# ADVISORY COMMITTEE
# ON
# EVIDENCE RULES

**Washington, D.C.**
**April 19, 2002**

# ADVISORY COMMITTEE ON EVIDENCE RULES

## AGENDA FOR COMMITTEE MEETING
**Washington, D.C.**
**April 19, 2002**

### 1. Opening Remarks of the Chair

Including welcoming new members; approval of the minutes of the April 2001 meeting; and a report on the January 2002 meeting of the Standing Committee. The Draft minutes of the April 2001 meeting and this Committee's report to the Standing Committee are included in the agenda book.

### 2. Proposed Amendments Released for Public Comment

A. *Text of Rules.* The text of both Rules released for public comment is included in the agenda book.

B. *Summary of Public Comments.* A memorandum containing a summary of all public comments received on the proposed amendments is included in the agenda book. If a Rule is referred to the Standing Committee for adoption, the summarized public comments for that Rule will be included in an appendix.

### 3. Consideration of Proposed Amendments Released for Public Comment

A. *Rule 608(b).* A memorandum discussing public comment on the proposed amendment, and possible changes to the proposal, is included in the agenda book.

B. *Rule 804(b)(3).* A memorandum discussing public comment on the proposed amendment, and possible changes to the proposal, is included in the agenda book.

### 4. Privileges

The agenda book includes the Privileges Subcommittee's discussion drafts and supporting memoranda on five possible Rules: 1) a physician and mental health provider-patient privilege; 2) a privilege for confidential communications to clerics; 3) a privilege for confidential interspousal communications; 4) a new Rule 501; and 5) an attorney-client privilege.

## 5. Long-Range Planning

The agenda book includes a memorandum from the Reporter concerning possible amendments to the Evidence Rules that the Committee might consider in the future.

## 6. Docket Sheet on Status of Rules Changes

## 7. New Business

## 8. Next Meeting

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Projects

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# Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of April 19, 2001

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence met on April 19th at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

*The following members of the Committee were present:*

Hon. Milton I. Shadur, Chair
Hon. Ronald L. Buckwalter
Hon. David C. Norton
Hon. Jeffrey L. Amestoy
Thomas W. Hillier, Esq.
David S. Maring, Esq.
Roger Pauley, Esq.
Patricia Lee Refo, Esq.

*Also present were:*

Hon. Anthony J. Scirica, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Frank W. Bullock, Jr., Liaison to the Standing Committee on Rules of Practice and Procedure
Hon. Richard H. Kyle, Liaison to the Civil Rules Committee
Hon. David G. Trager, Liaison to the Criminal Rules Committee
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Elizabeth Marsh, Esq., Federal Judicial Center
Daniel J. Capra, Reporter to the Evidence Rules Committee
Hon Jerry E. Smith, Former Committee Member
John M. Kobayashi, Esq., Former Committee Member
Christopher F. Jennings, Esq., Law Clerk to Hon. Anthony J. Scirica
Professor Leo Whinery, Reporter, Uniform Rules of Evidence Drafting Committee

## Opening Business

Judge Shadur opened the meeting by welcoming Judge Ronald Buckwalter, Thomas Hillier and Patricia Refo as new members of the Committee. On behalf of the Committee, Judge Shadur expressed his deep gratitude for the dedicated service of Judge Jerry Smith and John Kobayashi, whose terms have expired.

Judge Shadur asked for approval of the minutes of the April, 2000 Evidence Rules Committee meeting. The minutes were unanimously approved.

Judge Shadur provided a brief historical background of the Committee's history and previous work for the benefit of the new committee members. Judge Shadur observed that the Committee had not met in October 2000, because there was no pressing need to consider any amendments to the Evidence Rules at that time. He noted that the Committee has taken a cautious approach to amending the Evidence Rules. Unlike some of the other Federal Rules, the Evidence Rules must often be invoked and applied instantaneously in the course of a trial. As a result, the Evidence Rules must be predictable; changing the Rules can upset settled expectations and require substantial reorientation of judges and practicing lawyers. There is also a risk that a rule change may be misinterpreted as meaning more or less than it actually says. Judge Shadur noted that the Standing Committee views this cautious approach as a sound and justified way of treating the Evidence Rules. Therefore any shift to a more activist approach would require discussion with and approval of the Standing Committee. Judge Shadur noted that some commentators and judges have suggested that the Evidence Rules Committee take a more activist approach to amending the Evidence Rules. Members resolved to continue to monitor these calls for broader change to the Evidence Rules, but agreed that the Committee should adhere to the cautious approach that it has traditionally employed.

## Consideration of Evidence Rules

At the April 2000 meeting the Evidence Rules Committee tentatively agreed to propose amendments to Evidence Rules 608(b) and 804(b)(3). The Committee also agreed to consider a possible amendment to Rule 1101. A discussion of Committee action on each of these proposals follows.

### 1. Rule 608(b)

Rule 608(b) by its terms excludes extrinsic evidence when offered to impeach a witness' "credibility." Read literally, the Rule would mean that extrinsic evidence could never be offered

to prove any aspect of a witness' credibility. But the Supreme Court has made clear in *United States v. Abel* that the term "credibility" really means "character for truthfulness." So if the proponent is using the extrinsic evidence for impeachment on any ground other than an attack on character (e.g., to show bias, prior inconsistent statement, contradiction or lack of capacity), the extrinsic evidence limitation of Rule 608(b) is not applicable. At its April 2000 meeting the Evidence Rules Committee tentatively approved an amendment to Rule 608(b) that would substitute the term "character for truthfulness" for the term "credibility" in accordance with the decision in *Abel*. The Committee also tentatively agreed to a change that would specify that the extrinsic evidence limitation prohibits not only the introduction of extrinsic evidence but also any reference to such evidence. This change was designed to prohibit a cross-examiner from referring to the consequences suffered by a witness as a result of alleged witness' misconduct, such as suspension from a job. When the cross-examiner asks the witness not only whether the misconduct occurred but also whether the witness suffered consequences from it, the cross-examiner is violating both the hearsay rule and the spirit of the extrinsic evidence limitation of Rule 608(b).

The Committee considered the draft amendment and draft Committee Note as prepared by the Reporter. One Committee member suggested that the proposal's reference to "character for truthfulness" was inconsistent with later references in the Rule to "character for truthfulness or untruthfulness." But the Committee determined that the difference in terminology made sense in light of the different context in which "character for truthfulness" was used in the amendment. The clause in which the amendment is made refers to the "purpose of attacking or supporting" the witness' character. Since the clause is cast in terms of "attack or support," the reference to character for truthfulness is quite accurate. The next sentence of the Rule states that specific bad acts may be inquired into on cross-examination "if probative of truthfulness or untruthfulness." Given the generic reference to probative value (as opposed to "attack *or* support") the reference to truthfulness or untruthfulness makes sense. Therefore, it was resolved not to change the proposed addition of the term "character for truthfulness."

