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Refreshed Recollection of Witnesses Prior to Testimony: Certainty Stands Strong in Missouri State Courts

Morry Cole

Refreshed Recollection of Witnesses Prior to Testimony: Certainty Stands Strong in Missouri State Courts

State ex rel. Polytech, Inc. v. Voorhees[1]

I. INTRODUCTION

Under Missouri common law, "a witness need not produce a document used to refresh recollection before testifying."[2] Although federal courts follow a discretionary rule[3]—granting judges latitude as to which memory-refreshing documents a witness must disclose to avoid injustice—Missouri's high court has followed a more certain nondisclosure rule. This Note examines the development of Missouri's rule as well as the policy arguments for the Missouri and federal rules, in the context of *State ex rel. Polytech, Inc. v. Voorhees*,[4] the recent Missouri Supreme Court case that reaffirmed Missouri's refreshed recollection rule.

II. FACTS AND HOLDING

Polytech, Inc., sued Sedgwick James of Missouri, Inc., Polytech's insurance broker, for failure to secure adequate insurance.[5] In preparation for possible litigation, Polytech's counsel requested that Douglas Hazel, one of Polytech's officers, summarize his involvement with Sedgwick.[6] At deposition, Hazel admitted authoring, and forwarding to counsel, a one page summary of his intercourse with Sedgwick.[7] Further, Hazel acknowledged that he reviewed this summary prior to his deposition.[8]

Sedgwick requested Hazel's summary.[9] Polytech refused, claiming attorney-client privilege and work product immunity.[10] Since Polytech's counsel used the summary to prepare Hazel for deposition, Sedgwick sought

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1. 895 S.W.2d 13 (Mo. 1995).
2. *Id.* at 14; State v. Scott, 467 S.W.2d 851, 853 (Mo. 1971); State v. Smith, 431 S.W.2d 74, 82 (Mo. 1968); State v. Crayton, 354 S.W.2d 834, 837-38 (Mo. 1962).
3. *See* FED. R. EVID. 612.
4. 895 S.W.2d 13 (Mo. 1995).
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 13-14.

an order compelling disclosure[11] from Circuit Judge Alphonso H. Voorhees.[12] Voorhees ordered disclosure of Hazel's summary,[13] and Polytech sought a writ of prohibition from the court of appeals, which was denied.[14] Polytech then petitioned for a writ of prohibition from the Missouri Supreme Court.[15]

In a unanimous decision, written by Judge Duane Benton, the court reaffirmed the traditional Missouri rule that "a witness need not produce a document used to refresh recollection before testifying," and the writ of prohibition was made absolute.[16]

III. LEGAL BACKGROUND

The use of a writing to refresh a witness's recollection was recognized by English courts as early as 1660.[17] Courts in the United States began following the English rule in 1817.[18] Though several jurisdictions have struggled with the issue in the past,[19] it is now well settled in all jurisdictions that writings may be used to refresh a witness's memory.[20] However, when a document is claimed to be protected by the attorney-client privilege or work product immunity, and is used to refresh recollection prior to testifying, the federal rule often conflicts with state rules.[21] This is the case in Missouri.[22]

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11. *Id.* at 13.

12. *Id.* at 13-14. The Honorable Alphonso H. Voorhees serves on the Circuit Court of St. Louis County and was the respondent in Polytech's petition for a writ of prohibition. *Id.*

13. *Id.* at 14.

14. *Id.*

15. *Id.*

16. *Id.* at 14-15 (citing MO. CONST. art. V § 4).

17. *See* 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 735 (Chadbourn rev. 1970).

18. *Id.* (citing Pearson v. Wightman, 1 Mill's Const. Ct. 336, 344 (S.C.L. 1817) (where a witness to a will refreshed his recollection by identifying his handwriting)).

19. Wigmore gives a detailed summary of the "confused and perplexing" precedents that defined the course of the use of writings to refresh a witness's recollection in Pennsylvania, New York, Massachusetts and Illinois. *Id.* at § 736.

