ASSEMBLY COMMITTEE ON JUDICIARY - 56TH SESSION, 1971

JOINT HEARING OF SENATE AND ASSEMBLY JUDICIARY COMMITTEES FEBRUARY 10, 1971 CONCERNING SB 12 - CODIFIES LAW OF EVIDENCE.

The hearing began at 9:15 a.m. Assembly Judiciary Committee members present: Miss Foote, Messrs. Fry, Olsen, Kean, Torvinen, McKissick, Dreyer,and May. Absent: Mr. Lowman.

Senator Close made introductory remarks giving a background on the sub-committee's work on codifying the law of evidence, and stating that this follows the Federal law as far as possible, with Nevada case law taken into consideration. Suggestions have been received from some attorneys, which are made a part of these minutes by reference, and a copy of which is attached.

The committee heard from WILLIAM O'MARA, representing the National Society of Certified Public Accountants, who stated that the society is mainly concerned that the code should contain an accountant-client privilege provision. He feels that the accountant-client relationship is much like that of an attorney - client relationship and should be privileged. There should be an attest function. He urged that the privilege be maintained.

Senator Young asked if there are other states that have this, and what is the rule with regard to the Internal Revenue Service.

Mr. O'Mara stated 16 states have the accountant-client privilege.

Senator Dodge asked what was the rationale of the sub-committee for not including this. Senator Close replied it was considered at length, and they tried to limit exceptions as far as possible because the search for truth was the subcommittee's priority.

Mr. Kean asked if the court could subpoena records of corporations despite the client-accountant relationship. Senator Close said it could. Senator Dodge asked if there is a feeling that the accountant-client privilege affords protection for the individual rights to privacy. Mr. O'Mara said there is.

SUPREME COURT JUSTICE JOHN MOWBRAY addressed the committee and stated he thought this is a fine work and hoped the group would pass favorably upon it.

MR. LES BERGSTROM, Vice-President, Nevada Society of Certified Public Accountants, stated that books and records of corporations would be open, but accountants' working papers would be excluded. The privileges should apply to the professional accountant.

Discussion was held on the case of an accountant advising both a husband and wife, and subsequently one sues the other for divorce. Does the accountant-client privilege exist if the wife wants the accountant to testify as to the husband's property?

MR. FRANK DAYKIN, formerly of the Legislative Counsel Bureau, stated it would make a difference if the accountant had advised regarding community property or one party's separate property. In community property, it would fall within the joint interests exception and it should be worded more carefully. In Court the accountant is under oath to tell the truth.

Senator Wilson noted he didn't think the exception would apply unless it is separate property.

MR. CARLOS BROWN, President of the Nevada Society of Certified Public Accountants, urged the committee to amend this to cover the privileged communication.

Senator Close asked if he feels the privilege should extend beyond Certified Public Accountants, to public accountants and bookkeepers. Mr. Brown stated that bookkeepers would fall within an employee-employer relationship and this wouldn't apply to them. He said he couldn't speak for the public accountants.

Senator Close said public accountants are professional people who have codes of ethics and are furthermore licensed, so he thinks they would be interested in the accountant-client relationship.

Mr. Daykin read through the sections of the proposed evidence code with comments as follows from committee members:

Re. SEC. 7: Mr. Torvinen asked if this doesn't interfere with the present criminal statutes about the requirement of motions to suppress evidence. Mr. Daykin replied it doesn't interfere.

Re. SEC. 17: Senator Foley: Judicial notice can be taken only at the trial? Mr. Daykin: No, at any stage. The court may take judicial notice upon a preliminary motion, during the trial, after the matter has been submitted the court may in writing its opinion or rendering its decision take judicial notice of an undisputed fact which was not in evidence.

Senator Foley: After a jury has returned the verdict, could the court take judicial notice of facts that were not brought to the attention of the jury? Mr. Daykin: You have restrictive rules with respect to any evidence that may be considered on motion for a new trial and that is not affected here. If newly-discovered evidence comes to light which is an obvious fact it would be taken into account.

Re. SEC. 24, No. 1: Senator Wilson: What about crimes of assault with intent to commit murder or do bodily harm? The prosecution has to prove intent. Is this conclusive? Mr. Daykin: No. If you can prove the act was deliberate and was done for the purpose of injuring, it is conclusive.