The Reporter expressed concern that the language prohibiting "reference to or introduction of" extrinsic evidence was overbroad. Such language could prohibit the cross-examiner from referring even to a document prepared by the witness. The Reporter noted that it would be extremely difficult to craft language that would cover only the perceived problem of referring to the consequences suffered by the witness from his or her alleged misconduct; it would be likely that any amendment would prohibit more than would be intended. Moreover, it is probably not necessary to amend the Rule to prevent the practice of referring to the consequences of alleged misconduct, because a cross-examiner who does so is independently violating the hearsay rule (by referring to assertions by out-of-court declarants about the witness' misconduct, and offering those assertions as true). Because the hearsay rule prohibits the practice already, it seems unnecessary to add language covering the problem to Rule 608(b)–especially if that language could create problems of construction and application for lawyers and judges. The Committee resolved to delete the proposed language prohibiting "reference to or introduction of" extrinsic evidence. The Committee agreed that it would be sufficient to refer to the problem in the

Committee Note

A Committee member suggested that the Committee Note refer to *United States v. Abel*, the Supreme Court case that established that Rule 608(b) does not apply to non-character forms of impeachment. The Committee agreed with this suggestion, and *Abel* was added to the opening paragraph of the Committee Note.

A Committee member suggested that the Committee Note should refer to the fact that a number of courts have misread the current Rule to prohibit extrinsic evidence even when offered for a purpose other than attacking a witness' character (e.g., contradiction or bias). Committee members in discussion on this point recognized that judicial misapplication of the current Rule is a major reason for proposing an amendment. It was, however, considered counterproductive to point up in the Committee Note that specific courts had erroneously applied the Rule. The Committee approved language to the Note stating that the current Rule "has been read to bar extrinsic evidence for bias, competency and contradiction impeachment", without referring to the specific case law.

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 608(b) and the accompanying Committee Note, both as revised in light of discussion, be issued for public comment. The motion passed unanimously. A copy of the proposed amendment to Rule 608(b) together with the proposed Committee Note is attached to these minutes.

## 2. Rule 804(b)(3)

Rule 804(b)(3) provides a hearsay exception for declarations against penal interest In criminal cases, the Rule as written states that an accused must provide corroborating circumstances clearly indicating the trustworthiness of the statement before a statement exculpating the accused can be admitted as a statement against the declarant's penal interest. This requirement does not, by the terms of the Rule, apply to government-proffered (inculpatory) declarations against penal interest. Nor does the corroborating circumstances requirement apply on its face in civil cases. At its April 2000 meeting, the Evidence Rules Committee tentatively agreed to propose an amendment to Rule 804(b)(3) that would extend the corroborating circumstances requirement to every hearsay statement offered as a declaration against penal interest.

The Committee reviewed the draft amendment and Committee Note prepared by the Reporter. Committee members noted that the one-way corroboration requirement in the current Rule resulted from misconceptions in Congress about the scope of Rule 804(b)(3). Members of Congress apparently believed that inculpatory declarations against penal interest could not be

admitted against criminal defendants due to the rule of *Bruton v. United States*. Therefore the corroboration requirement was written to apply only to accused-proffered hearsay. But it is clear that government-proffered declarations against penal interest can be and are often admitted against criminal defendants.

Committee members recognized that most courts in fact apply the corroborating circumstances requirement to government-proffered declarations against penal interest (despite the absence of such a provision in the text of the Rule). But some do not, and it is possible that criminal defense counsel do not demand corroboration of government-proffered statements because a look at the text of the Rule indicates that the requirement is inapplicable.

The Department of Justice representative on the Committee expressed the Department's opposition to the proposed amendment. He contended that the legislative history showed that Congress was simply unconcerned about the asymmetrical corroborating circumstances requirement. He argued that there is a reason to distinguish between inculpatory and exculpatory declarations against penal interest insofar as the corroborating circumstances requirement is concerned, because exculpatory statements are often made under suspect motivation. He also stressed that a corroborating circumstances requirement for inculpatory statements is unnecessary in light of the Supreme Court's decision in *Williamson v. United States*. The Court in *Williamson* strictly construed the "against interest" requirement of Rule 804(b)(3), requiring that each statement in a broader narrative must be truly self-inculpatory of the declarant's penal interest to meet the Rule's "against interest" requirement. Moreover, statements made by the declarant while in custody are not "against interest" under *Williamson* to the extent that they directly implicate the accused in criminal conduct. The Department of Justice representative concluded that this strict construction of the "against interest" requirement would probably render a corroborating circumstances requirement superfluous. Alternatively, if a corroborating circumstances requirement were to have independent meaning beyond the *Williamson* "against interest" requirement, it might mean that the admissibility requirements would be so strict that no inculpatory statement would qualify.

The DOJ representative argued further that the Supreme Court's decision in *Lilly v. Virginia* counseled against an amendment to Rule 804(b)(3). In *Lilly* a plurality of the Court stated that the hearsay exception for declarations against penal interest is not "firmly rooted" under the Court's Confrontation Clause jurisprudence. Under the plurality's view, an inculpatory against-penal-interest statement would have to carry independent guaranties of trustworthiness to be admissible under the Confrontation Clause. The DOJ representative argued that the corroborating circumstances requirement of an amended Rule 804(b)(3) might be different from the "guaranties of trustworthiness" requirement of the Confrontation Clause, and this might create confusion in the courts. Finally, the DOJ representative saw no reason to extend the corroborating circumstances requirement to civil cases.

Several Committee members spoke in opposition to the comments of the DOJ representative. One member pointed out that *Lilly* was a constitutional law case that says nothing

about the Federal Rules of Evidence. He concluded that *Lilly*, if anything, supports the proposed amendment. The Court in *Lilly* expressed concern that an against-penal-interest exception might be applied too broadly against the accused; the proposed amendment addresses that concern by imposing an extra admissibility requirement on prosecution-offered statements.

Other Committee members stated that the proposed amendment was a necessary change that leveled the playing field in criminal cases. They also noted that the proposed change was consistent with most of the case law, including the cases construing Rule 804(b)(3) decided after *Williamson.* Other members noted that it was important to extend the corroborating circumstances requirement to civil cases. The stakes are often as high in civil as in criminal cases, and therefore the risks of admitting unreliable hearsay are just as profound. Those members also saw a positive benefit to a unitary treatment of against-penal interest statements in all cases.

