laird Kirkpatrick's commentary from The Oregon Law Review (Exhibit C, HB 2030). Mr. Kirkpatrick makes some suggestions for improvements.

The evidence code will cover all actions, suits and proceedings and will set forth certain exceptions. The exceptions are not controversial except as to what evidence will be admissible at preliminary hearings. The recommendation has been to have the formal rules of evidence apply to preliminary hearings. This is the general practice in the state. Professor Kirkpatrick feels this is an impediment to preliminary hearings and would tempt the district attorneys to waive preliminary hearings and indite under, thus depriving discovery to the defendant.

A considerable amount of preliminary hearing testimony comes into circuit court. It is offerred under the former testimony exception to the hearsay rule. It was the feeling of the Advisory Committee that the rules should be followed.

066 THE HONORABLE RICHARD L. UNIS, Circuit Court Judge, Fourth Judicial District, stated that the summary contained in the Proposed Oregon Evidence Code (Exhibit A, HB 2030) gives the reason for this. It is a policy decision.

070 JUDGE JONES stated that Judge Lenon has settled that the formal rules of evidence would apply to adjudication aspects of juvenile proceedings but not to disposition aspects.

080 JUDGE UNIS stated that there is no intention for these proposed rules to wipe out years of common law development in the field of evidence. The contrary is true. The proposed rules contain many omissions. The court will have to rely on common law principles to resolve questions on these omissions.

The basic question that had to be addressed by the Advisory Committee was: Should the rules even be codified? The feeling was that it would be a great service to the legal profession. It would also bring about certain consistency between the Oregon courts and the federal courts. About half the states now have codified evidence codes.

Article I contains one section he believes warrants consideration (page 10, Exhibit A, HB 2030). It suggests retaining ORS 41.880 with certain amendments and rejecting Federal Rule of Evidence 106 (See

Exhibit B, HB 2030). The Oregon Supreme Court in Black v. Nelson, 246 OR 164, said that ORS 41.880 is not to be given literal interpretation. The rule is that when a conversation or writing in part is received in evidence from one party, the remainder of the writing or conversation to be competent must be material and affect in some way the part already given in evidence. The court has construed the statute, despite its langauge, very much like the rule of completeness which is codified in Federal Rule 106. Federal Rule 106 is based upon misleading impressions created by taking matters out of context and the inadequacy of repair work when delayed to a later point at trial.

The troubling part about page 10 (Exhibit A, HB 2030) is that it relates to conversation. He has found language in the Oregon Supreme Court decisions which suggests that this is the "part/whole hearsay exception". The statute has never been given that broad of interpretation. Professor Kirkpatrick in the Oregon Law Review (Exhibit C, HB 2030) believes that the Legislature should consider adoption of Federal Rule 106 instead of the language in ORS 41.880 because ORS 41.880 tells lawyers they can do something that the court has said they cannot do.

147 JUDGE JONES stated that if something is offerred in writing, the opponent should be able to give the rest of the writing at that time so that the writing can be heard in context. Someone suggested that it should also be extended to oral statements. That is how this occurred.

176 JUDGE UNIS suggested that the committee look at adopting Federal Rule 106 rather than the misleading language in ORS 41.880.

In response to Sen. Brown's question about a basic rule of relevancy underlying Rule 106, JUDGE UNIS stated that he did not know. He had not heard of the part/whole hearsay exception until he read the Oregon Supreme Court case of Meyer v. Cessna Aircraft Company, 275 OR 501, p. 524. It does present some troublesome questions.

The rule of completeness is a rule a fairness. It is accomplished by Federal Rule 106.

206 JUDGE JONES stated that Federal Rule 106 would also cover someone reading a deposition out of context. That is traditionally where it comes up. This gives the opponent the opportunity to read the balance of the deposition at that time. Both portions must pass the rule of relevancy.

221 The committee discussed the procedure to be gone through in adopting the evidence code.

285 SEN. FADELEY asked why the judge's were now recommending Federal Rule 106 when the Interim Committee did not adopt it.

309 JUDGE JONES stated that the Interim Committee felt that if it were good for written statements it should be good for oral statements. Judge Unis feels that may be logical, but the Supreme Court has not interpreted it that way.

338 JUDGE UNIS stated that Article I was non-controversial. He was not aware of the statement in Black v. Nelson at the time of the discussion on this rule.

Page 11 (Exhibit A, HB 2030) expresses the view of the Advisory Committee. The Oregon statute is broader.

The statute should express whatever the Legislature wants.

397 SEN. GARDNER stated that it could be written in such a way that oral conversation will be covered. Judge Unis is saying that by simple using the language in the ORS, this would not occur because the courts have already construed that not to include oral conversation. Something else would have to be done to clarify that.

The issues that have been raised in this article are whether the Federal Rule should be used which covers writings and recorded statements and whether the rules of evidence should be applicable to preliminary hearings.

420 JUDGE UNIS stated that one other issue was the juvenile area.

436 JUDGE JONES stated that one very important statement in this section that has not been discussed is that this section does not change the existing Oregon law that error is presumed to be prejudicial. The statement in the code (Exhibit A, HB 2030) on page 5, Rule 103, says that error may not be predicated on a ruling that omits or excludes evidence unless a substantial right of the party is affected.

The Supreme Court has stated that it was going to presume that any error was prejudicial. Ex-Justice Howell feels that is a bad way to look at it. The error should be looked at and an independent judgment should be made as to whether it was prejudiced.

Tape 18
Side A

022 JUDGE JONES continued that he would commend that also for the trial judges. The committee could just state that it intended to change the law and that there would be no presumptive error. The long-run effect of that would be fewer reversals.

036 JUDGE UNIS stated that the way he read the commentary, under current Oregon law in civil cases, the court will presume that any found error is prejudicial. Under the Oregon Constitution, it is indicated

that if the error does not affect the substantial rights of the parties, the appellate courts can only affirm the judgment.

061 In response to CHAIRPERSON WYERS, JUDGE JONES indicated that Meyer v. Harvey Aluminum could be reversed in stating that as part of the legislative intent by passing this rule. The rule could be left as is and the commentary could indicate that presumptive error was not believed in and the intent was to reverse that case.

068 CHAIRPERSON WYERS asked if something were to added to ORS 41.880 and there is nothing in the rule to make evidence admissible that would not otherwise be admissible as to hearsay, would that go toward alleviating the problem seen by JUDGE UNIS.

073 JUDGE UNIS responded that the basic intent of this rule is completeness. The statute has been interpreted as dealing with opening the door. It would be well at this time to find out what the court has said the statute means. If it is the desire of the committee to retain Oregon law, language should be incorporated rather than continuing with language that says one thing and means something else.

He did not think this area was controversial; it just needs more examination.

He has never had a lawyer attempting to use the statute on oral, but apparently the issue has come up.

There is a doctrine that if one party gets in inadmissible evidence, the other party is permitted to come in with similar type of evidence to refute it.

120 SEN. GARDNER asked what sort of common law will supplement the code. He thought the code was to be the whole thing.

125 JUDGE UNIS stated that the code by no means touches all the rules of evidence. It just touches the major rules and will give a guide to the trial judges and lawyers. There will still be much interpretation.

138 SEN. GARDNER asked if there would be hearsay exceptions that are not in the code.

140 JUDGE UNIS replied that the hearsay exceptions give examples. The criteria is set forth.

145 The committee and witnesses discussed the format of the evidence code. The intent is to have the rules in the ORS and the commentary available elsewhere.

219 In response to REP. COURTNEY, JUDGE UNIS stated that he believed the Legislature would be safe if it adopted Federal Rule 106.

223 The committee continued its discussion of the format of the code.

238 In response to SEN. BROWN, JUDGE UNIS stated that as Federal Rule 106 is being interpreted, for practical reasons it is limited to writings and recorded statments. It does not apply to conversations. That is in the commentary to the Federal Rules of Evidence (Exhibit B, HB 2030).

If the committee desires to include oral statements, that should be added.

291 JUDGE JONES showed the committee the Federal Rules (Exhibit B, HB 2030) and explained the format.

311 SEN. KULONGOSKI stated that if the committee adopts the rules as presented, the printed proposed code (Exhibit A, HB 2030) could be used as is for the commentary. If any changes are made in the rules, changes will have to be made in the commentary in the proposed code.

316 JUDGE UNIS stated that some of the commentary is inaccurate. Because of changes through Legislative Counsel, there is commentary to sections and to requirements that have been deleted.

The commentary in the proposed evidence code (Exhibit A, HB 2030) is, in many cases, identical to the commentary in the Federal Rules (Exhibit B, HB 2030).

373 SEN. SMITH stated that he hoped there would only be one commentary for each rules to explain what the intent was, rather than the way the proposed evidence code and the Federal Rules are.

393 SEN. BROWN stated that if the committee were to adopt Federal Rule 106 with the addition of the words "at this time", the Federal Rule commentary could be used with the addition of an explanation of the words "at that time".

411 JUDGE UNIS stated that the commentary could also refer to Black v. Nelson.

The twenty states that have a code have taken the Federal Rules of Evidence commentary and changed it to conform with their local laws. New York's commentary is a beautiful piece of work. It used a good format.

440 SEN. WYERS stated that he was comtemplating using the federal commentary with the changes, but having only one commentary.

466 JUDGES JONES recommended not allowing oral statements and using Federal Rule 106. The federal commentary could then be used as it is.

Tape 17
Side B

017 SEN. WYERS stated that the procedure on the code would be to have a work session after the hearing on each article. The work session would apparently have to include changes in the commentary.

034 The committee continued discussion of the format of the commentary.

101 ELLIOTT LYNN, representing the Oregon Trials Lawyers Association, stated that his comments were directed to section 6(a), page 10 (Exhibit A, HB 2030). The Interim Committee rejected Federal Rule 106 because it was not broad enough. It was the committee's decision to broaden it to acts, conversations or writings and to allow the completion at that time, rather than at a later time.

He felt that if the committee just adopted Federal Rule 106 because it is easier, it would lose sight of the Oregon trial practice. The Interim Committee's intention was to broaden the rule and to reject Federal Rule 106.

Under section 6(a), the evidence would have to be admissible otherwise.

The Oregon Trial Lawyers Association (OTLA) recommends adopting section 6(a) because of its broadness.

134 SEN. GARDNER asked if Mr. Lynn accepted Judge Unis' statement about Black v. Nelson narrowing the Oregon law.

136 MR. LYNN replied that he had not read that case.

Section 6(a) broadens what is allowable at trial in terms of admitting additional evidence. This section will allow a greater degree of fairness in the courts.

167 SEN. GARDNER pointed out that if Judge Unis is right, to accomplish what Mr. Lynn wants would require more than just reiterating the existing law.

185 SEN. BROWN suggested just adding "at that time" to the Federal Rule.

187 MR. LYNN stated that he did not believe that would take care of it.

193 SEN. KULONGOSKI asked that witnesses submitting amendments have them in writing.

204 ALLISON SMITH, representing the Oregon District Attorneys Association (ODAA), stated that the association had some concern about the applicability of this code in preliminary hearings in criminal cases. The association does not think those types of hearings should be exempt from the application of the code, but it is concerned about hearsay in certain instances. For instance, if a car is stolen in the eastern part of the state and recovered in the western part, in order to hold a preliminary hearing and to apply strictly the hearsay rules, it would be necessary to bring the person from eastern Oregon to western Oregon to testify that permission to take the car was not given.

The hearsay exceptions that appear in sections 803 and 804 are not quite broad enough to take care of that sort of problem. The use of hearsay varies widely from county to county. The problem needs to be addressed, but a change in the substance of any of the rules in Article I is not the way to do it.

The language in the commentary on page 5 (Exhibit A, HB 2030) may give too strict of an impression as to what will ultimately be suggested in the hearsay area.

The denial of an accussed's right to examine adverse witnesses if hearsay evidence is admitted at a preliminary hearing is a right that has not been observed very strictly. The purpose of a preliminary hearing is to establish probable cause that a crime was committed, not to prove beyond a reasonable doubt.

He stated that the association could submit alternate language for that part of the commentary. He also expected to have suggested changes in the hearsay exceptions. The commentary change would be to reference the hearsay changes.

270 JIM McCANDLISH, representing the Criminal Defense Association, stated that his association shares Laird Kirkpatrick's concern with respect to the preliminary hearings about the possibility that prosecutors might change over to the grand jury system, as Lane County has.

That has been analyzed by the criminal defense bar, and it is his association's position that it would like to insure that preliminary hearings do follow the rules of evidence, but not to the exclusion of the instances where it doesn't make sense because the hearsay is reliable and desirable.

The arguments and disagreements on the juvenile adjudicatory phase were ironed out during the interim. His association strongly supports the existing practice in the state of Oregon that the rules of evidence do apply.

The granting of probation would be covered by sentencing, so the words "granting or" in Rule 101(4)(e) are redundant. Probation is a

bifuracted proceeding, just as the adjudicatory and dispositional phase in juvenile court and the sentencing in criminal court. In a huge majority of the probation revocation proceedings, the defendant does not contest the basis of the revocation. That puts it into the adjudicatory phase. There are a small number of cases where it is extremely important to factually go over the basis of the revocation recommendation. If there are any arguments on the facts, most judges would stop the proceedings until the person can be brought in. As this is written, it would appear that the committee is sanctioning the use of hearsay in that situation. He did not think that was the practice of the majority of courts. It is not a desirable practice to allow that hearsay. The commentary could make that clear. There is an analogous situation in Rule 101(4)(d) and the commentary to that.

In the vast majority of sentencing and of probation violation proceedings, it is a waste of time to get bogged down in evidentiary matters. In those cases where it is important, it would appear to be desirable to preserve the right to object. He suggested making that a little clearer.

In Rule 101(4), it says sections 1-31 and 42-78 (Rules 514 - 1008). Rule 514 is the last rule of the privileges section. It is not a rule intended to change anything; it is a rule that basically recognizes that the ORS is a massive set of rules. If the rules are not repealed by this section, the code is not applicable to them.

Rule 514 is basically a disclaimer, but in the interrelationship of sections 3 and 4, Rule 101, it would appear there is a substantive impact with respect to proceedings that are exempted from coverage by the evidence code.

Tape 18
Side B

023 MR. McCANDLISH continued that the law could be changed by excluding the unknown privileges from the proceedings that are being excluded. It could allow certain kinds of privileged matter to come into proceedings. For example, there is a specific statute which does not allow use of income tax forms except for certain agencies in certain contexts. As he reads this, the district attorney could then subpena the information from the Department of Revenue and use it in parole revocation proceedings. There are all kinds of possibilities just by including Rule 514 as is done in sections 3 and 4. He suggested that it would be better to amend that section in the bill on line 22, page 1, by deleting "513" and inserting "514"and on line 24 by deleting "514" and inserting "601". That would comport with what the committee was trying to do.

With respect to section (4)(c), the statute sets forth the kinds of evidence that are necessary. The courts have interpreted the

statutes fairly strictly. He suggested referencing the statute. The commentary mentions that changes are not intended. This would be consistent with (b).

068 JUDGE JONES agreed with Mr. McCandlish's suggestion of changing "514" to "601". That was just a scrivener's error.

070 Article II - Judicial Notice

076 JUDGE JONES stated that judicial notice was just a way of dispensing with formal proof. The Federal Rules were followed and expanded. Judicial notice was restricted to adjudicative fact. Judicial notice of legislative fact will be left to the appellate courts. Laird Kirkpatrick (see Exhibit C, HB 2030) suggests that in section 12, sub 2, that in criminal court, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed against the accused.

What facts should be noticed are clarified. Judicial notice will be taken of all state law and foreign law. Municipal ordinances should be pleaded by the date of the act.

As far as he knows, there is nothing controversial in the judicial notice field.

110 MR. LYNN stated that under section 11, judicial notice may be taken at any stage of the proceeding. Section 10 allows an opportunity to be heard by anyone opposing the judicial notice. If the Court of Appeals takes judicial notice, that would mean taking additional evidence in the Court of Appeals and an opportunity to be heard for the person opposing the taking of judicial notice.

162 JUDGE JONES stated that the criminal problem is taken care of in the commentary. The second paragraph on page 19 (Exhibit A, HB 2030) states that the jury shall pass on facts that are judicially noticed. This could not be done if the notice were taken for the first time when the case was on appeal.

174 SEN. GARDNER stated he did not believe that something could be judicially noticed for the first time on appeal.

190 JUDGE UNIS stated that there is an Oregon case which says that it would be unfair and improperfor the appellate court, particularly in a criminal case, to take judicial notice of questions that should be decided by a jury.

The sections have to be read together.

201 In response to SEN. SMITH, MR. LYNN stated that he felt if this were to be restricted in criminal cases, the code should say so.

Section 12 really does not take care of the problem of section 11. If the fact is judicially noticed in the Court of Appeals, there is no jury and no instruction to the jury whatsoever.

224 JUDGE UNIS stated that he thought the problem was taken care of. Since a jury cannot be told that it may find either way, it cannot be judicially noticed on appeal. The is why 201(g) and 201(f) are read together. In a criminal case, the appellate court cannot take judicial notice of something that a trial court could have found either way on.

231 SEN. GARDNER stated that the problem could be taken care of by a statement in the commentary that the committee agrees with the holding of the Jones decision.

