Chapter 44

1969 REPLACEMENT PART

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RIGHTS, COMPETENCY AND PRIVILEGES OF WITNESSES

44.010 Witness defined. A witness is a person whose declaration is received as evidence for any purpose, whether it is made on oral examination, by deposition or by affidavit.

44.020 Who may be witness. All persons, except as provided in ORS 44.030, who, having organs of sense can perceive, and perceiving can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action, suit or proceeding are excluded; nor those convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case, except the last, the credibility of the witness may be drawn in question, as provided in ORS 44.370.

44.030 Persons not competent as witnesses. The following persons are not competent witnesses:

(1) Those of unsound mind at the time of their production for examination.

(2) Children under 10 years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. Whenever a child under the age of 10 years is produced as a witness, the court shall, by an examination made by itself, publicly or separate and apart with counsel present, ascertain to its own satisfaction whether the child has sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify.

44.040 Confidential communications. (1) There are particular relations in which it is the policy of the law to encourage confidence, and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases:

(a) A husband shall not be examined for or against his wife without her consent, or a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage. The exception does not apply to a civil action, suit or proceeding, by one against the other, or to a criminal action or proceeding for a crime committed by one against the other.

(b) An attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional employment.

(c) A priest or clergyman shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

(d) A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action, suit or proceeding, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

(e) A public officer shall not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

(f) A stenographer shall not, without the consent of his or her employer, be examined as to any communication or dictation made by the employer to him or her in the course of professional employment.

(g) A licensed professional nurse shall not, without the consent of a patient who was cared for by such nurse, be examined in a civil action, suit or proceeding, as to any information acquired in caring for the patient, which was necessary to enable the nurse to care for the patient.

(h) A certified psychologist, as defined in ORS 675.010, shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of his professional employment.

(2) If a party to the action, suit or proceeding offers himself as a witness, it is deemed a consent to the examination also of a wife, husband, attorney, clergyman, physician or surgeon, stenographer, licensed professional nurse or certified psychologist on the same subject.

[Amended by 1957 c.44 §1; 1963 c.396 §16]

44.050 Judge or juror as a witness. The judge or any juror may be called as a witness by either party, but in the former case it is in the discretion of the court or judge to order the trial to be postponed or suspended and to take place before another judge.

44.060 Facts to which a witness may testify. A witness can testify of those facts only which he knows of his own knowledge,

that is, which are derived from his own perceptions, except in those express cases in which his opinions or inferences, or the declarations of others, are admissible.

44.070 What questions witness must answer. A witness shall answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a direct tendency to subject him to punishment for a felony, or to degrade his character, unless, in the latter case, it is as to the very fact in issue or to a fact from which the fact in issue would be presumed. This privilege is the privilege of the witness and objection cannot be made by a party or his attorney. A witness must answer as to the fact of his previous conviction for a felony.

44.080 Protection of witness from improper questions and excessive detention. It is the right of a witness to be protected from irrelevant, insulting or improper questions, and from harsh or insulting demeanor. He is to be detained only so long as the interests of justice require.

44.090 Protection of witness from arrest. (1) Every person who has been, in good faith, served with a subpena to attend as a witness before a court, judge, commissioner, referee or other officer, is exonerated from arrest, in a civil case, while going to the place of attendance, necessarily remaining there and returning. The arrest of a witness contrary to this section is void, and when wilfully made is a contempt of the court; and the officer making the arrest is responsible to the witness for double the amount of the damages which may be assessed against him, and is also liable in an action by the party serving the witness with the subpena, for the damages sustained by that party in consequence of the arrest.

(2) But the officer is not liable in any way, unless the person claiming the exemption makes, if required, an affidavit stating:

(a) That he has been served with a subpena to attend as a witness before a court, judge or other officer, specifying the same, the place of attendance and the action, suit or proceeding in which the subpena was issued; and

(b) That he has not been served by his own procurement with the intention of avoiding an arrest.

(3) The affidavit may be taken by the officer and exonerates him from liability for not making the arrest, or for discharging the witness when arrested.

(4) The court, judge or officer before whom the attendance of the witness is required may discharge him from an arrest made in violation of this section.

PROCURING THE WITNESS

44.110 Subpena, definition and effect. The process by which the attendance of a witness is required is a subpena. It is a writ directed to a person and requires his attendance at a particular time and place, to testify as a witness in a particular action, suit or proceeding therein specified, on behalf of a particular party therein mentioned. It also requires that he remain till the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or his attorney, the payment of his legal fees for the next following day and if not then paid, he is not obliged to remain longer in attendance. It may also require him to bring any papers, books, documents or other things under his control which he is bound by law to produce in evidence.

44.120 Subpena, purpose and by whom issued. The subpena is issued as follows:

(1) To require attendance before a court of record, or at the trial of an issue therein, or out of that court in an action, suit or proceeding pending therein:

(a) By the clerk of that court; or

(b) By the attorney of record of the party to the action, suit or proceeding in whose behalf the witness is required to appear.