Committee discussion then turned to the draft Committee Note Committee members expressed the opinion that it would be helpful to set forth in the Note some guidelines on how the courts have applied the corroborating circumstances requirement. Practitioners on the Committee noted that Committee Notes can and should provide helpful guidance to practicing lawyers about the meaning of a Rule. It was generally agreed that the Note should be simply descriptive of the case law, rather than an expression of the Committee's opinion on how the corroborating circumstances requirement should be applied. Members also agreed that the Note should make clear that a court applying Rule 804(b)(3) must find that the statement is "against interest" before it considers whether corroborating circumstances exist. Moreover, the factors supporting corroborating circumstances must be independent of the fact that the statement is against the declarant's penal interest, i.e., the against-interest factor is not to be double-counted as a corroborating circumstance indicating the trustworthiness of the statement. The Committee proceeded to suggest and agree upon language to revise the Reporter's draft of the Note to accord with the discussion.

One Committee member suggested that the Committee Note refer to the Supreme Court's decision in *Lilly v. Virginia*. But this suggestion was rejected on the ground that *Lilly* is a constitutional decision and that the Note should avoid any notion that the Rule is intended to codify a constitutional principle.

A motion was made and seconded to recommend to the Standing Committee that the proposed amendment to Evidence Rule 804(b)(3) and the accompanying Committee Note (as that Note was revised in light of Committee discussion) be issued for public comment. The motion passed with one dissent. A copy of the proposed amendment to Rule 804(b)(3) together with the proposed Committee Note is attached to these minutes.

## 3. Rule 1101

Evidence Rule 1101(d) provides that the Federal Rules of Evidence (with the exception of privilege rules) are not applicable to certain proceedings, e.g., grand jury proceedings, proceedings for extradition, sentencing proceedings, etc. Subdivision (e) of the Rule provides a laundry list of proceedings governed by listed statutes, in which the Evidence Rules are applicable only to the extent that "matters of evidence are not provided for" in the specified statutes.

Courts have found that several proceedings not listed as exempt by Rule 1101(d) are in fact exempt from the Evidence Rules. Examples include suppression hearings, proceedings for the revocation or modification of supervised release and psychiatric release and commitment proceedings. In 1998 the Evidence Rules Committee decided not to proceed with an amendment to Rule 1101 that would codify this case law. The Committee at that time concluded that the courts were having no trouble deciding that the Evidence Rules should not apply to any proceeding that was similar to those specified in Rule 1101(d), specifically those proceedings in which the judge is the factfinder and in which procedures are by necessity more flexible and less informal than those governing a trial.

The Department of Justice representative asked the Committee to revisit the question of amending Rule 1101. In discussing this proposal, all Committee members agreed that if the Rule were to be amended, Subdivision (e) of that Rule should be deleted. Subdivision (e) provides a laundry list of statutes that are not exhaustive, inaccurately cited in some respects, and outmoded or abrogated in others. Moreover, Rule 1101(e) is unnecessary because the Evidence Rules are by definition applicable only to the extent that proceedings are not governed by some other statutory rule of evidence. Committee members were generally in agreement, however, that the minor anomaly created by Rule 1101(e) is not a sufficient reason in itself to justify the costs of an amendment. If Subdivision (e) alone were amended, an unwarranted inference might be created, i.e , that the Committee had approved in principle the unamended text of Subdivision (d).

After extensive discussion, the Committee resolved not to propose an amendment to Rule 1101(d). The Committee determined that it is difficult, if not impossible, to mention specifically all the proceedings in which the Evidence Rules are not or should not be applicable. Listing some of the more common proceedings might create an inference that the Evidence Rules do apply to those proceedings not specifically mentioned. For example, a statement that the Evidence Rules do not apply to "proceedings for psychiatric commitment or release" may well not cover all the proceedings that are prescribed in the relevant statutes, 18 U.S.C. §§ 4241-4247. While a specific reference to the statutes would likely be more all-encompassing, that solution creates its own problems–a statute may be renumbered or abrogated at some point, meaning that the Rule would become outmoded and in need of amendment again. There is also a risk of failing to include some of the statutory proceedings that should be included as exempt from the Rules.

Most Committee members agreed that the risk of underinclusiveness might be tolerable if an amendment were truly necessary to provide guidance to the courts about the reach of the

Evidence Rules. But in fact the courts are having no problem in applying Rule 1101(d) as it is currently–and underinclusively–written. If a proceeding requires flexibility and if the judge is the factfinder, courts have uniformly held that the Evidence Rules are inapplicable even if the proceeding is not specifically listed in Rule 1101(d). The Judges at the Committee meeting each expressed an opinion that they have never had a problem in determining whether a particular proceeding is governed by the Evidence Rules Their conclusion was that the cost of any amendment to Rule 1101 would outweigh the benefit.

A vote was taken on whether to proceed with an amendment to Rule 1101. Six members of the Committee voted against any amendment. One member voted in favor. The Committee resolved to continue to monitor Rule 1101, and to reconsider a possible amendment if it appeared that the courts were having problems in applying that Rule.

## Privileges

Judge Shadur announced that Judge Buckwalter has been appointed Chair of the Subcommittee on Privileges. The Subcommittee is engaged in a long-term project to provide a draft of privilege rules that would codify the federal common law as developed under Evidence Rule 501. The Subcommittee has prepared a preliminary draft of five privilege rules: 1) a catchall provision, providing that the state law of privilege applies in diversity cases and containing a provision to govern application of privileges not specifically established in the Rules; 2) a rule covering the attorney-client privilege; 3) a rule providing a privilege to a witness to refuse to give adverse testimony against a spouse in a criminal case; 4) a rule providing a privilege for interspousal confidential communications; and 5) a rule governing waiver. The Subcommittee on privileges had reviewed these drafts in a conference call a month before the Committee meeting, and significant changes to the drafts were made in light of that discussion.

