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SENATE JUDICIARY COMMITTEE

MINUTES

February 10, 1971

Chairman Monroe called the meeting to order at 9:20 A.M.

Committee members present: Chairman Monroe
Senator Close
Senator Dodge
Senator Foley
Senator Swobe
Senator Wilson
Senator Young

Others present: William O'Mara
Judge Mowbrey
Carlos Brown
Leroy Bergstrom
Neil Galatz
Frank Daykin
Press

SB-12 Codifies law of evidence.

Senator Close: With myself as chairman, Cliff Young, Coe Swobe, Mack Fry and Harry Reid were the members of the subcommittee. What we have done is attempted to codify the evidence law of Nevada as far as we can from case law, and we followed, insofar as possible, the federal code. There is a federal evidence code that is proposed; it is amended in some respects and this draft follows as closely as possible that code.

There have been changes since this code came out and there will continue to be changes until its finally adopted. But our work here is as close as can be to federal code. Now, there are two or three reasons why we chose the federal code to follow. First, when it is finally adopted, it will be adopted for the entire United States and because of that there will be many decisions coming out that Nevada can follow in an attempt to further amplify our own evidence code; and secondly, there was an extreme amount of work that went into adopting the federal code and we feel that that work can be used by Nevada. Certainly we could never have gone from scratch with the funds that we had available nor with the manpower we had available, and prepared our own evidence code. Therefore, primarily we have adopted the federal code. Where appropriate, we have adopted the Nevada case law and also some statutory law that

*Bulletin No. 90: A Proposed Evidence Code for the State of Nevada is included as Attachment 1.

is the Nevada Revised Statutes at the time. Frank Daykin, who was with the Legislative Counsel, was assigned to our staff during the study and did an excellent job. He will review the whole evidence code with you and answer any of your questions.

We had three different seminars on this bill; one in Las Vegas, one in Reno, and one in Elko. At the one held in Las Vegas, out of 250 attorneys we had about 10 there, and maybe 15 in Reno, and several in Elko. So it has not been well attended by attorneys. I anticipate that as soon as the code is passed, attorneys and other affected will claim they had no notice, but we gave them a chance to come in. We transcribed the objections and comments the attorneys present had and will give to the committee at the conclusion of this hearing a list of all the things they have suggested to us, which are not substantial (attachment 2). However, they do bear investigation by the committee to see if you want to amend the evidence code.

I think an evidence code is valuable for attorneys and judges; I think it will provide for fewer appeals in the future; I think it will provide for fewer errors by the trial judge, because you will have for the first time something he can actually look at and determine what decisions should be made. It is also an advantage to the attorney because he will be able to look at, for the first time, something in writing in one place and be able to determine what the evidence law of Nevada is. At the present time there is a trap for the unwary because you have to go through many, many cases, and if you are not an experienced trial practitioner, and you miss one of these cases, you can lose your case, damage your client, lose the matter on appeal, or any number of things that could happen. So I think this is going to reduce the number of appeals and provide for better justice.

At this time I will turn the hearing over to Mr. Daykin.

Senator Dodge: I would like to ask a question apropos to the comments by attorneys and others. Did you incorporate any suggestions from attorneys that you did consider substantial?

Senator Close: Yes, we did. The people whose names I gave you were not the only members of the committee. We had district attorneys who were with us; defense attorneys; Neil Galatz was with our committee and did a great job so far as the plaintiff's

were concerned; Harry Reid's firm is a defense firm and he was there; district attorneys were there to take care of the criminal aspect of the matter. I think the committee was well balanced and made up.

Once the draft was proposed, and each of you should have received one of these blue bulletins (attachment 1), this is what we went to the Bar with. We have not changed it since we have gone to them, but do have their comments here, because obviously we couldn't change it for everybody who wanted to make a comment to it. Only the substantial changes were incorporated, after a lot of give and take in the committee hearings between those on various sides of the fence. The Bar was represented in almost every category of practitioner. Since the bill or bulletin has been put out, it has not been changed. We do have in writing for you the comments of the Bar. Gordon Rice has written a letter to most of the committee members on this committee today which I will give to you and we have had some other matters that have come in. Now, hopefully, there may be some more comment today from members of the Bar who will be testifying before the committee, and if their comments are justified, then I hope that we adopt them and put them into the code. We are not married to this proposal, so if there are changes to be made to it, lets make them.

