TESTIMONY OF J. MICHAEL EAKIN, DISTRICT ATTORNEY OF CUMBERLAND COUNTY, AND IMMEDIATE PAST PRESIDENT OF THE PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION, ON SENATE BILL 176, THE PROPOSED PENNSYLVANIA CODE OF EVIDENCE (PCE)

GIVEN BEFORE THE HOUSE JUDICIARY COMMITTEE, SEPTEMBER 8, 1993

In the five months since the proposed Pennsylvania Code of Evidence (PCE) has been on the fast track, many changes in the proposal have been made, many of those at the suggestion of the Pennsylvania District Attorney's Association . An ad hoc committee was formed by PDAA when this dramatic codification and revision of the laws of evidence was first brought to our attention in April, and we have worked hard to understand and help improve the Bill as we initially found it, as revised, and as presently drafted. It is a much better package than it was, but something this complex is not easily accomplished, and this sweeping revision has a way to go before it is a true improvement for our system of criminal justice.

Codification of the law of evidence is probably a good idea, and we support it. However, using the term "codification" to enact basic changes in the law is something else. Change itself is not bad, but let us be aware of exactly what changes this Bill would make. If the changes are not good ones, they should not find their way into the law by sneaking through customs in the baggage of an innocent looking but complicated statute.

At the outset, the PCE was marketed as a simple adoption of the Federal Rules of Evidence, modified to accomodate Pennsylvania law. It was never that, nor is it now. Whether good or bad, be it understood that the PCE as now constituted is neither an acceptance of the Federal Rules nor a simple codification of existing Pennsylvania law. If it were either, then prosecutors across the state would likely embrace this concept with little reservation.

There continues to be a pervasive pattern in the areas where the draft of the PCE diverges from the Federal Rules. The Federal Rules were often quoted directly when Pennsylvania law was more favorable to the Commonwealth, in the name of adopting the enlightened Federal approach. (For example, Section 6205 d, or 6273 (8)). Yet when state law restricted the prosecutor, the Federal Rules were modified or ignored in the name of maintaining Pennsylvania law. (For example, Section 6249 c, or 6264). It was described tongue-in-cheek by one of our members as "the Federal Rules modified by the ACLU".

At times, neither the Federal Rules nor Pennsylvania law was followed, in the name of the "trend" of the law or a perception of a modern evolution of enlightened legal thinking. In short, the Bill is a combination of existing Pennsylvania law, the Federal Rules, and academic theory based on perceived betterment of the law.

We do not intend to disparage the work or the intention of the author, but there is a difference between academic theory and practical trial work, and the PCE has from the outset started with the former and only considered the latter as an afterthought. What works in the laboratory often doesn't work in the field, and while evolution of the law is fine, this is not the best mechanism to accomplish it - it is simply too large a task to codify the law, without adding the burden of selective revision to the process.

We hear that there is no appellate authority to support the "horror stories" we anticipate will be created by some of the language. Unlike the drafters, our membership has much anecdotal history of the arguments of defense counsel who of course will continue to interpret the law in creative ways, so as to assist their clients. If they win these arguments, there is no appellate authority, as the prosecution cannot appeal a "not guilty" verdict. Because evidence issues arise during trial, after the jury is sworn, we cannot interrupt to appeal for a few months - the case proceeds, and if we lose, there is no case on which the higher court will correct the trial judge. For this reason, caselaw is predominantly based on defense appeals, not prosecution appeals. This means there is little authority dealing with these "ridiculous" arguments when a judge buys them, yet every prosecutor in the state can recite tales of seemingly ridiculous arguments which succeeded. Any language now enacted will be the subject of these arguments, and any loopholes that can be closed now should be, clearly and firmly.

Academia can only be aware of the reported cases. Those of us in the trenches, lawyers and judges alike, must deal with these issues immediately, during a trial, in the press of the moment. We haven't the luxury of reflection and nationwide trend-of-the-law analysis. Decisions must be made, and there is no ability to call the drafters on the phone and see what they really meant. If enacted, the language in the PCE will be it, and it ought to be drawn as carefully as possible. Take the time to do so now, because we won't have that time later when we must figure out what it means. That time exists now. It won't later.

One related point that is worth repeating is the haste with which this package has been moving. The District Attorneys of the Commonwealth, who with the trial judges, try more cases in court than anyone, were never asked for input on this idea before this spring. It is an immense project, with implications affecting literally every criminal case in the state. Haste in not good in this area, and the haste of the drafters has been evident in the product. For example, as originally drafted, it inadvertantly would have made confessions inadmissible in any proceeding! Despite countless hours of analysis, we simply can't be sure even now that there aren't other unintended gaffes hidden in the voluminous language we see before us.

