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Chapter 40

1991 EDITION

Evidence Code

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GENERAL

40.010 Rule 100. Short title. ORS 40.010 to 40.585 and 41.415 shall be known and may be cited as the Oregon Evidence Code. [1981 c.892 §1]

40.015 Rule 101. Applicability of Oregon Evidence Code. (1) The Oregon Evidence Code applies to all courts in this state except for:

(a) The small claims division of the Oregon Tax Court as provided by ORS 305.545;

(b) The small claims division of a district court as provided by ORS 46.415; and

(c) The small claims department of a justice's court as provided by ORS 55.080.

(2) The Oregon Evidence Code applies generally to civil actions, suits and proceedings, criminal actions and proceedings and to contempt proceedings except those in which the court may act summarily.

(3) ORS 40.225 to 40.295 relating to privileges apply at all stages of all actions, suits and proceedings.

(4) ORS 40.010 to 40.210 and 40.310 to 40.585 do not apply in the following situations:

(a) The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under ORS 40.030.

(b) Proceedings before grand juries, except as required by ORS 132.320.

(c) Proceedings for extradition, except as required by ORS 133.743 to 133.857.

(d) Sentencing, except as required by ORS 137.090.

(e) Proceedings to revoke probation, except as required by ORS 137.090.

(f) Issuance of warrants of arrest, bench warrants or search warrants.

(g) Proceedings under ORS chapter 135 relating to conditional release, security release, release on personal recognizance, or preliminary hearings, subject to ORS 135.173.

(h) Proceedings to determine proper disposition of a child in accordance with ORS 419.500 (2).

(i) Proceedings under ORS 813.210 to 813.230, 813.250 and 813.255 to determine whether a driving while under the influence of intoxicants diversion agreement should be allowed or terminated. [1981 c.892 §2; 1983 c.784 §1; 1985 c.16 §444; 1987 c.441 §10]

40.020 Rule 102. Purpose and construction. The Oregon Evidence Code shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. [1981 c.892 §3]

40.025 Rule 103. Rulings on evidence. (1) Evidential error is not presumed to be prejudicial. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

(a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(2) The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon. It may direct the making of an offer in question and answer form.

(3) In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(4) Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court. [1981 c.892 §4]

40.030 Rule 104. Preliminary questions. (1) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (2) of this section. In making its determination the court is not bound by the rules of evidence except those with respect to privileges.

(2) When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(3) Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.

(4) The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(5) This section does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility. [1981 c.892 §5]

40.035 Rule 105. Limited admissibility. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. [1981 c.892 §6]

40.040 Rule 106. When part of transaction proved, whole admissible. When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject, where otherwise admissible, may at that time be inquired into by the other; when a letter is read, the answer may at that time be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing which is necessary to make it understood may at that time also be given in evidence. [1981 c.892 §6a]

JUDICIAL NOTICE

40.060 Rule 201(a). Scope. ORS 40.060 to 40.085 govern judicial notice of adjudicative facts. ORS 40.090 governs judicial notice of law. [1981 c.892 §7]

40.065 Rule 201(b). Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

(1) Generally known within the territorial jurisdiction of the trial court; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. [1981 c.892 §8]

40.070 Rules 201(c) and 201(d). When mandatory or discretionary. (1) A court may take judicial notice, whether requested or not.

(2) A court shall take judicial notice if requested by a party and supplied with the necessary information. [1981 c.892 §9]

40.075 Rule 201(e). Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. [1981 c.892 §10]

40.080 Rule 201(f). Time of taking notice. Judicial notice may be taken at any stage of the proceeding. [1981 c.892 §11]

40.085 Rule 201(g). Instructing the jury. (1) In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact or law judicially noticed.

(2) In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed in favor of the prosecution. [1981 c.892 §12]

40.090 Rule 202. Kinds of law. Law judicially noticed is defined as:

(1) The decisional, constitutional and public statutory law of Oregon, the United States and any state, territory or other jurisdiction of the United States.

(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, and any other state, territory or other jurisdiction of the United States.

(3) Rules of professional conduct for members of the Oregon State Bar.

(4) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States or any state, territory or possession of the United States.

(5) Rules of court of any court of this state or any court of record of the United States or of any state, territory or other jurisdiction of the United States.

(6) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, "comprehensive plan" has the meaning given that term by ORS 197.015. [1981 c.892 §13]

BURDEN OF PERSUASION; BURDEN OF PRODUCING EVIDENCE; PRESUMPTIONS

40.105 Rule 305. Allocation of the burden of persuasion. A party has the burden of persuasion as to each fact the existence or nonexistence of which the law declares essential to the claim for relief or defense the party is asserting. [1981 c.892 §14]

40.110 Rule 306. Instructions on the burden of persuasion. The court shall instruct the jury as to which party bears the applicable burden of persuasion on each issue only after all of the evidence in the case has been received. [1981 c.892 §15]

40.115 Rule 307. Allocation of the burden of producing evidence. (1) The burden of producing evidence as to a particular issue is on the party against whom a finding on the issue would be required in the absence of further evidence.