Judge Shadur observed that the overriding question is whether the Committee will decide to propose a codification of the privileges He noted that Congress rejected the original Advisory Committee's privilege proposals, and that the Enabling Act (28 U.S.C. § 2074(b)) requires that privilege rules must be affirmatively enacted by Congress. One question that must be addressed by the Committee is whether the considerations leading to congressional rejection of the privilege proposals the first time around remain relevant today. Committee members observed that the predominant reason for rejection of the Advisory Committee's proposals was that the then-proposed federal rules of privilege would apply even in diversity cases. This raised *Erie*-like concerns of federalism. Judge Shadur stated that if this *Erie* concern can be overcome, the Committee might resolve the fundamental question as to whether privilege rules are acceptable at all, and then could look at the merits of each privilege. Committee members in discussion expressed the view in undertaking the privilege project, the Committee is not necessarily bound or required to propose a codification of the privileges. Others opined that the Committee would

perform a valuable service in preparing a "best principles" version of the privilege, even if such a version is never proposed or enacted. Others noted that privilege questions are the ones that arise most often in practice and that it is most important to have a clear and consistent law of privileges, making it all the more important for the Advisory Committee to attempt to codify the case law.

The Committee found it unwise to abandon the privileges project at the outset simply because Congress had objected to the proposals of the original Advisory Committee long ago. Congress' *Erie*-based objection is not pertinent to the current Subcommittee draft, which proposes, as does current Rule 501, that the state law of privilege governs when state law provides the rule of decision.

The Committee agreed that if it ever decides to propose amendments to codify the privileges, those amendments should be proposed as a single package, rather than privilege by privilege. Thus, any proposal to amend the Evidence Rules with respect to privileges will await the Committee's approval of an entire set of privileges.

The Subcommittee then sought specific commentary from the full Committee on three of the draft rules–the general catchall provision, the attorney-client privilege and the spousal privilege against giving adverse testimony. Because the project is at a very preliminary stage, no final decisions were made on any of the drafts. What follows is a summary of the discussion on the three drafts that were reviewed by the Committee:

*1. Catchall privilege:* In a previous review of this provision, Committee members had expressed concern about draft language that referred to the "state" law of privilege. The question raised was whether this language was sufficient to cover the privilege law of the District of Columbia, Commonwealth of Puerto Rico and the Territories. One question previously raised was whether those jurisdictions should be treated the same as States for purposes of privilege rules. The Reporter researched the pertinent cases and determined that all of the decided cases have held that where the law of the District, Commonwealth, or Territory provided the rule of decision, the local law of privilege was to be applied in federal court. Thus, the District, Commonwealth and Territories have been treated the same as the States under current Rule 501. The Reporter noted that the courts in those cases have not actually analyzed the possibility that the relationship between the District, Commonwealth and Territories and the federal government might be different from the relationship between the States and the federal government–and that this difference might support a different result with respect to privilege applicability.

After discussion at the meeting, it was determined that the reason that the District, Commonwealth and Territories should be treated on a par with the States is that Congress has provided for diversity jurisdiction for cases between citizens of different States, and the term "States" includes "the Territories, the District of Columbia, and the Commonwealth of Puerto Rico." See 28 U.S.C. § 1332(d). Because Congress has decided to treat those jurisdictions on a par with the States for purposes of diversity, it follows that the same considerations supporting

the application of the State law of privilege in a diversity case apply to the District of Columbia, the Commonwealth of Puerto Rico and the Territories. Those considerations are grounded in the policy judgment of current Rule 501 that the choice of privilege law should be tied to the applicable substantive law. The Committee therefore agreed that the catchall provision should include language defining a "State" as any jurisdiction whose residents can qualify for diversity jurisdiction under 28 U.S.C. § 1332(d).

The Committee then considered how and whether the draft rule should treat "mixed" claims: specifically, which privilege law should apply in a case in which federal and state claims are joined? The Subcommittee's current draft provides that if there is a federal claim in the case, then federal privilege law applies to *all* of the claims. The Reporter stated that the circuit court cases considering this matter have held that federal privilege law applies to all claims in a mixed claims case. Those cases have found it untenable to apply different privilege laws to the different claims, because it would be impossible to regulate the evidence and properly instruct the jury. The question is therefore whether federal or state law should apply to all the claims. The circuit courts have reasoned that the need for uniformity and consistency in federal privilege law requires that federal law of privilege must apply in mixed claims cases. However, the Reporter noted that a few cases can be found applying the state law of privilege to all claims in mixed cases. One Committee member argued that applying federal law of privilege to state claims in mixed cases undermines the *Erie* concerns that are embodied in the current Rule 501. Another member stated that the crucial question is whether the courts have been consistent in applying federal privilege law in mixed claims cases. If some courts would apply the state law of privilege in mixed claims cases, then Congress might be legitimately concerned about an amendment that would limit the application of state privileges more than is the case under current law.

After further discussion, the Committee directed the Reporter to do further research on the case law concerning privilege applicability in mixed claims cases. If there is a fair body of case law on either side of the matter, then the draft rule should simply leave the treatment of mixed claims cases to a discussion of that case law in the Committee Note. However, if the vast body of authority mandates the application of the federal law of privilege in mixed claims cases, then the draft should codify this case law.

The Committee next considered language in the draft which would retain privileges recognized by "existing federal common law." The intent of the language is to retain those common law privileges that Congress does not specifically abrogate if it ever codifies the privileges. Committee members suggested that if and when a Committee Note to the proposal is prepared, that Note should clarify that the term "existing" common law privileges refers to privileges existing on the date of enactment of the rule. This would avoid any misconception that a court could adopt a new common law privilege without regard to the Evidence Rules.

The Committee next considered the provision in the draft that is intended to govern the promulgation of new privileges. The draft provided that new privileges could be recognized if the court finds in the light of reason and experience that "the benefits of the privilege substantially

outweigh the loss of probative evidence that the privilege would entail." After discussion, the Committee resolved to change the language to provide that new privileges can be recognized if the court finds "that the benefits of the privilege outweigh the loss of probative evidence that would result from application of the privilege."

A tentative vote was taken on whether the draft catch-all provision was taking the right approach, with the caveat that the question of choice of privilege law in mixed claims cases must still be resolved. Six members voted in favor of the approach taken by the draft. One member dissented.

*2. Lawyer-client privilege:* The draft of the lawyer-client privilege was prepared by Professor Broun and reviewed by the Subcommittee on Privileges. The latest draft responded to questions and suggestions made by the Committee when it reviewed an earlier draft at its April 2000 meeting. The draft is derived from a number of sources, including the Restatement of the Law Governing Lawyers, the original proposal of the Advisory Committee and the latest version of the Uniform Rules of Evidence.

Professor Broun led a discussion of matters previously raised by the Committee, and explained how those matters were treated in the current draft. Professor Broun informed the Committee that the Subcommittee had chosen the term "lawyer-client" privilege rather than "attorney-client" privilege, because "lawyer-client" was chosen both by the original Advisory Committee and by the drafters of the new Uniform Rules. Committee members generally agreed, however, that the draft should be changed to refer to an "attorney-client privilege." This is how the privilege is referred to in the case law, and it is the term used by most judges and practicing lawyers. The Subcommittee agreed to make this change in a new draft.