Serious reflection must be given to any Bill this complicated, or this important, and ramming it through the legislature in the name of progress will undoubtedly cause some significant injustices simply because the language was not given enough thoughtful consideration. Time to consider all the ramifications of the PCE must be taken.

Our Association believes this is potentially the most significant piece of legislation in the criminal justice field in the last decade; the impact of the changes in its present form are that big. This should be reviewed with almost microscopic attention. Given the monumental scope and the rather basic errors found and corrected to date, rushing this package through is a mistake. We urge the legislature to take its time in considering this in its entirety.

All of us expect to have a criminal justice system that is responsive first and foremost to the people of the Commonwealth, not to the lawyers, a thought that should be maintained whenever this Bill is considered. The public is best served when the rules of evidence truly advance the search for truth, not the obfuscation of truth. If we are to change, let us change for the betterment of us all.

I have as an attachment a section by section review of the major areas which still trouble our Association. Some of them are truly significant, and if not modified or eliminated, would cause us to oppose the PCE in its entirety. Existing laws dealing with admissibility of prior criminal records and bad acts, character evidence, changes in the Rape Shield law and the like are terribly important to the victims of crime. Some of our points are minor, others are not; your consideration of all of them is appreciated. As always, we appreciate the opportunity to speak with you and to have our concerns aired.

CONCERNS OF THE PDAA TO SENATE BILL 176

1. First a drafting matter rather than a substantive one. The Bill has two numbers to refer to each Rule: a section number and a PCE Rule number. For example, the Title section or Rule is both 42 Pa.C.S.A. 6201 and PCE 100. No corollation continues through the Bill: Sec 6207/PCE 106 is/are followed by Sec 6211/PCE 201. This is confusing to the user, and one or the other should be eliminated. Our suggestion is to treat these Rules as an independant part of Title 42, with section numbers corresponding to the Federal Rule on the same point.

2. 6202 (d)/101 (d)

The prefatory language is from the Federal Rules, which then lists areas for which there are existing Federal statutes. In our state, the listed proceedings have no existant code or

statute as suggested by the prefatory language. These items are more properly the subject of the prefatory language of 6202 (e).

That is, these proceedings now have different evidentiary rules but no code or statute, and the strictures of PCE should be clearly stated as inapplicable (subsection e). Simply put, (d)'s language is aimed at Federal procedures which have no statutory counterpart in Pennsylvania, making it misleading as stated.

We have heard an explanation of a perceived distinction justifying the difference between (d) and (e), but frankly, none of us truly understood it. Either the Code applies or it doesn't, and chances are if we can't understand it now, it will be applied 67 different ways in the future, and spawn needless litigation. Our request remains to eliminate (d)'s prefatory language and handle this under (e).

Two other prodeedings that ought to be specifically excluded from the scope of the Rules are summary traffic proceedings and Rule 1100 hearings. As with other non-jury matters, the scope of the rules isn't aimed at them, and the law should say so; failure to say so means that it applies, in full.

One further point is the complete and sweeping revision of post-trial practice that will take effect in Pennsylvania in January 1994. Our committee raised questions about the applicability of PCE to new PCRA hearings, and frankly cannot answer the questions at this time. Experience may dictate a need to exclude those proceedings as well in the very near future.

3. Commentary to 6202/101 and 6203/102

We were uncomfortable with 'commentary" to statutory law. Some of the language has been modified to address specific concerns we had, and there are no specific objections to the present wording, yet the notion of enacting commentary as part of the Bill still leads to the question "Why?". Should this be part of the legislation at all?

4. 6205 (d)/104 (d)

Assuming "the accused" refers to a criminal defendant already charged, this apparently refers only to criminal cases. Many courts permit broader crossexamination in these non-jury hearings; See, e.g., <u>Commonwealth v. Petrakovich</u>, 459 Pa 511, 329 A.2d 844 (1974). This section would limit the discretion of the judge that now exists. This is an example of adopting the Federal Rule verbatum when existing law gives a perceived benefit to the DA. If we're taking the Federal Rules, let's take them all, not selectively choosing those that benefit only the defendant.

5. 6224 (b)/403 (b)

Again the Federal Rule is more expansive than Pennsylvania law, in that it allows pure opinion of character to come in on behalf of the defendant. As expected therefore, the Federal Rule is in the Bill, and we oppose the change in Pennsylvania law. Currently, only reputation (the opinion of many others in the community) is admissible; this change would permit anyone to give their personal opinion regardless of motive to falsify or relation to the accused.