(2) The burden of producing evidence as to a particular issue is initially on the party with the burden of persuasion as to that issue. [1981 c.892 §16]

40.120 Rule 308. Presumptions in civil proceedings. In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. [1981 c.892 §17]

40.125 Rule 309. Presumptions in criminal proceedings. (1) The judge is not authorized to direct the jury to find a presumed fact against the accused.

(2) When the presumed fact establishes guilt or is an element of the offense or negates a defense, the judge may submit the question of guilt or the existence of the presumed fact to the jury only if:

(a) A reasonable juror on the evidence as a whole could find that the facts giving rise to the presumed fact have been established beyond a reasonable doubt; and

(b) The presumed fact follows more likely than not from the facts giving rise to the presumed fact. [1981 c.892 §18]

40.130 Rule 310. Conflicting presumptions. If presumptions are conflicting, the presumption applies that is founded upon weightier considerations of policy and logic. If considerations of policy and logic are of equal weight, neither presumption applies. [1981 c.892 §19]

40.135 Rule 311. Presumptions. (1) The following are presumptions:

(a) A person intends the ordinary consequences of a voluntary act.

(b) A person takes ordinary care of the person's own concerns.

(c) Evidence willfully suppressed would be adverse to the party suppressing it.

(d) Money paid by one to another was due to the latter.

(e) A thing delivered by one to another belonged to the latter.

(f) An obligation delivered to the debtor has been paid.

(g) A person is the owner of property from exercising acts of ownership over it or from common reputation of the ownership of the person.

(h) A person in possession of an order on that person, for the payment of money or the delivery of a thing, has paid the money or delivered the thing accordingly.

(i) A person acting in a public office was regularly appointed to it.

(j) Official duty has been regularly performed.

(k) A court, or judge acting as such, whether in this state or any other state or country, was acting in the lawful exercise of the jurisdiction of the court.

(L) Private transactions have been fair and regular.

(m) The ordinary course of business has been followed.

(n) A promissory note or bill of exchange was given or indorsed for a sufficient consideration.

(o) An indorsement of a negotiable promissory note, or bill of exchange, was made at the time and place of making the note or bill.

(p) A writing is truly dated.

(q) A letter duly directed and mailed was received in the regular course of the mail.

(r) A person is the same person if the name is identical.

(s) A person not heard from in seven years is dead.

(t) Persons acting as copartners have entered into a contract of copartnership.

(u) A man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.

(v) A child born in lawful wedlock is legitimate.

(w) A thing once proved to exist continues as long as is usual with things of that nature.

(x) The law has been obeyed.

(y) An uninterrupted adverse possession of real property for 20 years or more has been held pursuant to a written conveyance.

(z) A trustee or other person whose duty it was to convey real property to a particular person has actually conveyed it to the person, when such presumption is necessary to perfect the title of the person or the person's successor in interest.

(2) A statute providing that a fact or a group of facts is prima facie evidence of another fact establishes a presumption within the meaning of this section. [1981 c.892 §20]

RELEVANCY

40.150 Rule 401. Definition of "relevant evidence." "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [1981 c.892 §21]

40.155 Rule 402. Relevant evidence generally admissible. All relevant evidence is admissible, except as otherwise provided by the Oregon Evidence Code, by the Constitutions of the United States and Oregon, or by Oregon statutory and decisional law. Evidence which is not relevant is not admissible. [1981 c.892 §22]

40.160 Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion or undue delay. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. [1981 c.892 §23]

40.170 Rule 404. Character evidence: admissibility. (1) Evidence of a person's character or trait of character is admissible when it is an essential element of a charge, claim or defense.

(2) Evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(b) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor;

(c) Evidence of the character of a witness, as provided in ORS 40.345 to 40.355; or

(d) Evidence of the character of a party for violent behavior offered in a civil assault and battery case when self-defense is pleaded and there is evidence to support such defense.

(3) Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. [1981 c.892 §24]

40.175 Rule 405. Methods of proving character. (1) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(2)(a) In cases in which character or a trait of character of a person is admissible under ORS 40.170 (1), proof may also be made of specific instances of the conduct of the person.

(b) When evidence is admissible under ORS 40.170 (3), proof may be made of specific instances of the conduct of the person. [1981 c.892 §25]

40.180 Rule 406. Habit; routine practice. (1) Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(2) As used in this section, "habit" means a person's regular practice of meeting a particular kind of situation with a specific, distinctive type of conduct. [1981 c.892 §21]

40.185 Rule 407. Subsequent remedial measures. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. [1981 c.892 §27]

40.190 Rule 408. Compromise and offers to compromise. (1)(a) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

(b) Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

(2)(a) Subsection (1) of this section does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

(b) Subsection (1) of this section also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [1981 c.892 §28]

40.195 Rule 409. Payment of medical and similar expenses. Evidence of furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an

injury is not admissible to prove liability for the injury. Evidence of payment for damages arising from injury or destruction of property is not admissible to prove liability for the injury or destruction. [1981 c.892 §29]

40.200 Rule 410. Withdrawn plea or statement not admissible. (1) A plea of guilty or no contest which is not accepted or has been withdrawn shall not be received against the defendant in any criminal proceeding.

