Colorado Dead Man's Statute: Time for Repeal or Reform?

by Herbert E. Tucker

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The Colorado Dead Man's Statute frustrates some judges and lawyers, and juries may be confused by it. It is thought by many to be the most difficult rule of evidence to understand and apply. This evidentiary statute continues to mystify judges and lawyers alike in complexities of interpretation and application. The vagaries and inconsistencies found in the volumes of decided Colorado cases have built one of the most complex and hazardous rules of evidence. The nine exceptions to Colorado's rule appear at times to have swallowed the rule. As one commentator has stated:

A legal beginner, as well as a veteran, well knows that, at its best, the Deadman's Statute is full of snares, traps, and pitfalls, and that we have a rule by a wilderness of uncertain cases as well as rule by an uncertain statute.1

In 1999, House Bill ("H.B.") 99-1236, which called for the **repeal** of the statute,2 was defeated on the Senate floor. The Trust and Estate Law Section of the Colorado Bar Association has formed a subcommittee3 to study the statute and submit recommendations regarding its modification for the next legislative session. In an effort to assist the subcommittee, this author has surveyed state Dead Man's Statutes across the country. In an effort to determine whether the Colorado statute should be scrapped entirely or simply overhauled, this article surveys the national trend to **repeal** or reform this evidentiary rule.

History

For many years, English scholars wrestled with the injustices that might be created in sealing the lips of honest litigants to avoid perjured testimony of dishonest litigants. The potential harm in the Dead Man's Statute is that it may impede the proof of valid claims. The benefit of the statute is that it tends to eliminate or reduce the number of invalid or otherwise unprovable claims.4

The genesis of the Dead Man's Statute dates back to the sixteenth century English common law. At common law, a party could not testify on his or her own behalf, nor be compelled to testify by an adversary. During the mid-nineteenth century, there was a movement to abolish the common law rule disqualifying parties to a lawsuit as witnesses.

In 1843, the English Parliament abolished the disqualification of testimony by interested parties.5

America followed suit, and when the common rule was changed so that a party to litigation could testify, it became apparent that, if the other party to the litigation were dead, the living party had an opportunity to slant the evidence in his or her own favor. In order to reduce the risk of perjury, Dead Man's Statutes were enacted by the majority of states to balance the scales by barring the testimony of all parties to a suit having a direct pecuniary or proprietary interest in its outcome. The rationale for this rule was that it was the best method of securing the truth to disqualify certain classes of witnesses who were apt to speak falsely from giving testimony. It was said to balance the scales: death had sealed the lips of the decedent and the statute would seal the lips of the witnesses who would testify regarding conversations or transactions with the decedent.6

By the end of the 1960s, thirty-four of the fifty states had enacted some form of the Dead Man's Statute.7 Since then, thirty-one states and the District of Columbia have repealed or amended their Dead Man's Statutes and instead have addressed its subject matter in their rules of evidence as a competency rule or as an exception to the hearsay rule.8 However, many of the states that have either repealed or amended their Dead Man's Statutes still require corroboration or require that there at least be some indicia of truthfulness as a prerequisite to the admission of otherwise incompetent evidence.

The Appendix to this article contains a summary by state of statutes that govern evidence concerning conversations or transactions with a decedent. Among the states that have retained a Dead Man's Statute, there is no uniformity. Each statute is unique.

The Colorado Statute

Colorado first codified the Dead Man's Statute in 1870.9 Colorado's first Dead Man's Statute was taken directly from an Illinois statute.10 The early Colorado cases reflect that, even in its infancy, the Colorado Dead Man's Statute contained numerous exceptions to the rule otherwise barring testimony concerning conversations or transactions with the decedent.11

There are currently more than eighty published Colorado cases interpreting the Colorado Dead Man's Statute,12 which provides in part:

No party to a civil action who is directly interested in the event thererof shall be allowed to testify on his own motion in a suit in which the opposing party is trustee, a conservator, executor, administrator or guardian of an estate of a person living or dead.13

The current Colorado statute is not a model of clarity. In fact, when compared to other states' Dead Man's Statutes, Colorado's is one of the longest and contains more exceptions to the rule than most. Many of its terms also are not well-defined. The volume of reported Colorado cases reflects over 100 years of court interpretation and application of the statute to a wide spectrum of factual situations.14 This has led to a maze of decisions that often have brought confusion. For example, excluding those cases that address the exceptions to the rule, there are approximately forty-seven reported cases defining who is "directly interested" in terms of witness disqualification because of direct gain or loss under the statute.

