SENATE JUDICIARY COMMITTEE

PUBLIC HEARING ON S.B.#12

February 23, 1971

Chairman Monroe called the hearing to order at 9:15 a.m.

Committee Members Present:	Chairman Monroe Senator Close Senator Dodge Senator Foley Senator Swobe Senator Wilson Senator Young
Others Present:	Fred Pinkerton - Chief Criminal Deputy District Attorney George Vargas - Private Attorney Press

S.B. 12 - Codifies law of evidence.

George Vargas: Because of certain language contained in the letter of submission by the committee which appears on the third page of the Evidence Code Booklet, and the Report of Legislative Commission's Study for an Evidence Code on the following page, it's a little bit difficult to determine whether the real intent of this code is to put things into the Nevada Law of Evidence which are not present at this time, or whether it is, as indicated at the outset of the report, a project of collecting, systematically arranging, and harmonizing existing law. On Page 8 near the bottom of General Statement of the Report in the paragraph next to the last, it would seem to be indicated there that there are things contained in this proposed code which are not presently contained in the statutes or the recorded decisions in our supreme court with reference to rules of evidence. Then if one turns to Exhibit A on Page 9, which defines the scope, in Section 2, it seems to me that the exception contained right there in essence defeats one of the announced purposes of this code; namely, to bring together and compile the existing law. Because if this code applies, excepting to the extent to which its provisions are relaxed by statute or procedural rule applicable to a specific situation, then it would seem to me that any trial lawyer doing his homework is still going to have to go back and research the law of Nevada and can not necessarily rely upon this code. So I think the way it is prepared, it does not really serve the purpose which it purports to serve.

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On Page 12, Section 12, "Remainder of Writings or Recorded Statements", I would say that with the exception of the last statement, that is the present law of Nevada. I do have great difficulty when it comes to the phrase "and any party may introduce any other parts." If that is to be taken literally, that's changed from the Nevada Law in my opinion.

On Page 30 under Impeachment, Section 77, the phrase "including the party calling him" is a fact permissive of trial procedure. Generally, I think the court has discretion to permit a party who is calling a witness to impeach that witness if the party calling him is taken by surprise. In other words, you have a statement from a witness and you put him on the stand. Ostensibly in the course of law, you vouch for the person you put on the stand under oath. If he testifies opposed to that set forth in the statement, he may be released from testimony by surprise.

Senator Wilson: This would mean that the sponsor wouldn't vouch for his testimony. Do you think its a good idea or bad?

George Vargas: This is right, and its an innovation in our law of evidence in Nevada. I think its a bad idea as a matter of social judicial policy. The reason I think its a bad idea is because all of us lawyers talk to the witness to evaluate his testimony and I think we should have some responsibility to the court and the litigant to take some of the obligation for presenting this individual as a trustworthy witness. If something develops during the trial which indicates that he is not and the attorney is caught by surprise, the court today has ample jurisdiction to relieve the binding effect of that testimony and the party may proceed to contradict or impeach that witness.

The general conclusion of my comments in pointing out some of these things is just simply that this code apparently introduces considerable new matter into the law of evidence in Nevada in spite of the fact that a part of its pronouncements indicate that this is not the intention of the code. Therein lies the danger.

You will recall that when Mr. Daykin was testifying the other day, he got beyond the portion of the code which deals with Section 48, Title 4 of NRS, and I interrupted to ask Mr. Daykin if he felt that this code repealed the dead man's statute, which is found in Chapter 48.010 of NRS. That came to the question of whether or not as a policy, the legislature might feel that it was advisable to completely repeal the dead man's statute.

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There have been direct efforts to repeal the dead man's statute. Up to this time those have not met with success. As I indicated the other day, I feel that whether it should be repealed or not is a matter of legislative policy. Mr. Daykin indicated that the dead man's statute found its root in the common law which I think is quite right. At one time, it prohibited any party to a transaction from testifying. Over the years, apparently that was refined up to the point that we have the current dead man's statute which prohibits a party to a transaction from testifying when the other party to that transaction is dead. This applies to both contract law and to court law, it does not exclude persons who are not parties to the action from testifying.

Apparently this has remained in our law based upon the proposition through historical knowledge that when there are two parties to a transaction and one is dead, there is a great temptation upon the other to at least color the transaction in his favor.

Today there are many cases that could be affected very directly by the repeal of this statute. Human nature being what it is, if you have a situation which could result in a large money judgement, there certainly is a tremendous incentive there to perhaps color one's testimony to an extent which would render it, if the circumstances could be fully displayed, as being perhaps untrustworthy. I am wondering whether simply as a matter of legislative policy in the interest of the state and to the public in general, if it is advisable to completely repeal the dead man's statute.

Senator Young: The repeal of this statute might work the other way too. There are many deserving injured parties who might be denied recovery because there is nobody there to testify except himself or herself and the law would preclude the testimony.

Senator Wilson: Do you think the danger would be averted if relaxation of the rule would require, for example, some evidence of corroboration to the surviving parties testimony without which the testimony might not be competent? Do you think it would cure the problem sufficiently to justify relaxation of the dead man's rule?

