

Senate Bill 177

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Attorney General Ellen F. Rosenblum)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Establishes exception to prohibition against hearsay evidence, regardless of availability of witness, for certain statements offered against party who engaged in conduct preventing declarant from testifying or causing declarant to refuse to appear or testify.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to hearsay; amending ORS 40.460 and 40.465; and declaring an emergency.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1.** ORS 40.460 is amended to read:

5 40.460. The following are not excluded by ORS 40.455, even though the declarant is available
6 as a witness:

7 (1) (Reserved.)

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

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

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

17 (5) A memorandum or record concerning a matter about which a witness once had knowledge
18 but now has insufficient recollection to enable the witness to testify fully and accurately, shown to
19 have been made or adopted by the witness when the matter was fresh in the memory of the witness
20 and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into
21 evidence but may not itself be received as an exhibit unless offered by an adverse party.

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

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

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

6 (8) Records, reports, statements or data compilations, in any form, of public offices or agencies,
7 including federally recognized American Indian tribal governments, setting forth:

8 (a) The activities of the office or agency;

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

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

15 (d) In civil actions and criminal proceedings, a sheriff's return of service.

16 (9) Records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the
17 report thereof was made to a public office, including a federally recognized American Indian tribal
18 government, pursuant to requirements of law.

19 (10) To prove the absence of a record, report, statement or data compilation, in any form, or the
20 nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation,
21 in any form, was regularly made and preserved by a public office or agency, including a federally
22 recognized American Indian tribal government, evidence in the form of a certification in accordance
23 with ORS 40.510, or testimony, that diligent search failed to disclose the record, report, statement
24 or data compilation, or entry.

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

28 (12) A statement of fact contained in a certificate that the maker performed a marriage or other
29 ceremony or administered a sacrament, made by a member of the clergy, a public official, an official
30 of a federally recognized American Indian tribal government or any other person authorized by the
31 rules or practices of a religious organization or by law to perform the act certified, and purporting
32 to have been issued at the time of the act or within a reasonable time thereafter.

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

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

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

45 (16) Statements in a document in existence 20 years or more the authenticity of which is es-

1 tablished.

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

4 (18) (Reserved.)

5 (18a)(a) A complaint of sexual misconduct, complaint of abuse as defined in ORS 107.705 or
6 419B.005, complaint of abuse of an elderly person, as those terms are defined in ORS 124.050, or a
7 complaint relating to a violation of ORS 163.205 or 164.015 in which a person 65 years of age or
8 older is the victim, made by the witness after the commission of the alleged misconduct or abuse
9 at issue. Except as provided in paragraph (b) of this subsection, such evidence must be confined to
10 the fact that the complaint was made.

11 (b) A statement made by a person concerning an act of abuse as defined in ORS 107.705 or
12 419B.005, a statement made by a person concerning an act of abuse of an elderly person, as those
13 terms are defined in ORS 124.050, or a statement made by a person concerning a violation of ORS
14 163.205 or 164.015 in which a person 65 years of age or older is the victim, is not excluded by ORS
15 40.455 if the declarant either testifies at the proceeding and is subject to cross-examination, or is
16 unavailable as a witness but was chronologically or mentally under 12 years of age when the
17 statement was made or was 65 years of age or older when the statement was made. However, if a
18 declarant is unavailable, the statement may be admitted in evidence only if the proponent estab-
19 lishes that the time, content and circumstances of the statement provide indicia of reliability, and
20 in a criminal trial that there is corroborative evidence of the act of abuse and of the alleged
21 perpetrator's opportunity to participate in the conduct and that the statement possesses indicia of
22 reliability as is constitutionally required to be admitted. No statement may be admitted under this
23 paragraph unless the proponent of the statement makes known to the adverse party the proponent's
24 intention to offer the statement and the particulars of the statement no later than 15 days before
25 trial, except for good cause shown. For purposes of this paragraph, in addition to those situations
26 described in ORS 40.465 (1), the declarant shall be considered "unavailable" if the declarant has a
27 substantial lack of memory of the subject matter of the statement, is presently incompetent to tes-
28 tify, is unable to communicate about the abuse or sexual conduct because of fear or other similar
29 reason or is substantially likely, as established by expert testimony, to suffer lasting severe emo-
30 tional trauma from testifying. Unless otherwise agreed by the parties, the court shall examine the
31 declarant in chambers and on the record or outside the presence of the jury and on the record. The
32 examination shall be conducted immediately prior to the commencement of the trial in the presence
33 of the attorney and the legal guardian or other suitable person as designated by the court. If the
34 declarant is found to be unavailable, the court shall then determine the admissibility of the evidence.
35 The determinations shall be appealable under ORS 138.045 (1)(d). The purpose of the examination
36 shall be to aid the court in making its findings regarding the availability of the declarant as a wit-
37 ness and the reliability of the statement of the declarant. In determining whether a statement pos-
38 sesses indicia of reliability under this paragraph, the court may consider, but is not limited to, the
39 following factors:

40 (A) The personal knowledge of the declarant of the event;

41 (B) The age and maturity of the declarant or extent of disability if the declarant is a person
42 with a developmental disability;

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

45 (D) Any apparent motive the declarant may have to falsify or distort the event, including bias,

1 corruption or coercion;

2 (E) The timing of the statement of the declarant;

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

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

5 (H) Whether the declarant's young age or disability makes it unlikely that the declarant fabri-
6 cated a statement that represents a graphic, detailed account beyond the knowledge and experience
7 of the declarant;

8 (I) Whether the statement has internal consistency or coherence and uses terminology appro-
9 priate to the declarant's age or to the extent of the declarant's disability if the declarant is a person
10 with a developmental disability;

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

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

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

14 (d) This subsection applies to a child declarant, a declarant who is an elderly person as defined
15 in ORS 124.050 or an adult declarant with a developmental disability. For the purposes of this sub-
16 section, "developmental disability" means any disability attributable to mental retardation, autism,
17 cerebral palsy, epilepsy or other disabling neurological condition that requires training or support
18 similar to that required by persons with mental retardation, if either of the following apply:

19 (A) The disability originates before the person attains 22 years of age, or if the disability is at-
20 tributable to mental retardation the condition is manifested before the person attains 18 years of
21 age, the disability can be expected to continue indefinitely, and the disability constitutes a sub-
22 stantial handicap to the ability of the person to function in society.

23 (B) The disability results in a significant subaverage general intellectual functioning with con-
24 current deficits in adaptive behavior that are manifested during the developmental period.

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

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

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

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

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

40 (24) Notwithstanding the limits contained in subsection (18a) of this section, in any proceeding
41 in which a child under 12 years of age at the time of trial, or a person with a developmental disa-
42 bility as described in subsection (18a)(d) of this section, may be called as a witness to testify con-
43 cerning an act of abuse, as defined in ORS 419B.005, or sexual conduct performed with or on the
44 child or person with a developmental disability by another, the testimony of the child or person with
45 a developmental disability taken by contemporaneous examination and cross-examination in another

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

13 (25)(a) Any document containing data prepared or recorded by the Oregon State Police pursuant
14 to ORS 813.160 (1)(b)(C) or (E), or pursuant to ORS 475.235 (4), if the document is produced by data
15 retrieval from the Law Enforcement Data System or other computer system maintained and operated
16 by the Oregon State Police, and the person retrieving the data attests that the information was re-
17 trieved directly from the system and that the document accurately reflects the data retrieved.

18 (b) Any document containing data prepared or recorded by the Oregon State Police that is
19 produced by data retrieval from the Law Enforcement Data System or other computer system
20 maintained and operated by the Oregon State Police and that is electronically transmitted through
21 public or private computer networks under an electronic signature adopted by the Oregon State
22 Police if the person receiving the data attests that the document accurately reflects the data re-
23 ceived.