The Exceptions to the Rule

The major criticism of the Colorado statute is that the number of exceptions to the rule makes it difficult to interpret and apply. Under Colorado's current version of the Dead Man's Statute, there are nine exceptions to the general rule that a party directly interested in the outcome of the litigation is incompetent to testify regarding "conversations" or "transactions" with a decedent.15 These exceptions can be divided into two categories, the first of which addresses "conversations" or "transactions" prior to or after the decedent's death in the presence or outside the presence of the decedent, his agent, family member, heir, or devisee.16 The other exceptions involve "waiver or rebuttal" testimony.17 Unless one of the nine exceptions applies, any person with a direct interest in the outcome of the litigation is rendered incompetent to testify.

The five exceptions that address "conversations" or "transactions" include the following:

1) any person may testify to transactions that occur after the decedent's death (such as reports of pain and suffering caused by the decedent's negligent conduct prior to death);18

2) testimony concerning conversations or transactions in the presence of the decedent is permitted where someone aligned with the decedent (such as a family member or legatee or devisee) is present or available at trial;19

3) parties in interest are permitted to testify to conversations or transactions with the decedent where an agent for the decedent first testifies;20

4) an adverse party is permitted to testify where any witness not a party to the lawsuit testifies to a conversation or admission by an adverse party or party in interest occurring before the death in the absence of the decedent;21 and

5) parties in interest are permitted to testify to facts occurring prior to the death of the decedent that occur outside his or her presence.22

The second category of "waiver" exceptions to the Colorado statute all involve admission of rebuttal testimony if a "waiver" of the statute occurs. The four waiver exceptions permit the following:

1) rebuttal testimony concerning conversations or transactions with the decedent where an opposing party or adverse party first testifies;23

2) prior testimony of any defendant if reduced to writing or stenographic minutes, as long as it relates to the estate and is relevant;24

3) testimony when the deposition of the decedent or an otherwise incompetent witness is introduced into the record;25 and

4) rebuttal testimony concerning conversations or transactions with the decedent if a "waiver" first occurs.26

General Criticism of Statute

Legal scholars have advanced the following general criticisms of Dead Man's Statutes.

Philosophically Unsound

The statutes are based on a philosophy that the number of dishonest individuals is greater than the number of honest ones, and that self-interest makes it probable that people will commit perjury.27

Unjust

The statutes create injustice by preventing proof of honest claims and defenses. In seeking to avoid the possibility of injustice to one side, the statutes work a certain injustice to the other. For example, when a third person not interested in the estate testifies that one of the family members taking under the will has used undue influence to procure a will, the accused party is barred from taking the stand to deny any claim of wrongdoing.28

Incomplete Bar

The "pecuniary interest" limitation is artificial. The statutes do not disqualify many persons who have an indirect pecuniary interest in the outcome of the suit, such as spouses, close relatives, or officers and directors of corporate parties.29

Fails to Accomplish Intended Purpose

The statutes fail to accomplish their intended purpose because the application of the statute may preclude only a small portion of the testimony, leaving the witness free to testify falsely as to other matters. Often during the course of trial, the barred testimony may be admitted through some other witness. The statutes also do not preclude an otherwise incompetent witness from suborning perjury by influencing a third person to testify falsely as to those matters as to which his or her own testimony is barred.30

Impedes Fact Finding

The statutes impede the search for truth in that they may bar material evidence at trial. A jury cannot make logical findings when it is precluded from hearing available evidence bearing on the issue in dispute. For example, in a will contest in which the decedent’s testamentary capacity is challenged or in which undue influence is alleged, the family members and other third parties who naturally would know the most about the decedent are barred from giving testimony.31