20. 3 WIGMORE, *supra* note 17, § 736.

21. *See* 3 WIGMORE, *supra* note 17, at 140 n.4 for a list of other jurisdictions following the Missouri rule.

22. *Polytech*, 895 S.W.2d at 13-14.

A. The Federal Rule

In federal courts, the rule analogous to Missouri's refreshed recollection rule is Federal Rule of Evidence 612. Originally promulgated in 1975, this rule provides that an adverse party has a right to inspect a writing used by a witness to refresh recollection while testifying or before testifying.[23]

Under the federal rule, if the writing is used to refresh memory while testifying, the adverse party is entitled to inspect the writing regardless of any claim of attorney-client privilege or work product immunity.[24] If a writing is used to refresh a witness's memory before testifying, the court must use its discretion to determine if production is required to serve the "interests of justice."[25]

The proponents of codification of the federal rules—as well as those arguing that states should follow the federal lead and codify rules of evidence—believed that doing so would benefit the bar in several ways. Proponents argued that adopting the federal rules would increase the competence of the bar through greater familiarity with the rules; establish uniformity and predictability throughout the courts; increase efficiency and decrease cost of litigation; and would lead to better decisions because more evidence would be accessible to the trier and the judge would have greater discretion.[26] On the other hand, the opponents to codification argued that this can generate neither uniformity nor predictability.[27] Nonetheless, after

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23. *See* FED. R. EVID. 612, which provides in pertinent part:

> Except as otherwise provided in criminal proceedings . . ., if a witness uses a writing to refresh memory for the purpose of testifying, either—
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> (1) while testifying, or
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
>
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

24. FED. R. EVID. 612.

25. *Id.*

26. *See generally* Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 256-57 (1984); House Comm. on the Judiciary, Notes on the Federal Rules of Evidence, 4 U.S.C.C.A.N. 7075, 7075-77 (1974); Thomas J. Green, Reporter for the Special Committee on Evidence, Judicial Conference of the United States, *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 109-10 (Feb. 1962).

27. *See, e.g.*, John H. Wigmore, *The American Law Institute Code of Evidence Rules: A Dissent*, 28 A.B.A. J. 23, 24 (1942).

decades of such debates the federal rules were signed into law on January 2, 1975, becoming effective on July 1, 1975.[28]

As written, the rules are extremely flexible, setting forth general standards, rather than concrete rules of law.[29] Rule 612 is no exception. Its clause allowing a judge to permit inspection of a writing used to refresh a witness's memory before testifying—if, in the judge's opinion, it is necessary to avoid an injustice—effectively codifies nothing.[30] Within several years of the Rules' codification, commentators began calling for a reassessment of some of the rules that grant discretion to judges.[31]

B. Synthesis of Missouri's Rule

As early as 1874, Missouri courts allowed the use of writings to refresh a witness's memory.[32] Before the turn of the century, in *Traber v. Hicks*,[33] the Missouri Supreme Court recognized—in order to ensure that a witness "testify from his own knowledge, and not from information obtained from others"[34]—the right of an adverse party to inspect a writing "to test its sufficiency for the purpose used."[35] Though *Traber* seems, at first glance, to be contrary to the current Missouri rule, its "test of sufficiency" is the foundation of the current rule, which delineates whether the writing is consulted during testimony or prior to giving testimony.[36]

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28. Berger, *supra* note 26, at 256-57, 277 n.6 (citing Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, codified at 28 U.S.C. App. 1976 & Supp. V 1981)).

29. Berger, *supra* note 26, at 255. Though much of the pre-promulgation debate centered on providing uniformity and guidance, the rules as adopted are far from predictable. Even the rule stating the purpose of the rules is ambiguous. *See* FED. R. EVID. 102, "Purpose and Construction," which provides:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

30. FED. R. EVID. 612.

31. *See, e.g.*, Berger, *supra* note 26, at 276.