(2) No statement or admission made by a defendant or a defendant's attorney during any proceeding relating to a plea of guilty or no contest which is not accepted or has been withdrawn shall be received against the defendant in any criminal proceeding. [1981 c.892 §29a]

40.205 Rule 411. Liability insurance. (1) Except where lack of liability insurance is an element of an offense, evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.

(2) Subsection (1) of this section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proving agency, ownership or control, or bias, prejudice or motive of a witness. [1981 c.892 §30]

40.210 Rule 412. Rape cases; relevance of victim's past behavior. (1) Notwithstanding any other provision of law, in a prosecution for a crime described in ORS 163.355 to 163.425, or in a prosecution for an attempt to commit such a crime, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(2) Notwithstanding any other provision of law, in a prosecution for a crime described in ORS 163.355 to 163.425, or in a prosecution for an attempt to commit such a crime, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:

(a) Admitted in accordance with paragraphs (a) and (b) of subsection (3) of this section; and

(b) Is evidence that:

(A) Relates to the motive or bias of the alleged victim; or

(B) Is necessary to rebut or explain scientific or medical evidence offered by the state; or

(C) Is otherwise constitutionally required to be admitted.

(3)(a) If the person accused of committing rape, sodomy or sexual abuse or attempted rape, sodomy or sexual abuse intends to offer under subsection (2) of this section evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties, and on the alleged victim through the office of the prosecutor.

(b) The motion described in paragraph (a) of this subsection shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subsection (2) of this section, the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding ORS 40.030 (2), if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(c) If the court determines on the basis of the hearing described in paragraph (b) of this subsection that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined. An order admitting evidence under this subsection may be appealed by the government before trial.

(4) For purposes of this section, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape, sodomy or sexual abuse or attempted rape, sodomy or sexual abuse is alleged. [1981 c.892 §31]

PRIVILEGES

40.225 Rule 503. Lawyer-client privilege. (1) As used in this section, unless the context requires otherwise:

(a) "Client" means a person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(b) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(d) "Representative of the client" means a principal, an employee, an officer or a director of the client:

(A) Who provides the client's lawyer with information that was acquired during the course of, or as a result of, such person's relationship with the client as principal, employee, officer or director, and is provided to the lawyer for the purpose of obtaining for the client the legal advice or other legal services of the lawyer; or

(B) Who, as part of such person's relationship with the client as principal, employee, officer or director, seeks, receives or applies legal advice from the client's lawyer.

(e) "Representative of the lawyer" means one employed to assist the lawyer in the rendition of professional legal services, but does not include a physician making a physical or mental examination under ORCP 44.

(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;

(b) Between the client's lawyer and the lawyer's representative;

(c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;

(d) Between representatives of the client or between the client and a representative of the client; or

(e) Between lawyers representing the client.

(3) The privilege created by this section may be claimed by the client, a guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(4) There is no privilege under this section:

(a) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(b) As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(c) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients. [1981 c.892 §32; 1987 c.680 §1]

40.230 Rule 504. Psychotherapist-patient privilege. (1) As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication not intended to be disclosed to third persons except:

(A) Persons present to further the interest of the patient in the consultation, examination or interview;

(B) Persons reasonably necessary for the transmission of the communication; or

(C) Persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) "Patient" means a person who consults or is examined or interviewed by a psychotherapist.

(c) "Psychotherapist" means a person who is:

(A) Licensed, registered, certified or otherwise authorized under the laws of any

state to engage in the diagnosis or treatment of a mental or emotional condition; or

(B) Reasonably believed by the patient so to be, while so engaged.

(2) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of the patient's mental or emotional condition among the patient, the patient's psychotherapist or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(3) The privilege created by this section may be claimed by:

(a) The patient.

(b) A guardian or conservator of the patient.

(c) The personal representative of a deceased patient.

(d) The person who was the psychotherapist, but only on behalf of the patient. The psychotherapist's authority so to do is presumed in the absence of evidence to the contrary.

(4) The following is a nonexclusive list of limits on the privilege granted by this section:

(a) If the judge orders an examination of the mental, physical or emotional condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(b) There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient:

(A) In any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense; or

(B) After the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(c) Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of mental examination performed under ORCP 44.

(d) There is no privilege under this section with regard to any confidential communication or record of such confidential communication that would otherwise be privileged under this section when the use of the communication or record is allowed specifically under ORS 426.070, 426.074, 426.075, 426.095, 426.120 or 426.307. This paragraph only applies to the use of the communication or record to the extent and for the purposes set forth in the described statute sections. [1981 c.892 §33; 1987 c.903 §1]

40.235 Rule 504-1. Physician-patient privilege. (1) As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication not intended to be disclosed to third persons except:

(A) Persons present to further the interest of the patient in the consultation, examination or interview;

(B) Persons reasonably necessary for the transmission of the communication; or

(C) Persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) "Patient" means a person who consults or is examined or interviewed by a physician.