Mr. Daykin: Senator Close has indicated principal guidelines for putting together this code. I know you have hearings set for this morning and tomorrow morning. I would like to put a question to the committee at this time. Do you wish me to review the code rapidly section by section, entertaining questions as they arise, or do you wish me to discuss it only very summarily and devote the time to answering the questions the committee might have on any particular points, and perhaps to commenting upon questions and suggestions that persons testifying may have?

Senator Close: When we went through this code in Las Vegas, Elko and Reno, we only asked for comments from the Bar. I found then, and I would presume now, that most people have not read this booklet. It is one thing to go through hearings as we did in Las Vegas, Elko, and Reno and merely ask for comments, but I think its something else for the legislature to be asked to adopt a particular bill of this size without going through it somewhat in detail. We have two days, and I feel that most of that time could be better spent in going through it section by section, although it is tedious and boring on some occasions. I think it is important that everybody

here have a chance to at least get a basic understanding of what we're doing. I don't think that will be accomplished if we merely ask for comments because I don't really think that you have had a great deal of time to study this proposal. Because of that I would suggest that we go through it section by section.

Chairman Monroe: Is that agreeable with the committee.

Committee: Yes

Chairman: Go ahead Frank.

Mr. Frank Daykin: This code will of course comprehensively revise Title 4 of present Nevada Revised Statutes which deals with witnesses and evidence. The subject matter of the different chapters has for the most part been completely revised in order to follow the arrangement of the federal proposed rules of evidence for reasons that the chairman of the subcommittee indicated to you. The first chapter, which will be Chapter 47 of NRS, deals with general provisions applicable to the law of evidence.

Senator Close: Does everybody have a copy of the blue evidence code book, called Bulletin No. 90. These blue books have comments at the bottom of every section explaining where it came from.

Chairman Monroe: Would anyone in the audience like to make their comments now rather than wait until the whole booklet has been reviewed?

Mr. Bill O'Mara: I'm Bill O'Mara and I represent the National Society for Certified Public Accountants. During the process of the evaluation or the development of this code, I was not retained by the Society, however, I have been present at the hearings that were scheduled in Reno and I have talked with Mr. Daykin.

You will notice that the privileges do not include the accountant-client privilege which is presently in the code. In the present law under 48.065 there is an accountant-client privilege. This was not included in the present draft that is before you.

During the hearings held in Reno, the question was asked why it was excluded in that the proposed evidence code was for the purpose of codifying the present existing law. At that time Frank Daykin indicated to us that they had written to the Board of Accountancy and had received no reply. I would represent to the legislative committee that I have checked with the Board of Accountancy and none of the officers have any knowledge of the

fact that they received a letter, and the only thing that we can say is that it apparently got lost. Both the Board of Accountancy and the Nevada Society for Certified Public Accountants do express their wish that they keep the privilege. They do feel it is an absolute necessity to have such a privilege.

The general rule of privilege is for the particular person to refuse to disclose any confidential information which is given to him by his client without his consent. This is the same privilege as we have in the attorney-client area. As you know, in present day practices the attorney and the accountant have become very close together. Everything that's done in tax planning is done between an attorney and accountant and the client. I think if you allow just the attorney-client privilege to go without continuing the accountant-client privilege, you are going to run into case decisions that will pervert the attorney-client privilege. The main purpose for the disclosure to the accountant is for the client to receive the best available advice without unnecessarily being given additional problems.

I would suggest, and I do have for you, a proposed accountant-client privilege amendment (attachment 4), which would modify the present privilege that is still existing in the law. This modification is due to the fact that there is no exception to the privilege for the attest function. The attest function is that function which gives the accountant the right to examine records, books of accounts, things of this sort, and make a public disclosure as to the correctness of these books of accounts and examinations. At the present time the present accountant-client law in the books, 48.065, is being questioned by the SEC.

There are two functions of the accountant. Those functions in which he has a confidential relationship with his client and those functions in which he does not have a confidential relationship with his client but purports to give information to the public, upon which the public can rely. It is a complete independent examination.

So I will at this time give to the Chairman a generalized redrafting of the accountant-client privilege and urge that the accountant-client privilege be maintained in the proposed evidence code.

Senator Young: Are there any other states that have this? What is the rule with regard to the IRS and federal prosecution.