261 JUDGE UNIS stated that the reason for instructing a jury that it "may" rather than "must" is because a series of cases say that the jury has the right under the system to find contrary to well-known facts. The jury has the right to be arbitrary. To tell a jury it must accept a certain fact is like directing it of a verdict on an essential element of the defense.

286 Article IV - Relevancy, Sections 21, 22, and 23

301 JUDGE JONES stated that section 21 is the adoption of the definition of the Federal Rule of relevancy. It eliminates the distinction between "relevant" and "material". Professor Kirkpatrick concurred that it was good to eliminate that distinction.

Rule 402 simply concludes that evidence which is not relevant is not admissible.

Rule 403 is the balancing effect. Even if evidence is relevant, it may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues or misleading the jury or by considerations of undue delay or repetition of cumulative evidence. The Federal Rule said that it could be excluded if the judge considered it a waste of time. The trial lawyers on the Advisory Committee did not want judges telling them their evidence was a waste of time. The Advisory Committee took out the "waste of time" expression and the element of surprise.

342 JUDGE UNIS stated that these three sections are noncontroversial.

There is no attempt by the evidence code to, in any way, rule on constitutional issues.

363 JUDGE JONES stated that there is some symmetry and some commentary that needs to be cleaned up. There will be some debate when it comes to impeachment with prior crimes.

392 CHAIRPERSON WYERS closed the hearing at 4:40 p.m.

Submitted,

Pearl Bare
Committee Assistant

EXHIBITS

Exhibit A, HB 2030 - Proposed Oregon Evidence Code, submitted by staff
Exhibit B, HB 2030 - Federal Rules of Evidence, submitted by staff
Exhibit C, HB 2030 - Oregon Law Review, submitted by staff

FOR EXHIBITS - See State Archives File: OVER-SIZED EXHIBITS

Chairperson:
SEN. JAN WYERS
Vice-Chairperson:
SEN. ROBERT SMITH

Staff:
FELICIA M. GNIEWOSZ
KRISTENA A. LaMAR
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SENATE COMMITTEE ON JUSTICE
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Members:
SEN. WALT BROWN
SEN. EDWARD FADELEY
SEN. JIM GARDNER
SEN. KENNETH JERNSTEDT
SEN. TED KULONGOSKI

Joint Meeting of the House Judiciary Subcommittee 1 and Senate Justice Committee

January 29, 1981 3 p.m. Room 350

HOUSE BILL 2030 PROPOSED EVIDENCE CODE

MEMBERS PRESENT:
Senator Walter Brown
Representative Joyce Cohen
Representative Peter Courtney
Senator Jim Gardner
Senator Edward Fadeley
Senator Ken Jernstedt
Senator Ted Kulongoski
Senator Ben (Kip) Lombard
Senator Bill Rutherford
Senator Robert Smith
Representative Dick Springer
SENATOR JAN WYERS, CO-CHAIRPERSON
REPRESENTATIVE TOM MASON, CO-CHAIRPERSON

Staff Present:
Stephen Griffith, Legal Counsel, House Judiciary
Kristena A. LaMar, Legal Counsel, Senate Committee on Justice
Harriet G. Civin, Chief Committee Assistant, Senate Justice

Witnesses:
James McCandlish, Metropolitan Public Defender's Office
Allison Smith, District Attorney's Association
Bruce Smith, Oregon State Bar Ad Hoc Committee
Elliott Lynn, Oregon Trial Lawyers Association

MEASURE: HB 2030 - Relating to Evidence Law (ARTICLE I, Sections 1, 2, 3, 4, 5, 6 and 6a).

Tapes: Senate Justice (Evidence) - 1A,1B; 2A, 2B.

MINUTES

SENATE COMMITTEE ON JUSTICE AND HOUSE JUDICIARY SUBCOMMITTEE 1
PROPOSED EVIDENCE CODE

January 29, 1981 — 3 p.m. — Room 350

MEMBERS PRESENT:
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Senator Robert Smith
Representative Dick Springer
SENATOR JAN WYERS, CO-CHAIRPERSON
REPRESENTATIVE TOM MASON, CO-CHAIRPERSON

TAPE 1A

005 Meeting was called to order at 3:05 p.m. by CHAIRPERSON TOM MASON. He said that this is formally a meeting on HOUSE BILL 2030. It is more appropriately an informal but joint hearing on the Proposed Evidence Code revision.

013 FIRST ORDER OF BUSINESS WOULD BE ADOPTION OF A PROCEDURE FOR THE EVIDENCE CODE IN REFERENCE TO THE COMMENTARY.

016 STEPHEN GRIFFITH, Legal Counsel, House Committee on the Judiciary. SEE EXHIBIT D.

017 CHAIRPERSON MASON said he would also note in the proposed procedure (Exhibit D) amendments to the commentary will be required to be submitted in writing. He said this was a suggested amendment to Exhibit D.

MR. GRIFFITH said that if there is a proposed amendment to the text of the code, the committee would expect that proposed commentary be prepared to the amendment indicating the purpose behind it.

077 MOTION:
REPRESENTATIVE LOMBARD MOVED THE ADOPTION OF THE PROCEDURE. NO OBJECTION AND THE PROCEDURE WAS ADOPTED.

080 ARTICLE I. General Provisions. (Exhibit A, PROPOSED OREGON EVIDENCE CODE, Report of the Legislative Interim Committee on the Judiciary, December 1980).

CHAIRPERSON called attention to page 1 of Exhibit A. CHAIRPERSON MASON called attention, also, to a summary he had which outlined where a controversy existed. (EXHIBIT E).

093 SECTION 1. Rule 100. No controversy and the Chair moved adoption of ARTICLE 1, SECTION 1, Rule 100. No objection and it was so adopted.

097 ARTICLE 1. SECTION 2. Rule 101. Applicability of Oregon Evidence Code. THE CHAIR noted the only area of controversy regarding this particular section was whether or not this was applicable to preliminary hearings.

Professor Kirkpatrick has suggested an amendment that (4)(g),(Exhibit A, p.1), after the phrase recognizance there be added "and to preliminary hearings." THE CHAIR explained this would make the Evidence Code inapplicable to preliminary hearings. (EXHIBIT C, "Reforming Evidence Law in Oregon", OREGON LAW REVIEW,

, vol. 59, Number 1, 1980, University of Oregon).

THE CHAIR next called attention to proposed amendments from the Oregon Criminal Defense Lawyers Association. (EXHIBIT F). THE CHAIR also called attention to proposed amendments submitted by the Ad Hoc Committee on Proposed Code of Evidence, Oregon State Bar. (EXHIBIT G). THE CHAIR then called attention to proposed amendments submitted by the Oregon District Attorneys Association. (EXHIBIT H).

132 JIM McCANDLISH, Metropolitan Public Defender's Office, Portland, Oregon. Represented the Oregon Criminal Defense Lawyers Association. The amendment proposed dealt with Rule 101(3) and (4). (EXHIBIT F). The effect of the numbering as done by the drafters, even though unintended, would be in proceedings which are exempted from the Evidence Code specifically enumerated privileges would apply -- doctor-patient, lawyer-client, etc. -- but those that are not specifically enumerated would not apply. MR. McCANDLISH thought there were a great many possibilites where there actually might be subsequent problems if that were to happen. He did not think this had been the intent of the Interim Committee on the Judiciary or the Advisory Committee. Judge Jones, at the last meeting of this body, had agreed it had simply been a drafting error. (See minutes, House Committee on the Judiciary, January 22, 1981).

THE CHAIR stated that Mr. McCandlish had suggested that in our text, SECTION 2, Rule 101(3), Rules of Privilege which states 32 to 41 (Rules 503 to 513), that phrase be changed by the deletion of the numerals 513 and inclusion of the numerals 514.

MR. McCANDLISH said that was correct.

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170 MOTION:
SENATOR SMITH MOVED THE ADOPTION OF THE PROPOSED AMENDMENT.

SENATOR WYERS asked about line 22, p. 1, House Bill 2030, "41" would have to be changed to "42".

SENATOR BROWN called attention to the fact that there presently is a SECTION 42 in the Proposed Evidence Code.

MR. McCANDLISH explained it would be the same with respect to the other suggestion he had made. The section numbers have not been changed by the proposed amendment.

SENATOR SMITH accepted the amendment made by Senator Wyers.

NO OBJECTION AND THE PROPOSED AMENDMENT WAS ADOPTED.

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193 Rule 101(4) Rules Applicable.

THE CHAIR called attention once again to Exhibit F. He said Mr. McCandlish had suggested that on line 24, p. 1 of the printed bill HB 2030 the numerical phrase "514" be deleted and insert the numerical phrase "601". He asked Mr. McCandlish to explain it and to explain whether a change was necessary "78" which appears right before that.

0 MR. McCANDLISH said he believed it was the same problem. He said he had not changed the section number either and that would be appropriate.

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KRISTENA A. LaMAR, Legal Counsel, Senate Committee on Justice. She believed the section change should be "42" to "43" rather than "78" to "79". MR. McCANDLISH agreed.

MR. McCANDLISH explained the purpose of his amendment. In this particular section what they are saying is that Rule 514 does not apply in the following situations and it lists eight or so situations. It is the last section in the privileges section. MR. McCANDLISH said he believed the intent was that privileges apply regardless.

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231 MOTION:
SENATOR SMITH MOVED THAT IN SUBNUMERAL PARAGRAPH (4) the numerical phrase "42" be deleted and the numerical phrase "43" be included and the numerical phrase "514" be deleted and the numerical phrase "601" be included.
NO OBJECTION AND THE AMENDMENT WAS ADOPTED.

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237 ALLISON SMITH, 100 State Office Building, Salem, Oregon. Represented the Oregon District Attorney's Association. (EXHIBIT H).

In response to the question from the CHAIR as to whether he had any suggested language on Rule 101(4)(c) which Mr. McCandlish's next suggested amendment addressed. (Exhibit F) MR. ALLISON SMITH said his association had no objection to that. It could be inserted in the manner suggested by Mr. McCandlish.

241 BRUCE SMITH, represented the Oregon State Bar Ad Hoc Committee on Evidence, attorney, Eugene, Oregon. (EXHIBIT G). MR. SMITH had no comment on this section.

243 CHAIRPERSON MASON then read the amendment proposed in Exhibit F which was that on page 1 of the bill, line 29, delete the period and insert ", except as required by ORS 133.743 to 133.857.". At the request of the Chair, Mr. McCandlish explained the proposed amendment. (See Exhibit F). If this amendment were adopted, it would then be consistent with the immediately preceeding paragraph (b) (line 28, p. 1, HB 2030). He felt it would be more consistent to put the statutory section in.

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267 MOTION:
THE CHAIR MOVED THE AMENDMENT. NO OBJECTION AND THE AMENDMENT WAS ADOPTED.

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272 <u>RULE 101(4)(d) Sentencing</u>

THE CHAIR called attention to the proposed amendment put forth by Mr. McCandlish (Exhibit F, p.2). The proposed amendment would on page 2, line 1, HB 2030, delete the period and insert ", except as required by ORS 137.090.".

287 MR. McCANDLISH said that again this proposed amendment was consistent with the two prior paragraphs with respect with specifically referring to the statute that places a limitation on the Rules of Evidence. (See Exhibit F). If interpreted literally, either the statute or this proposed rule if the rule included a specific reference to ORS 137.090, could create some problems in making sentencings burdensome. MR. McCandlish said that the Association he represented felt that that is not of particular practical concern because only those very damaging, either mitigating or aggravating, circumstances that are brought in by hearsay that anybody is going to object to. They believe the practice will continue as it stands. In a very

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difficult sentencing you bring in people to testify. Often you simply summarize as counsel for either the state or the defense that which you think the judge should hear and nobody objects. If there is an objection ORS 137.090 requires that it be done either if the witness is available, by testimony or in the event the witness is not available,by some other adequate means.

324 ALLISON SMITH said he was not familiar with the particular statute and so he could not comment on it. He did agree with what Mr. McCandlish had said except when the particular statute was cited because Mr. Smith repeated he was not familiar with it. He did agree with the principal.

329 BRUCE SMITH took no particular position on the proposed amendment.

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331 MOTION:
SENATOR WYERS MOVED THE ADOPTION OF THE AMENDMENT AS STATED BY THE CHAIR.
NO OBJECTION AND THE AMENDMENT WAS ADOPTED.

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341 <u>RULE 101(4)(e) Granting or revoking probation.</u>

THE CHAIR said that Mr. McCandlish's group was suggesting the deletion of the text "Granting or revoking probation and in lieu of that deletion the following phrase be inserted, "The dispositional phase of a probation violation proceeding, except that testimony in aggravation or mitigation of the punishment shall be presented in the manner provided by ORS 137.090.". (EXHIBIT F, p. 3).

367 MR. McCANDLISH discussed his proposed amendment. (See pp. 2-3, Exhibit F). The witness said there should be a distinction between the dispositional phase and the adjudicatory phase because the dispositional phase descends it. Even at sentencing because of the extreme consequences just as in sentencing on the original crime the limitations of ORS 137.090 so far as how you present aggravating or mitigating circumstances should apply also.

REP. SPRINGER said he felt a little uncomfortable addressing something as sensitive as the sentencing and moving beyond that to the granting or revoking probation without really having an opportunity to discuss this with someone who can speak for the Bench in this regard.

436 ALLISON SMITH stated he had some misgivings about this concept. He said he thought Mr. McCandlish was probably right in that most judges follow the Rules of Evidence in determining whether or not they should revoke probation. He said that he knows of a great many instances where as a practical matter it is quite an imposition among the people involved. This is particularly true when it is an employer for a different part of the state. MR. SMITH said he had seen this happen a lot in eastern Oregon. Often the probation officer will be at the hearing but because of the distance it is very difficult to get some employer down there. He felt there were other instances where there should be some kind of a relaxed rule. ALLISON SMITH said this concept had not been discussed in his Association's legislative meetings and therefore he was not prepared to answer the question as fully as he should.

461 BRUCE SMITH stated that his committee had taken no position on this.

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SENATOR WYERS asked Mr. McCandlish whether he had discussed this with Judges Unis and Jones or raised it previously.

MR. McCANDLISH responded that they had talked about it but not with the specific language and they generally agreed with that concept. He said that he had raised it at the last meeting when the Judges were present and even though neither of them spoke in support, neither of them objected to the statements he was making about his perception about what most judges do.

MR. McCANDLISH continued and said that over the course of the interim the issue has been addressed and he said he could represent to the committee that he knew of no objection that Judge Jones and Judge Unis has. He repeated that they had not seen the proposed language.

TAPE 2A

027 MOTION:
SENATOR WYERS MOVED THE ADOPTION OF THE AMENDMENT PROPOSED BY MR. McCANDLISH. (Exhibit F, p. 3).

028 SENATOR SMITH said that in deference to the objections that have been raised in the committee and in all courtesy to those who object there ought to be an opportunity to hear from others on this point.

REPRESENTATIVE SPRINGER said he objected to Senator Wyers' motion.

SENATOR WYERS withdrew his motion.

MOTION:
SENATOR BROWN MOVED THE McCANDLISH AMENDMENT. (Exhibit F, p. 3). SENATOR BROWN said it seemed to him a very important question when you have a question as to whether you have somebody committed or not as part of a revocation proceeding the Rules of Evidence should apply. He felt it was a very central issue and well taken.

SENATOR BROWN said he was not calling for a vote at this time. He did not know what the procedural method would be but he felt the committee should not move on without the amendment at least having been made.

THE CHAIR said there was no amendment on the floor to Rule 101(4)(e). THE CHAIR said it would remain as it is for adoption with the total rule.

068 RULE 101(4)(g) Proceedings under ORS chpater 135 relating to conditional release, security release or release on personal recognizance.

THE CHAIR explained that Professor Kirkpatrick had submitted a relatively simple amendment which would merely add to the end of the sentence in Rule 101(4)(g) by deleting the period and adding "and to preliminary hearings.".

Bruce Smith of the Oregon State Bar has submitted what the Chair assumed to be an amendment in the form of The American Law Institute's "Model Code of Pre-Arraignment Procedure (TENT. Draft. No. 5, April 25, 1972). (EXHIBIT G).

BRUCE SMITH (see above) said that EXHIBIT G has been submitted as a proposed amendment. He explained that the "discussion" or "commentary" followed the proposed amendment in EXHIBIT G.

MR. BRUCE SMITH asked to clarify what his position here is. He explained that he is the chairman of an ad hoc committee of the Oregon State Bar on the Proposed

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Evidence Code. He explained the committee consisted of five members. It was specially appointed during the spring of 1980 to study the Evidence Code and have input into the legislative process. MR. SMITH made it clear he was speaking here only on behalf of the committee and not on behalf of the Oregon State Bar or the Board of Bar Governors of the Bar.

MR. BRUCE SMITH said he thought Exhibit G, the proposed amendment, is a fairly complex amendment. What it really says is that the Rules of Evidence will apply in preliminary hearings except that the rule may be relaxed with respect to Hearsay under a couple of situations. One would be if it is necessary and two if there is some assurance of reliability of the hearsay testimony. The rule in Oregon is unclear at this point with some courts following one procedure and some another. This would provide a bit more flexibility than the rigid rule of requiring all the Hearsay Rules be applied in preliminary hearing.