(c) "Physician" means a person authorized and licensed or certified to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a physical condition. "Physician" includes licensed or certified naturopathic and chiropractic physicians.

(2) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications in a civil action, suit or proceeding, made for the purposes of diagnosis or treatment of the patient's physical condition, among the patient, the patient's physician or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

(3) The privilege created by this section may be claimed by:

(a) The patient;

(b) A guardian or conservator of the patient;

(c) The personal representative of a deceased patient; or

(d) The person who was the physician, but only on behalf of the patient. Such person's authority so to do is presumed in the absence of evidence to the contrary.

(4) The following is a nonexclusive list of limits on the privilege granted by this section:

(a) If the judge orders an examination of the physical condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the ex-

amination is ordered unless the judge orders otherwise.

(b) Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of a physical examination performed under ORCP 44.

(c) There is no privilege under this section with regard to any confidential communication or record of such confidential communication that would otherwise be privileged under this section when the use of the communication or record is specifically allowed under ORS 426.070, 426,074, 426.075, 426.095, 426.120 or 426.307. This paragraph only applies to the use of the communication or record to the extent and for the purposes set forth in the described statute sections. [1981 c.892 §33a; 1987 c.903 §2]

40.240 Rule 504-2. Nurse-patient privilege. 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. [1981 c.892 §33b]

40.245 Rule 504-3. School employee-student privilege. (1) 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 subsection may result in the suspension of certification of the professional staff member as provided in ORS 342.175, 342.177 and 342.180.

(2) 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 subsection 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. [1981 c.892 §33c]

40.250 Rule 504-4. Clinical social worker-client privilege. A clinical social worker licensed by the State Board of Clinical Social Workers shall not be examined in a civil or criminal court proceeding as to any communication given the clinical social worker by a client in the course of noninvestigatory professional activity when such communication was given to enable the licensed clinical social worker to aid the client, except:

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

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

(3) When the communication reveals a clear intent to commit a crime which reasonably is expected to result in physical injury to a person;

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

(5) When the licensed clinical social worker is a public employee 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 employee. [1981 c.892 §33d; 1989 c.721 §46]

40.255 Rule 505. Husband-wife privilege. (1) As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication by a spouse to the other spouse and not intended to be disclosed to any other person.

(b) "Marriage" means a marital relationship between husband and wife, legally recognized under the laws of this state.

(2) In any civil or criminal action, a spouse has a privilege to refuse to disclose and to prevent the other spouse from disclosing any confidential communication made by one spouse to the other during the marriage. The privilege created by this subsection may be claimed by either spouse. The authority of the spouse to claim the privilege and the claiming of the privilege is presumed in the absence of evidence to the contrary.

(3) In any criminal proceeding, neither spouse, during the marriage, shall be examined adversely against the other as to any other matter occurring during the marriage unless the spouse called as a witness consents to testify.

(4) There is no privilege under this section:

(a) In all criminal actions in which one spouse is charged with bigamy or with an offense or attempted offense against the person or property of the other spouse or of a child of either, or with an offense against the person or property of a third person committed in the course of committing or attempting to commit an offense against the other spouse;

(b) As to matters occurring prior to the marriage; or

(c) In any civil action where the spouses are adverse parties. [1981 c.892 §34; 1983 c.433 §1]

40.260 Rule 506. Member of clergy-penitent privilege. (1) As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) "Member of the clergy" means a minister of any church, religious denomination or organization or accredited Christian Science practitioner 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.

(2) 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 of the clergy in the member's professional character. [1981 c.892 §35]

40.262 Rule 507. Counselor-client privilege. A professional counselor or a marriage and family therapist licensed by the Oregon Board of Licensed Professional Counselors and Therapists under ORS 675.715 shall not be examined in a civil or criminal court proceeding as to any communication given the counselor or therapist by a client in the course of a noninvestigatory professional activity when such communication was given to enable the counselor or the therapist to aid the client, except:

(1) When the client or those persons legally responsible for the affairs of the client give consent to the disclosure. If both parties to a marriage have obtained marital and family therapy by a licensed marital and family therapist or a licensed counselor, the therapist or counselor shall not be competent to testify in a domestic relations action other than child custody action concerning information acquired in the course of the therapeutic relationship unless both parties consent;

(2) When the client initiates legal action or makes a complaint against the licensed professional counselor or licensed marriage and family therapist to the board;

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

(4) When the communication reveals that a minor is or is suspected to be the victim of crime, abuse or neglect. [1989 c.721 §20]

Note: 40.262 was added to and made a part of ORS 40.010 to 40.585 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

40.265 Rule 508a. Stenographer-employer privilege. A stenographer shall not, without the consent of the stenographer's employer, be examined as to any communication or dictation made by the employer to the stenographer in the course of professional employment. [1981 c.892 §36]

40.270 Rule 509. Public officer privilege. A public officer shall not be examined as to public records determined to be exempt from disclosure under ORS 192.501 to 192.505. [1981 c.892 §37]

40.275 Rule 510. Identity of informer. (1) As used in this section, "unit of government" means the Federal Government or any state or political subdivision thereof.