Mr. Bill O'Mara: There are 16 states at the present time that have the accountant-client privilege. There are two states, Pennsylvania and Maryland, that provide for the attest function. The others have basically been drafted and adopted by the different legislatures since 1933. As most of you know by the studying of your corporations laws and different accountancy, there have been new laws developed as to the liabilities of accountants, and because of this the more recently adopted codes do provide for the attest function. This is in order to protect the accountants from possible claims from devulging confidential information.

In so far as the fraud cases are concerned, there is no privilege, and the federal district court will not allow the privilege to stand. However, in other cases the Ninth Circuit Court has come down with a decision saying that the state privilege will be recognized, however there are three decisions in two other circuit courts that are in contradiction to the Ninth Circuit. However, we are in the Ninth Circuit and we would follow the Ninth Circuit case. I would be very happy to furnish that case to the committee.

Mr. Frank Daykin: I note that your draft contains an exception for the attest function. Has the Society given any consideration to the propriety of other exceptions, such as we are now embodied in the attorney-client privilege in this draft. One of the thoughts of the Legislative Commission's subcommittee was that if an accountant-client privelege would be inserted, it should be carefully drawn somewhat along the lines of the revised attorney-client privelege, rather than being so simple and unqualified as it is in the present NRS.

Mr. Bill O'Mara: I would say that the accountants have not considered any exceptions but I would represent that the accountants would accept some exceptions.

Senator Dodge: What was the rationale of the subcommittee for not including this privelege? Is it because it was not in the proposed federal code?

Senator Close: This was considered at some length and we have tried to limit exceptions as far as we could. The by-word of our committee was "the search for truth" and we felt that a trial is a search for truth and as much evidence as can come out, should come out respecting the rights of the parties. Many times where the accounting function is involved, although certainly goes much deeper than this, it is the books of the corporation or something of this nature that are required. We felt that in many cases, these things should be available. If a member of a corporation wants to question the accountant, he should be entitled to. In a case where the corporation may have hired the accountant, a member of that corporation would be precluded because he is not a member of the officers or board of directors. As I recall, we did try to contact the accountants, but received no comment back from them. Because of this we felt there was no interest on their part to include a privelege in the code.

I do believe that in cases of fraud and things of that nature, there should be no privilege. In partnerships and corporations, there should not be a privilege. Mr. O'Mara has acquiesced to amending his proposal to include these exceptions and it certainly becomes more acceptable to the subcommittee; the broader we can make it the better.

Mr. Bill O'Mara: I will work with Frank Daykin to submit the exceptions as we see it.

Senator Dodge: Don't you think there is a large area involving individuals and that Americans feel that there is invasion of privacy in peoples' lives at every turn. It seems to me there should be some justification for protection of individuals in their own feelings and tax situations.

Chairman Monroe: Judge Mowbrey, do you have any comments you might have.

Judge Mowbrey: The only role I played in this program was that I was appointed by Chief Justice Collins to attend and work with the subcommittee. The gentlemen on the subcommittee, with the help of Frank Daykin, did all the work on this. But I reviewed all the material and I think its a fine work and would certainly hope you will pass it. You are always going to find wrinkles in these programs, but its a step forward.

Mr. Lee Bergstrom: I am a certified public accountant and Vice President of the Nevada National Society of Certified Public Accountants. I would like to touch on two points. Books and records of the corporation would be available through normal action of the law. Under what we're proposing, assuming no examination had been performed, only the accountants working papers and the accountants testimony would normally be excluded.

If I may I would like to emphasize the point made by Senator Dodge dealing with individuals. I suppose we could all put ourselves in the position of the individual who may have a marital disagreement and all of a sudden a wife or husband might decide in a proposed divorce settlement he wants to call the accountant to testify and lay all of their financial assets in front of the court in that manner. I would think those of you who are with the Bar would not like that situation to occur to your own client. I'm sure we would not like it to occur to our client. There are many confidential negotiations in todays commercial world where the account is intimately involved; such as mergers, proposed employment contracts, labor negotiations, where the accountant isn't functioning in his attest function, and he isn't functioning in the capacity of one who is expressing an opinion to the public at large.

He is functioning simply as a technical consultant to a business man, and it would seem certainly appropriate that those privileges in those circumstances that would apply to counsel, logically should apply to a professional accountant as well.