32. *See* Smith v. Beattie, 57 Mo. 281, 283 (1874).

33. 32 S.W. 445 (Mo. 1895).

34. *Id.* at 447.

35. *Id.* In *Traber*, a witness testified to facts gleaned from refreshing his memory with the writings of another. It appears that the witness had no personal knowledge of the facts in the writing at the time of its composition. Since such testimony is in no sense a refreshed recollection, the court deemed that, in order to test the writing's sufficiency for the purpose used—refreshing the witness's memory—the adverse party had a right to inspect the writing. *Id.*

36. *Cf.* State v. Miller, 368 S.W.2d 353, 356-57 (Mo. 1963); State v. Gadwood,

When a document is used to refresh a witness's memory during testimony, opposing counsel may inspect the document to substantiate whether the testimony is in fact a reflection of the witness's memory or merely regurgitation of what is seen in the document.[37] However, when a document is used to refresh a witness's memory prior to giving testimony, the testimony is based on recollection, and not merely a recitation of the contents of "notes in hand."[38] In either case, it is the memory of the witness that is evidence, not the writing that is consulted.[39]

State v. Crayton[40] effectively synthesizes the foundational cases that developed the Missouri Rule. In *Crayton*, the court stated that:

> [t]he purport of the Missouri cases seems to be that [opposing] counsel should be permitted to examine a paper or document from which [the] witness has refreshed his recollection while on the stand . . . but that this is not required where the [paper] is not produced and used at the trial, although it may have been examined by the witness previously.[41]

Several more recent Missouri Supreme Court cases followed this rule;[42] however, the rule came into question when the Eastern District Court of Appeals handed down its opinion in *Barrett v. Mummert*.[43]

In *Barrett*, the court stated that the traditional rule, then most recently stated by the Missouri Supreme Court in *State v. Scott*,[44] had been "impliedly" overruled[45] by the court's decision in *Callahan v. Cardinal Glennon Hospital*.[46]

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116 S.W.2d 42, 50-51 (Mo. 1938); State v. Tracy, 243 S.W.2d 173 (Mo. 1922); State v. Patton, 164 S.W. 223, 225-26 (Mo. 1914); State v. Miller, 137 S.W. 887, 890 (Mo. 1911); Bova v. St. Louis Pub. Serv. Co., 316 S.W.2d 140, 146 (Mo. Ct. App. 1958); State v. Jackson, 194 S.W. 1078, 1078 (Mo. Ct. App. 1917); State v. Nardini, 186 S.W. 557, 557 (Mo. Ct. App. 1916).

37. *Tracy*, 243 S.W.2d at 175-76; *Patton* 164 S.W. at 225-26; State v. Miller, 137 S.W. at 887, 890 (Mo. 1911).

38. *See* State v. Miller, 368 S.W.2d 353, 356-57 (Mo. 1963); *Gadwood*, 116 S.W.2d at 50-51; *Bova*, 316 S.W.2d at 146; *Jackson*, 194 S.W. at 1078.

39. *Patton*, 164 S.W.2d at 226.

40. 354 S.W.2d 834 (Mo. 1962).

41. *Id.* at 838.

42. *See* State v. Scott, 467 S.W.2d 851, 853 (Mo. 1971); and State v. Smith, 431 S.W.2d 74, 81-82 (Mo. 1968).

43. 869 S.W.2d 282 (Mo. Ct. App. 1994).

44. 467 S.W.2d 851, 852-53 (Mo. 1971).

45. *Barrett*, 869 S.W.2d at 284-85.

46. 863 S.W.2d 852 (Mo. 1993).

