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Evidence; 1979 Revisions

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EVIDENCE; 1979 REVISIONS

Amends NRS 48.035, 48.055, 49.295, 50.115, 51.345, 51.375, 52.285

Repeals NRS 48.064

AB 153, 155, 156, 158, 159, 338 (Committee on Judiciary);

STATS 1979, Chs 29, 20, 21, 134, 37, 306 (respectively)

Revisions to the rules of evidence this year include: a modification of the requirements for jury instructions when evidence of separate crimes are introduced against an accused criminal;¹ a limitation on spousal witness privilege;² a limitation on the "statements against interest" hearsay exception;³ liberalizing requirements of examining hearsay declarants,⁴ adverse witnesses,⁵ and character witnesses;⁶ and repeal of the "dead man statute."⁷

These revisions change statutory language enacted in the 1971 comprehensive reform of evidence law,⁸ which was substantially similar to the 1969 Draft of the Proposed Federal Rules of Evidence.⁹ Congress adopted a modified version of those rules in 1974.¹⁰ The 1979 Nevada changes adopt language contrary,¹¹ identical¹² or substantially similar to¹³ that of the Federal Rules of Evidence.

NRS 48.035 previously required the trial court to give a cautionary instruction to the jury in a criminal trial when admitting evidence of separate and distinct crimes.¹⁴ Chapter 29 permits the instruction only at the request of an interested party.¹⁵ Thus, the defendant, usually the interested party, now determines at his option whether or not to draw the jury's attention to other crimes or acts during jury instructions.

Under prior law, inquiry into character on cross-examination of a defendant was limited to reputation and opinion unless the character or trait was an essential element of the charge, claim or defense.¹⁶ However, inquiries into specific conduct occurred in federal cases if the form of questioning was as to specific conduct of which the witness had heard.¹⁷ To eliminate this "have you heard" form of questioning, the federal rule was broadened to allow inquiry into specific conduct of the defendant on cross-examination. Chapter 21, amending NRS 481.055(1) conforms Nevada law to federal law by adopting the broadened scope of inquiry in cross-examination.¹⁸

Under prior law, testimony of a claimant on his own behalf to support a claim against a deceased person required corroboration by other evidence to be admissible

into evidence.¹⁹ This admissibility test is a variation of the "dead man statute" which excludes testimony of the survivor of a transaction with a decedent, when offered against the latter's estate.²⁰ However, as applied, NRS 48.064 did not limit its application to decedent's estates; it applied to other civil proceedings and criminal cases.²¹ Although testimony of a decedent qualified as a dying declaration it could not be admitted into evidence unless the testimony was corroborated by two witnesses.²² Chapter 134 repeals NRS 48.064, Nevada's Dead Man Statute.²³ Thus, it appears that testimony of a decedent which qualifies as a dying declaration is now admissible without corroboration.

Under prior law regarding the martial testimonial privilege, a spouse could not be a witness in a criminal trial for or against the other spouse absent consent of the charged spouse.²⁴ This rule, although warranted to sustain the martial relationship²⁵ allows the charged party to suppress testimony by marrying the witness. To prevent occurrence of this situation, the rule was narrowed to exclude the privilege's application to events which take place prior to the marriage. Chapter 306, adding Subsection 3 to NRS 49.295, adopts the Supreme Court Standard,²⁶ which has not been adopted by the Federal Rules of Evidence.²⁷

Chapter 20 adds subsection 3 to NRS 51.375 to allow a party against whom a hearsay statement is admitted, to call the declarant as a witness and examine him regarding his statements as if on cross examination. This addition to Nevada law adopts the federal premise for its rule: the declarant of an admitted hearsay statement is in effect a witness.²⁸

Chapter 37 amends Nevada's "Statement against interest" hearsay exception to include statements made against a penal interest provided that corroborating circumstances clearly indicate the trustworthiness of the statement.²⁹

These same changes were made in the Federal Rules of Evidence in 1969³⁰ from which the original rule in Nevada was adopted.³¹ The federal rules change was made to effect an accommodation between competing interests: untrustworthiness reflected by suspicions that the statement was fabricated when made or in its contents, and an increasing amount of decisional law which recognized exposure to punishment for a crime as a sufficient indicator of trustworthiness. This accommodation led to the requirement of corroboration which is included in the federal rule.³² Chapter 37, amending NRS 51.345, conforms Nevada law to federal law.

