

CONTINUATION OF JOINT HEARING OF SENATE AND ASSEMBLY JUDICIARY COMMITTEES, FEBRUARY 11, 1971, CONCERNING SB 12 - CODIFIES LAW OF EVIDENCE.

Hearing commenced at 8:30 a.m. Assembly Judiciary committee members present: Miss Foote, Messrs. Fry, Dreyer, Olsen and Kean.

The committee heard from MR. FRANK DAYKIN, further explaining the proposed code of evidence, with comments from the committee members as follows:

Re. SEC. 53: Senator Foley: Is there a similar exception if there is a breach of duty, for instance, in a malpractice case? Mr. Daykin: That is not set forth in the present statute or this expressly, but I think it would properly come under exception number 3.

Senator Foley: I think there is a statute that eliminates the privilege in a medical malpractice case. Mr. Daykin: In the next section which refers to proceedings in a hospital medical review committee. Senator Close: Doesn't the patient have the right to waive the privilege? Mr. Daykin: Yes, and the doctor has the right to waive the privilege only on behalf of the patient. There is no need for a specific reference to a breach of duty.

Re. SEC. 57: We have by separate statute in Nevada provisions for the confidentiality of what state officers, for instance, the Superintendent of Banks, find out in examinations conducted by them in the course of their official capacity. It would be harmful if the examined business's competition found out what had been discovered in the examination. The public official may not disclose findings in court if the public interest would suffer.

Senator Foley: That would be in the judgment of the public official? Mr. Daykin: If it were challenged the judge would examine whether or not the claim of privilege is valid. There are no cases on this in Nevada.

Re. SEC. 58, 5(b): Mr. Daykin pointed out there is no crime of adultery in Nevada. "Adultery" in that subsection was changed to "incest".

Mr. Daykin distributed copies of the draft he and Mr. O'Mara had prepared of the Accountant-Client privilege provision.

Re. SEC. 65: Senator Wilson: What is the reason for identifying the informer? A large part of the case put on by the district attorney is the result of information received by an informer. Will this compromise that privilege?

Mr. Daykin: The prosecutors that we heard didn't indicate they saw anything wrong with this. The only objection to it was by the public defender of Clark County, who didn't think there ought to be a privilege at all for the informer or that it should be limited to law enforcement personnel. It is logical to reduce this to a written rule since it is a subject likely to arise. It appears to be fair.

Senator Wilson: It would cause problems to the district attorneys to disclose the identity of an informer. That's the last time he'd be able to use that informer.

Re. SEC. 77: Senator Foley: You wouldn't vouch for your witness when you call him? Mr. Daykin: No. Senator Wilson: This puts plaintiff's lawyers in the driver's seat because you can call all the other side's witnesses and control their testimony and impeach them and destroy the opposition's case before starting your own.

Senator Foley: One of the things in vouching for your own witness is that you have ascertained that he is going to speak the truth or you don't put him on. It is one of the professional obligations for an attorney not to practice tricks.  
Mr. Daykin: You can't always choose your witnesses, either.

Senator Dodge: What is the rationale of the Federal law? Could you have a situation where the witness might testify on things that might not have previously come to light? Mr. Daykin: Under present law you can. The rationale was stated simply in terms of search for truth.

Senator Close read from the Federal Advisor volume the rules against impeaching one's own witness, which the committee had followed in drawing this up. (Rule 431)

Re. SEC. 81: Senator Wilson: Does this limit the scope of the cross-examination? More than it is presently limited? Are you applying the redirect examination rule to the subject of cross-examination? Mr. Daykin: I think this is the classical limitation on cross-examination.

Re. SEC 81, 4(b): Senator Young: What does "identified with an adverse party" mean? Mr. Daykin: It uses a single word rather than attempting to enumerate. If you objected to the use of leading questions the judge would have to test "identified".

Senator Young: What about an employee of the adverse party? Mr. Daykin: I think he would be "identified" with the party. This is a broadening in that specific area.

Re. SEC. 83: Senator Wilson: Are you leaving out past recollections? Mr. Daykin: That subject is treated under the hearsay rule. Senator Foley: If you are going to impeach a witness, you had to show him the statement. Mr. Daykin: This has been the past practice but this rule is to that extent a departure from it.