100 MR. McCANDLISH explained that he was looking at EXHIBIT G, the proposed amendment, for the first time. It seemed to him that the approach suggested by the Oregon District Attorney's Association at the last meeting of this committee is a sound approach. (EXHIBIT H).

STEPHEN GRIFFITH, House Legal Counsel, said it was. Allison Smith's submitted proposal (Exhibit H) would be added to the commentary.

MR. McCANDLISH said he had not seen Allison Smith's proposal for changes in the commentary. However, he believed that from comments Allison Smith had made at the last meeting would lead him to believe that the Bar's position has the same desired goal. The Bar approaches it from a different way. MR. McCANDLISH expressed the opinion that the Bar's position had some disadvantages. He then described how preliminary hearings are handled in Multnomah County.

MR. McCANDLISH suggested to the committee that specific exceptions be worked out. If it is an affidavit of an out-of-state witness, then that is what it is. So that trial courts will know. Otherwise, this approach of the Bar (EXHIBIT G) would require a foundation be laid by the police officer who is testifying, or whomever is testifying at the preliminary hearing, as to how reliable it is. MR. McCANDLISH felt it would take up more time than it would save.

168 ALLISON SMITH, District Attorney's Association, said he was inclined toward the Oregon State Bar Ad Hoc Committee proposal in preference to the one he had put forth. (EXHIBITS G and H). He felt that the Bar proposal provided the kind of guidance that the various judges handling those matters need. It is spelled out in the statute under the Bar proposal without going to commentary.

He said he was a bit concerned when general inapplicability of the rules of evidence to a lot of things is talked about. He said that "(a)-(g) are listed and it seems to be saying that these rules do not apply except in these limited statutory exceptions that are put out. (p.1, lines 16-29, p.2, lines 1-5, HB 2030). Perhaps we are missing the point in that the Rules of Evidence apply to most parts of those proceedings. By saying "just inapplicable" may be doing a disservice down the road. There could easily be a misreading of the Code in the future if it is kept in this form. He wondered whether the whole SECTION should not be rethought. He did not think it would be a particular thing for the police officer to lay the foundation in this particular thing or a problem for the police officer to do so.

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MOTION:
SENATOR WYERS MOVED THE AD HOC COMMITTEE'S PROPOSED AMENDMENT AS AN ADDITION TO (d) Rule 101, SECTION 2.

BRUCE SMITH explained he thought it might better be a separate paragraph.

MR. GRIFFITH pointed out another problem that this has not been accurately drafted according to the framework of the Code which is that the "Rules do not apply in the following situations" and it gives a list in which they do not apply. The EXHIBIT G uses the phrase "shall apply."

SENATOR WYERS ASKED THEN TO MAKE HIS MOTION CONCEPTUALLY WITH THE UNDERSTANDING IT WOULD BE BROUGHT BACK LATER FOR FINAL APPROVAL.

HIS CONCEPTUAL MOTION WAS ACCEPTED.

REPRESENTATIVE LOMBARD suggested that this is phrased in the positive, it might more appropriately be placed (2) as an addition to that subparagraph. This might be better than trying to rephrase it in the negative and slip it in as one of the lettered subparagraphs.

SENATOR WYERS ACCEPTED THAT AS AN AMENDMENT TO HIS MOTION. HE WONDERED WHETHER IT COULD BE SHORTENED UP SOME WAY AND HAVE PART OF IT IN THE COMMENTARY. HE ASKED THAT COUNSEL LOOK INTO THAT.

LEGAL COUNSEL LaMAR explained that it was Counsel's opinion that limitations on evidence in preliminary hearings be placed as amendments to the Criminal Code rather than as a part of the Evidence Code.

SENATOR BROWN shared Counsel's concern that this is a positive statement and should not be incorporated into the list of exclusions.

CHAIRPERSON MASON explained that because of that exact factor Representative Lombard had suggested that it be put in subparagraph 2 with a positive statement.

REPRESENTATIVE LOMBARD added that he would, however, feel more comfortable if committee counsel had an opportunity to look at it and came back with a recommendation.

REPRESENTATIVE MASON said that the conceptual motion should be to adopt the policy decision which the committee made today and leave it to committee counsel for correct placement.

NO OBJECTION TO THE CONCEPTUAL AMENDMENT AND IT WAS ADOPTED.

MOTION:
THE CHAIR MOVED THE ADOPTION OF RULE 101 AS AMENDED.

NO OBJECTION AND RULE 101 WAS ADOPTED AS AMENDED.

SECTION 3. Rule 102. Purpose and construction. (p.2, HB 2030; p. 5 EXHIBIT A).

MOTION:
THE CHAIR MOVED THE ADOPTION OF SECTION 3, Rule 102.
NO OBJECTION AND it was ADOPTED.

Page 8

SECTION 4. Rule 103. Rulings on evidence. (p. 5, EXHIBIT A; p.2, HB 2030).

THE CHAIR advised the committee that Professor Kirpatrick had suggested that the following be added to Rule 103(1) following the phrase "right of the party is affected," (line 12, HB 2030) "and evidentiary error is not presumed to be prejudicial.". (EXHIBIT C).

LEGAL COUNSEL apprised the committee of the reasons set forth by Professor Kirkpatrick for the addition. He argues that in the commentary to the rule, the advisory commentary, this is not meant to overrule present Oregon law but there is a suspicion because of the difference in the line of cases upon which the rule is based it might be interpreted to, in fact, change law.

SENATOR BROWN'S initial reaction was that it was not good law. He said it seemed to him there was a line of Supreme Court cases where a court has held that certain types of evidentiary areas that have a constitutional basis or have presumptively harmful effect. SENATOR BROWN felt it was too broadly stated and MS. LaMAR agreed. He said he was not sure it would do any good even to state it.

LEGAL COUNSEL GRIFFITH pointed out that this was an area where Judges Jones and Unis indicated that the committee did have discretion and wished to exercise it to overrule the Meyer v. Harvey Aluminum case. (EXHIBIT A, p. 7).

MOTION:
REPRESENTATIVE SPRINGER MOVED THE ADOPTION OF PROFESSOR KIRKPATRICK'S LANGUAGE. (See above).

SENATOR GARDNER said he favored changing the rule but he was not sure that the phraseology was exactly the way to do it.

CHAIRPERSON MASON agreed with Senator Gardner.

LEGAL COUNSEL GRIFFITH said the suggestion of the Judges had been that if the committee wished to adopt that position, that it could be taken care of in commentary. In effect it would be commentary to Rule 103(1). The commentary would indicate that the legislature, in passing the rule, had taken the position that the holding of Meyer v. Harvey Aluminum was no longer effective.

REPRESENTATIVE SPRINGER said that with that understanding in the commentary he would WITHDRAW HIS MOTION. HE WITHDREW HIS ORIGINAL MOTION AND MOVED THAT IT BE INCLUDED IN THE COMMENTARY AS STATED BY MR. GRIFFITH.

REPRESENTATIVE RUTHERFORD asked if it was being suggested that if the language is left the way it presently is, that the legislature would have overruled the Harvey v. Meyer Aluminum case provided that it is so stated in the commentary.

THE CHAIR said he believed that was the intention.

SENATOR WYERS said he recalled the testimony from the Judges also. He felt that if the motion to leave the language alone now is adopted, it would give the committee a week to get written comments for additions to the commentary. Plus the two Judges might be present to express their views. However, the Judges had said case law could be changed by so stating in the commentary.

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SECTION 6. Rule 105. Limited admissibility. (p. 10, EXHIBIT A; p. 2, HB 2030).

No objection or proposed amendments from witnesses present.

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098 MOTION:
CHAIR MOVED THE ADOPTION OF SECTION 6. RULE 105.
NO OBJECTION AND IT WAS ADOPTED.

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120 SECTION 6a. ORS 41.880 is amended to read:
41.880. Rule 106. When part of transaction proved, whole admissible. (p. 10, Exhibit A; p. 3, HB 2030).

124 ELLIOTT LYNN, Represented Oregon Trial Lawyers Association. (EXHIBIT I). His association proposed that at line 3, page 3 of HB 2030 the language ", the whole," be deleted and ", all relevant portions of the whole," be inserted.

MR. LYNN said this had been discussed at the last meeting of the committee. He said he thought Judge Jones had wanted to adopt Federal Rule 106. (SEE EXHIBIT B - archives oversized exhibits). The advisory committee rejected that rule.
MR. LYNN said that when SECTION 6a had been discussed during the interim Judge Unis had raised a potential problem. (p. 10, EXHIBIT A). JUDGE UNIS stated that in Black v. Nelson, a March 1967 case, the Supreme Court said that the statute which is almost identical to SECTION 6a was not to be interpreted literally.

JUDGE UNIS said that SECTION 6a would create a problem that would hit Black v. Nelson head on. That is why MR. LYNN was proposing the change. (EXHIBIT I). Under his proposal only relevant portions of evidence would be admitted by the trial court. This would eliminate the problem which Judge Unis had pointed out regarding SECTION 6a.

THE CHAIR called attention to a statement made by Mr. McCandlish in his prepared testimony. (EXHIBIT F, p. 3).

SENATOR GARDNER said the change is exactly the same language that has been construed by the court and the court has said it is not to be interpreted literally. Specifically, it is not to be interpeted to include oral conversations. By simply reiterating that language and assuming the committee wanted to, how would it be made applicable to oral conversations.

MR. LYNN said that if he understood the Senator correctly, the SEnator was saying that the Oregon Supreme Court states that oral testimony. . . .

SENATOR GARDNER said he had not read the Black v. Nelson case.

MR. LYNN read from Black v. Nelson: "Statute providing (ORS 41.880) that when a part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other party not to be given literal interpretation." In Black v. Nelson the defense wanted to get in some self-serving, irrelevant statements. They were in writing. The statute says to let in the whole thing. Under the present proposal, only relevant evidence would be allowed and that would be determined by the judge.

In response to a question from Senator Gardner, the witness said he read the case as qualifying it to "relevant" materials.

1B SENATOR GARDNER said the safer thing to do if we wanted to change the laws is to spell it out in the rules.

THE CHAIR reviewed the topic for the committee. Professor Kirkpatrick's language is meant to overrule the Meyer case but does not really say that. Representative Springer's position is that it should be in the commentary overruling the Meyer case. Senator Gardner's position is that perhaps it should not only be in the commentary overruling the Meyer case but also put down in black and white in the rules. The policy decision remains as to whether or not the Meyer case should be overruled. THE CHAIR thought that was what the vote should be on.

REPRESENTATIVE RUTHERFORD wanted to align himself with Senator Gardner's position.

SENATOR SMITH said he would like to do so also.

In response to a question from SENATOR BROWN, COUNSEL GRIFFITH said that it simply says that there is no presumption of harm in a civil case. The Meyer case says the opposite. The rule would say there is no presumption of harm in a civil case.

THE CHAIR asked if there was any objection to the proposition of a conceptual amendment of overruling Meyer v. Harvey Aluminum, 263 Or 487, as it applies to this particular situation.

SENATOR WYERS said that he had not read the case and therefore could not vote on that.

COUNSEL GRIFFITH pointed out the motion could be phrased without reference to the Meyer v. Harvey Aluminum case. The concept could be put into the motion.

THE CHAIR RESTATED THE MOTION. THE PROPOSITION WAS MADE THAT THE COMMITTEE OVERRULE THE RULE OF THE HOLDING WHICH STATES THAT THERE IS ERRONEOUS ADMISSION OF EVIDENCE IN A CIVIL CASE.

COUNSEL LaMAR explained that Professor Kirkpatrick did not anticipate that there would be an official commentary. If the committee is not inclined to keep changing the Code provisions per se, then the adoption of an official commentary spelling it out more clearly than could be achieved in potential amendments to the rule might be the way to handle the situation.

NO OBJECTION AND IT WAS ADOPTED.

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077 THE CHAIR ASKED MR. SMITH FROM THE DISTRICT ATTORNEY'S ASSOCIATION IF HE HAD ANY OBJECTION TO SECTION 4. RULE 103 and he had none. The same question was posed to MR. SMITH OF THE AD HOCK COMMITTEE and MR. McCANDLISH of the PUBLIC DEFENDERS. THEY HAD NO OBJECTION.

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081 MOTION:
THE CHAIR MOVED THE ADOPTION OF SECTION 4, RULE 103 AS AMENDED.
NO OBJECTION AND IT WAS ADOPTED.

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084 SECTION 5. Rule 104. Preliminary questions. (p. 7, EXHIBIT A; p. 2, HB 2030).

No proposed amendments were put forth from the witnesses present.

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089 MOTION:
THE CHAIR MOVED THE ADOPTION OF SECTION 5, RULE 104.
NO OBJECTION AND IT WAS ADOPTED.

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SENATOR FADELEY wanted to know whether this change would make the rule the same as the case holding and the response from the witness was that he believed it would. In Black v. Nelson the Supreme Court used the language concerning evidence to be let in "to be competent must be material." MR. LYNN said he had said "relevant" basically because the Proposed Code proposes doing away with the distinction between "relevance" and "materiality" because most judges and attorneys do not know the difference anyway.

SENATOR FADELEY said that what the witness was saying was to make it so it did not change the law but then would make it more acceptable to retain it.

SENATOR FADELEY said he liked the amendment being proposed.

THE CHAIR said he would accept a motion for the Senate side.

COUNSEL GRIFFITH advised the Chair that a vote could be taken of all those present it can be brought up for reconsideration by a quorum of House members.

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251 SENATOR FADELEY MOVED THE PROPOSED AMENDMENT PUT FORTH BY MR. LYNN. (EXHIBIT I, SECTION 6a. Rule 106).

NO OBJECTIONS AND IT WAS ADOPTED.

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266 MOTION:
THE CHAIR MOVED POSSIBLE ADOPTION AND FUTURE ADOPTION OF Rule 106.

NO OBJECTION BY THE SENATE MEMBERS PRESENT. NO OBJECTION BY THE THREE HOUSE MEMBERS PRESENT WITH THE UNDERSTANDING IT WILL TAKE A FOURTH VOTE FOR A FINAL VOTE.

COUNSEL LaMAR said that although the Chair had indicated that Professor Kirkpatrick favored the adoption of the Federal Rule, amendment to ORS 41.880 will allow much more extensive elaboration of acts, declarations and conversations than the Federal Rule which deals only with specific writings of the court of the statements admitted. Professor Kirkpatrick's argument suggests that if the jury is going to see a part of a written statement, they should be allowed to the entire thing as modified by our court in cases it has dealt with writings only. The court has felt those other portions in writing should be relevant. The representation of Black v. Nelson as has been presented to the committee is certainly accurate but we do not have in this state a development as to the extent to which acts and occurrences and conversations would also be admissible.

She felt the testimony had mixed "apples and oranges." One of them is limiting the statute of proponent rule to relevant evidence. The second half of the question is to the extent to which we want to allow total episodes to come in at that point which may or may not be disruptive rather than an elucidating element in that portion of the trial.

SENATOR FADELEY asked whether it wasn't true that the Code of Evidence was a Code of Evidence as opposed to a Code directing the judge at all points about what the order of proof or the order of presentation will be. It talks more about what can be admitted more than it talks about when and how. It is not an order of control of the trial as far as he could see.

COUNSEL LaMAR said she thought that was true in general.

SENATOR GARDNER that the change that might make rise to the problem Counsel had referred to was that the committee was saying or using the words "at that time" and

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they were being added to the language. He felt Counsel LaMar was making a valid point.

SENATOR BROWN pointed out that that language was in the Federal Rules.

SENATOR GARDNER said that the Federal Rules were limited to written. They are a lot less time consuming to present.

REPRESENTATIVE RUTHERFORD said that the statute does not say it has to be heard at that time. The statute says it "may".

SENATOR GARDNER said he did not know what that meant when it said "may at that time be inquired into by the other." SENATOR GARDNER read that as giving him a right to inquire into it at that time. He has the right to inquire at that time and the other side does not.

COUNSEL LaMAR then discussed another problem that was not addressed or cured by the proposed amendment. (Exhibit I). Theoretically there could be conversation, portions which were privileged, which although be relevant, would not be admissible.

REPRESENTATIVE RUTHERFORD said that if the concern was as to who had the discretion, perhaps the language should be used "may at the discretion of the court."

COUNSEL GRIFFITH responded to SEnator Gardner's and Representative Rutherford's concern. He said the commentary of the Judiciary Committee indicates that permissive language does not affect the judge's control over the order of presenting evidence. (EXHIBIT A, p. 10).

SENATOR GARDNER said that the language of the rule says that you may inquire into it at that time. The sequence is preserved.

REPRESENTATIVE RUTHERFORD said this returned to a concern of his as well as Senator Gardner's and that was putting things into the commentary which are really meant to be part of the statute.

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417 MOTION:
SENATOR GARDNER MOVED RECONSIDERATION OF THE ELLIOTT LYNN AMENDMENT (Exhibit I). NO OBJECTION TO THE MOTION TO RECONSIDER.

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428 MOTION:
SENATOR GARDNER MOVED THE FEDERAL RULE (Exhibit A, p. 11).

This would change the law in Oregon according to Senator Gardner.

