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The American Law Institute's Model Code of Evidence

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from the very nature of our profession and daily participation in legal matters.

In connection with the foregoing report, the Association adopted the following resolution:

"WHEREAS, due in a large measure to the absence of a permanent, independent, non-partisan agency of state government charged with specific responsibility for maintaining our statute laws and drafting legislative bills, there are now and almost certainly will be many unconstitutional, obsolete, superseded and duplicative laws, as well as laws made up of uncertain, inappropriate and excessive words; and

WHEREAS, this situation will greatly impair the value of the revised and recompiled code when adopted unless such a state agency is created;

Now Therefore, Be It Resolved by the Washington Bar Association assembled that this association endorse and recommend to the Legislature the establishment of a legislative reference and bill drafting agency with the duties and responsibilities of maintaining our statute law in conformity with the plan of the revised code as the same may be changed or modified from time to time by each successive legislature."

The American Law Institute's Model Code of Evidence

By JUDSON F. FALKNOR, *Dean of the Law School of the University of Washington.*

In planning this necessarily brief statement concerning the Code of Evidence which has been approved by the American Law Institute, I found that I was confronted with a considerable problem of condensation. In the first place, what we have here is a Code, and necessarily the draftsmen have undertaken to cover the entire area of the law of evidence. In the second place, the treatment of many existing rules has been radical in character. And finally, it should be mentioned that a controversy arose between the reporter and his advisers on the one hand, and Mr. Wigmore, chief consultant, on the other, as to the method or technique which should be employed in the drafting of an Evidence Code, Mr. Wigmore expressing his disapproval of the Code in an article in the January, 1942, issue of the *American Bar Association Journal.*

The result is that I can do no more today than refer to some of the salient features of the project. Specifically, I shall attempt only the following:

1—A brief reference to the background and history of the undertaking.

2—A word about the dispute as to method which I just mentioned.

3—Reference to some of the more significant changes which would be worked by adoption of the Code and

4—Finally, I shall venture a suggestion relative to the future study and consideration of the Code by the profession in our state.

As has been stated, the Code has been approved and is sponsored by the American Law Institute, whose principal activity up to this time has, as you know, consisted of the restatement of the basic subjects of the Common Law. In the early days of the Institute, the advisability of restating the law of evidence was considered, but the idea was abandoned because of the belief that the law of evidence was in many important respects anachronistic, unrealistic and otherwise deficient, and that what was needed was thorough revision rather than clarification.

So the matter was held in abeyance until the restatement of the more important Common Law subjects was completed or on the road to completion. Then in 1939, pursuant to a special grant from the Carnegie Corporation, the work of codifying the law of evidence got under way under the supervision and direction of a distinguished group of advisers, including Dean McCormick of the University of Texas Law School, Dean Ladd of the Iowa Law School, Judge Augustus Hand, Judge Learned Hand, Judge Lummus of the Massachusetts Supreme Judicial Court and Professor Edmund M. Morgan of the Harvard Law School, who was a member of our summer faculty in 1936 and whose visit here I am sure many of you will remember. Mr. Morgan acted as reporter. Mr. Wigmore was named as Chief Consultant, although he does not appear to have participated in the meetings of the advisers or in the actual drafting of the Code.

The Code went through the usual series of preliminary and final drafts and was finally approved by the American Law Institute in May, 1942. Let me emphasize again that what we now have is not a restatement or an attempt at the clarification of existing law, but a code—a rebuilding from scratch—which proposes many substantial changes in the existing rules of evidence and is designed either for legislative enactment or for adoption by rule of court where that is possible.

And it is no doubt correct to say that, with some exceptions presently to be noted, the present rule making power of our Supreme Court would authorize the adoption of the Code by rule in this state. However, in at least two respects, constitutional change would be required. As drawn, the Code permits judge and prosecutor to comment to the jury upon the failure of an accused to testify and permits the jury to draw inferences against the accused from his failure to testify, results not constitutionally permissible under prior local decisions. Also, the trial judge is permitted under the Code to do what our Constitution now specifically forbids, namely, to comment to the jury on the weight of the evidence and the credibility of the witnesses. Incidentally, the Code provides that the court's instructions shall follow the arguments of counsel. Also, there appears to be serious question whether those sections of the Code working substantial changes in the existing law relating to privileges could be adopted without legislative sanction. But except in the respects mentioned, I think it is fairly clear that the Code could be adopted locally by rule under the 1925 Act.