Mr. Torvinen: Is that in conflict with Sec. 23 where the judge can't make any determination of a presumption? Mr. Daykin: Even if a presumption is conclusive, it is not conclusive in criminal law. I think the presumptions are nonsense as a statute. Regarding the conclusive presumptions, you have to consider each of them separately. Keep them if there is a sound public policy behind them even if they are not logical.

Re. SUBSECTION 1 of SEC. 24: Mr. Torvinen: You are saying the criminal cases in the Supreme Court say the court cannot instruct under this presumption? Mr. Daykin: There are no cases on that in Nevada. You can instruct on how you can find intent from certain facts.

Senator Close: If any of this is considered not to be well founded, there can be a separate bill taking out any provision you don't go along with.

Senator Close advised that the controverted presumptions which were removed from NRS 175.191 and 175.201 were numbers 4, 9, 12, 16, 19, 22, 23, 24 and 26, because they were not valid as general propositions.

Mr. Torvinen: Why did you take out the presumption about partnership? Mr. Daykin: That is covered in the uniform partnership law and you don't need it here.

Re. SEC. 27: Mr. Kean: What about the privilege in that item? Mr. Daykin: That is otherwise provided in that title.

The hearing was in recess at 11:00 a.m.

Hearing in session at 1:20 p.m. The committee heard testimony from NEIL GALATZ, ESQ.: He stated that Nevada case law is small so there is an advantage to staying close to the Federal format. He suggests that in terms of numbering the committee should try to number the code to correspond with the Federal one to save time and confusion in looking up sections.

Mr. Daykin stated it would not be possible to take the rules of evidence in this draft and carry the numbers over directly to correspond with the Federal law because the NRS numbers are controlled by constitutional amendments. The annotations to NRS will contain reference to the Federal code.

Senator Monroe asked if the Federal references could be put in parentheses and Mr. Daykin said that could be done. Senator Dodge suggested checking with Russell McDonald to see if the numbers could be correlated for easier reference. The Supreme Court could adopt rules of evidence embodying this code but the last Legislature felt it was preferable to adopt these in statutory form.

GEORGE VARGAS, ESQ., asked the committee what would the prohibitions be of testimony under SEC. 6, page 10? This is the law as to the dead man's rule and should be retained.

Mr. Daykin stated this would have the effect of striking out the dead man rule. The subcommittee's reasoning was that under common law a party to an action was not a competent witness and was not allowed to testify as to the transaction.

The hearing recessed at 2:00 p.m.

sg

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December 3, 1970

Honorable Melvin D. Close, Jr.,
Honorable Richard H. Bryan,
Honorable Leslie Mack Fry,
Honorable Harry M. Reid,
Honorable C. Coe Swobe,
Honorable C. Clifton Young,
Honorable John C. Mowbray,
Honorable Howard W. Babcock,
Honorable John W. Barrett,
Honorable Herbert F. Ahlswede,
Honorable Frank J. Fahrenkopf, Jr.,
Honorable Neil G. Galatz

Gentlemen:

Re: Proposed Evidence Code for the State of Nevada

I address myself to each of you as a member of the Legislative Commission's Subcommittee - and to its acknowledged advisors - on this important subject.

The proposed Code is evidence in and of itself of momumental work and study by each of you individually, and by your learned group collectively. For this I am grateful as a practicing attorney; as I'm sure all the rest of the Nevada Bar and Bench is obliged and grateful to you too.

Some aspects of the "Judicial Notice" provisions of the code give me concern just the same. Particularly that provision requiring judicial notice of "The constitution, statutes or other written law of any other state or territory of the United States, or of any foreign jurisdiction, as contained in a book or pamphlet published by its authority or proved to be commonly recognized in its courts". Section 14. (7)

Section 15 permits a court or judge to "take judicial notice, whether requested or not"; and Section 17 permits

the taking of judicial notice "at any state of the proceedings."

Prior to advent of Choate v. Ransom, 74 Nev. 100, 323 P. 2d 700 (1958), Nevada followed the common law rule of nearly all states, to wit, that where there is no contravening statute foreign law and law of other states is a question of fact to be pleaded and proved. By the Choate decision Nevada joined New Hampshire and Arizona as the only states abrogating this common law rule without aid of statute. 29 Am. Jur. 2d 80, § 45, note 9.