(2) A unit of government has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(3) The privilege created by this section may be claimed by an appropriate representative of the unit of government if the information was furnished to an officer thereof.

(4) No privilege exists under this section:

(a) If the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the unit of government.

(b) If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the unit of government is a party, and the unit of government invokes the privilege, and the judge gives the unit of

government an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the unit of government elects not to disclose identity of the informer, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. In civil cases, the judge may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the unit of government. All counsel and parties shall be permitted to be present at every stage of proceedings under this paragraph except a showing in camera, at which no counsel or party shall be permitted to be present.

(c) If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible. The judge may require the identity of the informer to be disclosed. The judge shall, on request of the unit of government, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this paragraph except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the unit of government. [1981 c.892 §38]

40.280 Rule 511. Waiver of privilege by voluntary disclosure. A person upon whom ORS 40.225 to 40.295 confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication. Voluntary disclosure does not occur with the mere commencement of litigation or, in the case of a deposition taken for the purpose of perpetuating testimony, until the offering of the deposition as evidence. Voluntary disclosure does occur, as to psychotherapists in the case of a mental or emotional condition and physicians in the case of a physical condition upon the holder's offering of any person as a witness who testifies as to the condition. [1981 c.892 §39]

40.285 Rule 512. Privileged matter disclosed under compulsion or without opportunity to claim privilege. Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was:

(1) Compelled erroneously; or

(2) Made without opportunity to claim the privilege. [1981 c.892 §40]

40.290 Rule 513. Comment upon or inference from claim of privilege. (1) The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn from a claim of privilege.

(2) In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(3) Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom. [1981 c.892 §41]

40.295 Rule 514. Effect on existing privileges. Unless expressly repealed by section 98, chapter 892, Oregon Laws 1981, all existing privileges either created under the Constitution or statutes of the State of Oregon or developed by the courts of Oregon are recognized and shall continue to exist until changed or repealed according to law. [1981 c.892 §42]

WITNESSES

40.310 Rule 601. General rule of competency. Except as provided in ORS 40.310 to 40.335, any person who, having organs of sense can perceive, and perceiving can make known the perception to others, may be a witness. [1981 c.892 §43]

40.315 Rule 602. Lack of personal knowledge. Subject to the provisions of ORS 40.415, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. [1981 c.892 §44]

40.320 Rule 603. Oath or affirmation. (1) Before testifying, every witness shall be

required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience of the witness and impress the mind of the witness with the duty to do so.

(2) An oath may be administered as follows: The person who swears holds up one hand while the person administering the oath asks: "Under penalty of perjury, do you 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. The person swearing must answer in an affirmative manner.

(3) An affirmation may be administered as follows: The person who affirms holds up one hand while the person administering the affirmation asks: "Under penalty of perjury, do you promise 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?" If the affirmation is administered to any other than a witness, the same form and manner may be used. The person affirming must answer in an affirmative manner. [1981 c.892 §45]

40.325 Rule 604. Interpreters. An interpreter is subject to the provisions of the Oregon Evidence Code relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation. [1981 c.892 §47; 1981 s.s. c.3 §138; 1989 c.224 §7; 1991 c.750 §7]

40.330 Rule 605. Competency of judge as witness. The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point. [1981 c.892 §48]

40.335 Rule 606. Competency of juror as witness. A member of the jury may not testify as a witness before that jury in the trial of the case in which the member has been sworn to sit as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury. [1981 c.892 §49]

40.340 [1981 c.892 §50; repealed by 1987 c.352 §1]

40.345 Rule 607. Who may impeach. The credibility of a witness may be attacked by any party, including the party calling the witness. [1981 c.892 §51]

40.350 Rule 608. Evidence of character and conduct of witness. (1) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but:

(a) The evidence may refer only to character for truthfulness or untruthfulness; and

(b) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(2) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in ORS 40.355, may not be proved by extrinsic evidence. Further, such specific instances of conduct may not, even if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness. [1981 c.892 §52]

40.355 Rule 609. Impeachment by evidence of conviction of crime. (1) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or (b) involved false statement or dishonesty.

(2) Evidence of a conviction under this section is not admissible if:

(a) A period of more than 15 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date; or

(b) The conviction has been expunged by pardon, reversed, set aside or otherwise rendered nugatory.

(3) When the credibility of a witness is attacked by evidence that the witness has been convicted of a crime, the witness shall be allowed to explain briefly the circumstances of the crime or former conviction; once the witness explains the circumstances, the opposing side shall have the opportunity to rebut the explanation.