(2) To require attendance before a commissioner appointed to take testimony, by a court of the United States or a territory thereof, a sister state or foreign country, by any clerk of a court of record in places within the jurisdiction of that court.

(3) To require attendance before a judge, justice of the peace or other person authorized by law to take the testimony or affidavit of another, by such judge, justice of the peace or other person, in places within their respective jurisdictions.

(4) When a subpena is issued by the attorney of record of the party in whose behalf the witness is required to appear pursuant to

paragraph (b) of subsection (1) of this section, the subpena shall be subscribed by the signature of such attorney.
[Amended by 1969 c.383 §1]

44.130 Subpena, how and when issued. Upon request of a party or attorney of the court, the subpenas authorized by paragraph (a) of subsection (1) and subsection (2) of ORS 44.120 shall be issued in blank and delivered to the party or attorney. The party or attorney may fill in the blank with the name of the witness that he desires to be subpenaed and cause it to be served as required in ORS 44.140 and 44.150.
[Amended by 1969 c.383 §2]

44.140 Service of subpena. A subpena may be served by the party or any other person over 18 years of age. The service shall be made by delivering a copy to the witness personally and giving or offering to him at the same time the fees to which he is entitled for travel to and from the place designated and one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

44.150 Service of subpena if witness concealed. A sheriff, his deputy or some person specially appointed by him, but none other, is authorized and required to break into any building or vessel in which a witness may be concealed to prevent the service of a subpena, and serve it on the witness.

44.160 Proof of service. Proof of service of a subpena is made in the same manner as in the service of a summons.

44.170 [Repealed by 1961 c.413 §1 (ORS 44.171 enacted in lieu of ORS 44.170)]

44.171 Witness' obligation to attend; attendance fees and mileage. A witness is not obliged to attend for examination at a place outside the county in which he resides or is served with subpena unless his residence is within 100 miles of such place, or, if his residence is not within 100 miles of such place, unless there is paid or tendered to him upon service of the subpena:

(1) Double attendance fee, if his residence is not more than 200 miles from the place of examination; or

(2) Triple attendance fee, if his residence is more than 200 miles and not more than 300 miles from such place; or

(3) Quadruple attendance fee, if his residence is more than 300 miles from such place; and

(4) Single mileage to and from such place.
[1961 c.413 §2 (enacted in lieu of ORS 44.170)]

44.180 Compelling person present not upon a subpena to testify. A person present in court or before a judicial officer may be required to testify in the same manner as if he were in attendance before the court or officer upon a subpena.

44.190 Penalty for disobedience to subpena or refusal to be sworn, answer as a witness or subscribe an affidavit or deposition. Disobedience to a subpena, or a refusal to be sworn or answer as a witness or subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer before whom he is required to attend or the refusal takes place, and if the witness is a party, his complaint, answer or reply may be stricken.

44.200 Forfeiture and damages for disobedience to subpena. A witness disobeying a subpena duly served shall also forfeit to the party requiring his attendance the sum of $50 and all damages which he may sustain by the failure of the witness to attend. The forfeiture and damages may be recovered by an action at law.

44.210 Warrant to produce witness. If a witness fails to attend, the court or officer before whom he is required to attend, upon proof of due service of the subpena and the failure of the witness, may issue a warrant to the sheriff of the county in which the witness is required to attend, requiring him to arrest the witness and bring him where his attendance was required.

44.220 Warrant of commitment. Every warrant of commitment issued by a court or officer pursuant to ORS 44.190 shall specify the cause of the commitment. If it is for refusing to answer a question, the question shall be stated in the warrant. A warrant to commit a witness shall be directed to the sheriff of the county in which the witness is attending.

44.230 Order for deposition or production of prisoner. (1) If the witness is a prisoner confined in a prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and

production before a court or officer for the purpose of being orally examined, may be made as follows:

(a) By the court or judge in which the action, suit or proceeding is pending, unless it is a court of a justice of the peace.

(b) By any judge of a court of record when the action, suit or proceeding is pending in a justice's court, or when the witness' deposition, affidavit or oral examination is required before a judge or other person out of court.

(2) The order shall only be made upon the affidavit of the party desiring it, or someone on his behalf, showing the nature of the action, suit or proceeding, the testimony expected from the witness and its materiality.

(3) If the witness is imprisoned in the county where the action, suit or proceeding is pending, and for a cause other than a sentence for a felony, his production may be required; in all other cases, his examination shall be taken by deposition.

44.240 Production of witness confined in state penal or correctional institution. (1) Whenever a court or judge makes an order for the temporary removal and production of a witness who is confined in a state penal or correctional institution within this state before a court or officer for the purpose of being orally examined, the superintendent of the institution shall deliver, at the institution, the witness to the sheriff of the county in which the court or judge making the order is located.

(2) The sheriff shall give his signed receipt upon delivery to him of the witness under subsection (1) of this section, and shall be responsible for the custody of the witness until he returns the witness to the institution. Upon the return of the witness to the institution by the sheriff, the superintendent shall give his signed receipt therefor to the sheriff.