In *Callahan*, the court found "no error or prejudice resulted" from the trial court giving opposing counsel a document used by a witness to refresh recollection prior to testifying.[47] However, the court's observation that "no error or prejudice resulted," comes just one paragraph before the court's caveat that: "in cases of . . . prejudicial evidence or other improper incidents in the course of a trial . . . absent a manifest abuse of that discretion [the Missouri Supreme Court] should not interfere."[48] Nonetheless, the court of appeals, in *Barrett*, read an implied overruling of Missouri's refreshed recollection rule into *Callahan*, upon which Judge Voorhees relied.[49]

IV. THE INSTANT DECISION

In *State ex rel. Polytech, Inc. v. Voorhees*,[50] the Missouri Supreme Court's opinion reaffirmed Missouri's common law rule that "a witness need not produce a document used to refresh recollection before testifying."[51] After outlining the facts leading to Judge Voorhees's order for Polytech to produce a document used to refresh a witness's memory prior to testifying,[52] the opinion began by stating that "[w]here disclosure of 'privileged material' is alleged, prohibition is available, since an erroneous disclosure 'cannot be repaired on appeal.'"[53] Next, the opinion summarized why the document in question falls within Missouri's attorney-client privilege.[54]

The court explained that "[t]he attorney-client privilege protects 'confidential communications . . . between an attorney and . . . client' concerning representation of the client."[55] "The privilege may be invoked by either the attorney or the client, though it exists for the benefit of the client."[56] "A corporate manager is a 'client' for purposes of the privilege."[57] Since, in this case, one of Polytech's officers wrote and

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47. *Id.* at 868.

48. *Id.* (citing Hoene v. Associated Dry Goods Corp., 487 S.W.2d 479, 485 (Mo. 1972)).

49. State *ex rel.* Polytech, Inc. v. Voorhees, 895 S.W.2d 13, 14 (Mo. 1995).

50. 895 S.W.2d 13 (Mo. 1995).

51. *Id.* at 14.

52. *Id.* at 13-14.

53. *Id.* at 14 (citing State *ex rel.* Peabody Coal Co. v. Clark, 863 S.W.2d 604, 608-09 (Mo. 1993); MO. SUP. CT. R. 84.22(a)).

54. *Id.* at 14.

55. *Id.* (citing State *ex rel.* Terminal R.R. Ass'n of St. Louis v. Flynn, 257 S.W.2d 69, 73 (Mo. 1953) (en banc)).

56. *Id.* (citing State *ex rel.* Great Am. Ins. Co. v. Smith, 574 S.W.2d 379, 385 n.6 (Mo. 1978) (en banc)).

57. *Id.* (citing State *ex rel.* Pitts v. Roberts, 875 S.W.2d 200, 202 (Mo. 1993)).

delivered a summary of his interaction with the defendant to Polytech's counsel and no one except the officer and Polytech's counsel viewed the summary, the court concluded that the document was protected by the attorney-client privilege.[58] The opinion next discussed Missouri's work product doctrine.[59]

The court observed that "[t]he work product doctrine protects the 'thoughts' and 'mental processes' of the attorney preparing the case,"[60] and "[w]ork product includes documents prepared in anticipation of litigation."[61] As both Polytech's officer and counsel stated that the summary at issue was prepared in anticipation of future litigation, the court concluded that the document qualified as work product.[62]

Next, the opinion reviewed Judge Voorhees's argument that, since Polytech's officer reviewed the document for his deposition, Polytech waived both the attorney-client and work product privileges.[63] In the remainder of the opinion, Judge Benton compared the policy arguments for the traditional Missouri rule—prohibiting a discretionary standard and thus advancing attorney-client and work product privileges—to the uncertain and discretionary rule in federal court.[64] The opinion ended by overruling *Barrett v. Mummert*[65] and *State ex. rel. McCulloch v. Lasky*[66] to the extent that these cases recognized any abrogation of the traditional Missouri rule.[67]

The court unanimously made the writ of prohibition absolute; thus, Judge Voorhees could not order Polytech to disclose the document.[68]

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58. *Id.*

59. *Id.*

60. *Id.* (citing State *ex rel.* Terminal R.R. Ass'n of St. Louis v. Flynn, 257 S.W.2d 69, 73 (Mo. 1953)).