(4) The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(5) An adjudication by a juvenile court that a child is within its jurisdiction is not a conviction of a crime. [1981 c.892 §53; 1987 c.2 §9]

40.360 Rule 609-1. Impeachment for bias or interest. (1) The credibility of a witness may be attacked by evidence that the witness engaged in conduct or made statements showing bias or interest. However, before this can be done, the statements must be related to the witness and the conduct described, with the circumstances of times,

places and persons present, and the witness shall be asked whether the witness made the statements or engaged in such conduct, and, if so, allowed to explain. If the statements are in writing, they shall be shown to the witness.

(2) If a witness fully admits the facts claimed to show the bias or interest of the witness, additional evidence of that bias or interest shall not be admitted. If the witness denies or does not fully admit the facts claimed to show bias or interest, the party attacking the credibility of the witness may then offer evidence to prove those facts.

(3) Evidence to support or rehabilitate a witness whose credibility has been attacked by evidence of bias or interest shall be limited to evidence showing a lack of bias or interest. [1981 c.892 §54]

40.365 Rule 610. Religious beliefs or opinions. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the credibility of the witness is impaired or enhanced. [1981 c.892 §54a]

40.370 Rule 611. Mode and order of interrogation and presentation. (1) The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth, avoid needless consumption of time and protect witnesses from harassment or undue embarrassment.

(2) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(3) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. [1981 c.892 §54b]

40.375 Rule 612. Writing used to refresh memory. If a witness uses a writing to refresh memory for the purpose of testifying, either while testifying or before testifying if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this section, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial. [1981 c.892 §55]

40.380 Rule 613. Prior statements of witnesses. (1) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(2) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in ORS 40.450. [1981 c.892 §55a; 1983 c.433 §2; 1983 c.740 §5]

40.385 Rule 615. Exclusion of witnesses. At the request of a party the court may order witnesses excluded until the time of final argument, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) the victim in a criminal case. [1981 c.892 §56; 1987 c.2 §5]

OPINIONS AND EXPERT TESTIMONY

40.405 Rule 701. Opinion testimony by lay witnesses. If the witness is not testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are:

(1) Rationally based on the perception of the witness; and

(2) Helpful to a clear understanding of testimony of the witness or the determination of a fact in issue. [1981 c.892 §57]

40.410 Rule 702. Testimony by experts. If scientific, technical or other specialized

knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. [1981 c.892 §58]

40.415 Rule 703. Bases of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. [1981 c.892 §59]

40.420 Rule 704. Opinion on ultimate issue. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. [1981 c.892 §60]

40.425 Rule 705. Disclosure of fact or data underlying expert opinion. An expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. [1981 c.892 §61]

HEARSAY

40.450 Rule 801. Definitions for ORS 40.450 to 40.475. As used in ORS 40.450 to 40.475, unless the context requires otherwise:

(1) A "statement" is:

(a) An oral or written assertion; or

(b) Nonverbal conduct of a person, if intended as an assertion.

(2) A "declarant" is a person who makes a statement.

(3) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(4) A statement is not hearsay if:

(a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

(A) Inconsistent with the testimony of the witness and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition;

(B) Consistent with the testimony of the witness and is offered to rebut an inconsistent statement or an express or implied charge against the witness of recent fabrication or improper influence or motive; or

(C) One of identification of a person made after perceiving the person.

(b) The statement is offered against a party and is:

(A) That party's own statement, in either an individual or a representative capacity;

(B) A statement of which the party has manifested the party's adoption or belief in its truth;

(C) A statement by a person authorized by the party to make a statement concerning the subject;

(D) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(c) The statement is made in a deposition taken in the same proceeding pursuant to ORCP 39 I. [1981 c.892 §62; 1987 c.275 §3]

40.455 Rule 802. Hearsay rule. Hearsay is not admissible except as provided in ORS 40.450 to 40.475 or as otherwise provided by law. [1981 c.892 §63]

40.460 Rule 803. Hearsay exception; availability of declarant immaterial. The following are not excluded by ORS 40.455, even though the declarant is available as a witness:

(1) [Reserved.]

(2) A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) A statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain or bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

(4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the memory of the witness and to

reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Evidence that a matter is not included in the memoranda, reports, records, or data compilations, and in any form, kept in accordance with the provisions of subsection (6) of this section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth:

(a) The activities of the office or agency;

(b) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding however, in criminal cases matters observed by police officers and other law enforcement personnel; or

(c) In civil actions and proceedings and against the government in criminal cases, factual findings, resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with ORS 40.510, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) A statement of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Statements of facts concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) The record of a document purporting to establish or affect an interest in property, as proof of content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in a document in existence 20 years or more the authenticity of which is established.

(17) Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) [Reserved.]

(18a)(a) A complaint of sexual misconduct made by the witness after the commission of the alleged misconduct at issue. Except as provided in paragraph (b) of this subsection, such evidence must be confined to the fact that the complaint was made.

