

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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**TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure**

**FROM: Robert L. Hinkle, Chair
Advisory Committee on Evidence Rules**

DATE: May 6, 2009

RE: Report of the Advisory Committee on Evidence Rules

Introduction

The Advisory Committee on Evidence Rules met on April 23-24 in Washington, D.C. The meeting produced two action items for Standing Committee consideration at the June 2009 meeting.

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The second action item involves Rule 804(b)(3), the hearsay exception for an unavailable declarant's statement against interest. As the Standing Committee will recall, a year ago the Advisory Committee proposed, and the Standing Committee approved, releasing for public comment a proposed amendment to this rule. The current rule requires a criminal-case defendant — but not the government — to show corroborating circumstances as a condition to admission of an unavailable declarant's statement against penal interest. The amendment would extend the corroborating-circumstances requirement to the government, as some courts have done anyway. The Justice Department does not oppose the amendment. The proposed amendment makes no change for civil cases or for statements against pecuniary interest.

At the April 2009 meeting, the Advisory Committee considered the few public comments received on the proposal. The comments were generally favorable. The Advisory Committee

made no changes of substance to the proposal as released for public comment, but the Committee made stylistic changes consistent with some of the public comments and with the ongoing restyling project.¹ The Advisory Committee now asks the Standing Committee to approve the proposed amendment to Rule 804(b)(3) for submission to the Judicial Conference. The text of the proposed rule in black-line form and a summary of the public comments are attached to this Report as Appendix B.

A complete discussion of these items is in the draft minutes attached to this Report as Appendix C.

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II. Action Item — Proposed Amendment to Evidence Rule 804(b)(3)

As noted above in the introduction to this report, Rule 804(b)(3) now provides that in a criminal case, the defendant — but not the government — must show corroborating circumstances as a condition for admitting an unavailable declarant’s statement against penal interest. The proposed amendment would extend the corroborating-circumstances requirement to the government, as some courts have done anyway.

Nobody asked to speak at the scheduled public hearings on the proposed amendment. The hearings were canceled. A small number of written public comments were filed. They are summarized at the end of Appendix B to this report. No comment opposed requiring the government to show corroborating circumstances. Two comments suggested that although the government should be required to show corroborating circumstances, the defendant should not. The Advisory Committee rejected that suggestion. One comment suggested the rule should be amended further to overturn a controlling Supreme Court decision on another aspect of the rule. The Advisory Committee rejected that suggestion. Finally, several comments proposed stylistic changes. The Advisory Committee implemented those suggestions and sought to avoid successive changes by restyling the proposed Rule 804(b)(3) as will occur anyway as part of the restyling process. The Committee revised the proposed Committee Note to reflect this decision and in response to a further comment on the Note.

Appendix B to this report sets out the proposed amendment in black-line form. The appendix also includes the proposed Committee Note and summarizes the public comments.

Recommendation: The Advisory Committee on Evidence Rules recommends that the Standing Committee approve the proposed amendment to Rule 804(b)(3) for submission to the Judicial Conference.

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¹The Committee removed one sentence from the Committee Note after the report was submitted.

**PROPOSED AMENDMENT TO THE FEDERAL
RULES OF EVIDENCE***

Rule 804. Hearsay Exceptions; Declarant Unavailable

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(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

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(3) Statement against interest. A statement ~~which~~ that:

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8

(A) a reasonable person in the declarant's

9

position would have made only if the

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person believed it to be true because,

11

when made, it was so contrary to the

12

declarant's proprietary or pecuniary

13

interest or had so great a tendency to

*New material is underlined; matter to be omitted is lined through.

14 invalidate the declarant's claim against
15 someone else or to expose the declarant
16 to civil or criminal liability ~~was at the~~
17 ~~time of its making so far contrary to the~~
18 ~~declarant's pecuniary or proprietary~~
19 ~~interest, or so far tended to subject the~~
20 ~~declarant to civil or criminal liability, or~~
21 ~~to render invalid a claim by the~~
22 ~~declarant against another, that a~~
23 ~~reasonable person in the declarant's~~
24 ~~position would not have made the~~
25 ~~statement unless believing it to be true.~~
26 ; and

27 **(B)** ~~A statement tending to expose the~~
28 ~~declarant to criminal liability and~~
29 ~~offered to exculpate the accused is not~~
30 ~~admissible unless is supported by~~

31 corroborating circumstances that clearly
32 indicate ~~the~~ its trustworthiness ~~of the~~
33 statement, if it is offered in a criminal
34 case as one that tends to expose the
35 declarant to criminal liability.

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Committee Note

Subdivision (b)(3). Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978) (“by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)”); *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

All other changes to the structure and wording of the Rule are intended to be stylistic only. There is no intent to change any other result in any ruling on evidence admissibility.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The rule, as submitted for public comment, was restyled in accordance with the style conventions of the Style Subcommittee of the Committee on Rules of Practice and Procedure. As restyled, the proposed amendment addresses the style suggestions made in public comments.

The proposed Committee Note was amended to add a short discussion on applying the corroborating circumstances requirement.

What follows is the proposed amendment in “clean” form:

(3) Statement against interest. A statement that:

(A) a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.