In Choate Justice Merrill quoted approvingly as follows from Dean Wigmore on page 107 of the Nevada report: "***No one would demand that a court take judicial notice of foreign systems of law in foreign languages ***" Doesn't the proposed code make such a demand appropriate and proper?

A more basic and serious problem was presented in Choate - and should be contemplated in all such cases if judicial notice of other than forum law is to be the rule - namely, how and when should such law be brought to the court's attention? A couple of corollaries immediately come to mind: Who is to be charged with the duty of bringing such law to the attention of the court? And what are the consequences of not bringing same to the court's attention?

Defendant apparently did not formally suggest that the law of Idaho should be the rule in Choate until jury instructions were being settled by the trial judge. I submit that this suggestion was not timely, and that an invocation of foreign law should never be regarded as timely if it comes after the issues have been settled.

In Volume 35, No. 1 (Jan. 1970), Nevada State Bar Journal, pp. 4-9, in "The Garbled Status of the Imputed Negligence Doctrine", I endeavored to point up a couple of basic, fundamental mistakes made by the Supreme Court of Nevada in judicially noticing and applying Idaho law in Choate v. Ransom. Is this additional ammunition for asserting with respect to all cases in which foreign law is referred to for any purpose other than the typical one of finding the appropriate rule of decision, that there was widsom in the old rule that

foreign law must be pleaded and proved?

We are all aware of the presumption that when a cause is presented for trial, the court and jury are uninformed concerning the facts involved, and it is incumbent upon the parties to the proceedings to establish by evidence the facts upon which they rely. This presumption does not apply to judicially noticed facts as "***the courts repeatedly refuse to hear evidence concerning matters of which they take judicial notice***" 29 Am. Jur. 2d 58, § 20, note 18, citing Ex parte Kair, 28 Nev. 127, 80 P. 463. In Verner v. Redman, 77 Ariz. 310, 271 P. 2d 468, the Supreme Court of Arizona states this well-established rule even more succinctly by quoting as follows from an earlier decision: "***A fact to be judicially noticed must be certain and undisputable, requiring no proof, and no evidence may be received to dispute it***"

In conclusion I quote the late Professor Brainerd Currie" "Judicial notice is a convenient rhetorical device for rationalizing - as we seem to have a compulsion to rationalize - the phenomenon of a court's taking account of matters not formally introduced in evidence. It cannot perform magic, and it can easily get out of hand. Judicial notice cannot dispense with the necessity of work to find the rule of decision. It is unrealistic and probably unwise to expect judicial notice to change the relative roles of court and counsel by shifting the burden of that work to the court. It is positively dangerous to entertain the notice that judicial notice can dispense with the procedures that safeguard the fairness of the adversary process." 58 Columbia Law Review 964

Very truly yours,

Gordon W. Rice

GWR jk

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December 3, 1970

TO MEMBERS OF THE LEGISLATIVE COMMISSION'S SUBCOMMITTEE FOR STUDY OF AN EVIDENCE CODE, AND TO THE COMMITTEES ON JUDICIARY OF THE SENATE AND ASSEMBLY OF THE NEVADA LEGISLATURE, 56th SESSION:

The following observations upon the proposed Evidence Code (Bulletin No. 90 of the Legislative Counsel Bureau), made from the meetings at Las Vegas, Reno and Elko on November 18-20, 1970, are transmitted to you for your information:

1. Sec. 24 & 25: Some attorneys favor repeal of all conclusive statutory presumptions (sec. 24), all appear to favor elimination of subsection 5 from section 24, leaving subsection 15 of section 25 to cover the subject.

2. Sec. 29: Add a subsection, substantially thus:

   3. Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but a cautionary instruction shall be given explaining the reason for its admission.

3. Sec. 58, subsec. 5, par. (b): Adultery is not a crime. [Reporter's note: Should the reference be to incest?]

4. Sec. 62: Clark County public defender (only) objects to shielding all informants, would shield only government agents.

