

1. PROBLEM: Identify the specific issue to be studied or addressed by the Law Commission and explain the adverse consequences of current law. An illustration from real life might be helpful.

House Bill 3040 was introduced in the 2015 session to address the hearsay statements of victims in sex trafficking cases. The measure, in its introduced form, proposed adding the statements of crime victims that narrate, describe, or report a sex trafficking or prostitution crime to the established list of admissible hearsay statements under Rule 803 (ORS 40.460). The exception was modeled after the existing Rule 803(26) (ORS 40.460(26)), which allows introduction of recorded or written statements, or statements given to peace officers, by a victim of domestic violence, so long as the statement was made within 24 hours of the incident and it has sufficient indicia of reliability. HB 3040, as introduced, would allow the written or electronic statement of a sex trafficking victim, or a statement made by a victim to a peace officer, corrections officer, EMS provider, or firefighter - again, so long as it has sufficient indicia of reliability. In many instances, this would include text messages or digital statements, such as social media posts and website pages. The Commercial Sexual Exploitation of Children (CSEC) work group advocated for this exception in order to aid in the prosecution of pimps and traffickers.

Through its legislative journey, House Bill 3040 was amended to direct the Oregon Law Commission to study and make recommendations on the specific sex trafficking proposal and report to the Legislature on modifications to the hearsay rules. The measure was not enacted, but a small work group was formed to address the issue in the interim. The work group met twice and quickly reached the conclusion that the problem was not merely the statements of sex trafficking victims, but rather the treatment of text messages, emails, and other digital statements within the Oregon Evidence Code.

The work group submits this proposal asking the Oregon Law Commission to address the use of digital statements within the Oregon Evidence Code, in particular as it relates to hearsay statements.

2. HISTORY OF REFORM EFFORTS: Explain past efforts to address the problem and the success or limits of those efforts.

Oregon: Oregon enacted the Evidence Code (OEC) in 1981. The OEC largely mirrors the Federal Rules of Evidence (FRE), but has several unique components not present in the FRE or in other states' codes. Oregon has not adopted the 2011 updates to the FRE nor has the state undertaken a thorough revision in the OEC in its 35 year history.

Federal: The Oregon Evidence Code is based in large part upon the Federal Rules of Evidence (FRE). The Federal Rules were promulgated by Congress in 1975. Changes to the FRE are made through an Advisory Committee on Rules of Evidence, which reports to the Judicial Conference Committee on Rules and Practice, which in turn votes to send the proposal to the Judicial Conference and then the Supreme Court. If the Supreme Court promulgates the rule, Congress has a period of time in which to reject, modify, or defer the pending rule.

The Advisory Committee on Rules of Evidence has been examining several proposals relating to electronic documents in the Evidence Code. In respect to electronic statements and hearsay

("ehearsay"), the Committee held a symposium on the topic and reviewed a proposal to add a "recent perceptions" exception for reliable electronic testimony. In its most recent meeting in April of 2016, the Committee decided to take a "wait and see" approach to the issue. The reasoning of the Committee is that federal courts will demonstrate, through rulings and opinions, whether the FRE has the flexibility to introduce reliable electronic documents with other exceptions, or whether a real need for a new exception exists.

The Committee is also investigating two avenues for streamlining all hearsay exceptions, which would encompass ehearsay. See *Agenda Book for April 2016, Advisory Committee on Rules of Evidence*: <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-april-2016>.

Oregon has not undertaken any significant attempts at revising the OEC, let alone to address the use of electronic statements in the Evidence Code. Oregon does have a strong history of modifying the OEC with unique and state-appropriate provisions. The FRE is unlikely to modify hearsay rules to accommodate electronic statements in the near future. As such, the Work Group recommends Oregon continue to take a state-centric approach and look to its own solutions on this issue.

3. SCOPE OF PROJECT: Explain what needs to be studied, evaluated or changed to fix the problem.

This project would require a thorough review of the adoption of the Oregon Evidence Code and the Courts' interpretations of its provisions. With an understanding of the purpose and spirit of the hearsay rules, the project could proceed to examine possible avenues for treatment of electronic statements that balance the needs of litigants and courts, the standards of reliability and authenticity, and the intentions with which the OEC was enacted.

This proposal intends a discrete project: the treatment of electronic statements within Oregon's hearsay rules. However, it is plausible that this project could become the first effort in a larger, long-term review of the Oregon Evidence Code. This proposal does not advocate for a larger project, but recognizes that it may be appropriate.

The work group proposes this project begin in the fall of 2016, prior to the start of the 2017 session and undertake its preliminary historical investigations at that time. As this project is likely to draw significant interest from the legal community, we propose a long-term approach and would seek introduction of recommended legislation in the 2019 session. In order to meet the pre-session filing deadline, work on this project should be completed no later than September, 2018.

4. LAW COMMISSION INVOLVEMENT: Explain why the issue is a good subject for law reform of broad general interest and need (as opposed to an issue likely to be advanced by a single interest group or lobby).

The Oregon Evidence Code is used by a diverse and wide-ranging group of legal practitioners. During the debate on HB 3040, Legislators recognized the importance of the OEC and warned that

revisions should not be undertaken without careful consideration. Evidence is one of the few required courses in law school because of its fundamental role in the legal realm. Revisions to the OEC should be considered by several individuals representing the diversity of legal practitioners who have a depth of experience with the hearsay rules, and should be guided in its process by a neutral, nonpartisan entity. The Law Commission is the only entity in Oregon capable of this undertaking.

5. PROJECT PARTICIPANTS: Identify individuals who are willing to serve on a Work Group, and a Reporter who is willing to work with the Chair of the Work Group to draft a Report and Comments. The Chair of the Work Group should be a Commissioner. The Proposal may state a preference for a chair.

This project will require input from many groups and entities. Each participant should be familiar with the hearsay rules and use the OEC on a regular basis. Recommended participants include:

- Circuit court judges;
- Appellate jurists;
- Prosecuting attorneys;
- Criminal defense attorneys;
- Dependency and delinquency practitioners;
- Appellate attorneys;
- Civil practitioners, including: family law, personal injury, construction defect, business litigation, consumer law, and elder law;
- Attorneys representing victims;
- The Oregon State Bar;
- The Oregon Judicial Department;
- The Oregon Department of Justice; and
- Telecommunication companies and internet service providers.

This project will likely attract stakeholder and lobby groups representing the different interest groups. While it is appropriate for lobby stakeholders to observe and follow the process, the membership of the Work Group must be largely restricted to legal experts with practical experience with the OEC.

The proposed reporters are Channa Newell, Counsel to the Judiciary Committees and staff from her office, and Aaron Knott, Legislative Director, Oregon Department of Justice.

Proposed Chair:

- 1) Senator Floyd Prozanski
- 2) Attorney General Ellen Rosenblum
- 3) Judge Stephen Bushong
- 4) Representative Jennifer Williamson