At the previous Committee meeting, questions had been raised about the definition of "lawyer" (now "attorney") in the draft, specifically whether it was broad enough to cover non-lawyers in foreign countries who perform legal services, such as notaries. Professor Broun noted that the definition is not broad enough to cover non-lawyers, even if they have a "quasi-lawyer" status under foreign law. He stated that the Subcommittee had considered whether to cover non-lawyers and resolved that the draft language should not be changed. The privilege, as drafted and as generally applied in both the state and federal courts, covers only lawyers. Where the case law has recognized the privilege as covering non-lawyers who are covered by a comparable privilege in other countries, the issue is a choice of law problem. The court does not decide that there would be privilege for such a communication under the appropriate law of the United States, but rather that, under choice of law principles, the foreign privilege should be recognized. The Committee agreed that the draft should not cover non-lawyers and should not deal with complex choice of law questions.

Another question raised by the Committee was whether the term "attorney" was broad enough to cover patent agents. Professor Broun noted that a number of cases have held that communications between a U.S. patent agent and a client may be privileged where the patent proceeding is before the patent office and the agent is registered with that office. The Subcommittee resolved that if such communications should be privileged, such a privilege should be drafted as separate from the attorney-client privilege, even though it is based on some of the same policy considerations. If included within the attorney-client privilege, the definitions of "communication," "attorney" and "in confidence" would all have to be adjusted in order to take this special circumstance into account. Another possibility is to discuss the matter of patent agents in a Committee Note to the rule on attorney-client privilege. The Committee agreed that any patent agent privilege should not be added to the text of a rule on attorney-client privilege

Professor Broun next addressed a comment on the prior draft's treatment of the "common interest" doctrine. That doctrine provides a privilege for communications among multiple clients and lawyers when the clients are pursuing a common interest. The previous draft of the attorney-client privilege appeared to permit communications between clients to be protected even if no lawyer was present. Professor Broun noted that at least one case denied the privilege for a client-to-client communication, but that the case could be analyzed as one in which the communications between the clients were not even pertinent to legal representation. Professor Broun stated that as a policy matter it might be appropriate to protect communications between clients when those communications in fact dealt with the legal representation on which they shared a common interest. Discussion among Committee members indicated a strong preference for a more bright-line rule–that a communication between clients is not privileged unless a lawyer is present. The Committee believed a privilege for some client-to-client communications without a lawyer present would be difficult to regulate and administer. For example, it would be difficult to determine whether the clients were really communicating about the matter on which they were represented, and it would be difficult to determine whether they were communicating in a common interest. The Committee unanimously approved a change to the draft that would limit common interest protection to communications made while a lawyer is present.

Professor Broun next addressed the question whether the exception to the privilege for communications made for purposes of crime or fraud should be extended to communications made in furtherance of an intentional tort. He noted that there is a division in the cases on this subject. Probably more cases, especially federal cases, that have looked at the issue have expanded the exception to include intentional torts. Virtually all the cases are district court opinions. Professor Broun noted that the Restatement limits the exception to crimes and frauds, reasoning that "it would be difficult to formulate a broader exception that is not objectionably vague." In discussion, the sense of the Committee was that an exception for intentional torts would be too broad an incursion on the privilege. It would mean, for example, that a communication from a client to an attorney on whether the client should interfere with another's contractual relations might be excepted from the privilege. Committee members observed that clients would ordinarily expect that such statements would be protected by the privilege–unlike

statements that are obviously intended to further a crime or fraud. The Committee unanimously agreed that the exception set forth in the draft should remain limited to statements made for purposes of furthering a crime or fraud, and should not be expanded to cover statements made for purposes of furthering an intentional tort.

Professor Broun then addressed the next question raised at the previous Committee meeting: whether the draft adequately covers the situation where an in-house lawyer is fired for whistleblowing and sues for retaliatory discharge. Professor Broun observed that the current draft is ambiguous on whether the lawyer can disclose privileged communications as part of his case. It states that an exception to the privilege arises where it is necessary for the lawyer to reveal the information "in a proceeding to resolve a dispute with a client." Committee members expressed concern that this language might be too broad an exception to the privilege. It might, for example, allow a lawyer to reveal privileged communications in a business dispute with the client. The Committee directed the Subcommittee to consider the matter further and to determine whether the exception might be limited in some clear way. The Committee also asked the Subcommittee to consider whether to include language covering the privileged or unprivileged status of fees and fee payments.

The Committee next considered whether the draft of the attorney-client privilege accurately captured the exception for statements that a lawyer needs to reveal in order to defend against an allegation of negligent or wrongful conduct. The Committee agreed that the exception should permit disclosure in response to charges of either wrongful or negligent conduct. The sentiment was expressed that a Committee Note might specify that the term "wrongful" does not necessarily mean "immoral" but rather could refer to any charge of unprofessional conduct within the meaning of applicable rules on lawyer's ethics.

The Committee then considered whether the attorney-client privilege draft adequately set out the *Garner v. Wolfinbarger* exception. *Garner* has received a broad reading in most federal courts. It has come to stand for the proposition that a fiduciary may not invoke the attorney-client privilege as to communications made to an attorney in the course of working for a beneficiary. The Committee agreed that the draft accurately captures the exception, and that the *Garner* exception should not be limited to shareholder suits.

Finally, the language of Subdivision (c) of the draft was revised by general agreement to clarify that a client "may, implicitly or explicitly, authorize a lawyer, agent of the lawyer, or an agent of a client to invoke the privilege on behalf of the client."

*3. Adverse Testimonial Privilege for Spouses*: The Subcommittee prepared a draft of an a privilege for a witness to refuse to give adverse testimony against a spouse in a criminal case. The Reporter raised the policy question whether such a privilege should even be proposed. The Supreme Court limited the privilege in *Trammel v. United States,* and the federal courts since *Trammel* have often imposed significant limitations on its invocation. Committee members observed that the privilege rarely arises in practice The probability is that a witness who knows

about a spouse's criminal conduct will either want to testify or will be given a deal to testify, and thereby voluntarily waive the privilege (as did the witness-spouse in *Trammel*). Thus, instead of protecting the marriage as it was intended to do, the adverse testimonial privilege has become little more than a bargaining chip for a spouse when the government wants to call that spouse as a witness. The Committee unanimously resolved not to proceed at this time with an adverse testimonial privilege.