5. Sec. 79: (a) In subsection 1, add "and of the nature of that crime" before "is admissible."
   (b) In subsec. 2, add at the end of the subsection "unless the judge upon evidence of misdemeanor convictions within this period, which shall be taken outside the presence of the jury, concludes that the convicted person is not rehabilitated."

6. If the proposed code is enacted, the Annotations to NRS should contain not only the source notes now appearing as comments in Bulletin No. 90, but also references to the superseded statutes or decisions as noted in the material prepared for subcommittee consideration.

Very truly yours,

Russell W. McDonald

Russell W. McDonald
Legislative Counsel

RWM:ab

BULLETIN NO. 90 WAS SUBMITTED AS AN ATTACHMENT AND CAN BE FOUND IN THE RESEARCH LIBRARY OR AT THE WEB ADDRESS BELOW

A PROPOSED EVIDENCE CODE FOR THE STATE OF NEVADA:
LCB BULLETIN NO. 90

HTTP://WWW.LEG.STATE.NV.US/DIVISION/RESEARCH/PUBLICATIONS/INTERIMREPORTS/1971/BULLETIN090.PDF

ACCOUNTANT-CLIENT PRIVILEGE

DEFINITIONS.

Sec. 49.1. As used in sections 49.1 to 49.9, inclusive, of this act, the words and phrases defined in sections 49.2 to 49.6, inclusive, of this act have the meanings ascribed to them in sections 49.2 to 49.6, inclusive, of this act.

"ACCOUNTANT" DEFINED.

Sec. 49.2. "Accountant" means a person certified or registered as a public accountant under chapter 628 of NRS who holds a live permit.

"CLIENT" DEFINED.

Sec. 49.3. "Client" means a person, including a public officer, corporation, association or other organization or entity, either public or private, who is rendered professional accounting services by an accountant, or who consults an accountant with a view to obtaining professional accounting services from him.

"CONFIDENTIAL" DEFINED.

Sec. 49.4. A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional accounting services to the client or those reasonably necessary for the transmission of the communication.

"REPRESENTATIVE OF THE ACCOUNTANT" DEFINED.

Sec. 49.5. "Representative of the accountant" means a person employed by the accountant to assist in the rendition of professional accounting services.

"REPRESENTATIVE OF THE CLIENT" DEFINED.

Sec. 49.6. "Representative of the client" means a person having authority to obtain professional accounting services, or to act on advice rendered pursuant thereto, on behalf of the client.

GENERAL RULE OF PRIVILEGE.

Sec. 49.7. A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:

1. Between himself or his representative and his accountant or his accountant's representative.

2. Between his accountant and the accountant's representative.

3. Made for the purpose of facilitating the rendition of professional accounting services to the client, by him or his accountant to an accountant representing another in a matter of common interest.

WHO MAY CLAIM THE PRIVILEGE.

Sec. 49.8. 1. 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.

2. The person who was the accountant 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.

EXCEPTIONS.

Sec. 49.9. There is no privilege under section 49.7 or 49.8 of this act:

1. If the services of the accountant 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. 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 accountant to his client or by the client to his accountant.

4. As to a communication relevant to an issue concerning the examination, audit or report of any financial statements, books, records or accounts which the accountant may be engaged to make or requested by a prospective client to discuss for the purpose of making a public report.

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 an accountant retained or consulted in common, when offered in an action between any of the clients.

6. As to a communication between a corporation and its accountant:

(a) In an action by a shareholder against the corporation which is based upon a breach of fiduciary duty; or

(b) In a derivative action by a shareholder on behalf of the corporation.

Comment--Sections 49.1 to 49.9, inclusive, provide limitations upon the accountant-client privilege, as established by NRS 48.065, which conform to the limitations upon the lawyer-client privilege.

ASSEMBLY

AGENDA FOR COMMITTEE ON JUDICIARY

Date _____ Time _____ Room _____

Bills or Resolutions to be considered	Subject	Counsel requested*

*Please do not ask for counsel unless necessary.

HEARINGS PENDING

Date February 10 Time 9:00 a.m. Room 240
Subject Senate Bill No. 12 - Codifies Law of Evidence

Date February 11 Time 9:00 a.m. Room 240
Subject Senate Bill No. 12 - Codifies Law of Evidence