SENATOR FADELEY then elaborated and said it would change the law so that the present statute which the subcommittee wanted to retain would be repealed and replaced. It would be replaced by a statute that only allowed proof of a document but not concerning any kind of oral communication.

SENATOR GARDNER said that would be at the time the other side's case was being presented. You can always come back during your own case. Since the language has been added "at that time" to the earlier statute, what it is addressed to is being able to require your opponent to put in the entire part of a document, conversation, or whatever.

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SENATOR FADELEY asked whether the reason for adoption of the Federal Rule was because those who wanted the Federal Rule did not want anything like the statute that had been in effect in Oregon all these years concerning oral things to be covered by the Rule.

SENATOR GARDNER said he was not sure that the Oregon law has been interpreted -- has not had the language "at that time" in it to require the judge to let the evidence in during the opponent's case.

MR. LYNN did not know. He said that Federal Rule 106 said the same thing "may require in" at that time. It narrows the categories. It does say that an adverse party may require and that means may require the judge to do something. Under the present statute ORS 41.880, there is no requirement that the judge do that. Under the proposed SECTION 6a, there is no requirement that the judge allow the presentation at that time.

COUNSEL GRIFFITH said that certainly the way it is written on the face, it indicates that a party (and it is not a direction to a judge) may do something at a certain time. It could be construed to give that party the right to do it. It may or may not exercise the right.

SENATOR WYERS said it was very hard to appeal a case on an evidence point. In evidence case law, the judge has very wide discretion in these matters. He felt that unless a very strong word such as "shall" or "require," "may" means that the person can ask out. He did not feel strongly about whether it was going to be extended to oral statements.

Ms. LaMAR said that the judge did have some degree of latitude under the Federal Rule because he has to make some preliminary determination as to whether fairness would allow immediate introduction of the remainder of the writing be important. The party is afforded the right and they can demand that right but there has to be a preliminary determination.

For explanation, the CHAIR explained that the present motion was to adopt the Federal Rule which is for writings or recordings.

REPRESENTATIVE RUTHERFORD said he was talking about SECTION 6a on p. 10 of the Proposed Code (Exhibit A).

He was told that that included oral conversations already.

The motion does not include oral statements. Past Oregon law did.

SENATOR FADELEY wanted to know what the purpose was in restricting Oregon practice.

SENATOR GARDNER said it eliminated a potential for some disruption. You are attempting to deal with the order of proof rather than what is to be proven.

SENATOR GARDNER WITHDREW HIS MOTION AND THE ORIGINAL RULE REMAINED UNAMENDED.

Meeting was adjourned.

Respectfully submitted,

Harriet Civin, Chief Committee
Assistant, Senate Justice Committee

SEE NEXT PAGE FOR LIST OF EXHIBITS

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EXHIBITS:

Exhibit A - PROPOSED OREGON EVIDENCE CODE, December, 1980. Report of the Legislative Interim Committee on Judiciary. Filed with Archives (1981 session) Senate Justice Committee Oversized Exhibits.

Exhibit B - FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES (Effective July 1, 1975 -- As Amended to April 1, 1979). Filed with Archives (1981 session) Senate Justice Committee Oversized Exhibits.

Exhibit C - OREGON LAW REVIEW "Reforming Evidence Law in Oregon". Volume 59, Number 1. University of Oregon. 1980. Laird C. Kirkpatrick. Filed with Archives (1981 session) Senate Justice Committee Oversized Exhibits.

Exhibit D - Committee Procedure for Evidence Code. Prepared by staff.

Exhibit E - Outline prepared by staff.

Exhibit F - Oregon Criminal Defense Lawyers Association. James McCandlish, Metropolitan Defender's Office.

Exhibit G - Oregon State Bar Ad Hoc Committee on Proposed Code of Evidence. Bruce Smith, Eugene, Oregon.

Exhibit H - Allison Smith, Oregon District Attorney's Association.

Exhibit I - Oregon Trial Lawyer's. Elliott Lynn.

Exhibit J - Witness Registration

HOUSE COMMITTEE ON JUDICIARY

Joint Meeting of House Judiciary Subcommittee 1 and Senate Justice Committee

February 5, 1981 3:10 p.m. 350 State Capitol

WORK SESSION

Members Present:	Senator Jan Wyers, Co-Chairperson Representative Tom Mason, Co-Chairperson Senator Walter Brown Representative Joyce Cohen Representative Peter Courtney Senator Jim Gardner Senator Ed Fadeley Senator Ken Jernstedt Senator Ted Kulongoski Representative Kip Lombard Representative Bill Rutherford Senator Bob Smith Representative Dick Springer
Staff:	Stephen Griffith, Legal Counsel, House Judiciary Christena LaMar, Legal Counsel, Senate Justice Pearl Bare, Committee Assistant, House Judiciary
Witnesses:	Elliott Lynn, Oregon Trial Lawyers Association
MEASURE:	HB 2030 - Relating to evidence law (Article I)
Tapes:	H-81-JUD-45 H-81-JUD-46

Tape 45
Side A

001 CHAIRPERSON WYERS called the meeting to order and opened the work session.

Rule 101(g)

017 CHRISTENA LaMAR presented the committee with the proposed and adopted changes to HB 2030 (Exhibit D, HB 2030). This details what the committee has adopted to this time.

The first proposed amendment is 101(g). There was discussion and alternate proposals for the application. The committee adopted the

proposals of the Ad Hoc Committee on Evidence from the Oregon State Bar.

The proposed 135.133 is attached on page 2 (Exhibit D, HB 2030). This is the first half of the Ad Hoc Committee's tentative rule of evidence. The second half is an amendment to ORS 135.185. Those two proposals contain all of the substance of the Ad Hoc Committee's tentative draft on the code of prearraignment procedure.

She recommended the proposal rather than including this into the evidece code.

059 CHAIRPERSON WYERS stated this would be a minor addition to the evidence code of putting preliminary hearings subject to an ORS reference. It makes reference to the section in ORS that the committtee would be adding.

070 MOTION: CHAIRPERSON WYERS moved the proposed addition to Rule 101(g) as set forth in the proposal (Exhibit B, HB 2030).

075 MOTION PASSED: Hearing no objection, the CHAIR so ordered.

085 MOTION: REP. MASON moved adoption of page 2 of the proposal (Exhibit D, HB 2030).

089 MOTION PASSED: Hearing no objection, the CHAIR so ordered.

100 Rule 103

101 MS. LaMAR stated that the committee adopted, in principle, an amendment to Rule 103. The committee was concerned about the rules reflecting an over over-ruling of Myers v. Harvey Aluminum in which the Supreme Court indicated there was a presumption. This presumption is designed to overcome that ruling in that evidentiary area presumed to be prejudicial in a civil case. A sentence in the commentary (Exhibit E, HB 2030) was added to reflect that.

111 MOTION: REP. MASON moved the language in the proposal for Rule 103 (Exhibit D, HB 2030).

117 MOTION PASSED: Hearing no objection, the CHAIR so ordered.

119 Rule 106

121 CHAIRPERSON WYERS stated that Rule 106 was adopted at the last meeting. The question now is if the committee wants to reconsider it.

138 MR. GRIFFITH stated that there was a consensus of the committee members present on the adoption at the last meeting. The House did not have a quorum.

142 ELLIOTT LYNN, representing the Oregon Trial Lawyers Association (OTLA), stated that his association's proposal was given at the last meeting. It is in the proposal from staff (Exhibit D, HB 2030).

His proposal now is that line 3, page 3, HB 2030, should read "conversation or writing is given in evidence by one party, the whole on the same subject as long as otherwise admissible". (Exhibit F, HB 2030). He is changing his proposal because legal counsel raised the issue of privilege being involved. That would require waiver of the privilege and that other evidence that is not admissible be admitted.

190 CHAIRPERSON WYERS stated this was cleaning up an Oregon statute. The other option is to go with the federal rule, which is in the bill.

204 MR. GRIFFITH suggested the language "the whole on the same subject, where otherwise admissible".

215 SEN. GARDNER asked what the current law is with respect to privilege in this context. Can privileged material come in under ORS 41.880?

224 MS. LaMAR stated that Rule 511 is the rule that caused her to suggest that there should be a limitation on the extent to which Rule 106 would apply. The Interim Committee added language (page 96, Exhibit A, HB 2030) which goes to the issue of voluntary disclosure. The attempt was to clarify that by the language on the last two lines of the rule: "and testifying on direct examination". It was added to make certain that a witness could not inadvertently waive an otherwise privileged communcation by testifying on, for example, cross-examination.

If Rule 105 were applied without any restriction of "otherwise admissible" language, a party could attempt to admit privileged material.

This is a fairly unclear area insofar as the privilege rule and the extent to which privilege is waived.

271 REP. MASON asked why the federal rule was not adopted by the Interim Committee. The federal rule (Exhibit B, HB 2030) says "introduction of any part or any other writing which ought in fairness to be considered contemporaneously with it".

285 MS. LaMAR stated that she could only say that the judges felt there was no reason to make a change.

301 CHAIRPERSON WYERS stated that he did not think the law would be very different no matter which way the committee went.

312 MR. LYNN stated that the reason given for the Interim Committee not adopting Federal Rule 106 speaks just to introduction of evidence with respect to writings or recorded statements. The evidence rule

in Oregon has been ORS 41.880, which allows act, declarations, converstaions or writings. He read from ORS 41.880.

The feeling of the Interim Committee was that ORS 41.880 was broader than the federal rule and if the reason for introducing the evidence was for fairness and completeness, a broadening of the rule would be in the greater interest of justice than a narrowing of the rule.

338 SEN. FADELEY stated that Rule 511 tries to take care of the problem of broadening this so far that it interfers with the privilege. He does not think Rule 106 modifies or changes the rule of privilege. He did not think the problem was inherent. Using the words "unless otherwise admissible" is trying to counteract a thought-up problem.

He did not believe this rule opens the admissibility as much as other people believe. The proposal from the Interim Judiciary Committee does not reduce the amount of evidence which would be available. It would not change the law in a restrictive way so that there would be less evidence at a given time.

The difficulty with the federal rule is that it does not mention oral statements.

389 REP. MASON asked why OTLA needed the amendment.

394 MR. LYNN stated that his proposal is to keep Oregon law the way it is. The present ORS 41.880 reads almost the same as Rule 106 except it reads "may, at that time,". The emphasis is to admit the evidence at the time that the other part of the act, conversation or other thing is admitted. As long as the evidence was otherwise admissible, it would allow the evidence in at that time and allow a greater understanding of the evidence given.

He proposed the "otherwise admissible" language because of the decision in Balck v. Nelson in which the Supreme Court said that ORS 41.880 would not be given literal interpretation. The writing in that case contained a hearsay statement which was clearly not admissible.

438 MOTION: CHAIRPERSON WYERS moved the language in the bill on lines 2 through 6 of page 3 with, after the word "whole", the addition of the words "on the same subject, where otherwise admissible".

457 SEN. BROWN stated that the law is such that if part of the writing is not admissible as an exception to the hearsay rule, the hearsay rule will always dominate. Those rules cannot be read out of context. The requirement of admissibility is always going to be present.

He did not think that the amendment was necessary.

Tape 46

Side A

040 MOTION PASSED: In response to a roll call vote, the CHAIR delcared the amendment adopted. VOTING AYE: Cohen, Courtney, Gardner, Fadeley, Jernstedt, Kulongoski, Lombard, Rutherford, Smith, Springer, Mason, Wyers. VOTING NO: Brown.

041 Commentary Approval

042 Rule 100

043 REP. MASON moved adoption of the proposed commentary to Rule 100 (Exhibit G, HB 2030).

044 MOTION PASSED: Hearing no objection, the CHAIR declared the commentary approved.

045 Rule 102

047 MR. GRIFFITH stated that the Advisory Committee's commentary in all the proposed commentaries has been amended by referring to rule as sections. Headings have been deleted. The commentaries have also been changed so that there is only a single commentary showing the legislative intent, rather than the way the commentary is in the proposed code (Exhibit A, HB 2030). All commentary on a given section appears together. The subections are discussed in numerical order. Corrections for grammer, gender and clarity have been made.

The proposed commentary to Oregon Rule of Evidence (ORE) 102 (Exhibit H, HB 2030) simply changes references from rules to sections. It omits the comment concerning referring to the California Evidence Code and the New Jersey Evidence Rule.

077 MOTION: REP. MASON moved adoption of the commentary to Rule 102 (Exhibit H, HB 2030).

080 MOTION PASSED: Hearing no objection, the CHAIR declared it adopted.

082 Rule 103

083 MR. GRIFFITH stated that the proposed commentary (Exhibit E, HB 2030) comes from the proposed code (Exhibit A, HB 2030). The one exception referred to in the first paragraph is the decision by the committee to over-rule the holding in Myer v. Harvey Aluminum which is explained in paragraph 3.

He explained the grammar and gender changes in the proposed commentary, the changes for clarity and the changes to acommodate the exception referred to.

130 MOTION: CHAIRPERSON WYERS moved adoption of the proposed commentary to Rule 103 (Exhibit E, HB 2030).

133 MOTION PASSED: Hearing no objection, the CHAIR declared the commentary adopted.

135 Rule 104

136 MR. GRIFFITH explained the changes in the proposed commentary (Exhibit I, HB 2030). Counsel deleted the word "not" which appears on page 9 of the proposed code (Exhibit A, HB 2030). The indication is that if it is a matter of conditional relevancy, the court makes a preliminary determination whether or not there is sufficient evidence to allow the jury to find that the conditional fact exists. The commentary in the proposed code (Exhibit A, HB 2030) is in error by including a second negative in one of the sentences. The commentary has been submitted to Judge Jones and if the judge finds the proposed commentary (ERxhibit I, HB 2030) in error, MR. GRIFFITH will inform the committee.

206 MOTION: CHAIRPERSON WYERS moved adoption of the proposed commentary to Rule 104 (Exhibit I, HB 2030).

215 MOTION PASSED: Hearing no objection, the CHAIR declared the commentary adopted.

216 Rule 105

217 MR. GRIFFITH stated that the proposed commentary (Exhibit J, HB 2030) reorganizes the commentary of the proposed evidence code (Exhibit A, HB 2030).

220 MOTION: CHAIRPERSON WYERS moved adoption of the proposed commentary (Exhibit J, HB 2030).

224 MOTION PASSED: Hearing no objection, the CHAIR declared the commentary adopted.

242 MOTION: CHAIRPERSON WYERS moved that the Senate members introduce a bill with identical language to HB 2030 so that the committee could deal with the quorum problem. (A majority of the House members had to leave because of a meeting conflict.)

262 MOTION PASSED: Hearing no objection to the motion, the CHAIR so ordered. Senate members present: Gardner, Jernstedt, Brown, Kulongoski, Wyers. Senate member excused: Smith, Fadeley.

265 CHAIRPERSON WYERS adjourned the meeting at 3:55 p.m.

Submitted,

Pearl Bare,
Committee Assistant

EXHIBITS

Exhibit A, HB 2030 - Proposed Evidence Code (See Over-Sized Exhibits)
Exhibit B, HB 2030 - Federal Rules of Evidence (See Over-Sized Exhibits)
Exhibit D, HB 2030 - Proposed and adopted changes to HB 2030, Article 1, presented by staff
Exhibit E, HB 2030 - Proposed commentary to ORS 103 presented by staff
Exhibit F, HB 2030 - Proposed changes in Articles II, III & IV of the Proposed Oregon Evidence Code, HB 2030, presented by Elliott Lynn
Exhibit G, HB 2030 - Proposed comentarry to ORE 100 presented by staff
Exhibit H, HB 2030 - Proposed commentary to ORE 102 presented by staff
Exhibit I, HB 2030 - Proposed commentary to ORE 104 presented by staff
Exhibit J, HB 2030 - Proposed commentary to ORE 105 presented by staff

Chairperson:
SEN. JAN WYERS
Vice-Chairperson:
SEN. ROBERT SMITH

Staff:
FELICIA M. GNIEWOSZ
KRISTENA A. LaMAR
Legal Counsel
HARRIET CIVIN
Chief Committee Assistant
GLENDA HARRIS
VERA J. MOISEVE
Committee Assistants

SENATE COMMITTEE ON JUSTICE
Room 347, State Capitol
SALEM, OREGON 97310
(503) 378-8833

Members:
SEN. WALT BROWN
SEN. EDWARD FADELEY
SEN. JIM GARDNER
SEN. KENNETH JERNSTEDT
SEN. TED KULONGOSKI

Joint Meeting of the House Judiciary Subcommittee 1 and Senate Committee on Justice

February 12, 1981 3 p.m. ROOM 350

HOUSE BILL 2030 -- PROPOSED EVIDENCE CODE

Members Present: Senator Walter F. Brown
Representative Peter Courtney
Senator Kenneth Jernstedt
Senator Ted Kulongoski
Rep. William Rutherford
Senator Robert Smith
Rep. Dick Springer
Senator Jan Wyers, Co-Chairperson
Rep. Tom Mason, Co-Chairperson

MEMBERS EXCUSED: Represenative Joyce Cohen
Senator Jim Gardner
Senator Edward Fadeley
Representative Kip Lombard

STAFF PRESENT: Kristena LaMar, Legal Counsel, Senate Committee on Justice
Harriet G. Civin, Chief Committee Assistant, Senate Justice

Witnesses: Tape 3A
023 - Elliott Lynn, Trial Lawyers Association
036 - James McCandlish, Oregon Criminal Defense Lawyer's Association.
069 - Allison Smith, Oregon District Attorney's Association

METER READING GIVEN FOR INITIAL TESTIMONY OF EACH WITNESS. ADDITIONAL TESTIMONY OFTEN FOLLOWS.