(b) A statement made by a child victim, which statement concerns an act of sexual conduct performed with or on the child by another, is not excluded by ORS 40.455 if the

child either testifies at the proceeding and is subject to cross-examination or is under 12 years of age and is unavailable as a witness. However, when a child under 12 years of age is unavailable as a witness, the statement may be admitted in evidence only if the proponent establishes that the time, content and circumstances of the statement provide indicia of reliability, and in a criminal trial that there is corroborative evidence of the act of sexual conduct and of the alleged perpetrator's opportunity to participate in the conduct and that the statement possesses indicia of reliability as is constitutionally required to be admitted. No statement may be admitted under this paragraph unless the proponent of the statement makes known to the adverse party the proponent's intention to offer the statement and the particulars of the statement no later than 15 days before trial, except for good cause shown. For purposes of this paragraph, in addition to those situations described in ORS 40.465 (1), the child shall be considered "unavailable" if the child has a substantial lack of memory of the subject matter of the statement, is presently incompetent to testify, is unable to communicate about the sexual conduct because of fear or other similar reason or is substantially likely, as established by expert testimony, to suffer lasting severe emotional trauma from testifying. Unless otherwise agreed by the parties, the court shall examine the child in chambers and on the record or outside the presence of the jury and on the record. The examination shall be conducted immediately prior to the commencement of the trial in the presence of the attorney and the legal guardian or other suitable adult as designated by the court. If the child is found to be unavailable, the court shall then determine the admissibility of the evidence. The determinations shall be appealable under ORS 138.060 (3). The purpose of the examination shall be to aid the court in making its findings regarding the child's availability as a witness and the reliability of the child's statement. In determining whether a statement possesses indicia of reliability under this paragraph, the court may consider, but is not limited to, the following factors:

(A) The child's personal knowledge of the event;

(B) The age and maturity of the child;

(C) Certainty that the statement was made, including the credibility of the person testifying about the statement and any motive the person may have to falsify or distort the statement;

(D) Any apparent motive the child may have to falsify or distort the event, including bias, corruption or coercion;

(E) The timing of the child's statement;

(F) Whether more than one person heard the statement;

(G) Whether the child was suffering pain or distress when making the statement;

(H) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

(I) Whether the statement has internal consistency or coherence and uses terminology appropriate to the child's age;

(J) Whether the statement is spontaneous or directly responsive to questions; and

(K) Whether the statement was elicited by leading questions.

(c) This subsection applies to all civil, criminal and juvenile proceedings.

(19) Reputation among members of a person's family by blood, adoption or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood or adoption or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation of a person's character among associates of the person or in the community.

(22) Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of no contest, adjudging a person guilty of a crime other than a traffic offense, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Notwithstanding the limits contained in subsection (18a) of this section, in any proceeding in which a child under 12 years of age at the time of trial may be called as a witness to testify concerning an act of sexual conduct performed with or on the child by another, the testimony of the child taken by contemporaneous examination and

cross-examination in another place under the supervision of the trial judge and communicated to the courtroom by closed circuit television or other audiovisual means. Testimony will be allowed as provided in this subsection only if the court finds that there is a substantial likelihood, established by expert testimony, that the child will suffer severe emotional or psychological harm if required to testify in open court. If the court makes such a finding, the court, on motion of a party, the child or the court in a civil proceeding, or on motion of the district attorney or the child in a criminal or juvenile proceeding, may order that the testimony of the child be taken as described in this subsection. Only the judge, the attorneys for the parties, the parties, individuals necessary to operate the equipment and any individual the court finds would contribute to the welfare and well-being of the child may be present during the child's testimony.

(25)(a) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that:

(A) The statement is relevant;

(B) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) The general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence.

(b) A statement may not be admitted under this subsection unless the proponent of it makes known to the adverse party the intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance of the trial or hearing, or as soon as practicable after it becomes apparent that such statement is probative of the issues at hand, to provide the adverse party with a fair opportunity to prepare to meet it. [1981 c.892 §64; 1989 c.300 §1; 1989 c.881 §1; 1991 c.391 §1]

Note: Section 2, chapter 391, Oregon Laws 1991, provides:

Sec. 2. The amendments to ORS 40.460 by section 1 of this Act apply only to proceedings commenced on or after the effective date of this Act [September 29, 1991]. [1991 c.391 §2]

40.465 Rule 804. Hearsay exceptions where the declarant is unavailable. (1) "Unavailability as a witness" includes situations in which the declarant:

(a) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of a statement;

(b) Persists in refusing to testify concerning the subject matter of a statement despite an order of the court to do so;

(c) Testifies to a lack of memory of the subject matter of a statement;

(d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of an exception under paragraph (b), (c) or (d) of subsection (3) of this section, the declarant's attendance or testimony) by process or other reasonable means.

(2) A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(3) The following are not excluded by ORS 40.455 if the declarant is unavailable as a witness:

(a) Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(b) A statement made by a declarant while believing that death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(c) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(d)(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood or adoption or marriage, ancestry, or other

similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(e) A statement made at or near the time of the transaction by a person in a position to know the facts stated therein, acting in the person's professional capacity and in the ordinary course of professional conduct.