Underestimates the Ability Of Fact Finders

Cross-examination should be sufficient to uncover fraudulent schemes concocted by interested parties. The statutes underestimate the efficiency of cross-examination in exposing perjury, as well as the abilities of the judge and jury to determine the truth.32

Creates Delay and Uncertainties

Often, objections raised at trial to incompetent testimony are countered by an exception. This results in a chess game between experienced lawyers, which frequently results in trial delay. Courts are forced to rule after lengthy examination of the statutes and review of relevant case law. The statutes also burden the parties with uncertainties and appeals.33

General Support For the Statute

While Dead Man’s Statutes are perceived by many as unfair, proponents of these statutes point to a variety of factual situations where it might be virtually impossible to rebut the testimony of a claimant. For example, a party claiming to be a decedent’s common law spouse, absent a statute, would be permitted to testify without any

corroboration. The Dead Man's Statutes force claimants to corroborate their claim through third parties who, presumably, have no interest in the outcome of the litigation. Those who support retention of the Dead Man's Statutes make the following arguments.34

Philosophically Sound

The statutes are based on a philosophy that simply provides balance between the interests of the decedent's creditors and his or her successors or estate. In resolving disputes about entitlement to assets of a deceased or incapacitated person who is unable to defend against false testimony, the likelihood of false testimony from a witness who has direct interest in the estate increases.

Just

The statutes do not prevent proof of honest claims. They simply require proof by third-party testimony. Where there is third-party testimony regarding undue influence, the accused party may testify under the powerful rebuttal exception to the rule.

Incomplete Bar

If the "pecuniary interest" limitation is seen as artificial, it can be modified to bar the testimony of an individual who is shown to be indirectly interested, as well.

Intended Purpose

Any statute that fails to achieve its intended purpose can be repealed. It may be amended or corrected by appropriate amendments.

Impedes Fact Finding

All rules of evidence impede fact finding to one degree or another. In most cases, some competent and relevant evidence is excluded on account of such things as lack of foundation and hearsay nature.

Ability of Fact Finders

Dead Man's Statute issues often arise in contested claim and will contest cases that may be tried to a jury. Fact-finding sophistication may not be inherently high.

Delay and Uncertainties

The Dead Man's Statute bar must be raised at or prior to the objectionable testimony. It is often raised either by motions in limine or in pretrial proceedings. This tends to remove the uncertainties. The fact that lawyers and judges have trouble with the statute may be an indication of their unpreparedness or inexperience. The fact that a particular rule is complex does not mean that it should be abolished. Lawyers should be better prepared as to all rules of evidence, regardless of their relative ease or complexity.

Survey of Other States

Nineteen states currently have retained some form of a Dead Man's rule by statute, as opposed to evidentiary or procedural rule. These states include Arizona, Colorado, Florida, Idaho, Illinois, Indiana, Louisiana, Maryland, New Jersey, New York,

Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.35

Of the nineteen states that have retained a Dead Man's Statute, twelve states generally recognize an exception to the bar where a waiver occurs and permit an otherwise incompetent party to testify where an adverse party previously has testified on behalf of a personal representative or opposing party.36 Colorado, Florida, Illinois, Indiana, Maryland, Tennessee, Texas, and Wyoming permit an otherwise incompetent party to testify where a waiver occurs by introduction of a deposition.37

Of the thirteen Uniform Probate Code states, Arizona, Colorado, Florida, and Idaho38 have Dead Man's Statutes, while Alaska, Hawaii, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, and North Dakota39 have repealed their Dead Man's Statutes.