(3) At the time of the delivery of the witness to the sheriff under subsection (1) of this section, or at any time while the witness is in the custody of the sheriff as provided in subsection (2) of this section, the superintendent may deliver to the sheriff a list of persons who may communicate with the witness or with whom the witness may communicate. Except as otherwise required by law, upon receipt of the list and while the witness is in his custody, the sheriff shall permit communication only between the witness and those persons designated by the list.

(4) The institution shall not be liable for any expense incurred in connection with the witness while the witness is in the custody of the sheriff as provided in subsection (2) of this section.

[1955 c.523 §1; 1969 c.502 §2]

OATH AND AFFIRMATION

44.310 Necessity for oath or affirmation. A witness can be heard only upon oath or affirmation except that the testimony of a child under the age of 10 years may be given on a promise in open court to tell the truth if the court determines the child can be safely admitted to testify in accordance with subsection (2) of ORS 44.030.

44.320 Authority to take testimony and administer oaths. Every court, judge, clerk of a court, justice of the peace or notary public is authorized to take testimony in any action, suit or proceeding, as are other persons in particular cases authorized by statute. Every such court or officer is authorized to administer oaths and affirmations generally, and every such other person in the particular case authorized.

44.330 Form of oath generally. An oath may be administered as follows: The person who swears holds up his hand, while the person administering the oath addresses him: "You do solemnly swear that the evidence you shall give in the issue (or matter) now pending between —— and —— shall be the truth, the whole truth and nothing but the truth, so help you God." If the oath is administered to any other than a witness, the same form and manner may be used.

44.340 Variations in form of oath. Whenever the court or officer before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing, connected with or in addition to the usual form of administration, which, in his opinion is more solemn or obligatory, the court or officer may in its discretion adopt that mode. When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion.

44.350 Who may affirm. Any person who has conscientious scruples against taking an oath may make his solemn affirmation by assenting when addressed in the

following form: "You do solemnly affirm that," etc., as in ORS 44.330.

44.360 Affirmation equivalent to oath. Whenever by statute an oath is required, an affirmation, as prescribed in ORS 44.350, is equivalent, and a false affirmation is perjury equally with a false oath.

44.370 Witness presumed to speak truth; jury judges of credibility. A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence. Where the trial is by the jury, they are the exclusive judges of his credibility.

FEES

44.410 Fees of witnesses. (1) As used in this section, "judge" means judge of a court of record, judge of a district court, justice of the peace, referee, sheriff or other officer.

(2) The fees of witnesses shall be $5 for each day's attendance before a judge. [Amended by 1959 c.158 §1]

44.420 [Repealed by 1959 c.158 §2]

44.430 Mileage of witnesses. Every witness whose fees are prescribed in ORS 44.410 or 44.420 who is required to travel in order to execute or perform his duties as a witness, in addition to the fees prescribed, is entitled to mileage at the rate of eight cents a mile, and no more, in going to and returning from the place where the service is performed.

44.440 Payment of fees due from county to witnesses in Multnomah County. (1) The fees for mileage and per diem due from a county to each witness called to serve in the circuit court or county court of any county having more than 400,000 inhabitants, according to the latest federal decennial census, shall be paid on the day when the witness ceases his service as a witness. As soon as the witness ceases to serve he shall make and file with the county auditor a verified statement showing the amount due him for mileage and the number of days he served as a witness. The county clerk shall immediately compare the statement with the record of the witness' service; and if the statement is found to be correct as shown by the record, the clerk shall so certify by a certificate attached to the verified claim. The auditor shall thereupon audit and allow the claim and file his certificate of audit with the county clerk who shall thereupon draw a warrant upon the county treasurer of the county for the amount due the witness. The treasurer shall pay the amount on the presentation of the warrant, the same as any other warrant is paid by him.

(2) The county clerk shall prepare and have printed a form suitably arranged for the verified claim and a form for a certificate showing the claim to be correct as to the number of days of service and a certificate of audit to be signed by the auditor. [Amended by 1963 c.519 §24]

44.450 Time and manner of claiming witness fees in criminal proceedings. The county clerk must, on the application of a witness in a criminal action or proceeding, enter in a fee book, under the title of the action in which the witness was subpenaed or recognized, the number of days he attended and the number of miles he necessarily traveled in consequence of the subpena or recognizance. The clerk shall swear the witness to the statement contained in that entry. The mileage and per diem of a witness in a criminal action or proceeding shall be claimed as in this section provided, at the term of court which the witness attends, and not afterwards.

CERTIFICATE OF LEGISLATIVE COUNSEL

Pursuant to ORS 173.170, I, Robert W. Lundy, Legislative Counsel, do hereby certify that I have compared each section printed in this chapter with the original section in the enrolled bill, and that the sections in this chapter are correct copies of the enrolled sections, with the exception of the changes in form permitted by ORS 173.160 and other changes specifically authorized by law.

Done at Salem, Oregon, on December 1, 1969

Robert W. Lundy
Legislative Counsel