(f) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this paragraph unless the proponent of it makes known to the adverse party the intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance of the trial or hearing, or as soon as practicable after it becomes apparent that the statement is probative of the issues at hand, to provide the adverse party with a fair opportunity to prepare to meet it. [1981 c.892 §65]

40.470 Rule 805. Hearsay within hearsay. Hearsay included within hearsay is not excluded under ORS 40.455 if each part of the combined statements conforms with an exception set forth in ORS 40.460 or 40.465. [1981 c.892 §66]

40.475 Rule 806. Attacking and supporting credibility of declarant. When a hearsay statement, or a statement defined in ORS 40.450 (4)(b)(C), (D) or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the hearsay statement of the declarant, is not subject to any requirement under ORS 40.380 relating to impeachment by evidence of inconsistent statements. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. [1981 c.892 §67]

AUTHENTICATION AND IDENTIFICATION

40.505 Rule 901. Requirement of authentication or identification. (1) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(2) By way of illustration only, and not by way of limitation,the following are examples of authentication or identification conforming with the requirements of subsection (1) of this section:

(a) Testimony by a witness with knowledge that a matter is what it is claimed to be.

(b) Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(c) Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(d) Appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances.

(e) Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(f) Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if:

(A) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(g) Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(h) Evidence that a document or data compilation, in any form:

(A) Is in such condition as to create no suspicion concerning its authenticity;

(B) Was in a place where it, if authentic, would likely be; and

(C) Has been in existence 20 years or more at the time it is offered.

(i) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(j) Any method of authentication or identification otherwise provided by law or by other rules prescribed by the Supreme Court. [1981 c.892 §68]

40.510 Rule 902. Self-authentication. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) A document purporting to bear the signature, in an official capacity, of an officer or employee of any entity included in subsection (1) of this section, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position of (A) the executing or attesting person, or (B) any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with subsection (1), (2) or (3) of this section or otherwise complying with any law or rule prescribed by the Supreme Court.

(5) Books, pamphlets or other publications purporting to be issued by public authority.

(6) Printed materials purporting to be newspapers or periodicals.

(7) Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper, signatures thereon and documents relating thereto to the extent provided by ORS chapters 71 to 83.

(10) Any signature, documents or other matter declared by law to be presumptively or prima facie genuine or authentic.

(11)(a) A document bearing a seal purporting to be that of a federally recognized Indian tribal government or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(b) A document purporting to bear the signature, in an official capacity, of an officer or employee of any entity included in paragraph (a) of this subsection, having no seal, if a public officer having a seal and having official duties in the district or political subdivision or the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine. [1981 c.892 §69]

40.515 Rule 903. Subscribing witness' testimony unnecessary. The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing. [1981 c.892 §70]

CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

40.550 Rule 1001. Definitions for ORS 40.550 to 40.585. As used in ORS 40.550 to 40.585, unless the context requires otherwise:

(1) "Duplicate" means a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, by mechanical or electronic rerecording, by chemical reproduction or by other equivalent techniques which accurately reproduce the original, including reproduction by facsimile machines if the reproduction is identified as a facsimile and printed on nonthermal paper.

(2) "Original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(3) "Photographs" includes still photographs, X-ray films, video tapes and motion pictures.

(4) "Writings" and "recordings" mean letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording or other form of data compilation. [1981 c.892 §71; 1991 c.857 §1]

40.555 Rule 1002. Requirement of original. To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in ORS 40.550 to 40.585 or other law. [1981 c.892 §72]

40.560 Rule 1003. Admissibility of duplicates. A duplicate is admissible to the same extent as an original unless:

(1) A genuine question is raised as to the authenticity of the original; or

(2) In the circumstances it would be unfair to admit the duplicate in lieu of the original. [1981 c.892 §73]

40.565 Rule 1004. Admissibility of other evidence of contents. The original is not required, and other evidence of the contents of a writing, recording or photograph is admissible when:

(1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(2) An original cannot be obtained by any available judicial process or procedure;

(3) At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or

(4) The writing, recording or photograph is not closely related to a controlling issue. [1981 c.892 §74]

40.570 Rule 1005. Public records. The contents of an official record or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with ORS 40.510 or testified to be correct by a witness who has compared it with the original. If such a copy cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given. [1981 c.892 §75; 1983 c.433 §3]

40.575 Rule 1006. Summaries. The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court. [1981 c.892 §76]

40.580 Rule 1007. Testimony or written admission of party. Contents of writings, recordings or photographs may be proved by the testimony or deposition of the party against whom offered or by the party's written admission, without accounting for the nonproduction of the original. [1981 c.892 §77]

40.585 Rule 1008. Functions of court and jury. When the admissibility of other evidence of contents of writings, recordings or photographs under ORS 40.550 to 40.585 depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with ORS 40.030. However, the issue is for the trier of fact to determine as in the case of other issues of fact when the issue raised is:

(1) Whether the asserted writing ever existed;

(2) Whether another writing, recording or photograph produced at the trial is the original; or

(3) Whether the other evidence of contents correctly reflects the contents. [1981 c.892 §78]