Thirty-one states and the District of Columbia either have repealed or never enacted Dead Man's Statutes. Most of these states have expressly repealed their statute and have addressed it in some fashion in their Rule of Evidence 601 regarding "competency," or as hearsay exception under Rule of Evidence 803(3) regarding "then existing mental, emotional, or physical condition." However, many of the states that have repealed their Dead Man's Statutes still require the additional safeguard that there be some corroborating evidence or at least some indicia of truthfulness as a prerequisite to the admission of otherwise incompetent evidence. These states include Alabama, Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Iowa , Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, and Virginia.40

Legislative Schemes

Most of the states that either have amended or repealed their Dead Man's Statutes have adopted one or more of the following legislative schemes:

Trial Court's Discretion: A minority of states permit interested persons to testify when it appears to the trial judge that injustice would result if the testimony were excluded. The criticism about vesting more discretion with the trial court regarding the admission of otherwise incompetent evidence is that, without definite guidelines for the admission or exclusion of testimony, trial courts may be reluctant to exercise discretion. The exercise of trial court discretion also invites challenges to that discretion resulting in appeals. On review, appellate courts may be more inclined to formulate more specific rules to guide the trial courts, thereby curtailing their discretion.41

Four states, including Arizona, South Dakota, Missouri, and New Hampshire,42 have repealed or amended their Dead Man's Statutes in favor of statutes that vest total discretion in the trial court to allow or disallow otherwise incompetent testimony.

Corroborating Evidence or Evidence of a Trustworthy Nature: The majority of states that either have retained or amended their Dead Man's Statute vest discretion in the trial court to admit otherwise excludable testimony, but only where the purported testimony is "trustworthy," made in "good faith," or "corroborated." Critics of these statutes point to the difficulty of defining the terms "corroboration," "trustworthy," or

made in "good faith." Critics claim that these terms cannot easily be defined in a way that they can be applied in individual cases without resulting in substantial litigation.

Four states, including Louisiana, Texas, Virginia, and Wyoming, plus the District of Columbia, have amended their Dead Man's Statutes to provide that when evidence is submitted against an executor or administrator, the judge shall instruct the jury that such person is not permitted by law to give evidence relating to any oral statement by the deceased unless corroborated by someone other than the plaintiff or his or her agent.43 The New Jersey statute is unique in that it requires that evidence in support of a claim against an estate must be established by clear and convincing evidence.44

Seven states that have repealed their Dead Man's Statutes, including Alaska, California, Hawaii, Massachusetts, New Hampshire, Rhode Island, and Utah, permit otherwise inadmissible evidence of statements of the declarant (decedent) only if "trustworthy" or if the statements were made in "good faith."45

Competency/Hearsay Exception: Many of the states that have repealed their Dead Man's Statutes permit the survivors to testify without restriction and have created a special exception to their competency and hearsay rules to admit any relevant oral declarations or written statements of the decedent. The rationale of this approach is that statements or declarations of the decedent are admissible under the general exception to the hearsay Rule of Evidence 803(3) to prove the "state of mind" of the decedent.46

Nine states and the District of Columbia, which have repealed their Dead Man's Statutes, have created an exception to Rule of Evidence 803(3) permitting the statements or declarations of a decedent as an exception to the hearsay rule. These states include Alaska, California, District of Columbia, Hawaii, Massachusetts, New Hampshire, Ohio, Rhode Island, South Dakota, and Utah.47

The Alaska and California statutes exclude as hearsay statements of a declarant's then existing state of mind, emotion, sensation, or physical condition. However, this exclusion does not include a statement of memory or belief to prove the fact remembered or believed, unless it relates to execution, revocation, identification, or terms of the declarant's will. Both the California and Hawaii state statutes also provide that the statements of a person as to his or her mental or emotional condition, if used against the other, must have equivalent circumstantial guarantees of trustworthiness.48

Hawaii has abolished its Dead Man's Statute in favor of amendments to its Evidentiary Rules 601, regarding competency, and 803(3), regarding the hearsay exception. Hawaii's Rule 601 is identical to the Federal Rule of Evidence ("F.R.E.") and states that every person is competent to be a witness except as otherwise provided by the Rules of Evidence. Hawaii's Rule 601 embodies the intent as expressed in the Advisory Committee's Note to F.R.E. 601 "to abolish the connection with litigation and an interested person as a basis for disqualifying a witness."49 Further, the Hawaii statute provides that a statement is not excluded by a hearsay rule if the court finds the statement was made in good faith, with the personal knowledge of the declarant, while his or her recollection was clear, unless other circumstances indicate lack of trustworthiness.50