I spoke of Mr. Wigmore's objection to the method employed in the drafting of the Code, and some amplification of this is desirable

before we get too far along. It was his belief that the Code was too general, too abstract. While he long advocated a change in the general appellate attitude to the point where the rules of evidence would be treated as directory rather than mandatory, he nevertheless strongly criticized this Code, because, in his opinion, it failed to deal in a sufficiently concrete way with specific situations which have recurred in prior adjudicated cases. On this matter, the difference between Wigmore and the reporter appears to be merely as to the desirable degree of particularization.

Also, and this seems to me to be somewhat more serious, Wigmore has pointed out that to a considerable extent, the Code seems to give to the trial judge discretion to admit or exclude evidence and to determine the order, and he also found fault with what he termed the "novel, complex and unfamiliar terminology" employed in the drafting.

I have noted Mr. Wigmore's criticisms at this length, not because I wish to be understood as necessarily agreeing with his views, but because his eminence for many years in this field entitles his comments to consideration in any intelligent, careful and critical study of the Code. To some extent, direct answer to his criticism will be found in the comments of Professor Morgan, Dean Ladd and Judge McElroy which are included in the official publication of the Code.

Now to get to the Code itself and some of its more significant provisions. As already stated, the draftsmen have started from scratch. The Code first strikes down all existing restrictions and exclusionary rules and builds anew. Specifically, Rule 9 provides that, except as provided in subsequent rules, every person is qualified as a witness, no person is disqualified to testify to any matter, there are no privileges, and all relevant evidence (which by definition includes hearsay) is admissible.

Then follows that portion of the present exclusionary doctrine which the draftsmen have concluded should be retained.

As to the competency and qualification of witnesses, it should be noted first that the present disqualification resulting from immaturity or insanity as such has been removed. It is provided that every person is qualified to be a witness as to any material matter unless the judge finds that he is incapable of expressing himself intelligibly or is incapable of understanding his duty to tell the truth. More important, the Code abrogates entirely the so-called Dead Man Statute, our REM. REV. STAT., Section 1211. This is not the occasion, nor is there here sufficient time to discuss this proposal at any great length except to say that it is obviously controversial in a jurisdiction like ours where the disqualification has existed for a long period of time. Dean McCormick expressed very cogently the usual objection to the Dead Man Statute, in his article, "Tomorrow's Law of Evidence" in the July, 1938, issue of the *American Bar Association Journal,* when after referring to the disqualification as one "of the ancient barnacles which will have to go", he said: "The phrase 'where one man's lips are closed by death, the other's must be closed by law' has a specious equity which conceals a baneful potency for injustice. It is a sin against the light when, in the name of solicitude for the dead, the law permits one set of living folks to cut off another's claim without a fair hearing". Notwithstanding the wide-spread criticism of the statute, it

is my opinion that there is more to be said for the present disqualification than the draftsmen of the Code have conceded. It is no doubt true that occasionally the operation of the statute works an injustice, but this circumstance should not, in my judgment, be thought decisive. I suggest that the more determinative consideration is whether the statute works good more often than injustice. We should not forget that the statute interposes no obstacle to the establishment of a claim based upon a written contract and under present day conditions, it is probably true that the vast majority of actual good-faith contracts and business transactions are evidenced by some writing or memorandum.

It is perhaps true that our statute is too inflexible, and perhaps some relaxation is possible without yielding the advantages and benefits of its general application. This has been accomplished in some states by permitting the trial judge to relax the operation of the statute where it appears to him that an injustice would otherwise result, and in other states by requiring evidence corroborating the testimony of an interested claimant. However, between the statute as it is and its complete abrogation, there is no doubt considerable to be said for its retention. I do not wish to be understood as saying that I have come to any final conclusion on the matter. What I am attempting to say is that the proposal of the Code is probably debatable.

The Code also removes the disqualification resulting from a prior conviction of perjury. This seems to be a desirable change. I should think that such a conviction, like any other, should go to the credibility of the witness rather than to his competency to testify.

Permissible methods of impeachment are of course dealt with in detail. In at least two respects, the Code would work changes in the existing local law. Extrinsic evidence of bad character is to be admissible in impeachment only if it involves the traits of dishonesty or mendacity, whereas the present law of our state, at least in the case of a female witness, permits impeachment by proof of bad moral character as well. Also, extrinsic evidence of a prior conviction of crime is admissible to impeach a witness under the Code only if the crime involves dishonesty or mendacity, whereas our present statute permits impeachment by extrinsic proof of any crime. It should be noted also that, under the Code, the necessity for laying a foundation before the admission of extrinsic evidence of a prior contradictory statement is made discretionary with the trial judge.

