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DIV. 2 PRINCIPLES OF EVIDENCE
CH. 3 WITNESSES

CHAPTER 3
WITNESSES

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ARTICLE 1
WITNESSES GENERALLY

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§ 3101. Persons Who Cannot Testify.

A person is disqualified to be a witness if he is:

1. Incapable of expressing himself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or
2. Incapable of understanding the duty of a witness to tell the truth.

SOURCE: Calif. Evidence Code § 701. Contrast Guam CCP § 1880.

COMMENT: Section 601 (Div. 1) of this Title gives the general rule. The Federal Rules refer this matter to the states. Therefore some guidance is needed for Guam. Guam CCP § 1880 is antiquated. A number of attorneys have asked that the "Dead Man's Statute" be repealed. This was a part of former 1880 and contained limitations on testimony regarding transactions between the witnessed and a deceased party. California repealed this long ago. Additionally, this Section follows California in removing lower age limits on witnesses, making sure only that they know and understand their duty to tell the truth regarding an event.

§ 3102. Confidential Communications.

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness as to matters which are privileged. The general classes of privilege are stated in 503 of Division 1 of this Title. This

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Section provides the principles underlying the privileges stated in 503 of this Title:

1. A husband cannot be examined for or against his wife without his consent, nor a wife for or against her husband without her consent; nor can either during the marriage or afterward, without the witness's consent, be examined as to any communication made by one to the other during the marriage.

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment, nor can any attorney's secretary, stenographer or clerk be examined without the consent of the employer, concerning any fact the knowledge of which has been acquired in such capacity.

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

4. A licensed physician or surgeon cannot, without the consent of the patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient, provided, however, that either before or after probate, upon the contest of any will executed, or claimed to have been executed, by such patient or after the death of such patient, in any action involving the validity of any instrument executed or claimed to have been executed, by him, conveying or transferring any real or personal property, such physician or surgeon may testify to the mental condition of said patient and in so testifying may disclose information acquired by him concerning said deceased which is necessary to enable him to prescribe or act for such deceased; provided, further, that after the death of the patient, the executor of his will or the administrator of his estate, or the surviving spouse of the deceased or, if there be no surviving spouse, the children of the deceased personally, or if minors by their guardian, may give their consent, in any action or proceeding brought to recover damages on account of the death of the patient; provided, further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician or surgeon who has prescribed for or treated said person and whose testimony is material in said action shall testify; and provided,

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further, that the bringing of an action to recover for the death of a patient, by the executor of his will, or by the administrator of his estate, or by the surviving spouse of the deceased, or if there by no surviving spouse by the children personally or, if minors, by their guardian(s), shall be deemed consent to the testimony of any physician or surgeon who attended said deceased.

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by its disclosure. Any determination of whether or not such communications should be, in fact, disclosed, shall be made by the court or judge thereof hearing the case, sitting in camera. No matter sought to be disclosed may be ordered by the court to be disclosed until a period of five (5) days has elapsed, during which the interested parties may appeal. If an appeal is timely taken, no disclosure may be ordered until the appeal is disposed with in favor of the party seeking disclosure.

SOURCE: CCP § 1881, modified.

COURT DECISIONS: See *People v. Santos*, Superior Court Cr. #86F-79 (8/20/80) in which the Court interpreted § 503 of Div. 1 in accordance with the latest Federal interpretation of the marital privilege. This Section has been changed to reflect both § 503 and the *Santos* case.

COMMENT: 1. Subsection 1 has been materially changed from the rule at Common Law. At Common Law the non-witness spouse shared the privilege so that he or she could forbid the testimony of the witness-spouse in privileged areas. This Subsection and 503, and the U.S. Supreme Court have all decided that the privilege should be reduced to that of the witness-spouse only. Thus, if the witness-spouse desires to testify about marital affairs, he or she may without obtaining the consent of the other spouse. The courts now believe that if one spouse is willing to testify against the other, the marriage is in such a bad shape that it is beyond the protection of the privilege.

2. Section 504 of Div. 1 states that claims of privilege are to be governed by the principles of the common law as they may be interpreted by the Superior Court of Guam in light of reason and experience." Therefore, the Commission is continuing the definition of privileges as contained in prior law, modified only where needed to conform with Division 1 and with clarity.

3. CCP § 1881 contains the first sentence of Subparagraph 5 of this Section dealing with government privilege. The Attorney General has suggested that at least procedures be stated to guide the court in determining when to use the privilege. Therefore, the remainder of the Subparagraph is added to provide for in camera hearings and no disclosure until after appeals have ended. To provide otherwise would be to moot the possibility of appeal. However, no further guidelines are added to restrict the privilege since this language has existed in the Code from its Guam beginnings with no detriment to the public welfare.

