

AMERICAN LAW INSTITUTE



MODEL CODE OF EVIDENCE

MODEL CODE
OF
EVIDENCE

AS ADOPTED AND PROMULGATED
BY THE

AMERICAN LAW INSTITUTE

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AMERICAN LAW INSTITUTE

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THE AMERICAN LAW INSTITUTE RESTATEMENT OF THE LAW

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* Mr. Howard died on May 19, 1942, three days after the adoption of the Code herein published by the Institute.

INTRODUCTION

This volume contains the authentic text of The American Law Institute's Model Code of Evidence adopted and ordered promulgated by the Twenty-first Annual Meeting of Members and by the Council on May 15, 1942 at the Bellevue-Stratford Hotel in Philadelphia.

The Comment printed immediately after the Rule illustrates its application and states the extent if any to which the adoption of the Rule would involve a change in present common law. Where pertinent, the Comment also gives a short statement of the history of the law pertaining to the subject.

HISTORY OF THE PROPOSED CODE

The American Law Institute was organized February 23, 1923, as the result of a Report of a Voluntary Committee on the establishment of a Permanent Organization for the Improvement of the Law headed by the late Elihu Root. The Report emphasized the uncertainty and complexity of our common law and the resulting necessity for its clarification by Restatement. The first task undertaken by the Institute was this Restatement; that is the orderly statement of those basic or especially important subjects of the general common law susceptible of useful re-statement. On account of the outstanding importance of the subject in the earlier stages of the work on the

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Restatement of the Law, the possibility of clarifying the existing Law of Evidence was given careful consideration. It was, however, the unanimous opinion of the Council of the Institute that such a Restatement should not be undertaken. An important but minor reason for this conclusion was the fact that the conflicts in the case law of the several states and the frequent confusion of the decisions in a state tended to make a statement of what we may term the dominant law of the United States very difficult if not impossible. But the principal reason for the Council's abandoning all idea of the Restatement of the present Law of Evidence was the belief that however much that law needs clarification in order to produce reasonable certainty in its application, the Rules themselves in numerous and important instances are so defective that instead of being the means of developing truth, they operate to suppress it. The Council of the Institute therefore felt that a Restatement of the Law of Evidence would be a waste of time or worse; that what was needed was a thorough revision of existing law. A bad rule of law is not cured by clarification.

When this decision was made, the time was not ripe for the Institute to undertake any statutory or codification work. Work other than Restatement had to be postponed until the main subjects of the common law suitable for Restatement were either completed or well along towards completion. It was not, therefore, until November, 1938, that the Carnegie Corporation which had by its generous financial co-operation made possible the Institute's work on the Restatement of the Law, was approached in regard

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to the matter of a study of the Law of Evidence with a view not to its Restatement but to its revision.

In 1939, the Corporation made the Institute a grant of \$40,000 with the understanding that the funds would be used for the preparation of a Code of Evidence. Work on the Code was begun at once. The Council at its Meeting on February 21-25, 1939, confirmed the unanimous recommendation of its Executive Committee by appointing Edmund M. Morgan of the faculty of the Law School of Harvard University, Reporter. The Evidence Editorial group was completed by the appointment as Advisers of Wilbur H. Cherry, University of Minnesota Law School; William G. Hale, University of Southern California Law School, Augustus N. Hand, United States Circuit Court of Appeals, Second Circuit; Learned Hand, United States Circuit Court of Appeals, Second Circuit; Mason Ladd, University of Iowa College of Law; Henry T. Lummus, Supreme Judicial Court of Massachusetts; John M. Maguire, Harvard Law School; Charles T. McCormick, University of Texas Law School; Robert P. Patterson, United States Circuit Court of Appeals, Second Circuit; and Charles E. Wyzanski, Jr., Boston, Massachusetts. Mr. Maguire has also acted throughout the work as an Assistant Reporter. After the first year, Judge Patterson became Assistant Secretary of War and his duties in Washington prevented his further attendance at the meeting of the group. At this time Laurence H. Eldredge of the faculty of the University of Pennsylvania Law School was appointed Adviser and later throughout the work on the Second Tentative Draft and the Proposed Final Draft, J. Russell McElroy, Judge of the Tenth Alabama Circuit, acted as Adviser. Judge Lummus while an ac-

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tive member of the group during the early stages of its work, was unfortunately prevented by illness from taking part in its subsequent deliberations.

