Testimony Before the House Judiciary Committee on the the Proposed Pennsylvania Code of Evidence

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The codification of the common law of evidence in Pennsylvania is long overdue. The interests of judicial efficiency, improved advocacy, and uniformity in evidentiary rulings all stand to gain by a succinct compilation of rules and standards governing the admissibility of evidence. The Defender Association Of Philadelphia supports the passage of a Pennsylvania Code of Evidence. Such legislation is not an end in itself, however, and the continued efficacy of a transition from common law to codification will require periodic monitoring and a willingness of this body to revisit the Code and make such amendments as fairness, wisdom, and policy shall dictate.

Will It Work?

In 1975, Congress embarked on a then untested and highly controversial legislative initiative resulting in the Federal Rules of Evidence. Now eighteen years have passed and, although it still has its detractors, the Rules have not only stood the test of time but have served as a model for thirty-four states, Puerto Rico, and the Military jurisdiction. Perhaps the best testament to its durability is that since their inception only six substantive amendments to the Rules have been enacted (and three of those were Congressional policy initiatives). However, we deceive ourselves if we blithely assume the success enjoyed by the Federal Rules can be

achieved here by an uncritical transplantation of the federal codification to Pennsylvania.

Our common law of evidence, although in many respects similar to the Federal Rules, has an identity and character of its own, representing different interests and policies. The beauty of common law evidence is its unique ability to evolve as necessity and policy require, reflecting values distinctive to Pennsylvania. Our law of evidence was years in the making, with each successive decision providing a forum for fine-tuning, clarifying, and, when necessary, adapting the law. The result was a body of law that, although cumbersome to research, has in most cases served litigants and the courts well. If the codification of evidence is to work here our starting point must be to accurately and succinctly replicate the rules as they have evolved here, not as they were in the federal jurisdiction prior to 1975.

Our immediate objective should not be to transform our law but to make it accessible and understandable to litigants and judges. None of the explicit or implicit goals of the code are furthered if the codification of our law of evidence also becomes an opportunistic forum for those advocating wholesale changes in a law that is firmly rooted in the history of the Commonwealth and the experiences of its citizens. Although there may be areas of our common law that need to be looked at, this legislation should not be that vehicle. There's an old saying of Eastern origin -- "Do first what is first". This bit of wisdom is particularly instructive here. Let's first codify the law and then, after we can assess the success of the Code, look to make changes as needed.

The Fossilization of the Law of Evidence

The goals of the code are broadly stated in PCE 102 (taken verbatim from the federal version) with fairness and efficiency paramount among them. Also, implicit in the codification are the goals of improved advocacy, a better informed judiciary, and uniformity of evidentiary rulings. The most thought provoking objective, however, is also found in PCE 102 (again taken verbatim from the federal version) -- the "promotion of growth and development of the law of evidence." Although seemingly innocuous, the phrase highlights the most problematic consequence of codification.

Trials are procedural forums to resolve disputes. Disputes arise when the conduct of one person conflicts with the interests of another or society. Just as the conduct of people is unpredictable and infinitely varied, so is the array of potential evidentiary problems that may arise in a given case. No code no matter how artfully drafted can anticipate or adequate resolve every dispute. Novel evidentiary problems as well as changing values drive the evolution of our law. The subtleties and nuances that may be captured by the appellate judiciary in lengthy opinion is a luxury code drafters do not enjoy. By codifying the common law we are not only truncating the law into bite-size (and manageable) rules, we are also freezing the law at the point of codification. So where the Code purports to encourage the "promotion of growth and development of the law of evidence" the very act of codification inhibits such growth by setting in stone the status of the law at the time of codification. If the code is to become a vehicle for growth and development it can only do so if we periodically revisit

the rules to see how they are faring and how well they continue to further the goals that guided their invention.

What need be done?

The continued monitoring of the rules is necessary if they are to remain responsive to the ever-changing needs of the courts and litigants as well as reflective of evolving policy considerations. Such oversight is also necessary to identify those sections of the code that have proved problematic in interpretation and application. What is needed in the creation of an advisory committee composed of judges, lawyers, academics, and citizen representatives that will be charged with the duty of monitoring the code to ascertain how well it is doing what was intended and provide a forum for complainants and suggestions. The committee should periodically present a report to this body with recommended amendments, including comments explaining why the proposed amendments are deemed necessary or desirable. Only if we provide a mechanism by which the code can remain fluid and responsive can we ensure that its goals will be achieved.