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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 spouse shall not be examined for or against the other spouse without consent of the other spouse; 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 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 the client, be examined as to any communication made by the client to the attorney, or the advice given by the attorney thereon, in the course of professional employment.

(c) A member of the clergy shall not, without the consent of the person making the communication, be examined as to any confidential communication made to the member in the professional character of the member. As used in this paragraph, "member of the clergy" means a minister of any church, religious denomination or organization who in the course of the discipline or practice of that church, denomination or organization is authorized or accustomed to hearing confidential communications and, under the discipline or tenets of that church, denomination or organization, has a duty to keep such communications secret.

(d) Subject to ORCP 44, a regular physician or surgeon shall not, without the consent of the patient, be examined in a civil action or proceeding, as to any information acquired in attending the patient, which was necessary to enable the physician or surgeon to prescribe or act for the patient.

(e) A public officer shall not be examined as to public records determined to be exempt from disclosure under ORS 192.500.

(f) A stenographer shall not, without the consent of the employer, be examined as to any communication or dictation made by the employer to the stenographer 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 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 licensed psychologist, as defined in ORS 675.010, shall not, without the consent of the client, be examined as to any communication made by the client to the psychologist, or the advice given by the psychologist thereon, in the course of professional employment.

(i) A certificated staff member of an elementary or secondary school shall not be examined in any civil action or proceeding, as to any conversation between the certificated staff member and a student which relates to the personal affairs of the student or family of

the student, and which if disclosed would tend to damage or incriminate the student or family. Any violation of the privilege provided by this paragraph may result in the suspension of certification of the professional staff member as provided in ORS 342.175, 342.177 and 342.180.

(j) A physician licensed to practice medicine by the Board of Medical Examiners for the State of Oregon and a local health authority officer or employe shall not be examined in a civil or criminal court proceeding as to the existence or contents of any records of a person examined or treated for an infectious venereal disease without the consent of the person examined or treated for such disease unless the public interest by clear and convincing evidence requires disclosure in the particular instance.

(k) A certificated school counselor regularly employed and designated in such capacity by a public school shall not, without the consent of the student, be examined as to any communication made by the student to the counselor in the official capacity of the counselor in any civil action or proceeding or a criminal action or proceeding in which such student is a party concerning the past use, abuse or sale of drugs, controlled substances or alcoholic liquor. Any violation of the privilege provided by this paragraph may result in the suspension of certification of the professional school counselor as provided in ORS 342.175, 342.177 and 342.180. However, in the event that the student's condition presents a clear and imminent danger to the student or to others, the counselor shall report this fact to an appropriate responsible authority or take such other emergency measures as the situation demands.

(L) A clinical social worker registered by the State Board of Clinical Social Workers shall not be examined in a civil or criminal court proceeding as to any communication given him by a client in the course of noninvestigatory professional activity when such communication was given to enable the registered clinical social worker to aid the client, except:

(A) When the client or those persons legally responsible for the client's affairs give consent to the disclosure;

(B) When the client initiates legal action or makes a complaint against the registered clinical social worker to the board;

(C) When the communication reveals the intent to commit a crime or harmful act;

(D) When the information reveals that a minor was the victim of a crime, abuse or neglect; or

(E) When the registered clinical social worker is a public employe and the public employer has determined that examination in a civil or criminal court proceeding is necessary in the performance of the duty of the social worker as a public employe.

(m) A naturopathic physician licensed under ORS chapter 685 by the Naturopathic Board of Examiners 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 act for the patient.

(2) If a party to the action or proceeding voluntarily offers testimony as a witness, it is deemed a consent to the examination also of a spouse, attorney, clergyman, physician or surgeon, stenographer, licensed professional nurse, licensed psychologist, licensed naturopath, a registered clinical social worker, a certificated staff member, local health authority officer employe or a certificated school counselor on the same subject. [Amended by 1957 c.44 §1; 1963 c.396 §16; 1971 c.512 §4; 1973 c.136 §6; 1973 c.777 §19a; 1973 c.794 §13; 1975 c.694 §1; 1975 c.726 §1, 1977 c.656 §1; 1977 c.677 §12a; 1979 c.284 §79; 1979 c.731 §2; 1979 c.744 §1a; 1979 c.769 §12b]

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 subpoena 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 subpoena, 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 subpoena 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 subpoena 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.

44.095 Use of qualified interpreter for handicapped witness or party. (1) When a witness or a party in a civil or crimi-

nal proceeding is a handicapped person, the court shall appoint a qualified interpreter, unless the handicapped person knowingly and voluntarily files a statement with the court indicating that he does not desire the court to appoint a qualified interpreter for him.

(2) The court shall fix the fees and expenses of an interpreter appointed under subsection (1) of this section. In a criminal proceeding the county in which the proceeding is held shall pay the fees and expenses of a qualified interpreter for the defendant or his witness if:

(a) The defendant makes a verified statement and provides other information in writing under oath showing his inability to obtain a qualified interpreter, and provides any other information required by the court concerning his inability to obtain such an interpreter; and

(b) It appears to the court that the defendant is without means and is unable to obtain a qualified interpreter. Except as provided in ORS 183.418, in a civil proceeding the party plaintiff or defendant requiring the services of a qualified interpreter for himself or his witness shall pay the interpreter's fees and expenses.

(3) As used in this section:

(a) "Handicapped person" means a person who cannot readily understand or communicate the English language, or cannot understand the proceedings because he is deaf, or because he has a physical hearing impairment or physical speaking impairment.