## Long Range Planning

At Judge Shadur's suggestion, the Committee resolved to continue its practice of monitoring the cases and the legal scholarship for suggestions and guidance as to necessary amendments to the Evidence Rules. The Reporter was directed to prepare a report for the Committee at the next meeting; this report will analyze the recent scholarship that advocates some amendment to the Evidence Rules. Judge Shadur also invited Committee members to review the American University Evidence Project, as well as any other project for reforming the Rules, to determine whether there are any long-term issues that the Committee should address. The Committee was strongly of the view that amendments should not be proffered simply for the sake of change. On the other hand, valid arguments for necessary amendments must be seriously considered.

One suggestion for change was offered by Professor Broun. He urged the Committee to consider a possible amendment to Evidence Rule 803(4). Currently, Rule 803(4) excludes statements from the hearsay rule when they are made to medical personnel for purposes of "medical treatment or diagnosis " The Advisory Committee Note to the Rule states that the exception covers statements to a doctor consulted only for the purpose of enabling him to testify. Professor Broun suggested that the Committee consider whether the Rule should be amended to preclude statements made solely for purposes of litigation. He noted that the original rationale for admitting statements to litigation doctors was that such statements would ordinarily be disclosed to the jury at any rate as part of the basis for the doctor's expert opinion. Professor Broun observed that this rationale is now in question in light of the recent amendment to Evidence Rule 703, which generally prohibits disclosure to the jury of otherwise inadmissible hearsay when offered as the basis of an expert's opinion. The Committee directed Professor Broun and the Reporter to prepare a memorandum for the next meeting on the possibility of a proposed amendment to Rule 803(4).

## Conclusion

The meeting was adjourned at 3:30 p.m., Thursday, April 19th.

The next meeting of the Evidence Rules Committee is scheduled for October 15, 2001.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law

Attachments:

Proposed amendments to Evidence Rules 608(b) and 804(b)(3), with the recommendation that each proposal be released for public comment.

**Rule 608. Evidence of Character and Conduct of Witness***

(a) Opinion and reputation evidence of character. — The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. — Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' ~~credibility~~ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which

* New matter is underlined and matter to be omitted is lined through.

character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility

* * *

## COMMITTEE NOTE

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel,* 469 U.S. 45 (1984); *United States v. Fusco,* 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment restores the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if it was offered to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . .").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity)

to Rules 402 and 403. *See, e.g., United States v. Winchenbach,* 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann,* 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403). Rules 402 and 403 displace the common-law rules prohibiting impeachment on "collateral" matters. *See* 4 Weinstein's Evidence, § 607.06[3][b][ii] (2d ed. 2000) (advocating that courts substitute "the discretion approach of Rule 403 for the collateral test advocated by case law").

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis,* 183 F.3d 231, 257, n. 12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").

**Rule 804. Hearsay Exceptions; Declarant Unavailable**[**]

* * *

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

* * *

(3) Statement against interest – A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

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**COMMITTEE NOTE**

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** Matter to be omitted is lined through.

**Advisory Committee on Evidence Rules**
**Proposed Amendment: Rule 804**

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest, whether proffered in civil or criminal cases. See Ky.R Evid. 804(b)(3); Tex. R.Evid. 804(b)(3). Most 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 (5thCir 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. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring corroborating circumstances for against-penal-interest statements offered by the government). The corroborating circumstances requirement has also been applied to declarations against penal interest offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (noting the advantage of a "unitary standard" for admissibility of declarations against penal interest). This unitary approach to declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception

The Committee notes that there has been some confusion over the meaning of the "corroborating circumstances" requirement. *See United States v. Garcia,* 897 F.2d 1413, 1420 (7th Cir. 1990) ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain"). For example, some courts have held that in assessing corroborating circumstances, the court must consider whether the witness who heard the statement is a credible person. *See United States v. Rasmussen,* 790 F.2d 55 (8th Cir. 1986) (requiring an assessment of the "probable veracity of the in-court witness"). Other courts prohibit such an inquiry on the ground that it would usurp the role of the jury in assessing witness credibility. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985). Some courts look to whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant's account) Other courts hold that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g.,*

*United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995)):

> (1) the timing and circumstances under which the statement was made;
>
> (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie,
>
> (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
>
> (4) the party or parties to whom the statement was made;
>
> (5) the relationship between the declarant and the opponent of the evidence; and
>
> (6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985).

The corroborating circumstances requirement assumes that the court has already found that the hearsay statement is genuinely

disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Corroborating circumstances" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a corroborating circumstance.

**TO:** **Honorable Anthony J. Scirica, Chair**
**Standing Committee on Rules of Practice and Procedure**

**FROM:** **Honorable Milton I. Shadur, Chair**
**Advisory Committee on Evidence Rules**

**DATE:** **December 1, 2001**

**RE:** **Report of the Advisory Committee on Evidence Rules**

## I. Introduction

The Advisory Committee on Evidence Rules did not hold a Fall 2001 meeting. The Advisory Committee has proposed amendments to Evidence Rules 608(b) and 804(b)(3), and these proposals have been released for public comment. The Advisory Committee is also working on two long-term projects, but those did not require immediate consideration by the Committee at a Fall meeting. This memorandum reports on the status of the proposed amendments and the long-term projects.

## II. Action Items

**No Action Items**

## III. Information Items

### A. Proposed Amendments Released for Public Comment

At its June 2001 meeting the Standing Committee authorized the proposed amendments to two Evidence Rules–Rules 608(b) and 804(b)(3)–to be released for public comment.

The proposed amendment to Rule 608(b) would clarify that the Rule's preclusion of extrinsic evidence applies only if it is offered to prove the witness' character for truthfulness. Extrinsic proof when offered for any other form of impeachment, such as for bias or prior inconsistent statement, would remain governed by the balancing test of Rule 403. The proposed amendment refines the overbroad language of the existing rule, thereby clarifying the original intent of the drafters.

The proposed amendment to Rule 804(b)(3) would provide that a declaration against penal interest is admissible only if corroborating circumstances clearly indicate the trustworthiness of the statement. Currently the Rule requires a showing of corroborating circumstances if the statement is offered by a criminal defendant, but the Rule does not impose that requirement on statements proffered by the government in criminal cases or by any party in civil cases The proposed amendment to Rule 804(b)(3) extends the corroborating circumstances requirement to all proffering parties, rendering it consistent with the vast majority of case law that reads an across-the-board corroborating circumstances requirement into the Rule. The Advisory Committee has concluded that the current one-way corroboration requirement has never been justified and that it resulted from an oversight during the legislative process. A unitary approach to the admissibility of declarations against penal interest would result in both fairness and efficiency in the administration of the Rule.