MINUTES WERE RECORDED ON 60 MINUTES CASSETTE TAPES. METER READINGS INDICATE MINUTES ON EACH SIDE.

MINUTES

SENATE COMMITTEE ON JUSTICE AND HOUSE JUDICIARY SUBCOMMITTEE 1
PROPOSED EVIDENCE CODE

February 12, 1981 — 3 p.m. — ROOM 350

MEMBERS PRESENT:
Senator Walter Brown
Representative Peter Courtney
Senator Kenneth Jernstedt
Senator Ted Kulongoski
Rep. William Rutherford
Senator Robert Smith
Representative Dick Springer
Senator Jan Wyers, Co-Chairperson
Representative Tom Mason, Co-Chairperson

MEMBERS EXCUSED:
Representative Joyce Cohen
Senator Jim Gardner
Senator Edward Fadeley
Representative Kip Lombard

STAFF PRESENT:
Kristena LaMar, Legal Counsel, Senate Committee on Justice
Harriet G. Civin, Chief Committee Assistant, Senate Justice

TAPE 3A

008 Meeting was called to order at 3:15 p.m. in Room 350 by Representative Tom Mason, CHAIRPERSON.

RULE 106:

THE CHAIR said the first order of business would be the adoption of the commentary of Rule 106. He called attention to EXHIBIT D which was prepared by staff.

023 ELLIOTT LYNN, Trial Lawyers Association. Called attention to the fifth line in the commentary of Rule 106. He said he would suggest "only if the remaining evidence is otherwise admissible."

026 NO OBJECTION AND THE COMMENTARY TO RULE 106 WAS ADOPTED.

030 RULE 101(4)(e). Granting or revoking probation. (Exhibit A, p. 2). (Exhibit E).

036 JAMES McCANDLISH, Oregon Criminal Defense Lawyer's Association. (Exhibit E). The standard set forth in these proposed amendments would adopt the standards set forth in Gaymon v. Scarpelli 441 US 778, 93 SCt 1756, 36 L.Ed 2d 656 (1973). He called attention, particularly, to footnote 5. Footnote 5 is that opinion which closely tracks the Morrisey v. Brewer opinion and parole violation proceedings. The finding is that due process doesn't apply to probation violation proceedings.

The proposal put forth by the Oregon Criminal Defense Lawyer's Association (Exhibit E) is an attempt to codify Gaymon. It basically sets forth a two-factor test in order to admit one of the three types of hearsay evidence. Whether or not the judge finds that the requirement to appear would impose an unreasonable hardship on one of the parties and, secondly, that the judge is convinced of the reliability of the information.

This is the change from the original proposal put forth the first week of the session.

069 ALLISON SMITH, OREGON DISTRICT ATTORNEY'S ASSOCIATION. Mr. Smith said in reference to the proposed amendments, p. 2(3) ". . .hearsay evidence in the form of an affidavit, deposition or documentary evidence may be admitted. . . ,"

Page 2

(Exhibit E) he reads that to mean you could not have a probation officer explain what had happened. It would have to be done by some document and presumably submitted in advance. MR. SMITH said he did not think that was too desirable. He explained that in most of the cases you did not really know whether they were going to be contested or not. In some instances it is going to require a number of affidavits or depositions being prepared for what may turn out not be an issue. He feels the probation officer who has spoken with the employer should be allowed to make his recommendations for revocation.

MR. SMITH said he had a second problem with (5). He explained that Mr. McCandlish had not addressed himself to that as yet. It says "the conditions of probation have been violated." There is an inference there that all of the conditions have been violated and it should say "a" condition. He explained this was not part of the evidence code but it seemed to be changing part of the probation procedures.

CHAIRPERSON MASON asked whether Mr. Smith was reading this as saying the probation officer could not testify as he or she would normally testify presently. That this would require an affidavit.

MR. SMITH said that was the way he read it. The way Exhibit E is written it would exclude the oral testimony of the probation officer or whoever else it might be.

SENATOR BROWN asked whether Mr. Smith did not think that documentary evidence would be available in any event. He thought "documentary evidence" would sound like a police report. He wondered whether it would not almost always be the case that you would have something in hand other than a phone conversation, etc.

MR. SMITH answered that usually they have something in hand that is called a "pink slip". It is a report recommending probation revocation.

THE CHAIR asked Mr. McCandlish whether he agreed that the language found on lines 3 and 4 of Exhibit E be deleted. The language to be deleted would be on page 2, lines 3 and 4 "in the form of an affidavit, deposition or documentary evidence".

MR. McCANDLISH felt the deletion would create substantial havoc with the proposed amendment. He explained there had been quite a bit of debate on this in the Board meeting which had taken place yesterday.

SENATOR WYERS asked whether documentary evidence could include a letter from an employer.

MR. McCANDLISH said he would think not. An example of documentary evidence would a heroin urinalysis.

SENATOR WYERS asked how the probation officer would prove that the person lost his job without bringing the employer.

MR. McCANDLISH said that if it was not an unreasonable hardship, they would have to bring in the employer.

REPRESENTATIVE SPRINGER raised a procedural question. He said this rule was considered previously. He wanted to know if this was not a belated attempt to reconsider what has already been considered by this forum and voted upon.

MS. LaMAR, legal counsel, explained that the committee had considered this and indicated they would like to reconsider the issue if the judges indicated that

they followed a procedure other than that. The committee was assuming they followed a procedure which was essentially in compliance with the changes Mr. McCandlish suggested. As of today's mail, counsel had not received a response from the judges -- Judge Jones and Judge Unis. She explained that they had really not had time to respond to the specific language being suggested. In principal the judges had agreed but had not studied the proposed language.

MS. LaMar called attention to the first paragraph of Exhibit E (first page of the actual proposed amendments and not the cover letter). Other than that proposal, no other changes had been suggested for that statute. There were no other changes suggested with reference to the criminal procedure code or the evidence code.

MR. SMITH said that as rule 104(e) presently stands the District Attorneys Association had no complaint with it. However, Mr. McCandlish had proposed some changes and Mr. Smith had objected to those proposed changes. Presently, there is still some argument as to whether the McCandlish suggestions should be adopted.

REPRESENTATIVE SPRINGER felt he had not had sufficient information from the court or the judges on this issue. He said he did not feel comfortable to proceed without having that input from the judges.

The committee decided to postpone action on this question until the input mentioned above was available.

3-A

SECTION 7. Rule 201(a). Scope. (EXHIBIT A, p. 13).

220 SENATOR WYERS MOVED ADOPTION OF RULE 201(a).
NO OBJECTION AND IT WAS SO ORDERED.

SECTION 8. Rule 201(b). Kinds of facts. (EXHIBIT A, p. 16).

THE CHAIR pointed out that Professor Kirkpatrick (Exhibit C) had made a suggestion that there be added "including facts for which notice is provided by statute".

COUNSEL LaMAR pointed out that Professor Kirkpatrick had written his article at some point during the interim judiciary committee proceedings. It would seem to counsel that paragraph (2) of rule 201(b) may well be interpreted to cover facts by which notice is provided by statute.

In response to a question from Senator Brown, Chairperson Mason explained that although Professor Kirkpatrick wanted to broaden this, Ms. LaMar was saying that the definitions are in the statute."Sources whose accuracy cannot reasonably be questioned" would include that which the Professor was suggesting.

In answer to a question from Senator Wyers for an example of the fact that is notice by statute, the Chair gave the presumption of legitimacy.

MS. LaMAR said that presumption might be at least changed by the adoption of this. In some of the other substantive areas of law, worker's compensation for one, there are fact which create presumptions.

MS. LaMAR told the committee that Professor Kirkpatrick's article (Exhibit C) does not explain what other facts he has concern about being recognized.

SENATOR WYERS MOVED THAT ON SECTION 201(b)(2), THE PHRASE BE ADDED "INCLUDING FACTS FOR WHICH NOTICE IS PROVIDED BY STATUTE."

The Chair said he thought the phrase should be added by deleting the period at the end of the sentence and inserting the word "and".

NO OBJECTION AND THE MOTION WAS ADOPTED.

301 THE CHAIR MOVED THE ADOPTION OF THE FULL RULE - SECTION 8, Rule 201(b).
NO OBJECTION AND IT WAS SO ADOPTED.

312 SECTION 9. Rules 201(c) and 201(d). When mandatory or discretionary.

SENATOR WYERS MOVED THE ADOPTION OF Rules 201(c) and (d).

MS. LaMAR explained that she thought these rules had been written as one because they had been combined out of the Federal Rules (Exhibit B) and the same pattern was continued in the Oregon Rules.

NO OBJECTION AND IT WAS ADOPTED.

SECTION 10. Rule 201(e). Opportunity to be heard. (Exhibit A, p. 18).

341 THE CHAIR MOVED THE ADOPTION OF RULE 201(e).
NO OBJECTION AND IT WAS SO ORDERED.

353 SECTION 11. Rule 201(f). Time of taking notice. (Exhibit A, p. 18).

354 SENATOR WYERS MOVED THE ADOPTION OF RULE 201(f).

MS. LaMAR pointed out there were two proposals for change. (1) Oregon Criminal Defense Organization (Exhibit F), (2) Oregon Trial Lawyer's Association (Exhibit G).

400 ELLIOTT LYNN, OREGON TRIAL LAWYERS. He said they objected to this rule because it allowed judicial notice to be taken above the trial court level. This raises problems different in a criminal trial than a civil trial. In a criminal trial it obviously raises the problem that the defendant, if a judicated fact were judicially noticed at the appellate court level and a fact that must be proved by the prosecution at the trial court level in order to convict someone, this would deprive the defendant of the right to have the jury pass upon that fact. This example would create constitutional problems that would probably require reversal of cases and have to have them sent back down for another trial.

Present law in Oregon seems to be working fairly well even though there is no specific statutory law except one reference in the statutes to judicial notice ORS 41.410. Presently in the state of Oregon there is an open question as to whether judicial notice can be taken above the trial court level. It creates problems in the criminal as well as the civil law.

SENATOR WYERS MOVED RULE 201(f) ADDING THE WORD "TRIAL" BEFORE THE WORD"PROCEEDING" AT THE END OF THE SENTENCE.

SENATOR WYERS explained he would withdraw the motion if there was objection to it. His purpose was to get the question before the group.

SENATOR SMITH asked for both parties to comment on the question.

461 ALLISON SMITH, DISTRICT ATTORNEYS ASSOCIATION, said he had not comment.

REPRESENTATIVE RUTHERFORD said he thought the court would be aware of circumstances in which to recognize a fact, judicially, would deprive the person of a jury trial and therefore the court would not apply it. On the other hand, there may be cases in which the recognition of the judicial fact on appeal might very well save a lot of time, effort, etc.

MR. LYNN felt those would be isolated cases. The rest of the practice in Oregon might be "mucked up" just for those few isolated cases.

REPRESENTATIVE RUTHERFORD pointed out it was identical to the Federal Rules and it has not disturbed the federal practice.

MR. LYNN felt there might be something about the federal practice that we do not have in the state of Oregon.

1. 4-A
028 MR. LYNN called attention to an example in the commentary in Exhibit A (Rule 201(f) where the Federal Court refused to take judicial notice for criminal jury trials.

REPRESENTATIVE RUTHERFORD explained that that was exactly the point he was making. The Federal Court recognized that the application of judicial notice in a criminal trial would be wrong and it has not done so. However, they do not say that they won't do it in other cases. He said he was saying that that might be an appropriate standard to give the court especially in light of this case and take this case as a statement of the legislative intent.

MR. LYNN argued that would deal with the criminal law area. He did not feel it would solve the problem by any means. It would help if there were some commentary in that direction to show that a judicially noticed fact could not be taken into criminal trial above the trial court level.

MR. LYNN said that as rule 201(f) is set out, it doesn't say anything about taking judicial notice of criminal versus civil. It just says you can take judicial notice at any stage of the proceedings.

REPRESENTATIVE RUTHERFORD wondered whether the Federal Rule could be adopted and say that by doing so the legislative intent is that the case of United States v. Jones would be governing in this area.

MR. LYNN asked what would then be done about the civil section where the Court of Appeals or the Supreme Court takes judicial notice of an adjudicative fact that is important that then requires under the proposed statute notice of the taking of judicial notice and requires an opportunity for a hearing. Those levels of court--appellate and Supreme Court--are not the areas lending themselves well to taking evidence and bringing in witnesses.

REPRESENTATIVE RUTHERFORD was not suggesting trials at at the appellate level. What he was suggesting was that the court on the civil side go through the same reasoning process it has used in United States v. Jones.

REPRESENTATIVE COURTNEY wondered whether some of the problems raised by Representative Rutherford could be dealt with in the commentary. He suggested that it be restricted in the way Rutherford was suggesting without restricting it by putting the word "trial".

SENATOR BROWN called attention to p. 19 of Exhibit A, the commentary. He said there was a whole series of cases which have gone one way and some the other way. He would feel the Federal Rule should be adopted as it is originally written and let the courts put additional gloss on it.

REP. RUTHERFORD felt the commentary could state that it is not legislative intent to deprive anyone of a jury trial.

ROLL CALL:

Senator Walter Brown		No
Representative Courtney		No
Senator Jernstedt		No
SEnator Kulongoski	Aye	
Representative Smith		No
Representative Rutherford		No
Representative Springer	Aye	
Senator Jan Wyers	Aye	
Representative Mason, CHAIR PERSON	Aye	

MOTION FAILED.

121 SENATOR WYERS MOVED RULE 201(f) unamended. NO OBJECTION AND IT WAS ADOPTED.

The question still remains as to its relationship to existing law. Senator Brown has rightfully noted that Oregon law is confusing on the subject.

COUNSEL LaMAR called attention to the commentary in the Federal Rule (EXHIBIT B). There is a one sentence commentary that says "In accordance with the usual view judicial notice may be taken at any stage of the proceedings whether in trial court or on appeal." She felt there were no explanations for the questions raised above in the Federal Rules commentary.

REP. RUTHERFORD felt that our commentary should state the adoption of the rule is not intended to deprive a litigant of their right to a jury trial as to a fact that is being adjudicated.

MOTION PASSED AND THE ACTUAL WORDING WAS LEFT TO COUNSEL.

147 SECTION 12. Rule 201(g). Instructing the jury. (Exhibit A, p. 19).

Professor Kirkpatrick had proposed that a phrase "in favor of the prosecution" be added. (Exhibit C). This would be after sentence in (2).

MS. LaMAR said there had been discussion at the public hearing of the first session of this joint committee. In criminal cases (according to the discussion) the court could not have, essentially, what has been being discussed here about judicially noticing a fact that operates against the defense. Rather than say "against the defendant", Professor Kirkpatrick used, the phrase "in favor of the prosecution."

Page 7

This would operate against the defendant.

CHAIRPERSON MASON asked whether there could be a judicially noticed fact which operates in favor of the defendant and not be in favor of the prosecution. THE CHAIR said he was a bit uncomfortable with the specificity of his language in that it almost reads as if you can only have judicially noticed facts in a criminal case all but qualified and that they are not conclusive. That they can only be for the prosecution. It seemed to Representative Mason by adding the Kirkpatrick language that only the prosecution would have the benefit of it.

SENATOR WYERS said that he thought the defendant had to be protected against judicially noticed facts being conclusive but the state does not have to be protected from that in a prosecution.

SENATOR BROWN asked whether it could be conclusive in a civil case against the defendant.

SENATOR WYERS said the paragraph started out with "In criminal cases. . . ."

192 SENATOR KULONGOSKI MOVED PROFESSOR KIRKPATRICK'S AMENDMENT.

COUNSEL LAMAR recalled for the committee that Judge Jones had indicated the judges would have no objection to the addition of the Kirkpatrick language.

NO OBJECTION AND THE MOTION WAS ADOPTED.

THE CHAIR MOVED ADOPTION OF RULE 201(g) as amended.

MR. McCANDLISH pointed out that the way this has been drafted, the fact that it is judicially noticed against the state in favor of the defendant in a criminal case would follow the same prescriptions of subsection (1). However, it doesn't say that.

MS. LaMAR was asked if that could be reflected in the commentary and she said it certainly could be.

227 SECTION 13. Rule 202. Kinds of Law. (EXHIBIT A, p. 20).

Professor Kirkpatrick had a proposed amendment. (Exhibit C). Delete from (7) the phrase "when pleaded and referred to by its title, if any, or by its commonly accepted name, and the date of its approval when approval is necessary to render it effective."

MS. LaMAR read from Professor Kirkpatrick's article. (Exhibit C). He feels that Rule 202 is too restrictive since it requires of the person seeking to have a municipal ordinance judicially recognized is more stringent than the actual rules require.