Summary

The Dead Man's Statute has evolved from a rule of competency to a rule of admissibility. Thirty-one states and the District of Columbia have repealed their Dead Man's Statutes in favor of more liberal evidentiary rules. Should Colorado follow this

national trend? While repeal might rid Colorado courts of a vast amount of litigation over interpretation and application of the statute, it also would render parties vulnerable to self-serving testimony and possible perjury. When Colorado's statute is compared and contrasted to those other states, it is apparent that it is simply too long and has too many exceptions. Many states that have retained their Dead Man's Statutes have shorter statutes with fewer exceptions that are easier to apply.

Short of repeal, Colorado's statute could be simplified. Subject to the approval of the Statutory Revisions Committee of the Trust and Estate Law Section Council and, finally, the Board of Governors of the Colorado Bar Association ("CBA"), the Dead Man's Statute subcommittee of the CBA Trust and Estate Law Section has proposed the following amendment to the Colorado Dead Man's Statute:

13-90-102. Allowance of testimony regarding oral statements made by persons incapable of testifying, if:

(1) subject to the laws of evidence, in all civil actions by or against persons incapable of testifying, each party and person in interest with a party shall be allowed to testify regarding an oral statement made by the person incapable of testifying if:

(A) the oral statement was made under oath, when the person was competent to testify, or

(B) the statement is corroborated by material evidence of an independent and trustworthy nature, or

(C) the opposing party introduces evidence of related communications.

(2) For purposes of this section, "persons incapable of testifying" shall include, without limitation, decedents, incapacitated and protected persons.

(3) For purposes of this section, "a person in interest with a party" shall mean a person having an interest in the outcome of the civil action (other than an expectation of receiving just compensation for the value of services rendered as a witness), or any interest which makes that person's testimony, standing alone, untrustworthy.

(4) Questions of admissibility under this section are determined by the court as a matter of law.

The subcommittee has tried to address legislators' legitimate concerns with the existing statute by simplifying and shortening the statute, limiting it to oral statements, removing most of the exceptions, and giving the trial court greater latitude and discretion in determining what testimony is received.

Questions of admissibility under this section would be determined by the court as a matter of law. The proposed statute would make all interested parties competent to testify in suits involving oral communications, just as they are in all other suits. The bar regarding "transactions" would be removed because most transactions with the decedent are corroborated through some form of written evidence. The main sources for exposing false testimony available in all cases would be relied on, such as the bringing of honest witnesses, when available, to counter the false with the truth and the test of cross-examination, by which fraud and perjury can be exposed.

The proposed statute also provides additional safeguards in that it requires that the statement be corroborated by "independent material evidence of a trustworthy nature." Ultimately, the trial court would have discretion to disallow testimony where it determines that the testimony standing alone is untrustworthy.

In addition, it is recommended that the Colorado Jury Instructions be amended to provide that, in passing on the credibility of the testimony of parties as to any transaction with or statement of decedents, their interest shall be considered, and the court or the jury shall not be bound to find in accordance with it, even though their testimony is uncontradicted if found not to be convincing.

NOTES

1. Stout, "Should the Deadman Statute apply to automobile collisions?" 38 Tex. L.Rev. 14, 23 (1959).

2. CRS § 13-90-102.

3. Members of the subcommittee include James W. Hill, Herbert E. Tucker, and Marc Darling.

4. Ray, "Deadman Statutes," 25 Ohio St. L.J. 89 (1963).

5. Id. at 89, 90.

6. Wade/Parks, Colorado Law of Wills, Trusts and Fiduciary Administration, §§ 42.2, 42.3 (Rev. Ed. 1998); Scope & Application of Colorado's Dead Man's Statute, 7 Colo. Law Ann. 397 (1983).