At its last meeting, the Standing Committee approved the release of both proposed amendments for public comments, but several members of the Committee expressed some concern about the proposed amendment to Rule 804(b)(3). These members suggested that the Advisory Committee consider, and seek input on, some specific questions with regard to the operation of the existing Rule and the impact of the proposed amendment Some of the questions raised were:

1. the practical effect that a corroborating circumstances requirement would have on the government's ability to admit declarations against penal interest;

2. whether declarations against penal interest that exculpate the accused are sufficiently distinguishable from inculpatory statements so as to justify the application of a corroborating circumstances requirement to the former and not to the latter; and

3. the interaction between a corroborating circumstances requirement and the accused's right to confrontation.

The Advisory Committee is currently considering these questions and others. The request for public comment on the proposed Rule change was specifically designed to obtain information that

would address the Standing Committee's questions and possible concerns about the amendment. Specific questions on which the Advisory Committee sought public comment are these:

1. In terms of trustworthiness, is there a difference between statements against penal interest when offered to exculpate an accused and such statements when offered to inculpate the accused? Are the circumstances under which exculpatory statements are or may be made different from those surrounding inculpatory statements in such a way as to justify, as a bright-line rule of law, the asymmetry of the corroborating circumstances requirement in the current Rule?

2. Are there other examples of rules, evidentiary or otherwise, that are asymmetrical in the government's favor? If so, what is their justification?

3. Are there examples of government-proffered statements that have satisfied or would satisfy the against-penal-interest requirement of Rule 804(b)(3) but have not satisfied or would not satisfy a corroborating circumstances requirement?

4. Would the corroborating circumstances requirement add anything to the Rule that is not already required by the Confrontation Clause?

5. Several states, e.g., Kentucky and Texas, have written a two-way corroborating circumstances requirement into the state version of Rule 804(b)(3). How has the Rule operated in practice in those states? Have prosecutors been unduly burdened by the Rule?

The Advisory Committee is currently collecting public comments on both proposed amendments. Comments received to this point are highly supportive of both proposals. A public hearing on the proposed amendments is scheduled for January 23 in Washington, D.C.

## B. Privileges

The Evidence Rules Committee continues to work on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. This project will not necessarily result in proposed amendments, however. The Subcommittee on Privileges is working on draft rules for consideration by the Advisory Committee at the April, 2002 meeting. Those rules would codify: 1) the lawyer-client privilege; 2) an interspousal privilege for confidential communications; 3 ) rules on waiver; and 4) a catch-all provision similar to current Rule 501, that would permit further development of privileges. The subcommittee on privileges is also working on proposals that would codify the psychotherapist-patient privilege and the governmental privileges.

## C. Long-Term Issues

At its April 2002 meeting, the Evidence Rules Committee intends to consider three sources of information in order to determine whether there are any serious problems with the current Evidence Rules that might warrant a proposed amendment. Those sources are: 1. Rule changes proposed in legal scholarship; 2. federal case law that substantially diverges from the text of an Evidence Rule; and 3. significant circuit splits on the meaning of an Evidence Rule.

While considering these sources for suggested amendments, the Evidence Rules Committee retains its long-held view that amendments to the Evidence Rules are costly and should not be proffered simply for the sake of change. The Committee has always taken and will continue to take a conservative approach on the question of Rule amendments. Amendments to an Evidence Rule will not be proposed unless the existing Rule is causing significant confusion, substantial dispute or unfair results.

**FORDHAM**
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Daniel J. Capra
Philip Reed Professor of Law

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendments Released for Public Comment
Date: March 21, 2002

This memorandum sets forth the two proposed amendments that have been released for public comment–amendments to Rules 608(b) and 804(b)(3). A proposed Committee Note is set forth after each amendment

The agenda book also contains a detailed discussion on each of the proposed amendments.

**Advisory Committee on Evidence Rules**
**Proposed Amendment: Rule 608**

**Rule 608. Evidence of Character and Conduct of Witness***

(a) Opinion and reputation evidence of character. — The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. — Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' ~~credibility~~ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for

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truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility

* * *

## COMMITTEE NOTE

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel,* 469 U.S. 45 (1984); *United States v. Fusco,* 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment restores the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . .").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g., United States v. Winchenbach,* 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann,* 85 F.3d 1232 (7th Cir 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403). Rules 402 and 403 displace the common-law rules prohibiting impeachment on "collateral" matters. *See* 4 Weinstein's Evidence, § 607.06[3][b][ii] (2d ed. 2000) (advocating that courts substitute "the discretion approach of Rule 403 for the collateral test advocated by case law").

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis,* 183 F.3d 231, 257, n. 12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").

**Advisory Committee on Evidence Rules**
**Proposed Amendment: Rule 804**

**Rule 804. Hearsay Exceptions; Declarant Unavailable**[**]

* * *

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

* * *

(3) Statement against interest. – A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

* * *

**COMMITTEE NOTE**

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to

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** Matter to be omitted is lined through.

all declarations against penal interest, whether proffered in civil or criminal cases. See Ky.R.Evid. 804(b)(3); Tex. R.Evid. 804(b)(3). Most 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 (5thCir. 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. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring corroborating circumstances for against-penal-interest statements offered by the government). The corroborating circumstances requirement has also been applied to declarations against penal interest offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (noting the advantage of a "unitary standard" for admissibility of declarations against penal interest). This unitary approach to declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception.

The Committee notes that there has been some confusion over the meaning of the "corroborating circumstances" requirement. *See United States v. Garcia,* 897 F.2d 1413, 1420 (7th Cir. 1990) ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain"). For example, some courts look to whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant's account). Other courts hold that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include

(*see, e.g., United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995)):

> (1) the timing and circumstances under which the statement was made;
>
> (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;
>
> (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
>
> (4) the party or parties to whom the statement was made,
>
> (5) the relationship between the declarant and the opponent of the evidence; and
>
> (6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985).

The corroborating circumstances requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Corroborating circumstances" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a corroborating circumstance.

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|---|---|
| Memorandum To: | Advisory Committee on Evidence Rules |
| From: | Dan Capra, Reporter |
| Re: | Summary of Public Comments Received on the Proposed Amendments to the Federal Rules of Evidence |
| Date: | March 1, 2002 |

Below is a summary of all public comments received on the proposed amendments to Rules 608(b) and 804(b)(3). The summaries of public comment will be placed after each proposed rule change that the Committee decides to recommend to the Standing Committee. Many of these comments will receive detailed consideration and analysis in the memos on the respective Rules, found in this agenda book.