Senator Foley: Would the listing here in these sections of the witness rule tend to exclude those not listed? Would you be repealing the legislative act regarding subpoenaing of legislators? Mr. Daykin: That is contained in another section.

Re. SEC. 124: Senator Foley: Isn't it 30 years on the documents now? Mr. Daykin: It was reduced to 20 years to conform with the presumption of authenticity and because in this state, particularly where we have short periods of limitations, to require an ancient document to be older seems inconsistent.

Re. SEC. 135: Senator Monroe: The statement against interest, does that rule out the possibility where a person turns state's evidence? Mr. Daykin: This only deals with a situation where a statement made out of court will be admitted in court.

Re. SEC. 136 (b): Senator Wilson: Why does it say, "is unavailable as a witness"? Mr. Daykin: To complete the sentence, because before this there were separate sections with subsections in which the wording was carried over. It's there for clarity.

Re. SEC. 145: Senator Dodge: Voices sound different over telephone or tape. Does this mean that if they have a tape they are trying to identify the voice on, you would have to have heard the person's voice on tape before? Mr. Daykin: If he had heard another taped voice that would probably be the best authentication but he might have heard the person speaking naturally or over the telephone. He could still testify but the fact that he heard the voice through a different mode would be admissible. Then it would be up to the jury or judge either to accept the testimony or, not.

Re. SEC. 151: Senator Foley: That's in this state, not foreign documents? Mr. Daykin: Public records would be for this state or another state in the United States. Senator Foley: They now need an exemplified copy. Does this mean a certified copy is sufficient? Mr. Daykin: Yes.

Re. SEC. 153: Senator Foley: What about the contents of the newspaper articles? Are they presumed to be accurate and authentic? Mr. Daykin: This doesn't say a thing about their being true. This only says, this is a copy of the article that appeared. Senator Foley: Only the fact that it was printed that day is all this covers? Mr. Daykin: Yes. It doesn't certify the contents.

Re. SEC. 177: Senator Foley: Is this a change? Mr. Daykin: No, only a relocation.

Re. SEC. 210: Senator Monroe: Don't we have a charter revision in the works? Mr. Daykin: Yes, and we'll have to keep track of this in Russ's office. The new charter may possibly conform to this.

Senator Dodge: George Vargas will want to know about the dead man's statute. Could you give us the rationale of the committee about the omission of it?

Mr. Daykin: The statute says that if one party to a transaction is dead the other party to the transaction shall not testify with respect to it. If the adverse party in the proceeding is the representative of a deceased person then a witness shall not be allowed to testify to the transaction with the decedent unless the deceased person was represented by an agent who is living and testifies, or persons other than the parties to the transaction claiming to have been present testify.

So, it is the exclusion of the evidence of a live and present witness because either the other party to the transaction about which the witness is testifying, or the other party to the law suit, is dead. It is a survival in limited form of the whole disqualification of a party from testifying in his own lawsuit at all. The common law said you had to bring in a witness to testify for you but that rule is almost gone. In some states the law has some survival of this rule. What you would do if this is repealed is that if one person testifies as a witness to something that a deceased person did, you could allow it subject to a decision of the judge or jury to decide if that were true. There is a question of public policy. Under the existing statute you shall not permit the living to testify because of the strong presumption that he would lie about it.

Senator Dodge: Supposing only one person can testify about what a dead man did? In what position does it place the jury? They either take the man's word or have nothing to go on.

Mr. Fry: That is not necessarily true. Senator Foley: Is that admissible under the statute? Mr. Daykin: It would depend on the circumstances. If the action is being brought on behalf of the driver of the car under the second element of the rule and the adverse party called this passenger you could call it a dead man rule. The rule is complicated and it is hard to get two witnesses to agree what is the real story. Your question is, shall you exclude the testimony absolutely or shall you allow the jury to hear it and make their own decision to believe it or not?

Senator Wilson: If you bar the testimony, the subject is closed. Mr. Daykin: It seems preferable to let the testimony in and let the jury decide whether to believe it or not.

February 11, 1971

The members of the committees unanimously expressed appreciation to Mr. Daykin for his work.

Hearing adjourned at 10:55 a.m.

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