7. Ray, "Dead Man's Statute: A Relic of the Past," 10 S.W.L.J. 390 (1956).

8. Uniform Rules of Evidence 601 and 803 (3); Zitter, "Dead Man's Statutes as Affected by Rule 601 of the Uniform Rules of Evidence and State Law," 50 A.L.R.4th 1238 (1986) (1992 Supp., 50 A.L.R. 4th at 29-30).

9. Territorial Laws of Colorado (1870) at 63; 43 Denver L.J. 349 (1966).

10. 1867 Ill. Laws 183, § 2.

11. Whitsett v. Kershow, 4 Colo. 419 (1878); Savard v. Herbert, 1 Colo.App. 445, 29 P. 461 (1882), applying Gen. St. Colo. §§ 3641, 3643 (1880), recognized partner who was present at the time of admission or conversation with decedent could testify as an exception to the rule barring testimony. *Levy v. Dwight*, 12 Colo. 101, 20 P.12 (1888), incompetency of witness removed where deposition taken and introduced at trial. *Jones v. Henshall*, 3 Colo.App. 448, 451, 34 P. 254, 255 (1893), otherwise incompetent witness may testify to facts after death of decedent.

12. Wade/Parks, *supra*, note 6 at §§ 42.22-42.27.

13. CRS § 13-90-102(1).

14. Wade/Parks, *supra*, note 6 at §§ 42.2, 42.3.

15. CRS § 13-90-102(1).

16. CRS § 13-90-102(1)(a)(I), (a)(II), (b), (d), and (f).

17. CRS § 13-90-102(1)(c), (e), (g), and (1.5).

18. CRS § 13-90-102(1)(a)(I).

19. CRS § 13-90-102(1) and (1)(f).

20. CRS § 13-90-102(1) and (1)(b).

21. CRS § 13-90-102(1) and (1)(d).

22. CRS § 13-90-102(1) and (1)(II).

23. CRS § 13-90-102(1) and (1)(b).

24. CRS § 13-90-102(1) and (1)(g).

25. CRS § 13-90-102(1) and (1)(e).

26. CRS § 13-90-102(1) and (1.5); *see also Wise v. Hillman*, 625 P.2d 366, 367 (Colo. 1981).

27. Ray, *supra*, note 4 at 107.

28. *Id.*

29. *Id.* at 108.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Information for the summaries of arguments in support in this section was provided by James R. Wade.

35. Ariz. Review. Stat. Ann. § 12-2251 (West 1996); CRS § 13-90-102; Fla. Stat. Ann. § 90.602 (West 1996); Idaho Code § 9-202 (1996). *See also Lowry v. Ireland Bank*, 779 P.2d 22 (Idaho App. 1989); 735 Ill. Stat. Ann. 5/8-201 (West 1997); Ind. Code Ann. §§ 34-1-14-6, 34-1-14-7, 34-1-14-8, and 34-1-14-10 (West 1996); La. Review. Stat. Ann. §§ 13:3721 and 13:3722 (West 1996); Md. Code Ann. [Courts and Judicial Proceedings] § 9-116 (1996); N.J. Review. Stat. 2A:81-2; N.Y. [Civil Practice Law and Rules] Law § 4519 (McKinney 1997); Pa. Cons. Stat. Ann. § 5930 (West 1996); S.C. Code Ann. § 19-11-20 (Law Co-op 1996); Tenn. Code Ann. § 24-1-203 (1996); Tx. R. Civ. Ev. Rule 601; Vt. Stat. Ann. Tit. 12 §§ 1602 and 1603 (1996); Wash. Review. Code Ann. § 5.60.030 (West 1996); W. Va. Code § 57-3-1 (1996); Wis. Stat. Ann. § 885.16 (West 1996); and Wyo. Stat. Ann. § 1-12-102 (Michie 1997).