The Privileges

The self-crimination privilege is retained. The Code adopts specifically the prevailing view, at least the view of the more modern cases, restricting the self-crimination privilege to protection only against testimonial compulsion, that is, protection against *speaking* to one's guilt. Under the Code, the privilege does not protect against bodily measurement or examination such as the taking of finger prints, and it is specifically provided that no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis, a procedure of particular importance in the prosecution of drunken driving cases.

As has already been noted, the Code permits comment by judge and prosecutor upon the failure of an accused to testify. While no federal

constitutional question is involved, there is no doubt that amendment to the state constitution would be required for this proposal. Such constitutional change was made in Ohio in 1912 and in California in 1934. Compensation to a considerable extent for this right to comment on the failure of an accused to testify is the provision prohibiting the impeachment of an accused as a witness in his own behalf by proof of a prior commission or conviction of crime, although as to witnesses generally this method of impeachment, within limits, is preserved. The theory of this, which to me seems quite sound, is that many, perhaps most, criminal defendants who do not take the stand remain silent, not so much because of fear that their testimony will disclose guilt as because of a realistic apprehension of prejudicial misuse by the jury of evidence of prior convictions admitted ostensibly merely to affect credibility. By eliminating the possibility of such an impeachment in the case of an accused as a witness, the inference to guilt because of his failure to testify becomes a much stronger and more permissible one, thus putting the right to comment on a fairer and sounder basis. Even so, there remains what has always seemed to me to be a logical inconsistency between the recognition of the privilege and the right to comment. It can be argued, I think, that the right to comment is to a substantial degree destructive of the privilege, and that if the privilege rests upon a sound and sufficient basis it ought to be protected as far as possible against the right of comment. Proponents of the right to comment answer that it is futile to expect a jury not to draw an unfavorable inference however carefully they are instructed and, to a certain extent, this may be true. On the other hand, if the right to draw inferences against the silent accused is theoretically unsound, I should think that we ought not affirmatively encourage the drawing of the inference. After considering the comments of the draftsmen of the Code, I cannot avoid the conclusion that they were basically unsympathetic with the privilege itself, but felt that it was not expedient to attempt its outright abrogation and consequently have proposed instead a more devious attack upon the privilege, by lessening its significance and perhaps pointing the way to its ultimate destruction. I am not saying that I either agree or disagree with this apparent viewpoint. I merely call attention to it because I think it should be considered in passing upon the propriety of these provisions of the Code.

The attorney-client privilege and priest-penitent privilege are retained in the Code without significant change.

The privilege cloaking confidential communications between husband and wife is retained, but the Code abrogates entirely the marital privilege recognized by our statute which, except in a few situations, forbids one spouse to testify against the other without the latter's consent.

In all drafts of the Code, save the last, the physician-patient privilege was entirely eliminated, but in the May, 1942, meeting of the Institute the privilege was ordered reinstated, though in considerably restricted form. As now included, the privilege does not extend "to cases where the patient, or someone claiming through him, is relying upon the patient's physical or mental condition as a factor in his claim or defense." More particularly under the Code, as I read it, the privilege would not protect against compulsory disclosure of communications between patient and physician in insanity proceedings, in will contests or in personal injury actions. Such restrictions seem to me to be sound. Referring

particularly to personal injury actions, it would appear that when the plaintiff makes a public issue of his physical condition there is no rational basis longer to suppress what is by hypothesis the relevant truth.

At this point reference should be made to Rule 303 of the Code, which Professor Morgan calls the "keystone of the arch." Notwithstanding an item of evidence may be admissible under the other provisions of the Code, under Rule 303 the trial judge may, in his discretion, exclude the evidence if he finds that its probative value is outweighed by the risk that the proof will take more time than the evidence is worth, or that the admission of the evidence would create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or would unfairly surprise the opponent. Rule 303 expressly provides that all other rules of the Code stating evidence to be admissible are subject to Rule 303 unless the contrary is expressly stated. There are a few such instances. For example, the right of an accused to introduce evidence of good character is absolute and not subject to the trial court's discretion which generally obtains under Rule 303. Also, the breadth of Rule 303 and its wide applicability should be kept in mind in considering the radical relaxation of the hearsay rule. While literally the Code relaxes the hearsay rule to the point of allowing the introduction of a considerable amount of evidence of perhaps doubtful trustworthiness and cogency, the application of Rule 303 would operate to exclude the evidence in a particular case if the judge concludes that the evidence offered is of only slight probative value. Rule 303 also exemplifies the flexibility which has been sought and the large discretion which the Code vests in the trial judge.