6. 6224 (c)/403 (c)

Further expanding the types of testimony that would become admissible are prior specific acts. That is, defendant Hitler could introduce evidence that he was once nice to his dog. This is not so innocuous as it seems. Not only is this a significant change, it will require this type of evidence on pain of retrial.

There is caselaw holding that it is per se ineffective assistance of counsel when a defense lawyer fails to produce available character evidence; ie, the convicted criminal gets a new trial simply by proving his or her lawyer did not introduce available evidence of this kind. Since reputation evidence is to be expanded to include any prior good act, there is never going to be a case where someone hasn't seen the defendant do something good once in his life. It is absolutely no stretch to say that ineffective counsel claims will succeed and cases will be forced to retrial if counsel in every case does not call these otherwise irrelevant witnesses. This is a dangerous section as written.

7. 6225 (a)/405 (a)

The attached correspondence from Syndi Guido of the Attorney General's office explains this particular area of the law best. The last sentence is not Pennsylvania law and should be eliminated. Maintaining it will benefit only one person: the serial criminal. It does so at the expense of common sense, and is basically senseless.

8. 6225 (b)/405 (b)

Designed 100% as a limit on the prosecutor, this is nothing more than a repetition of basic principles applicable to all types of evidence; why is there a felt need to repeat them when it comes to this area? It will lead to pointless litigation, it is already covered by the law of offers, of discovery, and of general relevance.

The notice provisions are also going to spark appeals, whether the notice was sufficient, whether the judge abused his or her discretion, etc. Discovery Rules cover the area, and there should not be another creation dealing with the requirements of notice. We oppose this section strongly.

9. 6230/410

Again the letter from Syndi Guido expresses our concerns here very well. We suggest that Section (a)(2) should have "except as provided in Rule 609 (Section 6249)" added to it.

10. 6232/412

The "Rape Shield Law" should be let alone. We were led to believe this would be eliminnated from PCE, a move we support: it has not been, and it should be taken out.

Not only are there problems with the language, there are countless scenarios we envision where this change will be detremental to the victim, in a very difficult situation. In short, rapists will be able to return to the "smear the victim" tactics of old.

11. 6248/608

In this important area, we have significant disagreements with the drafter on the import of this language, and the state of the law in Pennsylvania. We understand the intent of the drafter and his analysis of his language, but we do not agree that in the real world in the heat of a trial, when the judge must immediately rule on the meaning of the statute, that the same interpretation will prevail. If the language or its purpose is ambiguous, or simply misinterpreted, judges invariably rule so as to avoid creating an appeal issue and to ensure the accused gets the benefit of the doubt: that is, if they don't agree with the drafter, they will rule against the Commonwealth, and that is not the stated intent of this section.

Our suggestion is to utilize the Federal Rule as written, not as modified in the present draft of PCE. Specifically in subsection (d), we again see general principles of law directed at a limited rule of evidence, an unwise and unnecessary thing to do. We don't see the need for this, and if we don't see it now, it isn't likely to be understood in the middle of a trial.

12. 6249(c)/609(c)

The first sentence is the Federal Rule, and the second sentence is not. We suggest it be removed. While it is argued that this is simply Pennsylvania law, we believe it is not and therefore should not be added.

13. 6249(e)/609(e)

This purports to be a simple transfer of existing stautory law from 42 Pa. CSA 5918. It is not. The language is substantially different, and would limit the instances where a prior record could be introduced. Once more, protecting the defendant and hindering the jury's ability to know who they are dealing with seems to be the goal. If anything, the existing statute should be preserved as written, not as modified.

14. 6250(b)/609.1(b)

This section would require that a witness be asked about rebuttal evidence while theey are on the stand, or the rebuttal evidence becomes inadmissible. This is ridiculous. Not only is it straegically counterproductive for both prosecution and defense, it is useless. A witness can always retake the stand after rebuttal is offered - this rule protects nothing. What it does do is give the defense a good argument for excluding rebuttal evidence entirely.

For example, if an alibi witness has received a bribe for their testimony, which bribe is discovered after the witness steps down, that would never be admissible under this rule, since the witness was not confronted with it during their crossexamination. Besides, the whole goal of crossexamination for both sides is not to create opportunities for oppsition witnesses to explain things. That is simply not the purpose of crossexamination. Irving Younger would turn in his grave if counsel was forced to ask this.

15. 6252(c)(d)/611(c)(d)

If we understand the goal of these two subsections, their purpose deals with civil cases, not criminal ones. That should be stated. Unless it is, they would apply to criminal as well, with no good purpose.

