

SUPPORT FOR HB 2641

Chair Kropf, Vice Chair Wallan, Vice Chair Chotzen, Members of the Committee,

My name is Jo Perini-Abbott. I am a professor of practice at Lewis & Clark Law School and Director of the Advocacy Center at Lewis & Clark Law School. I teach a variety of trial and litigation practice classes as well as evidence.

Others in the testimony will talk about how Oregon's 609 is an outlier compared to the same rule in other states, but I want to focus on how OEC 609 is an outlier even within Oregon's own evidence code.

We are here today to talk about OEC 609, but I want to start somewhere else in the evidence code: OEC 403. Some evidence professors have gone so far as to say that the entire evidence code boils down to OEC 403.

OEC 403 tells us that relevant evidence that passes every other bar in the evidence code can still be excluded if the probative value is substantially outweighed by the risk of unfair prejudice.

It quite beautiful in its simplicity: we put the probative value - why the evidence matters to the case at hand - on one side of the scale and then on the other side of the scale we consider the risk of unfair prejudice. What about this evidence may make a jury decide the case on an improper basis. If it's really important and relevant evidence, such as crime scene photos, then it is nearly impossible for that relevance to be substantially outweighed by the risk of unfair prejudice even if that risk is high. But if the probative value of the evidence is relatively low then it doesn't take as much to substantially outweigh that evidence.

It is a balancing test that courts and attorneys do with nearly every piece of evidence. The evidence is relevant and reliable - it passes OEC 401, and it's not hearsay or impermissible character evidence - the court STILL looks at the evidence and says "when I put this evidence on the scales, does the risk of unfair prejudice substantially outweigh the probative value? For lawyers who regularly appear in court, the 403 balancing test is second nature.

And to be clear, there are other sections of the evidence code that step in and effectively do that balancing for the court but those all result in the EXCLUSION of evidence. Rule 609 stands alone in preempting the court's balancing to require INCLUSION of evidence.

OEC 609 stands an anomaly to that core tenet of the evidence code - It is the only place in the evidence code where admissible evidence does NOT get evaluated under any balancing test. And while a bright line rule can seem very enticing in its simplicity, it actually intrudes on the

standard function of the court which is to conduct exactly these types of balancing tests to determine admissibility.

When you consider the purpose of 609 it become even a bit more shocking. Because the entire premise of 609 has come to be seen somewhat antiquated. 609 stems from the common law prohibition on felons being permitted to testify at all. There was a presumption that someone's prior felony conviction meant that they were so disdainful of the law that they would not take the oath seriously and would like.

In modern times that premise has been largely rejected. FRE 609 - which is the language we are asking this court adopts - recognizes this shifting pattern and nuance in the type of prior crimes that would affect someone's credibility. FRE 609 sets out different balancing tests depending on the type of witness - criminal defendant versus other witnesses - and the type of prior crimes - recognizing that crimes of dishonesty DO per se weigh on a person's credibility while general felonies must be put on those scales to weigh probative value against risk of unfair prejudice.

For these reasons, we ask the legislature to not only align Oregon with the rest of the country on this issue, but also to align OEC 609 with the rest of our own evidence code.

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