231 SENATOR BROWN MOVED THE AMENDMENT AS PREVIOUSLY READ BY THE CHAIR.

MOTION WAS ADOPTED.

255 SENATOR BROWN MOVED RULE 202. NO OBJECTION AND THE RULE WAS ADOPTED.

260 SENATOR KULONGOSKI asked whether Rule 202(5) was existing law.

MR. McCANDLISH said he had spoken with Judge Jones on this question and about this Section and what his interpretation of it meant. They discussed (5) -- with particular emphasis on what a court record is. A court rule is quite easy to figure out but a court record is not. The case in the commentary that is expressly over-ruled and, therefore, the law would be changed in the state of Oregon by this proposal is Staté ex rel. Juvenile Dept. v. Martin, 271 Or 603, 533 P2d 780. (Exhibit A, p. 23). MR. McCANDLISH went into some detail concerning this case and the ruling made by the judge. The judge had read into the record material dealing with commitment proceedings saying that he was taking notice of the contents of the files. This was specifically over-ruled by the appellate court. What is being done by the proposal before the committee is letting in any other file under the prescription of relevancy. It has to be relevant in order for it to come in as a judicially notice of fact.

MR. McCANDLISH said that even though the intent of the section does not change anything but procedures, it could have a very substantive impact. Judge Jones informed Mr. McCandlish that his intention or the intention of the committee when they drafted it was to only allow that evidence from the record which would be otherwise admissible. In other words, if it was hearsay, it would be admissible.

SENATOR KULONGOSKI expressed concern with the words "record of the court". He was concerned with how broad it would actually be interpreted as.

MR. McCANDLISH said that was also their concern.

SENATOR KULONGOSKI said he did not have a language which would limit his concern. However, he thinks is an extremely broad definition of judicial notice. He is more concerned about the civil cases even though examples had been given in criminal cases.

CHAIRPERSON MASON called attention to page 23 of Exhibit A and read from (5).

384 SENATOR KULONGOSKI MOVED RECONSIDERATION OF THE VOTE ON RULE 202. MOTION TO RECONSIDER WAS ADOPTED.

401 SENATOR KULONGOSKI MOVED DELETION OF (5) Rule 202.

REP. RUTHERFORD objected to the deletion. It seemed to him the rule would make court proceedings more efficient. The case raised by Mr. McCandlish, Rep. Rutherford would not be allowed by these rules. Those records were apparently case workers records and files that were used in the case cited by Mr. McCandlish. That would seem to him to be hearsay. The alternative is to say that all these records become authenticated. That seemed to him to be too cumbersome.

SENATOR KULONGOSKI suggested he delete the word "records" and leave "rules" in.

NO OBJECTION AND IT WAS SO ORDERED.

SENATOR KULONGOSKI was concerned that you would open up a search of all the filings and they are all subject to judicial notice. He feels existing law making it relevant to the items and file in the case.

REP. RUTHERFORD did not like being limited to the one case. He wanted to know why could not notice that another case had been filed or that it had been completed.

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SENATOR KULONGOSKI said the word "records" is much broader than notice that a case has been filed.

REP. SPRINGER said that he noticed under rule 202 that what it seems to create in this category is kinds of law and law judicially noticed is defined as. If we are getting into records, we are not talking about law but we are talking about facts. He felt we ought to give the court discretion before it is opened up.

REP. COURTNEY said that he is of the opinion that judicial notice is pretty structured, restrictive type of doctrine. The discussion by Senator Kulongoski points up that perhaps we are unstructuring it to the extent that he would be nervous of what he had done prior to this. Therefore, he was going to support Senator Kulongoski's motion because he wanted to be sure that doctrine if we choose judicial notice on appeal.

TAPE 3-B
033

SENATOR KULONGOSKI HAD MOVED THAT (5) BE AMENDED TO THE EXTENT THAT THE FIRST TWO WORDS "RECORDS AND" BE DELETED WHICH WOULD LEAVE THE PARAGRAPH READING "RULES OF ANY COURT OF THIS STATE OR ANY COURT RECORD OF THE UNITED STATES OR ANY STATE TERRITORY OF THE JURISDICTION OF THE UNITED STATES." THE COMMENTARY SHOULD BE AMENDED TO REFLECT THE MOTION.

ROLL CALL:	Senator Brown	Aye	
	Representative Courtney	Aye	
	Senator Jernstedt	Aye	
	Senator Kulongoski	Aye	
	Representative Rutherford		NO
	Representative Springer	Aye	
	Senator Wyers	Aye	
	REP. MASON, CHAIRPERSON	Aye	

MOTION PASSED.

MS. LaMAR pointed out an ambiguity in paragraph 4 of Rule 202. On the second line in Exhibit A, p.21 the words are used "public entity of the United States."

MS. LaMAR said that "public entity" is not a particularly widely recognized term. There is ambiguity between the text of subsection (4) and the commentary. The commentary indicates that the intent of the rule is to recognize the regulations, ordinances and similar legislative enactments issued by any state, territory or possession of the United States rather than the language "public entity."

REP. RUTHERFORD said he preferred the language in the commentary better than the language in the rule.

MS. LaMAR wanted to know whether the committee wanted to substitute the words "state, territory or possession" for "public entity".

NO OBJECTION AND IT WAS SO ORDERED.

T 3B

SECTION 21. Rule 401. Definition of "relevant evidence." Exhibit A, p. 39.

CHAIR MOVED ADOPTION OF RULE 401.
NO OBJECTION AND RULE 401 WAS ADOPTED.

085 SECTION 22. RULE 402. Relevant evidence generally admissible. (Exhibit A, p. 41)
CHAIR MOVED ADOPTION OF RULE 402.
NO OBJECTION AND IT WAS SO ORDERED.

091 SECTION 23. RULE 403. Exclusion of relevant evidence on grounds of prejudice, confusion or undue delay.

SENATOR KULONGOSKI called attention to"C.", Exhibit A, p. 43. He called attention to the elimination of surprise as a basis for excluding relevant evidence and wanted to know why that had been deleted.

REP. RUTHERFORD thought it was covered in the discovery statute.

CHAIR MOVED THE ADOPTION OF SECTION 23, RULE 403 and there was no objection and it was adopted.

WORK SESSION CONCLUDED.

122 PUBLIC HEARING:
SECTIONS 24, 25, 26, 27, 28, 29, 30, 31. Rules 404, 405, 406, 407, 408, 409, 410, 411, 412. (Exhibit A, pp. 44-65).

133 LEGAL COUNSEL LaMAR reported she was authorized by Judge Jones to indicate that the judges would like to eliminate from the commentary under summary the "archaic," in the words of Judge Jones, "the chastity of a victim under a statute specifying the victim's chastity as an element of the crime of seduction,". (Exhibit A, p. 45).

NO OBJECTION AND IT WAS SO ADOPTED.

143 ELLIOTT LYNN, Oregon Trial Lawyer's Association. (Exhibit H, p. 3). Section 24, Rule 404. (Exhibit A, p. 44).

He called attention to Exhibit A, p. 47. MR. LYNN believed that what was being done with this rule was expanding the use of circumstantial character evidence in civil cases contrary to the material in "DISCUSSION", Exhibit H, p. 3. He called attention to (c) of Rule 404 (Exhibit A, p. 44). It would allow character evidence to come in under this section if it fits within rules 607-609. These rules deal with the opinion evidence of some one.

MR. LYNN expressed the fear that this would create a trial within a trial and cited examples.

MR. LYNN said the Oregon Trial Lawyers do not object to character evidence. They do object to opinion evidence which may be the result of a single occasion.

SENATOR WYERS asked Mr. Lynn what he was proposing be done.

MR. LYNN said he was proposing that evidence of the character of the witness should be eliminated as follows: "as provided in sections 51 to 53". (Exhibit A, p. 44).

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He called attention to Exhibit A, p. 124. MR. LYNN said you had to look at what is allowed in under Rule 402(4)(c) and look ahead to Rules 51 to 53 to see what is allowed in there.

In response to a question from Representative Rutherford, MR. LYNN said reputation in the community to something that is built up over a period of time. It is not the single occasion where you have met someone, where the dealings turned sour, who now feels that your character for truthfulness is bad. However, in the community as a whole you may be known as a truthful individual.

REP. RUTHERFORD agreed with the theory but gave as an example the Gortmaker trial when one of the key witness against Gortmaker was called and a judge was called and asked what that witnesses character reputation in the legal community was and the judge said it was bad. Rep. RUTHERFORD said he thought only that judge believed that. REP. RUTHERFORD felt that was strictly opinion.

SENATOR KULONGOSKI asked whether a foundation had to be laid for character evidence when a person comes in to testify as to the general reputation of the person.

MR. LYNN said you absolutely had to do so.

THE CHAIR felt we were getting ahead of ourselves since this was really found in a later section.

Meeting adjourned.

Respectfully submitted,

Harriet G. Civin, Chief Committee Assistant
Senate Committee on Justice

EXHIBITS:

Exhibit A - PROPOSED OREGON EVIDENCE CODE, December, 1980. Report of the Legislative Interim Committee on Judiciary. Filed with Archives (1981) session) Senate Committee on Justice Oversized Exhibits.

Exhibit B - FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES (Effective July 1, 1975 -- As Amended to April 1, 1979). Filed with Archives (1981 session) Senate Committee on Justice Oversized Exhibits.

Exhibit C - OREGON LAW REVIEW "Reforming Evidence Law in Oregon". Volume 59, Number 1. University of Oregon, 1980. Laird C. Kirkpatrick. Filed with Archives (1981 session) Senate Committee on Justice Oversized Exhibits.

Exhibit D - Oregon Rule of Evidence 106. Prepared by staff.

Exhibit E - Oregon Criminal Defense Lawyer's Association. Presented by James McCandlish of Metropolitan Public Defender's Office. Dated February 9, 1981.

Exhibit F - Oregon Criminal Defense Lawyers Association. Presented by James McCandlish. (See above).

Exhibit G - Oregon Trial Lawyers. Elliott Lynn

Exhibit H - Oregon Trial Lawyers' Proposals in Articles II, III, IV. Elliott Lynn,

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EXHIBITS (continued):

Exhibit I - Oregon State Bar Ad Hoc Committee on Proposed Code of Evidence.

Exhibit J - Committee Procedure for Evidence Code (HB 2030). Prepared by staff

SENATE COMMITTEE ON JUSTICE
Evidence Code
EXHIBIT D
January 29, 1981
2 pages - staff document

COMMITTEE PROCEDURE

FOR

EVIDENCE CODE

(HB 2030)

Text

Each week the joint Senate and House committee will announce, in advance, the evidence code sections it expects to cover in the public hearing regularly scheduled on Thursdays at 3 p.m.

A. Persons desiring to amend the language of the sections of the bill scheduled to be considered are urged, in the strongest terms, to submit any proposed amendments in writing to committee counsel and other interested persons (whose names will be available from committee counsel) at least 48 hours in advance of the hearing.

B. Prior to the Thursday hearing and work session, committee counsel will prepare a list of possible issues for use by the committee members. This will indicate points of difference between the recommended text of the advisory committee and the recommended text of the Interim Joint Committee on the Judiciary; between these texts and the commentary by Professor Kirkpatrick in 59 Oregon Law Review; and all proposed amendments that have been submitted by prospective witnesses.

C. The committee will hear from interested persons during the public hearing, and in work sessions on the same day decide on any amendments to the code sections scheduled for consideration.

Commentary

An official commentary will accompany the evidence code as approved by the committee and (it is to be anticipated) the legislature.

A. The commentary will not be published in Oregon Revised Statutes, but will be referred to therein as the official statement of legislative intent. Cf. ORS 90.920 (3).

B. Commentary will be prepared by committee counsel in the week following the adoption of the pertinent code text, and will reflect any instructions given by the committee in its work session on the text.

C. The commentary will reflect any changes in the code since the recommendations of the advisory committee. If none have been made, however, it is anticipated that the official commentary will draw heavily on the commentary of the advisory committee that is printed in the Report of the Interim Committee on the Judiciary.

D. Persons who wish to amend any section of the evidence code should also submit, in writing, a proposed commentary appropriate to that amendment at the time they submit the amendment.

E. Persons who do not wish to amend the text, but who do propose amendments to the commentary, are urged to submit their proposed commentary amendments to committee counsel, in writing, before the session in which the committee first considers the related code text.

F. Committee counsel will provide committee members and interested persons with the proposed commentary to code sections adopted, five days after their adoption.

G. The first item of business of any session of the joint committee will be the approval of commentary to any text adopted in a prior session.

ARTICLE

RULE	ADVISORY COMMITTEE	INTERIM COMMITTEE	PROF. KIRKPATRICK
101 Applicability	FRCP 1101 & FRE 101		Add to 4 (g) "and to preliminary hearings."
102	FRE 102	Added to 4 (h) Juvenile proceedings' adjudicatory phase.	
103	FRE 103		Add to (1) "and evidentiary error is not presumed to be prejudicial."
104	FRE 104		
105	FRE 105		
106	ORS 41.880	Added "at that time" to statute.	FRE 106

SENATE COMMITTEE ON JUSTICE
Evidence Code
EXHIBIT E
January 29, 1981
5 pages - staff document

ARTICLE II

RULE	ADVISORY COMMITTEE	INTERIM COMMITTEE	PROF. KIRKPATRICK
201(a)	FRE 201(a) as modified		Add definition of Judicial Notice to act.
201(b)	FRE 201(b)		Add "including facts for which notice is provided by statute" to (2).
201(c)&(d)	FRE 201 (c) and (d)		
201 (e)	FRE 201(3)		
201 (f)	FRE 201(f)		
201 (g)	FRE 201(g)		Add "in favor of the prosecution" after sentence in (2).
202	Cal. Ev. C ss. 451, 452		Delete "when pleaded and referred to by its title, if any, or by its commonly accepted name, and the dat of its approval when apprc is necessary to render it effective." from (7).

ARTICLE

RULE	ADVISORY COMMITTEE	INTERIM COMMITTEE	PROF. KIRKPATRICK
301-304	Nonexistent		Define "inference," "presumption," "burden of pro and "burden of persuasion'
305	Cal. Ev. C s 500		
306	Original provision		
307	Cal. Ev. C s550		
308	FRE 301 modified		
309	FRE 303 modified		Change criminal 'presumpti to 'inferences' and all allusions to "a presumed fact" to "an inference."
			Change "beyond a reasonabl doubt" to "by a preponder of the evidence," in (2)(t
310	Uniform Rule 301(b)		
311	ORS 41.360		Delete (1) and transfer tc ORS 17.250 as instruction. Delete (22). Add ( ) A statute providir that a fact or a group of facts is prima facie evide nce of another fact establ es a presumption within th meaning of this Rule.

ARTICLE IV

RULE	ADVISORY COMMITTEE	INTERIM COMMITTEE	PROF. KIRKPATRICK
401	FRE 401		
402	FRE 402 modified		
403	FRE 403 modified		
404	FRE 404 modified		Allow evidence of the victi only in homicide prosecutic rather than all crimes in (2)(b). Delete (2)(d), and forbid evidence of reputation for violent behavior in any civil actions-
405	FRE 405 modified	Re-numbered the provision, and changed paragraph order.	Add, after "reputation <u>in the community or group in which the individual habitually associated,"</u> in (1), or add a definition of "reputation" separately.
406	FRE 406	Added definition of "habit."	
407	FRE 407		Allow introduction of evidence of remedial measures in defective design product liability cases.
408	FRE 408		Add "Exclusion is required where the sole purpose is to impeach a party by showing a prior inconsister statement after (1)(a).
409	FRE 409	Added exclusion of payment of injuries for property damage.	

RULE	ADVISORY COMMITTEE	INTERIM COMMITTEE	PROF. KIRKPATRICK
410	(Deleted)	Added FRE 410	
411	FRE 411		
412	FRE 412 modified	Added application to prosecutions for "attempted rape, sodomy, or sexual abuse."	Add to define "constitutionally protected," to (2)(a): '(1) when such evidence relates to the motive or bias of the alleged victim; or (2) when such evidence is required to rebut or explai scientific or medical evidence offered by the state." Add to (3)(a) "on the alleg victim through the office of the district attorney."

SENATE COMMITTEE ON JUSTICE
Evidence Code
EXHIBIT F
January 29, 1981
6 pages - James McCandlish

OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

ARTICLE I

Rule 101

(1) Rule 101(3) and (4) - Exclusion of Rule 514 from application to proceedings enumerated in Rule 101(4)(a) through (h). This appears to be a drafting error. Rule 514 merely recognizes the existence of statutory privileges not touched by the proposed Code. The intent of the drafters was to make privileges applicable to all proceedings, including proceedings in which the Code will not apply (e.g. sentencing). As drafted, only the privileges specifically enumerated in Article V would be applicable.

Proposed Amendment

On page 1 of the bill, line 22, delete "513" and insert "514".

On line 24, delete "514" and insert "601".

(2) Rule 101(4)(c) - Exclusion of Extradition Proceedings. In as much as the intent is to maintain present practice and requirements as outlined by statute, ORS 133.743 to 133.857, the rule should expressly so state.

Proposed Amendment

On page 1 of the bill, line 29, delete the period and insert ", except as required by ORS 133.743 to 133.857.".