Senator Wilson: You said something in illustration, and I don't know if you were just illustrating or making a point, but do you think you could live under Section #5 as drawn for the attorney-client privilege. That is where you advise in common two clients, whether they're husband and wife or otherwise, a dispute arises between them and one sues the other.

The accountant-client provision here provides that that's an exception to it and it is not to be testimony admissable in evidence. I assume that would apply in the case of the accountant.

Mr. Lee Bergstrom: It could in certain cases. Where in a community property state, such as our own, one is dealing with both the husband and the wife although perhaps only talking to one of them, I would concur, there would be no privilege. But there are many people who have separate property, and I would think that the dealings there between the accountant and the client or the attorney and the client might still be privileged.

Mr. Frank Daykin: As I would off hand interpret the exception privilege, I think Mr. Bergstrom has discussed it pretty well. I would say that if the accountant were advising the husband concerning his own property, this would properly be privileged in a divorce action. Where it concerns the community, it would probably fall within the joint interest exception, which I think as to an accountant ought to be worded even more carefully to be sure that it brought in the partnership and corporation, situations as well as to direct individuals.

Chairman Monroe: Suppose there was a divorce in a community property state and the husband has taken money and invested it in things that he has held from his wife. They want a divorce and he goes into court and testifies as to his assets but does not include the money that he has accrued and put in other investments. The accountant testifies that the assets presented to the court are correct. Does the accountant become part of the fraud or should he testify that he knows that the husband has these assets?

Mr. Frank Daykin: The accountant, like the husband, is under oath. The husband has chosen to commit perjury, he has chose to lie under oath. I cannot believe that an ethical accountant would choose to compound that felony by also lieing under oath.

I think in the community property situation that this would be prper. This should not be the subject of any privilege to withhold the truth from the court. If on the other hand the accountant has advised the husband only in respect to the husbands separate property, I can see he has an old problem of conscience; on the one hand he has an ethical duty to his client, and on the other hand he has a duty to tell the truth. The effect of the privilege is to remove him from that dilemma by permitting him to refuse to testify.

Mr. Lee Bergstrom: Mr. Daykin, from the accountants point of view, he is not obviously going to contribute to the fraud. On the other hand, to the extent that in the example used, I would assume that it is after all the husband that is required to assert the privilege, not the accountant. The counsel for the husband would simply not permit the accountant to answer the questions.

Mr. Frank Daykin: Not to mislead the committee under this draft, the professional man is permitted to claim the privilege. His authority to claim it on behalf of the client is presumed.

Senator Close: The dilemma that our subcommittee wrestled with was should the court be precluded from inquiring into any of these matters. That's the decision for this committee to make. We attempted to restrict privilege as far as possible, and like I said, "search for truth" became a by-word of our committee because it was used so often. When you go to court you should attempt to find out all the facts, and put them on the table. Let the judge make the decision. If he doesn't have all the facts, he can't make it. I'm not saying I oppose your privilege, because I do not. We didn't put it in because of other reasons. But that is the type of a thing that this committee is going to have to make a value judgement on. Whether or not you should be able to keep this sort of information from the judge.

Mr. Frank Daykin: I will draft a proposed amendment. It won't resolve all the extremes of the conflict, but I think it could strike a good middle line.

Chairman Monroe: Is there further testimony?

Mr. Carlos Brown: I'm a certified public accountant and President of the Nevada Society of CPA. I think the subject of privilege was pretty well covered, and I don't have anything further to add. We do encourage the committee to amend this to cover the privilege excluding the attest function.

Senator Close: Do you feel the privilege should extend beyond CPA's down to public accountants and bookkeepers.

Mr. Carlos Brown: I haven't thought about that. The people who keep books are not licensed, the public accountants are licensed. They have their own society and I haven't consulted with them.

Senator Close: Would you feel, knowing their occupations and responsibilities, which are similar to yours, that they should have the same privilege.

Mr. Carlos Brown: Public accountants do perform audits and attest, so I feel it should extend to them also. In the case of the bookkeeper who is maintaining books for a client, I think that possibly he comes closer to being an employee or having an employee relationship with the client.

Senator Close: Do public accountans presently have the privilege?

Mr. Frank Daykin: I think they do. Our law simply says an accountant, and of course Nevada law recognizes them. It would not extend to the employee bookkeeper under present terminology.

Mr. Neil Galatz: I'm interested in the code because I had the pleasure to help work on it, and because my practice is primarily a trial practice and I live and die by the evidence code.