36. CRS § 13-90-102; Fla. Stat. Ann. § 90.602 (West 1996); Idaho Code § 9-202 (1996); 735 Ill. Comp. Stat. Ann. 5/8-201 (West 1997); Md. Code Ann. [Courts and Judicial Proceedings] § 9-116 (1996); N.Y. [Civil Practice Law and Rules] Law § 4519 (McKinney 1997); S.C. Code Ann. § 19-11-20 (Law Co-op 1996); W. Va. Code § 57-3-1 (1996); Wis. Stat. Ann. § 885.16 (West 1996); Tenn. Code Ann. § 24-1-203 (1996); Tx. R. Civ. Ev. Rule 601; and Wyo. Stat. Ann. § 1-12-102 (Michie 1997).

37. CRS § 13-90-102(ii)(e); Fla. Stat. Ann. § 90.602 (West 1996); 735 Ill. Comp. Stat. Ann. 5/8-201 (West 1997); Ind. Code Ann. §§ 34-1-14-6, 34-1-14-7, 34-1-14-8, and 34-1-14-10 (West 1996); Md. Code Ann. [Courts and Judicial Proceedings] § 9-116 (1996); Tenn. Code Ann. § 24-1-203 (1996); Tx. R. Civ. Ev. Rule 601; and Wyo. Stat. Ann. § 1-12-102 (Michie 1997).

38. Ariz. Review. Stat. Ann. § 12-2251 (West 1996); CRS § 13-90-102(ii)(e); Fla. Stat. Ann. § 90.602 (West 1996); and Idaho Code § 9-202 (1996). *See also Lowrey v. Ireland Bank*, 779 P.2d 22 (IdahoApp. 1989).

39. Ala. Code § 12-21-163 (1996), Ala. R. Evid. 601; Alaska R. Evid. 601, Alaska R. Evid. 803(3); H.R.S. Rules of Evid. Rule 601; Me. R. Evid. 601; Mich. Comp. Laws Ann. § 600.2166 (West 1996), M.R.E 601; Minn. M.R.E. 601; Mont. R. Evid.; Neb. Review. Stat. Ann. § 27-601 (Michie 1996); N.M. Stat. Ann. § 11-601 (Michie 1996); and N.D. R. Evid. 601.

40. Ala. Code § 12-21-163 (1996), Ala. R. Evid. 601, 803(3); Ark. R. Evid. 601; Cal. [Civil Procedure] Code § 1880(3) (West 1996); Conn. Gen. Stat. Ann. § 52-172 (West 1996); Del. R. Evid. 601; D.C. Code Ann. § 14-302 (1996); Ga. Code Ann. § 24-9-1 (1996); H.R.S. Rules of Evid. Rule 601; Iowa R. Evid. 601; K.S. 1949, § 60-2804; Ky. Re. Stat. Ann. § 421.210 and K.R.E. 601; Me. R. Evid. 601; Mass. Gen. Laws Ann. Ch. 233, § 65 (West 1996); Mich. Comp. Laws Ann. § 600.2166 (West 1996), M.R.E 601; Minn. M.R.E. 601; Miss. R. Evid. Rule 601; Mo. Review. Stat. Ann. § 491.010 (1996);

Rule 601, Mont. R. Evid.; Neb. Review. Stat. Ann. § 27-601 (Michie 1996); Nev. Review. Stat. Ann. § 50.025 (Michie 1996); N.H. Review. Stat. Ann. §§ 516:25 and 516:26 (1996); N.M. Stat. Ann. § 11-601 (Michie 1996); N.C. R. Evid. Rule 601; N.D. R. Evid. 601; Ohio Review. Stat. Ann. § 2317.03 (Anderson 1996) and Ohio Evid. R. 601 and 804(B)(5); Okla. Stat. Ann. 12, § 2601 (West 1996); Or. Review. Stat. § 40.310 (1996); R.I. Gen. Laws § 9-19-11 (1996); S.D. Codified Laws § 19-16-34 [Rule 804(b)(5)] (Michie 1996); Utah Rules of Evidence, Rule 601; and Va. Code Ann. § 8.01-397 (Michie 1996).