FOOTNOTES

1. 1979 Nev. Stats. ch. 29 (hereinafter "Ch. 29") §1 (amending NRS 48.035).
2. 1979 Nev. Stats. ch. 306 (hereinafter "Ch. 306") (amending NRS 49.295).
3. 1979 Nev. Stats. ch. 37 (hereinafter "Ch. 37") (amending NRS 51.345).
4. 1979 Nev. Stats. ch. 20 (hereinafter "Ch. 20") §2 (amending NRS 51.375).
5. Id. §1 (amending NRS 50.115).
6. 1979 Nev. Stats. ch. 21 (hereinafter "Ch. 21") (amending NRS 48.055).
7. 1979 Nev. Stats. ch. 134 (hereinafter "Ch. 134") (repealing NRS 48.064).
8. 1971 Nev. Stats. ch. 402 at 775 (NRS Chs. 47, 48 and 51).
9. 46 F.R.D. 161 (1969).
10. FED. RULES EVID. Rules 101-1103, 28 U.S.C.
11. Compare Ch. 306 (adding NRS 49.293(3)) with FED. RULES EVID. Rule 501, 28 U.S.C.
12. Compare Chs. 37, 21 & 20 §2 (amending NRS 51.345, 48.055 and 51.375) with FED. RULES EVID. Rules 804(b) (3), 405(a) and 806, 28 U.S.C.
13. Compare Chs. 20 §1 and 29 §1 (amending NRS 50.115 and 48.035) with FED. RULES EVID. Rules 611 and 404(b), 28 U.S.C.
14. 1971 Nev. Stats. ch. 402, §29 at 780 (NRS 48.035) (amended by Ch. 29 §1).
15. Ch. 29 §1 (amending NRS 48.035).

16. 1971 Nev. Stats. ch. 402 §31 at 781 (NRS 48.055) (amended by Ch. 21 §1) See also 46 F.R.D. 161, 231 (1969). See generally, 1 J. Wigmore A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§191-96 (1940).
17. Commissioner's Note to 51 F.R.D. 315, 348-49 (1971). See Michelson v. U.S., 335 U.S. 469, 477-8 (1948).
18. Ch. 21 §1 (amending NRS 48.055(1)).
19. 7 Wigmore, Evidence §2065 (Chadbourn rev. 1978).
20. 2 J. Wigmore, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §578 (1940). 1971 Nev. Stats. ch. 402, §110.5, at 794 (NRS 48.064) (repealed by Ch. 134 §1).
21. 1971 Nev. Stats. ch. 402 §110.5, at 794 (NRS 48.064) (repealed by Ch. 134 §1).
22. Minutes of the Nevada State Legislature, Attachment "D" March 6, 1979, Senate Judiciary Committee.
23. Ch. 134 §1 (repealing NRS 48.064). See also, Notes of Advisory Committee on Proposed Rules, FED. RULES EVID. Rule 601, 28 U.S.C.
24. 1977 Nev. Stats. ch. 132 §1 at 265 (NRS 49.295) (amended by Ch. 306 §1).
25. Hawkins v. U.S., 358 U.S. 74 (1958).
26. 2, Weinstein and Berger, WEINSTEIN'S EVIDENCE, ¶505 (1975). See United States v. Van Drunen, 501 F.2d 1293 (7th Cir.), cert. denied, 419 U.S. 1091 (1974) (privilege inapplicable when marriage took place one month after indictment). See also N.M. Stat. Ann. §20-4-505(d)(2) (Supp. 1975).
27. FED. RULES EVID. Rule 505, 28 U.S.C. See United States v. Owens, 424 F. Supp. 423 (E.D. Tenn. 1976) ('reason and experience' test in Rule 501 does not warrant this exception).
28. Ch. 20 §2. See also FED. RULES EVID. Rule 806, 28 U.S.C.
29. Ch. 37 §1 (amending NRS 51.345).
30. 46 F.R.D. 161, 378 (1969).
31. 1971 Nev. Stats. ch. 402 §135, at 797-8 (NRS 51.345).
32. Advisory Committee's Note to 56 F.R.D. 183, 327 (1973). See e.g., U.S. v. Oropeza, 564 F.2d 316, 325 (9th Cir. 1977).