When the committee first started I asked to be on it because I was opposed to the code. I felt a good lawyer could dig out his own evidence rules and doesn't need some sort of manual, and if you put together some sort of manual you're going to freeze the law if evidence in a very unrealistic way. As we began to work on it and analyze the federal evidence code, I was truly amazed and delighted at the fantastic job the people did who put the federal code together. I found out you can find the federal rules without a manual, but its a lot easier to turn to a common starting point that codifies the rule in one simple starting source and from there go on if there is a question of interpretation. I did a complete about face in my opinion. As we worked on the federal code, I felt everybody has a different feeling, but the federal people did a find job trying to find the fairest compromise between all the conflicting potential views. Some people will be unhappy with certain parts. But in terms of a code, this probably represents about as reasonable a realistically fair compromise as anybody can hope to reach. What I hope to get across to you is that you have a pretty good code. If you change it piecemeal and deviate piecemeal from what is there, you may well destroy the continuity because sections are interrelated. If you try to reflect varying views, you are looking for impossible results. You have a view put together by a federal committee that is incredibly fair.

Another big advantage to staying close to the federal format is that Nevada is still comparatively small in terms of our supreme court case load. It could take us 10 or 15 years to have our court adequately interpret the code because no code will suffice without some interpretation. If we leave it with the federal, when there is no Nevada case, we can go to the decisions of the federal circuit courts. There we have a body of reference that will accumulate 150 times faster than what we can generate in our own state. I think some degree of certainty is an extremely important thing, and the federal code will give you a body of interpretation to look forward to.

The only practical thing I would suggest, this is something that never dawned on me when we were on the committee, is that in terms of numbering we could assign a NRS Chapter number and after that number try to number each section according to the federal code. So instead of NRS 48.1, it might be NRS 48.1-3, which would tie it to the federal. That has a number of practical advantages.

Chairman Monroe: Can we work the Nevada statutes sections into that numbering code?

Mr. Frank Daykin: Well, no. NRS is numbered according to a particular and set system in which the chapter number is the item preceding the decimal point and subsequent sections are numbered decimally to follow. It would not be possible to take the rules of evidence as they are in this draft and carry those numbers over directly because these are numbered from front to back in eleven groups. So a federal rule for example on hearsay is 8-03 where our hearsay treatment is Chapter 50.000. Also the federal rules are quite long, and NRS because of our constitutional requirements when a section is amended, is set forth in relatively short sections. Introductory material has to be brought in. However, the annotations to NRS will contain with respect to each of these section numbers, a reference to the federal rule from which it is taken or to which it corresponds. Consequently, you will have an immediate key in your annals, not only to your Nevada cases, but also to the federal rule under which you can look.

Mr. George Vargas: I'm a private attorney from Reno. I was wondering if it was called to the committee's attention that very probably this proposed code would repeal all the provisions with reference to the so called "dead man's rule", which prohbitis one party to a transaction from testifying in the event of the death of another party.

Mr. Frank Daykin: This was thoroughly discussed by the sub-committee. The dead man's rule does have the effect of excluding relevant evidence if it is applied. It is a limitation upon the witness, as a little later in Section 71 you have a general rule of competency and then a limitation as to personal knowledge, but again no limitation comparable to the dead man's rule.

Those two general provisions; the admissibility of all relevant evidence; and the competency of all witnesses as to any matter of knowledge or expert opinion, between them have the effect of wholly striking out the dead man's rule.

The dead man's rule existed because in common law, a party to an action was not a competent witness, he was not permitted to testify because it was supposed that being a party interested in the matter, he would lie. That has gone by the board almost entirely. The so called dead man's statute exists in many states and does not exist in many states, and is one vestige of it. We have set it aside in every other area, the draft federal rule and this rule would set it aside also.

Chairman Monroe: Do I understand, Mr. Vargas, that you object to leaving it out?

Mr. George Vargas: It is my position that it is sound law today and should be retained.

Chairman Monroe: We would like to hear your comments on this if you will be good enough to come back at a later date.

Hearing adjourned until 9:00 a.m. on Thursday, February 11th.

Respectfully submitted,

Eileen Wynkoop

Eileen Wynkoop, Secretary

Approved: _____

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

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Attachment 2

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1- 93

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

Attachment 3

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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

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.