(b) "Qualified interpreter" means a person who is readily able to communicate with the handicapped person, translate the proceedings for him, and accurately repeat and translate the statements of the handicapped person to the court. [1973 c.386 §1]

PROCURING THE WITNESS

44.110 [Repealed by 1979 c.284 §199]

44.120 [Amended by 1969 c.383 §1; repealed by 1979 c.284 §199]

44.130 [Amended by 1969 c.383 §2; repealed by 1979 c.284 §199]

44.140 [Amended by 1977 c.789 §2; repealed by 1979 c.284 §199]

44.150 Service of subpoena if witness concealed. A sheriff, his deputy or some 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 subpoena, and serve it on the witness.

44.160 [Repealed by 1979 c 284 §199]

44.170 [Repealed by 1961 c.413 §1 (44.171 enacted in lieu of 44 170)]

44.171 [1961 c 413 §2 (enacted in lieu of 44 170); repealed by 1979 c.284 §199]

44.180 [Repealed by 1979 c.284 §199]

44.190 [Repealed by 1979 c.284 §199]

44.200 [Repealed by 1979 c 284 §199]

44.210 [Repealed by 1979 c.284 §199]

44.220 [Repealed by 1979 c.284 §199]

44.230 [Amended by 1973 c.836 §326; repealed by 1979 c 284 §199]

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 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. If the witness is a party plaintiff, the sheriff shall recover costs of his care from the

plaintiff, and shall have a lien upon any judgment for the plaintiff. [1955 c.523 §1; 1969 c.502 §2, 1973 c.836 §327]

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 or proceeding, as are other persons in particular cases authorized by statute or the Oregon Rules of Civil Procedure. Every such court or officer is authorized to administer oaths and affirmations generally, and every such other person in the particular case authorized. [Amended by 1979 c 284 §81]

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.

FEEES

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 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 court administrator a verified statement showing the amount due him for mileage and the number of days he served as a witness. The claim shall be verified by the court administrator; and if found to be correct, he shall authorize a warrant to be drawn by the Finance Division for the amount due to witness.

(2) The county clerk or court administrator 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.

[Amended by 1963 c.519 §24; 1977 c.408 §1]

44.450 Time and manner of claiming witness fees in criminal proceedings in counties other than Multnomah. In counties having less than 400,000 inhabitants, according to the latest federal decennial census, 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 subpoenaed or recognized, the number of days he attended and the number of miles he necessarily traveled in consequence of the subpoena or recognition. 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. [Amended by 1977 c 593 §1]

MEDIA PERSONS AS WITNESSES

44.510 Definitions for ORS 44.510 to 44.540. As used in ORS 44.510 to 44.540, unless the context requires otherwise:

(1) "Information" has its ordinary meaning and includes, but is not limited to, any written, oral, pictorial or electronically recorded news or other data.

(2) "Medium of communication" has its ordinary meaning and includes, but is not limited to, any newspaper, magazine or other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system. Any information which is a portion of a governmental utterance made by an official or employe of government within the scope of his or her governmental function, or any political publication subject to ORS 260.512, 260.522 and 260.532, is not included within the meaning of "medium of communication."

(3) "Processing" has its ordinary meaning and includes, but is not limited to, the compiling, storing and editing of information.

(4) "Published information" means any information disseminated to the public.

(5) "Unpublished information" means any information not disseminated to the public, whether or not related information has been disseminated. "Unpublished information"

includes, but is not limited to, all notes, out-takes, photographs, tapes or other data of whatever sort not themselves disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated. [1973 c.22 §2; 1979 c.190 §398]

44.520 Limitation on compellable testimony from media persons; search of media persons' papers, effects or work premises prohibited; exception.(1) No person connected with, employed by or engaged in any medium of communication to the public shall be required by a legislative, executive or judicial officer or body, or any other authority having power to compel testimony or the production of evidence, to disclose, by subpoena or otherwise:

(a) The source of any published or unpublished information obtained by the person in the course of gathering, receiving or processing information for any medium of communication to the public; or

(b) Any unpublished information obtained or prepared by the person in the course of gathering, receiving or processing information for any medium of communication to the public.

(2) No papers, effects or work premises of a person connected with, employed by or engaged in any medium of communication to the public shall be subject to a search by a legislative, executive or judicial officer or body, or any other authority having power to compel the production of evidence, by search warrant or otherwise. The provisions of this subsec-

tion, however, shall not apply where probable cause exists to believe that the person has committed, is committing or is about to commit a crime. [1973 c.22 §3; 1979 c.820 §1]

44.530 Application of ORS 44.520. (1) ORS 44.520 applies regardless of whether a person has disclosed elsewhere any of the information or source thereof, or any of the related information.

(2) ORS 44.520 continues to apply in relation to any of the information, or source thereof, or any related information, even in the event of subsequent termination of a person's connection with, employment by or engagement in any medium of communication to the public.

(3) The provisions of subsection (1) of ORS 44.520 do not apply with respect to the content or source of allegedly defamatory information, in civil action for defamation wherein the defendant asserts a defense based on the content or source of such information. [1973 c.22 §§4, 5; 1979 c.820 §2]

44.540 Effect of informant as witness. If the informant offers himself as a witness, it is deemed a consent to the examination also of a person described in ORS 44.520 on the same subject. [1973 c.22 §6]

44.610 [1973 c.136 §1, repealed by 1979 c.284 §199]

44.620 [1973 c.136 §§2,3; repealed by 1979 c.284 §199]

44.630 [1973 c.136 §4; repealed by 1979 c.284 §199]

44.640 [1973 c.136 §5; repealed by 1979 c.284 §199]

CERTIFICATE OF LEGISLATIVE COUNSEL

Pursuant to ORS 173.170, I, Thomas G. Clifford, 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,
October 1, 1979.

Thomas G Clifford
Legislative Counsel