24 (c) Notwithstanding any statute or rule to the contrary, in any criminal case in which docu-
25 ments are introduced under the provisions of this subsection, the defendant may subpoena the ana-
26 lyst, as defined in ORS 475.235 (6), or other person that generated or keeps the original document
27 for the purpose of testifying at the preliminary hearing and trial of the issue. Except as provided
28 in ORS 44.550 to 44.566, no charge shall be made to the defendant for the appearance of the analyst
29 or other person.

30 (26)(a) A statement that purports to narrate, describe, report or explain an incident of domestic
31 violence, as defined in ORS 135.230, made by a victim of the domestic violence within 24 hours after
32 the incident occurred, if the statement:

33 (A) Was recorded, either electronically or in writing, or was made to a peace officer as defined
34 in ORS 161.015, corrections officer, youth correction officer, parole and probation officer, emergency
35 medical services provider or firefighter; and

36 (B) Has sufficient indicia of reliability.

37 (b) In determining whether a statement has sufficient indicia of reliability under paragraph (a)
38 of this subsection, the court shall consider all circumstances surrounding the statement. The court
39 may consider, but is not limited to, the following factors in determining whether a statement has
40 sufficient indicia of reliability:

41 (A) The personal knowledge of the declarant.

42 (B) Whether the statement is corroborated by evidence other than statements that are subject
43 to admission only pursuant to this subsection.

44 (C) The timing of the statement.

45 (D) Whether the statement was elicited by leading questions.

1 (E) Subsequent statements made by the declarant. Recantation by a declarant is not sufficient
 2 reason for denying admission of a statement under this subsection in the absence of other factors
 3 indicating unreliability.

4 (27) A report prepared by a forensic scientist that contains the results of a presumptive test
 5 conducted by the forensic scientist as described in ORS 475.235, if the forensic scientist attests that
 6 the report accurately reflects the results of the presumptive test.

7 **(28) A statement offered against a party who intentionally or knowingly engaged in**
 8 **criminal conduct that directly caused the death of the declarant, directly prevented the**
 9 **declarant from testifying or directly caused the declarant to refuse to appear or testify.**

10 **(29) A statement offered against a party who engaged in, directed or otherwise partic-**
 11 **ipated in wrongful conduct that was intended to prevent the declarant from testifying and**
 12 **did result in the declarant's refusal to appear or to testify.**

13 [(28)(a)] **(30)(a)** A statement not specifically covered by any of the foregoing exceptions but
 14 having equivalent circumstantial guarantees of trustworthiness, if the court determines that:

15 (A) The statement is relevant;

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

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

20 (b) A statement may not be admitted under this subsection unless the proponent of it makes
 21 known to the adverse party the intention to offer the statement and the particulars of it, including
 22 the name and address of the declarant, sufficiently in advance of the trial or hearing, or as soon as
 23 practicable after it becomes apparent that such statement is probative of the issues at hand, to
 24 provide the adverse party with a fair opportunity to prepare to meet it.

25 **SECTION 2.** ORS 40.465 is amended to read:

26 40.465. (1) "Unavailability as a witness" includes situations in which the declarant:

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

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

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

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

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

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

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

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

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

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

9 (d)(A) A statement concerning the declarant’s own birth, adoption, marriage, divorce, legitimacy,
 10 relationship by blood or adoption or marriage, ancestry, or other similar fact of personal or family
 11 history, even though the declarant had no means of acquiring personal knowledge of the matter
 12 stated; or

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

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

19 *[(f) A statement offered against a party who intentionally or knowingly engaged in criminal con-
 20 duct that directly caused the death of the declarant, or directly caused the declarant to become un-
 21 available as a witness because of incapacity or incompetence.]*

22 *[(g) A statement offered against a party who engaged in, directed or otherwise participated in
 23 wrongful conduct that was intended to cause the declarant to be unavailable as a witness, and did
 24 cause the declarant to be unavailable.]*

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

36 **SECTION 3. This 2021 Act being necessary for the immediate preservation of the public**
 37 **peace, health and safety, an emergency is declared to exist, and this 2021 Act takes effect**
 38 **on its passage.**