(3) Rule 101(4)(d) - Sentencing. The Interim Judiciary Committee Commentary to this sub-section recognizes that the rules of evidence must apply in certain situations. E.g. State v. Collins, 43 Or App 265 (1979)(Defendant properly objected to the district attorney's introduction of aggravating hearsay evidence not contained in the presentence investigation). ORS 137.090 specifically limits the use of hearsay in sentencings, and should be highlighted in the Code, as well as the Commentary.

Proposed Amendment

On page 2, line 1, delete the period and insert ", except as required by ORS 137.090.".

(4) Rule 101(4)(e) - Granting or revoking probation. Granting probation occurs at sentencing and is therefore covered by (d) immediately above. Most revocation proceedings begin with an admission to a violation, and move on quickly to the dispositional phase. In those few instances wherein the violation is contested, the rules of evidence should apply. The consequences of being found in violation can be drastic. Not infrequently, persons with minor criminal records are placed on probation for Class C and B felonies. Class A felons, particularly those with Burglary I convictions, are frequently probationers and carry an exposure to a 20 year executed sentence, subject to the parole board's matrix system.

Most judges do in fact follow the rules of evidence in the first stage of a revocation proceeding. If the probation officer does not show up for the hearing, no violation will be found

unless the accused waives the right to confront the adverse witness. If the probation officer is asserting that the accused failed to follow through on a required job training program, for example, most judges will not consider the officer's hearsay testimony if the facts are contested. There is no conceptual difference between the dispositional phase of a revocation proceeding and a sentencing with respect to presentation of aggravating or mitigating circumstances occurring subsequent to the original sentencing. The limitations of ORS 137.090 should therefore apply.

Proposed Amendment

On page 2 of the bill, line 2, after "(e)" delete the rest of the line and insert, "The dispositional phase of a probation violation proceeding, except that testimony in aggravation or mitigation of the punishment shall be presented in the manner provided by ORS 137.090.".

Section 6(a)

The Interim Joint Committee deleted proposed Rule 106, and amended ORS 41.880 to allow contemporaneous introduction of other parts of a conversation, declaration, act or writing under the "rule of completeness", if necessary to understand the evidence in context. Federal Rule 106 is unnecessarily restrictive. The OCDLA supports retention of the present statute, as amended by Section 6(a).

OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

ARTICLE II

Rule 201(f)

Paragraph 2 on page 19 of Interim Committee's Report implicitly adopts the holding of United States v. Jones, 580 F2d 219, 221 (6th Cir., 1978). This section of the Commentary should be amended to expressly adopt Jones. Jones stands for the proposition that an appellate court may not take judicial notice on its own in a criminal appeal without violating the accused's right to trial by jury.

Rule 201(g)

The OCDLA agrees with Professor Kirkpatrick's suggestion, seconded by Judge Jones, that subsection (2) be amended to clarify that it applies only in those situations wherein a fact is judicially retried against the accused.

Proposed Amendment

On page 3 of the bill, line 26, delete the period and insert "against the accused.".

OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

ARTICLE IV

Rule 404(2)(b)

This paragraph would expand the use of character evidence concerning the victim's peacefulness beyond its present limitation to homicide cases only. State v. Holbrook, 98 Or 43 (1920). Federal Rule 404 retains this limitation. Professor Kirkpatrick criticizes the proposed expansion, and recommends limiting such character evidence to homicide cases.

> "Character evidence is a particularly dangerous type of evidence because it may cause a jury to base its decision on sympathy for the victim or disapproval of the victim's past conduct rather than on the relevant facts. When evidence of the victim's character is allowed, unfair pressure is placed on the defendant to present evidence of his own character. The federal rule allows evidence of a victim's character in homicide cases largely out of necessity; the victim is not alive to tell what happened. In other criminal proceedings and in civil assault and battery cases, the use of character evidence is highly questionable. The legislature should delete the proposed rule's authorization of evidence of a victim's character in non-homicide cases.". 59 Or. L. Rev. 43, 63-64 (1980).

Proposed Amendment

On page 6, line 3, after "prosecution", insert "in a homicide case".

Rule 412

The proposed rule would allow testimony on prior sexual conduct of the prosecutrix, if more probative than prejudicial when:

(1) The accused raises the defense of consent and the evidence is of prior sexual behavior with the accused; or

(2) The accused offers evidence of sexual conduct between the prosecutrix and another on the issue of whether or not he was the source of semen or injury; and

(3) If constitutionally required, without further definition.

It is recommended that Section (5) of ORS 163.475 be retained. This section was added to the statute by the 1977 Legislature to correct the vagueness problems of the prior statute, which was held unconstitutional in State v. Jalo, 27 Or App 845 (1976). ORS 163.475(5) is broader than the specifics of the proposed rule in several respects:

(1) It is not limited to "source of semen or injury"; rather it would allow "(e)vidence that is necessary to rebut or explain scientific or medical evidence offered by the state." For example, the results of a hair analysis test would be challengeable now, but not under the proposed rule, unless constitutionally required.

(2) Evidence establishing motive or bias of the prosecutrix is specifically allowable under present law; but not so under the proposed rule, unless constitutionally required.

Professor Kirkpatrick suggests that in order to provide trial courts with more guidance, greater specificity is desirable. 59 Or. L. Rev. at 69. The proposed Rule 412 needs careful review to incorporate the suggested changes. No specific amendments are proposed at this time.

OREGON STATE BAR
AD HOC COMMITTEE ON PROPOSED CODE OF EVIDENCE

SUBJECT: Section 2. Rule 101. Applicability of Oregon Evidence Code.

RECOMMENDATION: The proposed Rule does not exclude preliminary hearings in criminal cases from the Rules of Evidence. The American Law Institute's "Model Code of Pre-Arraignment Procedure (TENT. Draft. No. 5, April 25, 1972) should be adopted under section (4), Rules inapplicable.:

> "The rules of evidence for trial of criminal cases shall apply at the preliminary hearing, except that hearsay may be admitted if the court determines that it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing, and if the witness furnishes information bearing on the informant's reliability and, as far as possible, the means by which the information was obtained. When hearsay evidence is admitted, the court, in determining the existence of reasonable cause, shall consider (a) the extent to which the hearsay quality of the evidence affects the weight it should be given, and (b) the likelihood of evidence other than hearsay being available at trial to provide the information furnished by hearsay at the preliminary hearing."

DISCUSSION

In commenting on this Rule in his article, "Reforming Evidence Law in Oregon," 59 Or. L. Rev. 43, 48 (1980) Laird Kirkpatrick states:

> "The most important change from existing law is that preliminary hearings in criminal cases would become subject to the rules of evidence. This change may be unwise. Strict application of the rules of evidence to preliminary hearings may impose significant burdens on the state with little concomitant increase in protection for defendants. In fact, it probably would make prosecutors more inclined to avoid preliminary hearings by returning indictments before the date scheduled for the hearing.

> Federal Rule 1101(d)(3) exempts preliminary examinations from the rules of evidence, as do the majority of state evidence codes patterned after the federal rules. The legislature should add preliminary hearings to the list of proceedings exempted from the proposed code."

The discussion has generated considerable controversy in Oregon and elsewhere and is not answered either by any Oregon statute or by any reported Oregon appellate court decision. Some Oregon judges admit hearsay--others do not. The Federal Rules of Criminal Procedure specifically provide (Rule 5.1) that a finding of probable cause at a preliminary hearing "may be based upon hearsay evidence in whole or in part."

We believe a good compromise is achieved by the American Law Institute's Model Code quoted above.

Oregon State Bar
Ad Hoc Committee on Proposed
Code of Evidence

SENATE COMMITTEE ON JUSTICE
Evidence Code - EXHIBIT H
1/29/81 - 1 page - Allison Smith

Prepared and submitted on behalf of the Oregon District Attorneys Association

Proposed addition to commentary to Section 2 (Rule 101). To be added to commentary appearing on page 5 of Proposed Oregon Evidence Code, immediately preceding Section 3.

"It is not the intent of the Joint Senate Justice/House Judiciary Subcommittee on Evidence that this rule impose a strict application of Section 63 (Rule 802), the rule against hearsay, to preliminary hearings in criminal matters. The subcommittee intends that, as a general matter, preliminary hearings be controlled by this proposed code. However, consideration of witness availability, economy of court time and the efficient administration of justice dictates the courts exercise their discretion in permitting exceptions under Section 64(24) (Rule 803(24)) and Section 65(e) (Rule 804(e)), in those cases where law outside this evidence code does not require strict application."

SENATE COMMITTEE ON JUSTICE
Evidence Code - EXHIBIT I

1/29/81 - 1 page
Elliott Lynn

ELLIOTT LYNN REPRESENTING OREGON

TRIAL LAWYERS

RE: H.B. 2030

Section 6a. Rule 106

Substitute at line 3, page 3 of H.B. 2030, ", all relevant portions of the whole," for the present language ", the whole,".

Section 11.Rule 201(f)

Change existing language to read as follows "Judicial notice may be taken at any stage of the trial proceedings."
This involves only the insertion of "trial" to modify the word "proceedings".

EVIDENCE CODE
Joint Work Session
Staff Proposal
February 12, 1981

Joint House and Senate
Judiciary and Justice Comm.
Proposed Evidence Code
Exhibit D - 2/12/81
1 page - Prepared by staff

Oregon Rule of Evidence 106

Commentary

Oregon Rule of Evidence 106 amends the former ORS 41.880. The Legislature intends that the adoption of ORS 106 will not change prevailing Oregon law. The amendments are intended to allow (1) contemporaneous introduction of the remainder of the writing or event, but (2) only if the remaining evidence is otherwise competent. This rule is intended to codify Black v. Nelson, 246 Or 161,424 P2d 251 (1967), and Myers v. Cessna Aircraft Corp. et al, 275 Or 501, 553 P2d 355 (1976).

The Legislature considered but did not adopt Federal Rule of Evidence 106, which has a more limited application, in that contemporaneous acts, declarations, and conversations are not then admissible by the opposing party.

METROPOLITAN PUBLIC DEFENDER
MULTNOMAH COUNTY SECTION

Joint House Jud. & Senate
Justice Committees
Proposed Evidence Code HB 2030
2/12/81-6 pages- EXHIBIT E
OREGON CRIMINAL DEFENSE LAWYER'S
Association - Jim McCandlish

February 9, 1981

Kristena A. Lamar
Co-Counsel, Senate Justice
Committee
343 Capitol Building
Salem OR 97310

Dear Kris:

I.C. I must have brought OCDL directors.

These two drafts are enclosed for your perusal and comment. No one else has seen them yet. Note that the ORE 101(4)(e) proposal is a change to accomodate the witness' fear expressed at the hearing two weeks ago.

Sincerely,

JAMES E. McCANDLISH
Attorney at Law

JEM:lso
Enclosures

OREGON CRIMINAL DEFENSE LAWYER'S ASSOCIATION

ORE 101(4)(3) - PROBATION VIOLATION PROCEEDINGS

Proposed Amendments

On Page 2 of HB 2030, after "(e)", delete the rest of Line 2 and insert "Proceedings to revoke probation, except as provided in ORS 137.550."

ORS 137.550 is amended to read:

"137.550 (1) Subject to the limitations in ORS 137.010:

(a) The period of probation shall be such as the court determines and may, in the discretion of the court, be continued or extended.

(b) The court may at any time discharge a person from probation.

(2) At any time during the probation period, the court may issue a warrant and cause a defendant to be arrested for violating any of the conditions of probation. Any probation officer, police officer or other officer with power to arrest may arrest a probationer without a warrant, and a statement by the probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation is sufficient warrant for the detention of the probationer in the county jail, house of detention or local prison, when designated in such statement, until the probationer can be brought before

court. The probation officer shall forthwith report such arrest or detention to the court and submit to the court a report showing in what manner the probationer has violated his probation.

(3) The court shall hold a probation violation hearing as soon as practicable. The Oregon Rules of Evidence shall apply to the adjudicatory phase of the hearing, except that hearsay evidence in the form of an affidavit, deposition or documentary evidence may be admitted if the court determines that it would impose an unreasonable hardship on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing, and if the witness furnishes information bearing on the informant's reliability and, as far as possible, the means by which the information is obtained.

(4) The Oregon Rules of Evidence shall not apply to the dispositional phase of a probation violation proceeding, except that testimony in aggravation or mitigation of the punishment shall be presented in the manner provided by ORS 137.090.

(5) Thereupon the court, after (summary) hearing and a finding that the conditions of probation have been violated, may revoke the probation and suspension of sentence and cause the sentence imposed to be executed or, if no sentence has been imposed, impose any sentence which originally could have been imposed. A defendant who has been previously confined in the county jail as a condition of probation pursuant to ORS 137.540

shall be given credit for all time thus served in any order or judgment of confinement resulting from revocation of his probation. In the case of any defendant whose sentence has been suspended but who is not on probation, the court may issue a warrant and cause the defendant to be arrested and brought before the court at any time within the maximum period for which the defendant might originally have been sentenced. Thereupon the court, after summary hearing, may revoke the suspension of sentence and cause the sentence imposed to be executed."

Commentary

The United States Supreme Court has held that due process applies to probation violation proceedings. Gaymon v. Scarpelli, 441 US 778, 93 SCt 1756, 36 L.Ed 2d 656 (1973). In Footnote 5 of the opinion, the court recognizes that while in some cases there is simply no adequate alternative to live testimony, conventional substitutes such as affidavits, depositions and documentary evidence may be sufficient if production of the primary source is unduly burdensome on one of the parties, and an in court witness can testify as to the reliability of the evidence in question.

The dispositional phase of a probation violation proceeding is analogous to a standard criminal sentencing. The rules of evidence need not be strictly adhered to, except that evidence offered in aggravation or mitigation of punishment should be admitted subject to ORS 137.090.

OREGON CRIMINAL DEFENSE LAWYER'S ASSOCIATION

Proposed Amendments - ORE 412

1. On Page 7 of the bill, Line 18, delete "or opinion." On Line 22, delete "or opinion" and delete the second "or." On Line 23, delete "opinion."

Commentary - The reference to "opinion evdience" is unnecessary because of its deletion as proper character evidence from ORE 405. (If it is)

2. On Line 24, after "section", delete "and is" and insert "; and."

Delete Line 25.

On Line 26, after "(b)", delete the remainder of the line and insert "is evidence that. . ."

Delete Line 27 through 31 and insert:

"(A) Relates to the motive or bias of the alleged victim; or

(B) Is necessary to rebut or explain scientific or medical evidence offered by the state; or

(C) Is otherwise constitutionally required to be admitted.". ≠

Commentary - Delete the first three paragraphs of the Commentary on Page 64 of the Proposed Evidence Code and insert:

"(1) The evidence relates to motive or bias; or

(2) The evidence rebuts scientific or medical evidence offered by the state; or

(3) Is otherwise constitutionally required.

This section specifies two instances in which such evidence is constitutionally required, and comports with existing Oregon law. ORS 163.475(5), as modified by the 1977 legislature in response to the prior statute being declared unconstitutional in State v. Jalo, 27 Or App 845, 557 P2d 1359 (1976). Paragraph (C) recognizes that an unusual chain of circumstances in any given case may require that evidence of the prosecutrix's past sexual behavior be admitted in deference to the constitutional rights of the accused. ".

Justice Committees
Proposed Evidence Code-HB 2030
EXHIBIT F-2/12/81-6 pages
OREGON CRIMINAL DEFENSE LAWYER'S
ASSOCIATION- JIM McCANDLISH

OREGON CRIMINAL DEFENSE LAWYERS A

ARTICLE I

Rule 101

(1) Rule 101(3) and (4) - Exclusion of Rule 514 from application to proceedings enumerated in Rule 101(4)(a) through (h). This appears to be a drafting error. Rule 514 merely recognizes the existence of statutory privileges not touched by the proposed Code. The intent of the drafters was to make privileges applicable to all proceedings, including proceedings in which the Code will not apply (e.g. sentencing). As drafted, only the privileges specifically enumerated in Article V would be applicable.

Proposed Amendment

On page 1 of the bill, line 22, delete "513" and insert "514".

On line 24, delete "514" and insert "601".

(2) Rule 101(4)(c) - Exclusion of Extradition Proceedings. In as much as the intent is to maintain present practice and requirements as outlined by statute, ORS 133.743 to 133.857, the rule should expressly so state.

Proposed Amendment

On page 1 of the bill, line 29, delete the period and insert ", except as required by ORS 133.743 to 133.857.".

(3) Rule 101(4)(d) - Sentencing. The Interim Judiciary Committee Commentary to this sub-section recognizes that the rules of evidence must apply in certain situations. E.g. State v. Collins, 43 Or App 265 (1979)(Defendant properly objected to the district attorney's introduction of aggravating hearsay evidence not contained in the presentence investigation). ORS 137.090 specifically limits the use of hearsay in sentencings, and should be highlighted in the Code, as well as the Commentary.

Proposed Amendment

On page 2, line 1, delete the period and insert ", except as required by ORS 137.090.".