Police will always be "adverse" to defendants. This would allow the defense to call a police officer and ask nothing but leading questions, aomething they can do with no one else. Then, to compound the problem, the prosecutor could not lead this defense witness on crossexamination - only direct questions could be used. This is 100% backwards.

The scope of this extends to witnesses "whose testimony is identified with an adverse party", a broad concept. Could the prosecution call the defendant's mother as if on cross and limit the defense to direct examination in response? Whatever the similarities between this and Federal Rule 611, this is not a good idea.

16. 6254 (a)(b)/613 (a)(b)

These appear procedural, not substantive.

17. 6254/613

This tracks neither the Pennsylvania law nor the Federal Rule, and the explanation we receive is that "few people understant the law of prior consistent statements". Even if we are ignorant of what it 'really" is, this is no improvement on the Federal language. For example, (c)(1) takes two separate areas and combines them, the adds the requirement that the fabrication be "at time of trial"; one supposes that fabrications made the day before are somehow different. This is one phrase that ought to be eliminated no matter what happens to the rest of the section. Likewise, the terms "intentional fabrication" and bias" should be separated by the word "or", not joined as concurrent requirements for introduction of a prior statement.

Our suggestion is to utilize the Federal Rule, as is.

18. 6264/704

The Federal Rule includes the so-called "Hinckley Amendment", a pro-prosecution section that has not been codified in Pennsylvania. While we can live without it, it is manifest that when the Federal Rules help the defense, they are the darlings of the drafters: when they don't, they are quickley made orphans.

If we are to enact the law of Pennsylvania, let's do it. If we're going to adopt the Federal Rules, let's do it. If we're going to take some of each, let's not take the portions of each that hamstring everyone except the criminal defendant.

19. 6266/706

While some of the confusing language here has been cleared up and grammar corrected, we still remain opposed to the contents of this section. The law of deposing criminal witnesses is already covered by Supreme Court Rule 9015. Expanding the right to depose witnesses is opposed. The accused of course has the right

to refuse any statements, so this would not benefit the Commonwealth. The Commonwealth's witnesses would have no such right, and they are the victims of crime, to be subjected to another round of defense interrogation designed to create inconsistancies, confusion and doubt. Besides, counties cannot afford to be sending local prosecutors all over the country to depose witnesses. This is a rule we can live without.

20. 6271/801

Again I would defer to the letter from Attorney Guido on many of the specific objections to the provisions of this paragraph. The Section needs work.

21. 6273/803

Again the letter from Attorney Guido should be referenced here. I would mention two subsections specifically, as examples of the mischief we forsee here.

First, (8) would make police reports hearsay if offered against the defendant, but non-hearsay when utilized for the defendant. The elimination of the phrase "against the defendant in criminal cases" would make this an evenhanded rule.

Section (18) would allow an expert to authenticate any document or periodical and then quote from it as gospel. We can see the "expert" reading in all sorts of scandalous and spurious material simply because he or she says it is reliable. Given the state of flux in the court decisions in the area of expert testimony, this is a dangerous expansion. We are told (surprise) that this is verbatim from the federal rule, so Pennsylvania law should give way. There ought to be a better statement of this area of the law.

22. 6299/1101

We believe the question of what the judge tells the jury is not appropriate for an evidence code. Many of us knkow that the occasional judicial comment to the jury on the evidence can be properly and fairly accomplished, and is appropriate and helpful to the jury so long as there is no expression of opinion or undue emphasis. This section will cause retrials simiply because the judge makes an innocuous or offhand reference to the evidence, or effectively helps the jury by an innocent reference.

For example, cautionary instructions often include references to testimony just heard. To say that the judge "shall not comment upon the evidence" would prevent this, often to the detrement of the defense; either way the judge acts, a mistrial is risked. It is better to let the question to caselaw than to try to codify language appropriate to all circumstances.

23. Section 2.

This Repealer section should exclude the Rape Shield law and that dealing with spousal immunity under 42 Pa.C.S.A. 5913. The latter, just accomplished by the legislature in the past year or two, should not be undone now. The Rape Shield law is discussed above in Paragraph 10.

24. I must stress once more that these are areas remaining from our review of the language proposed. It has been redrafted so often that new and unforseen problems may have been created by the rewrites. It cannot be said too often that this is a very complex and ever changing area of the law, with tremendous iimpact on every criminal prosecution in Pennsylvania. Time to review and consider this is time well spent. Action for the sake of action is foolish. While an Evidence Code would be good, we can live without it. A bad or hastily enacted code is not an improvement, for anyone.