It seems to me that, practically speaking, the Code abrogates the opinion rule as we know it today. The present rule excludes the opinion and conclusion of a lay witness whether or not he has personal knowledge of the event or transaction to which his testimony relates unless it appears that he cannot satisfactorily reproduce in words the basic factual data which he has observed. Thus, notwithstanding the opinion rule, it is familiar doctrine for the admission of his hearsay. In several important respects the provision of the Code is even more liberal than the so-called Massachusetts Hearsay Statute, which itself has been regarded as a considerable departure from orthodox doctrine. It will be noted also that if the declarant is present at the trial and subject to cross-examination his prior hearsay is admissible. This would work substantial change in the existing law because, as the matter now stands, prior inconsistent statements of a witness in court are admissible only as touching his credibility, whereas under the Code the statements would be admissible substantively as well, that is, as proof of the matter asserted on the prior occasion. Incidentally, this change of the rule would operate to admit the former testimony of a witness now in court—a result not permitted under existing doctrine. The Code also would authorize the admission of the declarations of an agent if the declarations concern the subject-matter of the agency. Thus, here again, a substantial change in existing law would be worked. The declaration of an authorized driver of the defendant's automobile, concerning the circumstances of an accident, would be admissible whether or not he was authorized to speak for his employer and whether or not the declaration was admissible as a spontaneous exclamation.

The Code also makes substantial change in reference to the admissibility of a declaration against interest by providing that the unavailability of the declarant is not a prerequisite to admissibility and by extending the exception to admit declarations against penal interest as well as declarations against pecuniary or proprietary interest. Thus, the Code would appear to admit in a criminal action the out-of-court confession of a third party, a result which is, of course, opposed by the overwhelming weight of authority at the present time.

Finally, a word about presumptions. The final draft of the Code reverts quite completely to the Thayer-Wigmore view as to the office and effect of a presumption of law. Particularly, Rule 704 provides that when the basic fact of a presumption has been established and the opponent of the presumption introduces evidence which would support a finding of the non-existence of the presumed fact, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action. This appears to mean that the presumption is to be accorded merely a procedural effect, and that it disappears entirely from the case upon the introduction of opposing evidence barely sufficient to support a contrary finding whether or not the opposing evidence is actually believed by the trier of the fact. As stated, this appears to represent a complete adherence to the Thayer theory. To be a little more specific: Suppose, in an automobile accident case, plaintiff proves the defendant's ownership of the car at fault. Under existing local law, this gives rise to a presumption that at the time of the accident the defendant's car was being operated by his agent and within the scope of the agency and the plaintiff is at least relieved from the burden of going forward with actual proof on this issue. Prior to the *Bradley* case, the presumption could not be dissipated as a matter of law by the testimony of interested witnesses. The interested-witness rule was abrogated by the *Bradley* case, and in its place we now have a holding that, regardless of the source of proof, the presumption is dissipated as a matter of law if the defendant's showing is clear, convincing, uncontradicted and unimpeached. The Code would clearly abrogate the rule of the *Bradley* case because, under the Code, if the defendant puts in evidence sufficient to justify a finding in his favor, whether or not that proof is clear, convincing, uncontradicted and unimpeached, the question of agency is to be determined "exactly as if no presumption had ever been applicable in the action," which, of course, means that the defendant's proof has operated to dissipate the presumption as a matter of law. In this analysis I have assumed (and I think I am correct in this assumption) that it is the view of our court that the mere fact of defendant's ownership, aside from the presumption, would not be deemed sufficient circumstantial evidence of agency at the time of the accident to justify a finding in plaintiff's favor.

Here again, I am not venturing to approve or disapprove the proposed change. I am merely noting it and also the circumstance that we are again in a controversial area and that the proposal of the Code appears opposed to the trend of many of our local decisions of the last two or three decades.