(4) Rule 101(4)(e) - Granting or revoking probation. Granting probation occurs at sentencing and is therefore covered by (d) immediately above. Most revocation proceedings begin with an admission to a violation, and move on quickly to the dispositional phase. In those few instances wherein the violation is contested, the rules of evidence should apply. The consequences of being found in violation can be drastic. Not infrequently, persons with minor criminal records are placed on probation for Class C and B felonies. Class A felons, particularly those with Burglary I convictions, are frequently probationers and carry an exposure to a 20 year executed sentence, subject to the parole board's matrix system.

Most judges do in fact follow the rules of evidence in the first stage of a revocation proceeding. If the probation officer does not show up for the hearing, no violation will be found

unless the accused waives the right to confront the adverse witness. If the probation officer is asserting that the accused failed to follow through on a required job training program, for example, most judges will not consider the officer's hearsay testimony if the facts are contested. There is no conceptual difference between the dispositional phase of a revocation proceeding and a sentencing with respect to presentation of aggravating or mitigating circumstances occurring subsequent to the original sentencing. The limitations of ORS 137.090 should therefore apply.

Proposed Amendment

On page 2 of the bill, line 2, after "(e)" delete the rest of the line and insert, "The dispositional phase of a probation violation proceeding, except that testimony in aggravation or mitigation of the punishment shall be presented in the manner provided by ORS 137.090.".

Section 6(a)

The Interim Joint Committee deleted proposed Rule 106, and amended ORS 41.880 to allow contemporaneous introduction of other parts of a conversation, declaration, act or writing under the "rule of completeness", if necessary to understand the evidence in context. Federal Rule 106 is unnecessarily restrictive. The OCDLA supports retention of the present statute, as amended by Section 6(a).

OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

ARTICLE II

2/12
cf 2/19

Rule 201(f)

Paragraph 2 on page 19 of Interim Committee's Report implicitly adopts the holding of United States v. Jones, 580 F2d 219, 221 (6th Cir., 1978). This section of the Commentary should be amended to expressly adopt Jones. Jones stands for the proposition that an appellate court may not take judicial notice on its own in a criminal appeal without violating the accused's right to trial by jury.

Rule 201(g)

The OCDLA agrees with Professor Kirkpatrick's suggestion, seconded by Judge Jones, that subsection (2) be amended to clarify that it applies only in those situations wherein a fact is judicially retried against the accused.

Proposed Amendment

On page 3 of the bill, line 26, delete the period and insert "against the accused.".

OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

ARTICLE IV

Rule 404(2)(b)

This paragraph would expand the use of character evidence concerning the victim's peacefulness beyond its present limitation to homicide cases only. State v. Holbrook, 98 Or 43 (1920). Federal Rule 404 retains this limitation. Professor Kirkpatrick criticizes the proposed expansion, and recommends limiting such character evidence to homicide cases.

> "Character evidence is a particularly dangerous type of evidence because it may cause a jury to base its decision on sympathy for the victim or disapproval of the victim's past conduct rather than on the relevant facts. When evidence of the victim's character is allowed, unfair pressure is placed on the defendant to present evidence of his own character. The federal rule allows evidence of a victim's character in homicide cases largely out of necessity; the victim is not alive to tell what happened. In other criminal proceedings and in civil assault and battery cases, the use of character evidence is highly questionable. The legislature should delete the proposed rule's authorization of evidence of a victim's character in non-homicide cases.". 59 Or. L. Rev. 43, 63-64 (1980).

Proposed Amendment

On page 6, line 3, after "prosecution", insert "in a homicide case".

Rule 412

The proposed rule would allow testimony on prior sexual conduct of the prosecutrix, if more probative than prejudicial when:

(1) The accused raises the defense of consent and the evidence is of prior sexual behavior with the accused; or

(2) The accused offers evidence of sexual conduct between the prosecutrix and another on the issue of whether or not he was the source of semen or injury; and

(3) If constitutionally required, without further definition.

It is recommended that Section (5) of ORS 163.475 be retained. This section was added to the statute by the 1977 Legislature to correct the vagueness problems of the prior statute, which was held unconstitutional in State v. Jalo, 27 Or App 845 (1976). ORS 163.475(5) is broader than the specifics of the proposed rule in several respects:

(1) It is not limited to "source of semen or injury"; rather it would allow "(e)vidence that is necessary to rebut or explain scientific or medical evidence offered by the state." For example, the results of a hair analysis test would be challengeable now, but not under the proposed rule, unless constitutionally required.

(2) Evidence establishing motive or bias of the prosecutrix is specifically allowable under present law; but not so under the proposed rule, unless constitutionally required.

Professor Kirkpatrick suggests that in order to provide trial courts with more guidance, greater specificity is desirable. 59 Or. L. Rev. at 69. The proposed Rule 412 needs careful review to incorporate the suggested changes. No specific amendments are proposed at this time.

Joint House Jud. & Senate
Justice Committees
PROPOSED EVIDENCE CODE-HB 2030
EXHIBIT G-2/12/81-1 page
OREGON TRIAL LAWYERS-LYNN

ELLIOTT LYNN REPRESENTING OREGON

TRIAL LAWYERS

RE: H.B. 2030

Section 6a. Rule 106

Substitute at line 3, page 3 of H.B. 2030, ", all relevant portions of the whole," for the present language ", the whole,".

Section 11.Rule 201(f)

Change existing language to read as follows "Judicial notice may be taken at any stage of the trial proceedings."

This involves only the insertion of "trial" to modify the word "proceedings".

PROPOSED CHANGES IN ARTICLES II, III & IV, OF THE PROPOSED OREGON EVIDENCE CODE HOUSE BILL 2030

The Oregon Trial Lawyers' Proposals

H

Section 6a Rule 106

DISCUSSION - The present Rule 106 embodies ORS 41.880 and essentially allows evidence to be admitted at the time any part of an act, declaration, conversation or writing is introduced. The reason for the timely introduction of evidence is so that a more fair and complete understanding of the evidence will result. A problem arose with respect to the Oregon Supreme Court's interpretation of ORS 41.880 in the case of Black -v- Nelson, 246 Or 161 (1967). That case generally stated that in order for evidence to be introduced, it must be material, and affect in some way, the part already given in evidence. In other words, the statute would not be given a literal interpretation.

In order to prevent any problems with the interpretation of Section 6a Rule 106, the following proposal is made.

PROPOSAL - Remove the language on page 3,line 3 ",the whole,". Substitute in its' place, the following, ",the whole on the same subject as long as otherwise admissible,".

SECTION 11 Rule 201(f)

DISCUSSION - Because of the constitutional problem of taking Judicial notice at the Appellate Court level, which effectively precludes a jury finding, and because of the unfairness and procedural problems of judicial notice on appeal in a civil case, the following proposal is made.

PROPOSAL - Section 11 Rule 201 (f) should be changed to read, "Judical notice may be taken at any stage of the trial proceedings." This involves the insertion of the word "trial" to modify the word "proceedings".

Section 14 Rule 305 and Section 15 Rule 306

DISCUSSION - Because the phrase "burden of persuasion" is confusing and carries a connotation that it is less trustworthy than "proof", it should not be adopted. The common person understands and uses phrases pertaining to proof, such as "prove it to me", and will find the phrase "burden of persuasion" difficult to grasp. Also, "burden of proof" is quantified more easily than the proposed "burden of persuasion".

The present jury instructions are couched in clear terms regarding the burden of proof, and are generally understood by the publ. and the legal community. There is no reason for making this confusing change.

PROPOSAL - In Section 14 Rule 305 and Section 15 Rule 306, the phrase "burden of persuastion" should be deleted and the phrase "burden of proof" substituted.

Section 18 Rule 309

DISCUSSION - The advisory committee commentary in Section 18 Rule 309 makes clear that the "net effect of this section is to reduce presumptions in criminal cases to nothing more than permissible inferences."

PROPOSAL - Therefore, the third full paragraph on page 32 of the Proposed Evidence Code with commentary, beginning with "therefore, the net effect. ", should be adopted as official commentary.

Section 24 Rule 404

DISCUSSION - The advisory committee commentary makes clear that it chose not to expand the use of circumstantial character evidence in civil cases. The commentary on page 47 paragraph 4 states that "sub-section 2 of this section should not be construed to allow admission of character evidence under circumstances in which it would not be currently admitted," and then goes on to point out that it still proscribes character evidence with respect to care, negligence or accident proneness, etc. in negligence cases, therefore;

PROPOSAL - The fourth full paragraph on page 47 of the advisory committee commentary, dealing with Section 24 Rule 404 should be adopted as part of the official commentary.

Section 25 Rule 405

DISCUSSION - Section 25 Rule 405 is a drastic departure from existing Oregon law. This section would allow any witness to give his opinion regarding the truthfullness of any other witness. The witnesses opinion would be based on his or her perception of events that may have taken place at any time in the past. The witness may give his opinion that another witness is a liar, with very little basis for making that opinion. The opposing attorney is then required to delve into facts and circumstances which form the basis for the witnessess' opinion. These facts and circumstances may have occured years before and may be open to several different interpretations. This would open up the need for a trial within a trial to determine if the facts which arose as a result of incidents were properly interpreted by the witness and the calling of other witnesses who may have seen or heard the same incidents but who drew different conclusions.

The witnesses' perception will of necessity, have involved peripheral matters, such as the interpretation of a contract which may have taken place between the witnesses and on which each placed a different meaning. As an example, a witness is called and he gives his opinion that the plaintiff is a liar. The basis of his opinion may be that in previous dealings with the plaintiff, the plaintiff has not lived up to his end of the contract with respect to timely delivery, etc. and therefore, the witness preceives the plaintiff as a liar.

Opinion evidence is much different than reputation evidence because reputation evidence involves what the witness has heard regarding general knowledge in the community, and does not deal with the specific opinion of the witness based upon his or her personal dealings with the person whose truthfullness is challenged. Reputation in a community is a sum of all the witnesses' actions and interactions in the community and is much more trustworthy and less prejudical than an opinion. Reputation evidence has been accepted for many years in the Oregon Courts, but there is no history of opinion evidence being admitted, and there is no Oregon case allowing opinion evidence.

In summary, if opinion evidence is allowed, it will create "trials within trials" regarding peripheral matters and will involve the calling of additional witnesses to testify regarding extraneous and peripheral matters, creating delay at trial and increased cost of trials.

Section 25 Rule 405 makes specific reference to Section 24 Rule 404 (2) which allows evidence of the character of a witness as provided in Section 51 through 53 which are Rule 607 and 609. Section 52 Rule 608 allows the credibility of a witness to be supported or attacked by opinion evidence regarding the character for truthfullness

or untruthfullness. However, it does not allow specific instances of the conduct of a witness to be proved by extrinsic evidence. Furthermore, it does not allow inquiry into specific instances of conduct on cross-examination of the witness even if they would be probative of truthfullness or untruthfullness. It is so restrictive that it only allows a witness on cross-examination to be asked if they "have heard"or "know" of specific instances of bad conduct relevant to the character trait of credibility.

Therefore, it appears that Section 52 Rule 608 allows evidence in the form of an opinion but does not allow cross-examination regarding specific instances of conduct even if they are probative of truthfullness or untruthfullness. This must be contrasted with Section 25 Rule 405 where a witness can give an opinion and upon cross-examination, inquiry is allowable into relevant specific instances of conduct. There is a seeming contadictory policy between Rule 405 and Rule 608.

Even if "opinion" is deleted, there still remains apparent contradiction of policy in the evidence to be received regarding "reputation" evidence.

PROPOSAL - The word opinion should be deleted from Section 25 Rule 405 and Section 52 Rule 608. The last sentence of Section 25 Rule 405 Subsection 1 which reads "On cross-examination, inquiry is allowable into relevant specific instances of conduct." should be deleted.

Section 26 Rule 406

DISCUSSION - The present Oregon law requires that there be an absence of eye witnesses as a prerequisite to receiving evidence regarding the habit of a person or of the routine practice of an organization. This requirement should be kept and reinforced in the Proposed Evidence Code.

It is not difficult to envision a situation where two automobiles collide at an intersection which has a stop sign controlling one direction. Both eye witnesses will testify as to their version of what happened. Then the defendant who was alleged to have run the stop sign, will parade in several witnesses who have previously driven with him, and who have known him for years and years, testify that it is his habit, custom and routine to stop at every stop sign. This has almost no reliable probative value. The real question is what happened on that particular occasion, and a parade of witnesses who did not see what happended will be of no use to the Court. It will take the Court's time and will require that a plaintiff and a defendant scout up several people who will come in and testify that they are both very, very safe drivers and never break the law.

The Oregon Rule requiring an absence of eye witnesses is and has been a workable rule and should be adopted in the Proposed Evidence Code.

PROPOSAL - The present Oregon law requiring an absence of eye witnesses before evidence of habit or routine practice can be admitted, should be codified in the new Evidence Code.

OREGON STATE BAR
AD HOC COMMITTEE ON PROPOSED CODE OF EVIDENCE

SUBJECT: Section 13. Rule 202. Kinds of law. Law judicially noticed is defined as:

(1) The decisional, constitutional and public statutory law of Oregon, the United States and any state, territory or other jurisdiction of the United States.

(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, and any other state, territory or other jurisdiction of the United States.

(3) Rules of professional conduct for members of the Oregon State Bar.

(4) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States or any public entity of the United States.

(5) Records and rules of court of any court of this state or any court of record of the United States or of any state, territory or other jurisdiction of the United States.

(6) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom, when pleaded and referred to by its title, if any, or by its commonly accepted name, and the date of its passage or the date of its approval when approval is necessary to render it effective. As used in this subsection, "comprehensive plan" has the meaning given that term by ORS 197.015.

RECOMMENDATION: The proposed Rule does not provide for taking judicial notice of rules and regulations of state agencies or public bodies in the state of Oregon and should be amended to so provide.

Subparagraph (4) should be amended to read:

"(4) Regulations, ordinances and similar legislative enactments issued by or under the authority of the state of Oregon or United States or any public entity of the state of Oregon or United States."

DISCUSSION

The Advisory Committee Commentary to Subsection (4) states that the section provides for judicial notice of regulations and enactments of "any state, territory or possession of the United States, including public entities therein." However, the Commentary is incorrect because Subsection (4) does not refer to states, territories or possessions of the United States. The term "public entity of the United States," is generally perceived as referring to federal agencies, and not states or public bodies within states.

It may be that Subsection (2) would cover regulations and ordinances of state agencies of the state of Oregon and the United States. The Commentary to Subsection (2) indicates this. However, if that is true, what is the need for Subsection (4)?

The language of these two subsections, coupled with the Commentary, is unclear and confusing. It should be made clear that regulations of state agencies in the state of Oregon may be judicially noticed. It also seems that the regulations

of other public bodies in Oregon, which are not state agencies, such as school districts, should be judicially noticed. There are many obscure federal agencies, whose regulations may be more difficult to verify than local public bodies in the state of Oregon. It was believed that the regulations of state agencies and public bodies of states other than Oregon should not be judicially noticed, because they may be more susceptible to error and more difficult for opposing counsel to verify as to accuracy.

Oregon State Bar
Ad Hoc Committee on Proposed
Code of Evidence

Joint House Judiciary - Senate
Justice Committees
PROPOSED EVIDENCE CODE-HB 2030
EXHIBIT J-2/12/81-2 pages
Staff document

COMMITTEE PROCEDURE

FOR

EVIDENCE CODE

(HB 2030)

2/12 J

Text

Each week the joint Senate and House committee will announce, in advance, the evidence code sections it expects to cover in the public hearing regularly scheduled on Thursdays at 3 p.m.

A. Persons desiring to amend the language of the sections of the bill scheduled to be considered are urged, in the strongest terms, to submit any proposed amendments in writing to committee counsel and other interested persons (whose names will be available from committee counsel) at least 48 hours in advance of the hearing.

B. Prior to the Thursday hearing and work session, committee counsel will prepare a list of possible issues for use by the committee members. This will indicate points of difference between the recommended text of the advisory committee and the recommended text of the Interim Joint Committee on the Judiciary; between these texts and the commentary by Professor Kirkpatrick in 59 Oregon Law Review; and all proposed amendments that have been submitted by prospective witnesses.

C. The committee will hear from interested persons during the public hearing, and in work sessions on the same day decide on any amendments to the code sections scheduled for consideration.

Commentary

An official commentary will accompany the evidence code as approved by the committee and (it is to be anticipated) the legislature.

A. The commentary will not be published in Oregon Revised Statutes, but will be referred to therein as the official statement of legislative intent. Cf. ORS 90.920 (3).

B. Commentary will be prepared by committee counsel in the week following the adoption of the pertinent code text, and will reflect any instructions given by the committee in its work session on the text.

C. The commentary will reflect any changes in the code since the recommendations of the advisory committee. If none have been made, however, it is anticipated that the official commentary will draw heavily on the commentary of the advisory committee that is printed in the Report of the Interim Committee on the Judiciary.

D. Persons who wish to amend any section of the evidence code should also submit, in writing, a proposed commentary appropriate to that amendment at the time they submit the amendment.

E. Persons who do not wish to amend the text, but who do propose amendments to the commentary, are urged to submit their proposed commentary amendments to committee counsel, in writing, before the session in which the committee first considers the related code text.

F. Committee counsel will provide committee members and interested persons with the proposed commentary to code sections adopted, five days after their adoption.

G. The first item of business of any session of the joint committee will be the approval of commentary to any text adopted in a prior session.