61. *Id.* (citing MO. SUP. CT. R. 56(b)(3)).

62. *Id.* (citing Friedman v. Provaznik, 668 S.W.2d 76, 80 (Mo. 1984) (quoting Hickman v. Taylor, 329 U.S. 495, 505 (1947))).

63. The opinion points out that Judge Voorhees based his decision on the recent Missouri Eastern District Court of Appeals case of Barrett v. Mummert, 869 S.W.2d 282 (Mo. Ct. App. 1994), which held that the Missouri Supreme Court had, in Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852 (Mo. 1993), "impliedly approved" a requirement that documents used to refresh recollection before testifying be disclosed. *Polytech*, 895 S.W.2d at 14.

64. *Id.* at 14-15; *see supra* note 23 for the pertinent test of the analogous federal rule, FED. R. EVID. 612.

65. 869 S.W.2d 282 (Mo. Ct. App. 1994).

66. 867 S.W.2d 697 (Mo. Ct. App. 1993).

67. *Polytech*, 895 S.W.2d at 14-15.

68. *Id.* at 15.

V. COMMENT

In *Polytech*, the Missouri Supreme Court favored a well-reasoned doctrine over the discretion of any particular judge on any particular day. By following the well-established Missouri rule, the court makes clear that the certainty and administrability of the attorney-client privilege and work product doctrine, as they have developed in Missouri, will not soon fall prey to a discretionary standard plagued by a lack of steadfastness.

The traditional Missouri rule, that "a witness need not produce a document used to refresh recollection before testifying,"[69] has survived for good reason. As observed by Judge Benton in *Polytech*, the Missouri rule "advances attorney-client and work product privileges by prohibiting discretionary disclosure."[70] This is true. However, the opinion does not elaborate on the reasons why these privileges are advanced.[71]

The Missouri refreshed recollection rule provides certainty to judges, lawyers and litigants. Under the Missouri rule, judges do not have discretion to compel disclosure of pre-testimony recollection-refreshing documents.[72] This is a practical rule that is easy to understand. When preparing a case for litigation in Missouri's state courts, lawyers can freely solicit information from their clients and can plan strategy and prepare their case without having to face the uncertainty of possible disclosure.[73]

The federal rule is far less certain.[74] The federal rule analogous to Missouri's refreshed recollection rule, Federal Rule of Evidence 612,[75] allows a judge to compel disclosure of memory-refreshing documents "if the court in its discretion determines it is necessary in the interests of justice . . ."[76] In regard to discretionary rules of evidence, Wigmore wrote that "large areas of 'discretion' [will cause] the Law of Evidence [to] suffer, not a reform, but a relapse into that primal condition described in Genesis 1:2, when the Earth 'was without form and void.'"[77] Though this is a bit of an exaggeration,

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69. *Id.* at 14 (citing State v. Scott, 467 S.W.2d 851, 853 (Mo. 1971); State v. Smith, 431 S.W.2d 74, 82 (Mo. 1968); State v. Crayton, 354 S.W.2d 834, 837-38 (Mo. 1962)).

70. *Id.* at 15.

71. *Id.*

72. *Polytech*, 895 S.W.2d at 14-15.

73. *See Polytech*, 895 S.W.2d at 15; Ettie Ward, *The Litigator's Dilemma: Waiver of Core Work Product Used in Trial Preparation*, 62 ST. JOHN'S L. REV. 515 (1988).

74. *See infra* note 78 and accompanying text.

75. *See supra* note 23 for the pertinent text of FED. R. EVID. 612.

76. FED. R. EVID. 612.

77. Wigmore, *supra* note 27, at 24.

Wigmore was not entirely off the mark. Since Rule 612 was enacted, a certain amount of chaos has resulted—as revealed by the widely differing results in the rule's application.[78]

The Missouri Rule is easy to administer. "A witness need not produce a document used to refresh recollection before testifying."[79] The plain meaning of this rule is obvious and is not open to discretionary application. The only factual determination necessary under this rule is when the witness refreshed his memory. If memory is refreshed while testifying, the document is freely discoverable; if memory is refreshed prior to testifying, it is not.

