

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

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FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted a proposed amendment to Rule 804(b)(3) with a recommendation that it be approved and transmitted to the Judicial Conference. The amendment to Rule 804(b)(3) was published for public comment in August 2002. A public hearing was held at which several witnesses testified.

The proposed amendment to Rule 804(b)(3) requires “particularized guarantees of trustworthiness” indicating the reliability of an unavailable witness’s statement against penal interest *incriminating* an accused. The requirement mirrors the test applied by the Supreme Court in *Lilly v. Virginia*, 527 U.S. 116, 134-135 (1999). The amendment would maintain the longstanding “corroborating circumstances” requirement for a statement against penal interest of an unavailable witness *exculpating* an accused.

In *Lilly*, the Supreme Court held that statements against penal interest by unavailable witnesses incriminating an accused must bear “particularized guarantees of trustworthiness” because of the Confrontation Clause. But statements exculpating an accused do not implicate the Confrontation Clause. The advisory committee concluded that the “corroborating circumstances” standard, which has been significantly developed by case law over 30 years, should continue to apply to statements exculpating an accused. The Committee Note explains the distinction between the two standards.

The advisory committee recognized that the difference between the two standards is not sharply defined. Although there is substantial case law explaining what is meant by “corroborating circumstances” supporting a hearsay statement exculpating an accused, the precise extent of “particularized guarantees of trustworthiness” required to support a hearsay statement incriminating an accused is subject to developing case law. The Committee Note is intended to provide as much guidance as is possible to the bench and bar to understand the differences between the two standards. The Note points out the factors to be considered under each standard.

The advisory committee withdrew its proposed amendments to extend the “corroborating circumstances” standard to statements against penal interest in civil cases. It determined that the change was not necessary and would be counterproductive.

The Committee concurred with the advisory committee’s recommendations.

Recommendation: That the Judicial Conference approve the proposed amendment to Evidence Rule 804(b)(3) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

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