

Senate Bill 867

Sponsored by COMMITTEE ON JUDICIARY

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**.

Provides that witness is unavailable for purposes of hearsay rules if witness is absent from hearing and proponent of statement has established that party against whom statement is offered engaged in certain conduct that caused witness to be unavailable.

A BILL FOR AN ACT

1
2 Relating to forfeiture by wrongdoing; amending ORS 40.465.

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

4 **SECTION 1.** ORS 40.465 is amended to read:

5 40.465. (1) "Unavailability as a witness" includes situations in which the declarant:

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

8 (b) Persists in refusing to testify concerning the subject matter of a statement despite an order
9 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 or then existing physical
12 or mental illness or infirmity; [*or*]

13 (e) Is absent from the hearing and the proponent of the declarant's statement has been unable
14 to procure the declarant's attendance (or in the case of an exception under subsection (3)(b), (c) or

15 (d) of this section, the declarant's attendance or testimony) by process or other reasonable
16 means[.] ; **or**

17 **(f) Is absent from the hearing and the proponent of the declarant's statement has es-**
18 **ablished the criteria of subsection (3)(f) or (g) of this section by a preponderance of the ev-**
19 **idence.**

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

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

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

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

31 (c) A statement which was at the time of its making so far contrary to the declarant's pecuniary

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 or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to
2 render invalid a claim by the declarant against another, that a reasonable person in the declarant's
3 position would not have made the statement unless the person believed it to be true. A statement
4 tending to expose the declarant to criminal liability and offered to exculpate the accused is not ad-
5 missible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

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

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

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

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

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

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

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