Under the by-laws, all official publications of the Institute must first be approved by the separate action of the Council and a Meeting of Members. This Code, as is the case in practically all other work undertaken by the Institute, has passed through in the course of its development three stages:

- (1) The discussion by the Evidence Editorial group of the Preliminary Drafts prepared by the Reporter; the Final Preliminary Drafts submitted to the Council of the Institute being evolved from these discussions;

- (2) The discussion and amendment of the Final Preliminary Drafts by the Council of the Institute and the submission by them as Tentative Drafts to the Members and the Annual Meeting of Members and the discussion of these tentative drafts at the Annual Meeting;

- (3) The revision of the Tentative Drafts in the light of their discussion at the Annual Meeting and criticisms and suggestions received from members of the profession by the Editorial group and the subsequent consideration of these revisions by the Council and the Council's submission of a Proposed Final Draft to the Annual Meeting of Members for discussion and action.

At its Meeting February 21-23, 1940, the Council considered a Proposed Tentative Draft submitted by the Evidence Editorial group of the Rules governing most of the matters herein included in the first four chapters of the Code. After discussion and some amendment, the Draft was submitted by the

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Council to the Annual Meeting May 16-17, 1940. The discussion at the Annual Meeting of this Tentative Draft is set forth in full in the Proceedings of the Institute, Volume XVII, pages 64-148.

As the result of its many conferences, the Evidence group were able to submit to the Council the following February a Proposed Second Tentative Draft covering all the chapters of the Proposed Code including a revision of the chapters in the First Tentative Draft. After discussion and amendment, this Second Tentative Draft was submitted by the Council to the Members at the Annual Meeting May 6-9, 1941. The discussion of the Draft will be found in the Proceedings of the Institute, Volume XVIII, pages 84-252.

In the subsequent revision of the Second Tentative Draft, the Editorial group had the advantage not only of its discussion at the Annual Meeting, but of its discussion at Bar Meetings and state or local Institute Meetings of the Alabama Bar Association, Birmingham, Alabama; Fourth Judicial Judges Conferences, Asheville, N. C.; First Judicial Circuit Judges Conference, Boston, Mass.; California State Bar Association; Cleveland Bar Association, Cleveland, Ohio; Idaho Institute Meeting; Inglewood California Bar Association; Iowa District Institute Meetings; Montana Institute Meeting; Nebraska Bar Association, Lincoln, Nebraska; Pittsburgh Bar Association, Pittsburgh, Pa.; Rhode Island Bar Association, Providence, R. I.; Ohio Bar Association, Toledo, Ohio; Orange County California Bar Association; South Dakota Institute Meeting; Sioux Falls Institute Meeting; Tennessee Institute Meeting; Utah Bar Association; West Virginia Bar Association, White Sulphur Springs, W. Va.; and the

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Wisconsin Bar Association, Lake Geneva, Wisconsin; in the summer and fall of 1941 and January, 1942. Most of these meetings were addressed by the Reporter, Mr. Morgan, who explained the Draft, others by the Adviser, Mr. Ladd, and still others by the Adviser, Mr. Hale.

The revision in the form of a Proposed Final Draft was submitted to the Council at its Meeting February 24-27, 1942. This revised Draft, after the usual discussion and also some amendment, was submitted by the Council to the Annual Meeting May 11-15, 1942. The discussion of the Draft occupied a large part of the time of the Meeting. It will be printed in full in the forthcoming Proceedings of the Institute, Volume XIX. While some other changes were adopted by the Meeting and subsequently by the Council, the principal change resulting from the discussion at the Annual Meeting was the adoption of Rules recognizing among the privileges of witnesses a Physician-Patient Privilege. (See Rules 220-223) Such a privilege had been omitted from all preceding Drafts. On the vote of the Meeting adopting the Privilege, the Council convened and took similar action.

The Relation of the Chief Consultant, John H. Wigmore, and Other Consultants to the Work on the Code

In February, 1939, shortly after the organization of the work, John H. Wigmore was asked and consented to act as Chief Consultant.

The terms of Mr. Wigmore's appointment did not require his attendance at Conferences of the Reporter and his Advisers and he did not attend any of the conferences. The group, however, received the

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benefit of his advice. The Reporter, Mr. Morgan, before distributing a Draft to his Advisers, sent a preliminary copy to Mr. Wigmore, who returned it to Mr. Morgan with his criticisms and suggestions. Normally many of these suggestions were incorporated by Mr. Morgan into the Draft submitted to his Advisers. Those not incorporated into the Draft were submitted by him to a meeting of the group for discussion in connection with their consideration of the Draft. In each instance, the group passed on the question whether Mr. Wigmore's suggestion should be adopted. As a result of this process, the Reporter and his Advisers were able to receive the full benefit of Mr. Wigmore's advice. Where Mr. Wigmore did not agree with the Reporter and his Advisers on the policy expressed in a Rule, Mr. Wigmore's dissent was called to the attention of the members of the Institute by a "Note to the Members" printed in connection with the Rule in question. Mr. Wigmore's advice was naturally as to two classes of matters: one, the correct policy relating to specific matters; the other, the way in which the policy adopted should be formulated in the Rules. As to the former, the Rules set forth in the Tentative Drafts accorded substantially with Mr. Wigmore's views except where, as above stated, a specific dissent on his part was noted.