41. Ray, *supra*, note 4 at 112 .

42. Ariz. Review. Stat. Ann. § 12-2251 (West 1996); S.D. Codified Laws § 19-16-34 [Rule 804(b)(5)] (Michie 1996); Mo. Review. Stat. Ann. § 491.010 (1996); N.H. Review. Stat. Ann. §§ 516:25 and 516:26 (1996).

43. D.C. Code Ann. § 14-302 (1996); La. Review, St. § 13:3722; Tx. R. Civ. Ev. Rule 601; Va. Code Ann. § 8.01-397 (Michie 1996); Wyo. Stat. Ann. § 1-12-102 (Michie 1997).

44. N.J.R.E. 2A:81-2.

45. Alaska R. Evid. 601, Alaska Rule 803 (23); California Section 1261(b) limits the admissibility of the statement if it was made under circumstances that indicate a lack of trustworthiness; Hawaii Rule 601 Commentary, H.R.S. Rules of Evid. Rule 601. A statement is not excluded by the hearsay rule if the court finds the statement was made in good faith, on the personal knowledge of the declarant, and while his recollection was clear, unless other circumstances indicate a clear lack of trustworthiness; Mass. Gen. Laws Ann. Ch. 233, § 65 (West 1996), Mass. Gen. Laws Ann. Ch. 233, § 65 provides that a declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith and on the personal knowledge of the declarant; N.H. Review. Stat. Ann. §§ 516:25 and 516:26 (1996) and New Hampshire Rules of Evidence 804(b)(5) provide that in actions by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided the trial judge first finds as a fact that the statement was made by the decedent, in good faith, and on the decedent's personal knowledge; R.I. Gen. Laws § 9-19-11 (1996); Utah Rules of Evidence 601(a)(c)(2).

46. C.R.E. 803(3) provides in part: "[A] Statement of the declarant's then existing state of mind, emotion, sensation or physical condition shall not be excluded as hearsay . . . but not including statement of memory or belief to prove a fact remembered or believed unless it relates to execution, identification or terms of the decedent's will." [*See also Murphy v. Glenn*, 964 P.2d 581 (Colo. App. 1998)].

47. Alaska R. Evid. 803(3); Cal. [Evidence] Code § 1261 (West 1996); D.C. Code Ann. § 14-302(b); see Hew v. Aruda, 462 P.2d 476 (Haw. 1969); Mass. Gen. Laws Ann. Ch. 233, § 65 (West 1996); N.H. Review. Stat. Ann. § 516:25 ("Declarations of Deceased Persons") was repealed effective Jan. 1, 1995. Rule 804(b)(5) of the New Hampshire Rules of Evidence ("N.H.R.E.") provides that in actions by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided the trial judge first finds as a fact that the statement was made by the decedent, in good faith, and on the decedent's personal knowledge. N.H.R.E. 804(b)(5) is based on and is identical to

RSA 516:25, Reporter's Notes, N.H.R.E.; Ohio Evid. R. 804(B)(5), applies to all actions brought after July 1, 1980. Case Notes, Ohio Review. Stat. Ann. § 2317.03; *see also Johnson v. Porter*, 471 N.E.2d 484 (Ohio 1984). Rule 601 states that every person is competent to be a witness except as provided in 601. Furthermore, Rule 804(B)(5) states that a statement is not excluded by the hearsay rule if made by a decedent where the estate or personal representative of the decedent's estate is a party, the statement was made before the death of the declarant, and the statement is offered to rebut testimony of an adverse party on a matter within the knowledge of the decedent; R.I. Gen. Laws § 9-19-11 (1996); S.D. Codified Laws § 19-16-34 [Rule 804(b)(5)] (Michie 1996), and Utah Rules of Evidence, Rule 601(c)(2).

48. Alaska R. Evid. 803(3); Cal. Civ. Pro. Code § 1880 (3) (West 1996) and Cal. [Evidence] Code § 1261 (West 1996).

49. F.R.E. Rule 601, Commentary; H.R.S., Rules of Evidence 601.

50. Hawaii Stat. H.R.S Rules of Evidence 601.

For Appendix to this article, please contact the author.