George Vargas: I would think it would. There's much to be said, as Senator Young pointed out, about the possibility of this excluding people who are fully entitled, if all the circumstances could be known,to recover

Senator Foley: I would like to get your reaction to this judicial notice in Section 17, Page 13. It says "may be taken at any stage of the proceedings." I asked Frank Daykin if this was the present law, and he says it is the law now. This runs contrary to my feeling that only while the evidence is being presented, you take judicial notice, unless there is some extreme situation.

George Vargas: I don't see how judicial notice could be taken after the case was tried and submitted to the judge. It's terribly unfair. I do think it would be advisable to limit that to during the course of the trial.

Senator Close: I think Frank Daykin's comment on Section 17 was that he felt there was a point where judicial notice would be taken by a judge just in his thought process, and he didn't feel there was any way to prevent that. The judge just in the course of making up his mind would take judicial notice. I don't have the federal rule before me to explain that particular change, but they usually have a very good reason for making a change.

Senator Young: I have the federal rules. It says the provision for taking notice at any stage of the proceedings is in accord with the usual view.

George Vargas: Just as a suggestion, if you wanted to in Section 17 amend it to read "judicial notice may be taken at any stage of the proceedings prior to submission to the court or the jury".

Chairman Monroe: Are there any objections to that?

Senator Close: I have no objection.

Senator Wilson: What was the committee's rationale for including the last phrase, "and any party may introduce any other parts," in Section 12.

Senator Young: The federal rule advisory committee's notes say: "If whole or part of a dispotion is offered in evidence by a party, an adverse party may require all else relevant to the part introduced and any other party may introduce any other parts. A somewhat greater measure of discretion in application is suggested by substituting in lieu of "relevant", the phrase "which ought in fairness to be considered with the part introduced." 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 if the affair were delayed to a point later in the trial.

Senator Close: I think in this case the proponent would be limited to the things that he could introduce because of other restrictions, such as the hearsay rule, which would still preclude this evidence from coming in.

Senator Foley: Mr. Vargas, do you regard this as being applicable to depositions?

George Vargas: No, but I did have some question about the language in the footnote referring to depositions. There is a very sharp difference between what you can bring in in a deposition and what you can bring in as evidence in the courtroom. In a deposition you are not tied down at all to relevant evidence, you may inquire to things which are not relevant, but which may be calculated to lead to discovery of relevant evidence.

We never had any trouble with someone putting in a writing and if there is another relevant portion which may cast a different light on the subject, I would request the court to ask the witness to read the remainder of the writing.

Senator Young: The federal rule, I think is better than what we have in Section 12. It says that "when a writing or recorded statement or part thereof is introduced by a party, he may be required at that time to introduce any other part or any other writing or recorded statement, which ought in fairness to be considered with it." How about if we put in "any other relevant parts."

Senator Close: That's superfluous. The judge is not going to permit irrelevant matters to come into the trial.

I would like to have a chance to investigate the rationale of our sub-committee and the federal rule drafters.

Chairman Monroe: Thank you for your testimony Mr. Vargas. Is there anyone else who would like to speak on this bill.

Fred Pinkerton: I'm with the District Attorney's Office in Washoe County, and I'm here to speak about a few provisions in the evidence code. My remarks should be considered in the context of criminal cases.

In Section 29 on Page 18, Subsection 2 b) provides that evidence is not admissible if it would unfairly and harmfully surprise a party. In my experience, surprise is more an objective type of thing. The court would make a determination whether counsel had a reasonable opportunity to expect such evidence. I would refer the committee to the comments of the federal drafters dealing with the deletion of surprise from the federal rules. Rather than calling for the outright exclusion of evidence which the judge determines has or would unfairly and harmfully surprise the party, the court can grant the defense a continuance to look into the circumstances or into the evidence which has been offered. I think this is a fairer determination in the courtroom rather than calling for the outright exclusion.

Senator Wilson: What are the parameters of properly claimed surprise?

Fred Pinkerton: I think it's largely objective. There is a provision in the law now for discovery in criminal cases. That discovery is more limited than in civil cases. I think the court can look and see if there had been a motion for discovery which had been granted, the defense had followed all of their procedures in discovering all properly discoverable evidence, then I think the judge would have something upon which to base whether this party has been diligent in determining whether or not it would be surprised by other evidence. The discovery statutes exclude from discovery all police reports and memorandum of state agencies and I have experienced that there has been claimed surprise because of evidence contained in the police reports. I think for criminal cases, Section 29 ought to have at least the discretion in the trial judge to grant a continuance, because at the time of the trial this evidence is going to be unveiled which is not properly discoverable. This is a difficult thing for a judge to determine.

Senator Wilson: Don't you think that relief ought to be in a footnote. I question seriously whether in an evidence code we ought to get into a question of what the parameters of discretion should be.

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Fred Pinkerton: I feel that footnotes become part of the section anyway. How its done is a matter of opinion. I would follow how the federal drafters did it and drop it completely. Then the court would use common law, which allows for a continuance.

Senator Close: I'm afraid putting it in a footnote wouldn't do much good because the courts don't pay attention to footnotes.