From the inception of the task, however, Mr. Wigmore, emphatically disagreed with the way in which the problems of drafting should be approached and formulated. As those familiar with his *Code of Evidence*, Second Edition, 1935, realize, there is a fundamental difference of approach and method between the Reporter and his Advisers on the one hand and Mr. Wigmore's on the other. The Council of the Institute in considering the Proposed First Tentative

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Draft submitted by the Evidence group realized that it was important that the members of the Institute should understand this difference and therefore arranged for its discussion at the Annual Meeting. They directed that Mr. Wigmore be requested to set forth the general difference in approach and method between the Reporter and his Advisers on the one hand and himself on the other as well as examples of the difference between the Rules as expressed in the First Tentative Draft and as they would be expressed if the form advocated by Mr. Wigmore was adopted. This Mr. Wigmore did and his statement will be found in the Appendix of the Second Tentative Draft, pages 111-115.

In the Summary of my Annual Report to the Meeting of Members, May 16-18, 1939, speaking of the First Tentative Draft of the Code I said: "We want not only a thorough discussion of the more important of the rules suggested, but also a thorough discussion of the interesting difference that has arisen between the Reporter and his Advisers on the one hand and Mr. Wigmore, the Chief Consultant, on the other in respect, not to the principles underlying the rules, but to the form of treatment and expression". (Ibidem page 42) Subsequently, the President, George Wharton Pepper, before calling for a discussion of the Draft said: "We have not merely the usual series of questions respecting the content of particular paragraphs, but we have broad questions of policy to consider which I suppose may be expressed somewhat thus: That at one extreme of the field of opinion you find those who think that the subject of Evidence should be so flexible that the trial judge should be all but the final arbiter of what is admissible and inadmissible. At the other extreme you

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find the view of those who believe that as the law of Evidence is to be a working guide for those conducting the business of trial, it should be so specific, so detailed and so meticulous that scarcely any situation should fail of specific recognition in the system of rules. And in between there is the view, which in a general way represents what I understand to be the view of the Reporter and his group, that a great measure of flexibility should be introduced into the law, and that there is such a thing as too great particularization and that that should be avoided." (Ibidem pages 64, 65)

With these preliminary statements of the President and myself, the Meeting at once took under consideration the fundamental issue of form raised by the criticisms of Mr. Wigmore as set forth in the Appendix to the Draft. The resulting discussion will be found in full in the Proceedings of the Institute, Volume XVII, pages 66-80. At its conclusion, a motion was offered: That the method adopted by the Reporter and Advisers in formulating the rules of the Code be approved by the Institute. (Ibidem page 79) The question was put to the Meeting and carried after an explanation by the Chair that the vote would determine only the issue between Mr. Wigmore and the Editorial group. (Ibidem pages 86, 87) Subsequently, a motion was carried that the Institute approves a form of codification which is substantially as detailed as that embodied in the Draft before the meeting (as compared with the more condensed form desired by Judge Charles E. Clark).

Thereafter, the Editorial group continued their work along the general lines of form adopted in the First Tentative Draft. Mr. Wigmore, while of course not convinced of the desirability of the form

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used, continued to make criticisms and suggestions (as to the substance of proposed rules), many of which were adopted.

From the beginning and throughout his work as Chief Consultant, it was understood that Mr. Wigmore would not be bound to approve the Code as finally adopted, its form or any rule contained therein. His specific suggestions and criticisms throughout the course of the work are much appreciated.

What is here said in relation to Mr. Wigmore as Chief Consultant applies also to the list of Consultants on page V. These Consultants never met as a body; each acted separately of the others and of the Chief Consultant. They were sent by me copies of certain Preliminary Drafts prepared by the Evidence group with the request that they read and make criticisms and suggestions. Their written suggestions were all considered and in many cases adopted. While in nearly every instance they expressed themselves as believing that the Draft was a great advance on the present law both in content and form, they do not by having acted as Consultants in the manner explained specifically commit themselves to the provisions of the Code as finally adopted. The Institute is much indebted to their cooperation.

WM. DRAPER LEWIS
DIRECTOR

September 3, 1942.

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