

SB 177-1
(LC 356)
3/22/21 (MNJ/ps)

Requested by SENATE COMMITTEE ON JUDICIARY AND BALLOT MEASURE 110 IMPLEMENTATION

**PROPOSED AMENDMENTS TO
SENATE BILL 177**

1 On page 1 of the printed bill, line 2, delete “40.460 and”.

2 Delete lines 4 through 29 and delete pages 2 through 7 and insert:

3 **“SECTION 1. ORS 40.465 is amended to read:**

4 “40.465. (1) ‘Unavailability as a witness’ includes situations in which the
5 declarant:

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

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

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

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

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

17 “(2) A declarant is not unavailable as a witness if the declarant’s ex-
18 emption, refusal, claim of lack of memory, inability, or absence is due to the
19 procurement or wrongdoing of the proponent of the declarant’s statement for
20 the purpose of preventing the witness from attending or testifying.

21 “(3) The following are not excluded by ORS 40.455 if the declarant is un-

1 available as a witness:

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

8 “(b) A statement made by a declarant while believing that death was im-
9 minent, concerning the cause or circumstances of what the declarant be-
10 lieved to be impending death.

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

19 “(d)(A) A statement concerning the declarant’s own birth, adoption, mar-
20 riage, divorce, legitimacy, relationship by blood or adoption or marriage,
21 ancestry, or other similar fact of personal or family history, even though the
22 declarant had no means of acquiring personal knowledge of the matter
23 stated; or

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

28 “(e) A statement made at or near the time of the transaction by a person
29 in a position to know the facts stated therein, acting in the person’s profes-
30 sional capacity and in the ordinary course of professional conduct.

1 “(f) A statement offered against a party who intentionally or knowingly
2 engaged in criminal conduct that directly caused the death of the declarant,
3 or directly caused the declarant to become unavailable as a witness because
4 of incapacity or incompetence.

5 “(g) A statement offered against a party who engaged in, directed or
6 otherwise participated in wrongful conduct that was intended to cause the
7 declarant to be unavailable as a witness, and did cause the declarant to be
8 unavailable.

9 “(h) A statement not specifically covered by any of the foregoing ex-
10 ceptions but having equivalent circumstantial guarantees of trustworthiness,
11 if the court determines that (A) the statement is offered as evidence of a
12 material fact; (B) the statement is more probative on the point for which it
13 is offered than any other evidence which the proponent can procure through
14 reasonable efforts; and (C) the general purposes of the Oregon Evidence Code
15 and the interests of justice will best be served by admission of the statement
16 into evidence. However, a statement may not be admitted under this para-
17 graph unless the proponent of it makes known to the adverse party the in-
18 tention to offer the statement and the particulars of it, including the name
19 and address of the declarant, sufficiently in advance of the trial or hearing,
20 or as soon as practicable after it becomes apparent that the statement is
21 probative of the issues at hand, to provide the adverse party with a fair op-
22 portunity to prepare to meet it.

23 **“(4) For purposes of subsection (3)(f) and (g) of this section, the**
24 **proponent of a statement is not required to issue a material witness**
25 **order, as defined in ORS 136.608, or seek sanctions for contempt in**
26 **order to show the unavailability of the declarant under subsection**
27 **(1)(e) of this section.**

28 **“SECTION 2. This 2021 Act being necessary for the immediate**
29 **preservation of the public peace, health and safety, an emergency is**
30 **declared to exist, and this 2021 Act takes effect on its passage.”.**