Missouri's rule is fair and efficient. The Rule facilitates equal treatment of refreshed recollection testimony in all cases. It limits lengthy discovery "fishing expeditions," which are often delay tactics, and does not require judicial resources to be spent on long investigations to determine what—in a judge's discretion to avoid an injustice—should be disclosed.

One might argue that, in order to serve the interests of fairness, a judge should have discretion over this area of discovery. However, when any arbitrary rule is created, fairness is best served by equal application and strict enforcement.

Since the rule stated in *Polytech* is merely a reiteration of the rule stated in earlier Missouri Cases, a brief analysis of why the court of appeals strayed from this rule, in *Barrett*,[80] is warranted. The court of appeals relied on an "implied" overruling of Missouri's rule, as interpreted from *Callahan v. Cardinal Glennon Hospital*.[81] In *Callahan*, the Missouri Supreme Court stated that "no error or prejudice resulted" from a trial court requiring disclosure of documents used to refresh recollection.[82] The court of appeals read this to be an "implied" overruling[83]—which is not entirely unreasonable when taken out of context. However, when read in context—found just after

78. Some courts give Rule 612 a broad reading; *see* Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 613-16 (S.D.N.Y. 1977). Other courts give Rule 612 a narrow reading, as in Dorderian v. Polaroid Corp., 121 F.R.D. 13 (D. Mass. 1988); and some follow a case by case standard, as in *In re* Joint Eastern & Southern Dist. Asbestos Litig., 119 F.R.D 4 (E.D.N.Y. 1988). For other examples of inconsistent application of Rule 612, *see* EDNA S. EPSTEIN & MICHAEL M. MARTIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 74-75, 158-64 (2d ed. 1989); JACK B. WEINSTEIN & MARGARET A. BERGER, 3 WEINSTEIN'S EVIDENCE 621-37 (1994); 1 MCCORMICK ON EVIDENCE 34-35 (4th ed. 1992); Glen A. Guarino, Annotation, *Use of Writing to Refresh Witness' Memory, as Governed by Rule 612 of Federal Rules of Evidence*, 73 A.L.R. FED. 423, 431, 438 (1985).

79. *Polytech*, 895 S.W.2d at 14.

80. 869 S.W.2d 282, 284 (Mo. Ct. App. 1994).

81. 863 S.W.2d 852, 867 (Mo. 1993).

82. *Id.*

83. *Barrett*, 869 S.W.2d at 284-85.

the statement that the Supreme Court should not interfere absent a manifest abuse of discretion[84]—a more reasonable interpretation is that "no *[reversible]* error or prejudice resulted." Though *Callahan* was not as clearly worded as it should have been, there was no discussion of Missouri's refreshed recollection rule, and there was no implied overruling of the rule.[85]

The *Polytech* decision is sound, well-reasoned, and concise. Had *Callahan* been so carefully worded there would have been little possibility of the Eastern District Court of Appeals straying from the traditional rule in *Barrett*, requiring *Polytech* to be litigated. Missouri's best interests—in the conservation of judicial resources, certainty, predictability and fairness—are served when rules are clearly stated and strictly applied, as in this decision.

IV. CONCLUSION

Rules subject to discretionary imposition—especially regarding attorney-client and work product privileges—effectively codify nothing, add uncertainty to trial preparation, and are difficult for judges to administer with consistency. In *State ex rel. Polytech v. Voorhees*, the Missouri Supreme Court reaffirmed the traditional Missouri rule that a document used to refresh a witness's memory prior to testifying need not be produced. By so doing, the court has avoided the uncertainty that would inevitably accompany any purely case-by-case approach to the question of what disclosure is necessary in order to avoid injustice.

MORRY COLE

84. *Callahan*, 863 S.W.2d at 867.
85. *Polytech*, 895 S.W.2d at 14.