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4. No definition of psychotherapist-patient privilege is added here. California law contains a multitude of definitions and more exceptions. Considering the state of the art on Guam, the Commission thought it wise to leave the definition of this privilege up to the court "in light of reason and experience," and that not just from California.

§ 3103. Subpoenaed Witnesses Bound to Attend.

A witness, served with a subpoena, must attend at the time appointed, with any papers under his control lawfully required by the subpoena and answer pertinent and legal questions, and, unless sooner discharged, must remain until the testimony is closed.

SOURCE: CCP § 2064.

§ 3104. Witnesses Bound to Answer Questions.

A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself, but he need not give an answer which will have a tendency to subject him to punishment for a crime, nor need he give an answer which will have a direct tendency to degrade his character, unless his be the very fact in issue, or to a fact from which the fact in issue will be presumed. What a witness must answer as to the fact of his previous conviction for a felony, if ordered by the judge shall be governed by Division 1 of this Title.

SOURCE: CCP § 2065, modified.

CROSS-REFERENCE: § 609 of this Title.

COMMENT: This Section has been changed to refer to the controlling portions of Division 1 and to the full scope of the Fifth Amendment Privilege, which protects a person from incriminating himself not only in cases of possible felonies, but also in all other criminal cases.

§ 3105. Right of Witnesses to Protection.

It is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue.

SOURCE: CCP § 2066.

COMMENT: 9 GCA § 52.50 (Crimes and Corrections) provides the criminal penalty for tampering with witnesses.

§ 3106. Witnesses Protected From Arrest.

Every person who has been, in good faith, served with a subpoena to attend as a witness before a court, judge, commissioner, referee or other

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person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance and necessarily remaining there, and returning therefrom.

SOURCE: CCP § 2067.

§ 3107. Arrest Void and Arresting Party Liable.

The arrest of a witness, contrary to the preceding Section, is void, and, when wilfully made, is a contempt of the court, and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the witness with the subpoena, for the damages sustained by him in consequence of the arrest.

SOURCE: CCP § 2068.

§ 3108. Affidavit Required If Arrested.

An officer is not liable to a party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claims the exemption, and makes an affidavit stating:

1. That he has been served with a subpoena to attend as a witness before a court, officer or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued;
2. That he has not thus been served by his own procurement, with the intentions of avoiding arrest; and
3. That he is at the time going to the place of attendance or returning therefrom, or remaining there in obedience to the subpoena.

The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested.

SOURCE: CCP § 2069.

§ 3109. Court May Discharge Witness From Arrest.

The court or officer before whom the attendance is required may discharge the witness from an arrest made in violation of 3107. If the court has adjourned before the arrest, or before application for the discharge, a judge of the court may grant the discharge.

SOURCE: CCP § 2070.

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ARTICLE 2
ADMINISTRATION OF OATHS AND AFFIRMATIONS

§ 3201. Officers Authorized to Administer Oaths.

§ 3202. Form of Oath.

§ 3203. Form May Vary to Suit Witness' Belief.

§ 3204. Witnesses of Non-Christian Belief.

§ 3201. Officers Authorized to Administer Oaths.

Every court, every judge or clerk of any court, every justice and every notary public, and every officer or person authorized to take testimony in an action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations.

SOURCE: CCP § 2092.

§ 3202. Form of Oath.

An oath or affirmation, in an action or proceeding, may be administered as follows; the person who swears or affirms expressing his assent when addressed in the following form:

"You do solemnly swear (or affirm, as the case may be) that the evidence you shall give in this issue (or matter) pending between _____ and _____ shall be the truth, the whole truth, and nothing but the truth, (so help you God)."

SOURCE: CCP § 2094, modified grammatically only.

CROSS-REFERENCES: See 5 GCA Chapter 34 for the current law on Notaries Public, the form of oaths, acknowledgments and other matters.

§ 3203. Form May Vary to Suit Witness' Belief.

Whenever the court before which a person is offered as a witness is satisfied that he has a particular mode of swearing connected with or in addition to the usual form of administration, which, in his opinion, is more solemn or obligatory, the court may, in its discretion, adopt that mode.

SOURCE: CCP § 2095.

§ 3204. Witnesses of Non-Christian Belief.

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When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremony of his religion, if there be any such.

SOURCE: CCP § 2096.