Fred Pinkerton: I have reservations about Section 79 on Page 31, Subsection 2 which provides that evidence of a conviction is inadmissible if a period of more than 10 years has elapsed since the date of release or the expiration date of his parole, probation or sentence. The principal as I understand it is that at the time of cross examination for impeachment purposes, a witness was asked whether or not he or she has ever been convicted of a felony. The law in Nevada now is if the defendant is on the stand and the prosecutor asks that question, he must have in his possession evidence that there has been in fact a previous felony conviction. There is no limitation presently on the time that prior felony conviction occured. There can be an objection by the defense counsel that the previous felony conviction is so remote from the present trial that it is of so little probative value that it can be excluded.

I would suggest and propose that rather than putting a specific time limit in there, that the section dealing with the 10-year provision be dropped. Subsection 1 is very commendable, but subsection 2, where a specific period of time is proposed, raises a problem. I think the best way is to leave it with the judge as it is now to exclude it, or admit it if the facts are so close and the credibility isn't a question.

Senator Wilson: Of course, it's only admissible in any event if the answer to the question "have you ever been convicted of a felony" is "no", if he says "yes", that's the end of it.

Fred Pinkerton: I'm afraid that this section would prevent that question from even being asked if the exemplified copy showed that 10 years had elapsed from the date of his release from confinement. And the prosecutor must have in his hand an exemplified copy of his conviction as evidence.

I think the idea expressed in Subsection 3 is very valid, but as to evidence of an honorable discharge in Subsection 3 a), I have some question about that. In this state we do not have a certificate of rehabilitation. We have a provision in the state law for honorable discharge from probation. I think rather than putting disqualification on whether the person can be asked the question has he been convicted of a felony previously, that should be dropped. I think that another way to approach it is if a person has been honorably discharged on probation and the prosecutor has asked the question on cross examination; on redirect the defense counsel should be permitted to ask "have you been discharged honorably from probation." I think that if the prior felony conviction is before the jury, the mitigating circumstance of an honorable discharge should also be before the jury.

Federal drafters did not include allowing the conviction and the fact of rehabilitation because of reasons of policy, economy of time, and difficulty of evaluation. I think the same argument is true for permitting both of them in. When we talk about economy of time, its difficult enough to get exemplified copies of prior convictions in time for trial without burdening the state with trying to determine the status of their probation and the result of that probation. I don't think we save time by applying or enacting this section. I think we are qualifying and limiting the matter of impeachment too much when we get into examining whether or not they were released from probation and what was the status of that discharge.

What I have proposed would be consistent with NRS 176.225 which is the discharge from probation statute.

There is another point I want to make regarding Sections 41 through 49, the Lawyer-Client privelege, on Page 22. The present law is contained in NRS 48.060. This section expresses the proper limitation upon the attorney-client relationship. Sections 41 through 49 expand the attorney-client relationship and I think it opens the door to abuse.

I particularly have an objection to expanding the attorney-client relationship to coverage for the representative of the lawyer and client in Sections 45 and 46. Who do we look to to determine whether or not that witness is a representative of the defendant? We look to the defendant himself.

Senator Wilson: This is a valid point because Section 45 could be used by a knowledgeable defendant in cloaking a witness with the privelege of representative. What does the committee say on that?

Fred Pinkerton: The comments of the drafters are: "Representative of the client is limited to one who may properly be said to speak for the client within the spirit and purpose of the privelege; that is, one having authority to obtain legal services or to act on the legal advice for a client." They speak to all cases practically except criminal cases. Enactment of this section as it appears now would lend itself to abuse, rather than encouraging a criminal defendant dlient to disclose everything to the attorney.

Senator Young: I think your point is unrealistic. Everybody in trouble doesn't have a chance to go to an attorney personally, he might have to send his sister or brother. This only excludes confidential communications to a representative made for the purpose of facilitating professional services to the client. I don't see any great problems of abuse. If you can establish by evidence that there is a relationship, the privelege can be claimed. You have to have the confidentiality for communication with your lawyer.

Fred Pinkerton: My last comment is to Section 66 on Page 28, Subsection 1 which provides for the disclosure of the identity of an informer. I think that it misses the boat. The question before the judge is whether or not the officers who made the search had reason to believe that the informer was reliable. How the name adds or detracts from that, I'm not certain. The judge is going to listen to the testimony of the officers and determine whether or not they had reason to believe the information was reliable. I don't see how disclosure of the informant's name adds anything to that determination.

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Senator Wilson: Realistically the reliability of the informer and the reasonableness of the officers reliance on him, can't be disclosed unless the informant is produced, and cross-examined.

Fred Pinkerton: It's a policy consideration if informant's are disclosed, it drys up the source of information for law enforcement. If informants know that their names will be disclosed in a courtroom in front of the defendant and his attorney, he will not be so anxious to give information in the future. If the judge does not believe that the informant was reliable, the evidence does not come in. I don't know how the name of the informer, and how does the judge know who the informant is anyway, adds or detracts from the determination.

The hearing adjourned at 11:05 a.m.

Respectfully submitted,

Eileen Wynkoop

Eileen Wynkoop, Secretary

Approved: _____