In conclusion I suggest to you that, notwithstanding the comparatively radical and controversial character of some of the changes proposed, it should be kept in mind that the Code represents the product

of three years of serious and conscientious effort by some of the best legal brains in the country who have endeavored by these proposals to improve an area of the procedural law which is well charged with anachronism and a good many absurdities. To amplify this and emphasize the importance of this effort, I should like to read to you a paragraph or two from Professor Morgan's Introduction to the Code:

> "The law of evidence is in such a confused and confusing condition that it is almost impossible to draft a rule which is universally accepted without qualification. On the other hand, many of the rules, if adopted, will make important changes in the common law. They call for serious consideration by the Bench and Bar; and in considering them the members of the profession should have constantly in mind the disturbing truth that more and more of the problems which are traditionally solved by lawyers and judges are being taken from the courts and handed over to private arbitrators or to official administrative tribunals. To what extent this phenomenon is due to the obstructions to the prompt and efficient investigation and determination of disputes which have been interposed by antique rules of procedure and the exclusionary rules of evidence is a question which deserves more than passing attention. Unless Bench and Bar institute a procedure for quickly disclosing the matters really in dispute between litigants and for a speedy, inexpensive and sensible trial and final determination of those matters, potential litigants will justifiably resort to other tribunals, official and unofficial. To say that the courts have not and cannot get personnel competent to use such a procedure is to confess that our system of administration of justice has completely broken down."

The Code is entitled to the careful study and consideration of every member of the profession. No one ought to take a final or definite position on any of its proposals, in my opinion, without careful study of the provisions against existing doctrine and the relevant recent literature. I have been reading and re-reading the various drafts of the Code since its inception and, while I have some tentative ideas, I should like to defer making my final conclusions until I have the opportunity for further study, and particularly an opportunity for an interchange of ideas with trial judges and trial lawyers of our community. Also, I suggest to you that the circumstance that one may disapprove one or more of the proposals of the Code ought not to prejudice him against the value of the enterprise at large.

My suggestion as to the future study of the Code by the bar of this state is this: In the first place, I doubt whether a series of lectures by anyone, however well qualified, would be adequate as the basis for a decision as to the propriety of the adoption of the Code, or even a part of it locally. What I do believe is that a proper consideration of the Code would require a round table or seminar discussion by a relatively large group or committee composed of experienced trial judges and trial lawyers. Such an enterprise to be valuable and successful would, in my opinion, have to extend over some period of time. It could not be accomplished in two or three meetings. If it should be concluded at any future time to undertake a project of this character, the faculty of the law school would, of course, be glad

to assist in every way possible, not only in respect to physical facilities, but as well in respect to any preliminary or administrative work which is thought advisable. To be a little more specific, it seems to me that a proper consideration of the Code would require a series of meetings of such a group or committee extending over a period of some months, during which time the Code would be considered and discussed title by title, particularly against the present law of our own state, so that everyone would be entirely clear as to the extent and significance of the changes proposed. We have been following this procedure at the law school for the last two years, in a seminar on the Code for advanced students, and the plan has worked very well. I believe that this would be a more helpful approach to the problem than an institute on the Code or a series of lectures, and I know that it would be immensely more valuable than these rather disjointed and necessarily superficial remarks of mine today.

In connection with Dean Falknor's address the Association adopted the following resolution:

"Whereas, the American Law Institute has recently prepared, and at the present time has under consideration a Code of the law of evidence, and in view of the excellent address before this association by Dean Judson F. Falknor of the University of Washington Law School, on the subject matter of this Code as the same relates to the Washington law;

"BE IT RESOLVED that it is the sense of this association that a committee of the bar representative of the several sections of the state be appointed to counsel and advise with Dean Falknor for a further study of the merits of this proposed code; and that this association recommend to the Superior Court Judges Association that said association appoint forthwith a similar committee to act with the committee of this association. It is the further sense of this association that said joint committees should be of sufficient size to reflect the thought of the courts and bars of the various counties of the state. Further, that if this joint committee deems it necessary, notice will be given to the Bench and Bar of any hearings which may be held; furthermore, that this said joint committee shall report back at the next annual meeting of this association."

Improving Administrative Law

By JOSEPH W. HENDERSON

(EDITOR'S NOTE: Mr. Henderson addressed the Association on September 17. The first part of his remarks dealt with the accomplishments of the American Bar Association. The remainder of his address was concerned with the subject of administrative law and is set out here in full.)

At the annual meeting in Chicago I said: "The time has now arrived when we must prepare with all our strength for the reforms needed to secure justice under law, before administrative tribunals, state and federal, and the enactment of necessary legislation to procure a fair