# Summary of Public Comment on the Proposed Amendment to Rule 608(b)

**Thomas J. Nolan, Esq. (01-EV-001)** states that the proposed amendment to Rule 608(b) is "extremely important, should be adopted, and can and will significantly increase the administration of justice in the United States Courts.

**Mikel L. Stout, Esq. (01-EV-002)** approves of the proposed amendment.

**The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (01-EV-003)** endorses the proposed change to Rule 608(b).

**The Federal Magistrate Judges Association (01-EV-004)** supports the proposed amendment and notes that it "is consistent with the drafters' original intent and Supreme Court authority."

**Professor Lynn McLain (01-EV-005)** supports the proposed amendment on the ground that if "clarifies the rule and removes an arguable, though unintended, conflict with cases permitting extrinsic proof of bias and of contradiction . . ."

**Professor John C. O'Brien (01-EV-006)** supports the proposed change to Rule 608(b). He states that some Evidence Rules use the term "credibility" to refer to "character for truthfulness" and that this usage "has created considerable confusion, particularly with respect to whether extrinsic evidence is precluded by Rule 608(b)." He contends that the problem of misuse of the term "credibility" is not limited to Rule 608(b) and that the Advisory Committee consider proposing similar amendments to replace the term "credibility" with the term "character for truthfulness in Rules 608(a), 609 and 610.

**The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (01-EV-009)** recommends the adoption of the proposed amendment to Rule 608(b), noting that it is "a modest and benign narrowing clarification of the existing rule." The Committee states that "the Advisory Committee is correct in suggesting that the proposed amendment brings the rule's language in line with its original intent and corrects a less precise locution that has led to unfortunate results in some cases."

**The Federal Bar Association, Western Michigan Chapter (01-EV-012)** supports the proposed amendment.

**The State Bar of California's Committee on Federal Courts (01-EV-013)** supports the proposed modification of Rule 608(b).

**Professor James J. Duane (01-EV-014)** recommends that the proposed change to Rule 608(b) should be made, "but only if the word 'credibility' is also replaced with 'character for truthfulness' throughout all of Rules 608, 609 and 610. He argues that the change proposed by the Advisory Committee "would result in a situation whether the word 'credibility' would mean one thing in Rule 608(b), and something quite different in two other parts of the same Rule, as well as the two rules that follow it.

**The Committee on the United States Courts of the State Bar of Michigan (01-EV-016)** supports the proposed amendment to Rule 608(b).

**The National Association of Criminal Defense Lawyers (01-EV-017)** "fully supports the proposed amendment to Evidence Rule 608(b)." The Association notes that the proposed amendment "only makes more clear what the Rule already intends – that the prohibition against proving a specific instance of conduct by a witness with extrinsic evidence only applies where the specific instance of conduct is offered to attack or support the witness's character for truthfulness."

# Summary of Public Comment on the Proposed Amendment to Rule 804(b)(3)

**Thomas J. Nolan, Esq. (01-EV-001)** states that the proposed amendment to Rule 804(b)(3) is "extremely important, should be adopted, and can and will significantly increase the administration of justice in the United States Courts.

**Mikel L. Stout, Esq. (01-EV-002)** approves of the proposed amendment.

**The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (01-EV-003)** endorses the proposed change to Rule 804(b)(3).

**The Federal Magistrate Judges Association (01-EV-004)** supports the proposed amendment and notes that it will resolve a "conflict in the case law and establish a uniform approach in all cases."

**Professor Lynn McLain (01-EV-005)** opposes the proposed amendment to Rule 804(b)(3). He contends that the proposal would add "an extra complication for the trial judge and another hurdle for the prosecution, when the Supreme Court's decision in *Williamson* has already made the route to admissibility of a statement against penal interest a long and winding one." Professor McLain asserts that "the reasons for the existing rule's 'asymmetry' are well-founded."

**Professor Clifford S. Fishman (01-EV-007)** states that the proposed amendment to Rule 804(b)(3) "is worthwhile, not only because it makes that rule symmetrical, but because it closes an illogical and unfortunate gap of coverage between Rules 804(b)(30 and 801(d)(2)(E), the coconspirator exception " Professor Fishman notes that Rule 801(d)(2)(E) requires the government to present independent corroborating evidence of the existence of a conspiracy between the defendant and the declarant, and that "the absence of a trustworthiness requirement in Rule 804(b)(3) often allows a prosecutor to ignore the procedural and substantive safeguards of Rule 801(d)(2)(E)."

**Professor David P. Leonard and Twenty Other Law Professors (01-EV-008)** support the proposed amendment on the ground that it would "complement the existing corroboration requirement imposed on statements offered by the accused." The professors note that the existing rule is asymmetrical in favor of the prosecution because "the rule contemplated that statements against penal interest generally would be offered by the defense, not the prosecution." However, subsequent developments indicate that admission of inculpatory statements against penal interest has become

"common" , to that in "today's environment, there is no reason to treat the statements differently." The professors assert that a corroborating circumstances requirement adds "an element not necessarily subsumed by confrontation" and conclude that [h]aving to defend against uncorroborated accusations of an unavailable declarant, many of which are made under circumstances suggesting untrustworthiness, implicates the very fairness that is the cornerstone of our criminal justice system."

**The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (01-EV-009)** recommends that the proposed amendment not be adopted in its present form. The Committee "agrees that the corroboration requirement, if there is to be one, should apply to both prosecution and defense in criminal cases." The Committee does not agree, however, that there is a qualitative difference between statements against pecuniary interest and statements against penal interest. The Committee suggests as one possibility that the proposal be modified to make the corroborating circumstances requirement applicable "only when the primary import of the proffered declaration is to admit criminal culpability, regardless of whether the declaration is offered by a plaintiff, a prosecutor, or a civil or criminal defendant." The Committee stresses that "it is not opposed to the essential purposes of the proposed amendment to Rule 804(b)(3)."

**The Association of the Bar of the City of New York (01-EV-010)** strongly endorses the proposed amendment to Rule 804(b)(3) and states that "there is no principled basis to distinguish between the reliability of inculpatory and exculpatory statements, or to conclude that inculpatory statements are inherently more reliable than exculpatory statements. Thus, the court should scrutinize both inculpatory and exculpatory statements using the same standards." The Association suggest that the Committee Note be modified to "specify that a clearly self-inculpatory statement is admissible even without independent evidence of the truth of its details."

**The Department of Justice (01-EV-011)** strongly opposes the proposed amendment to Rule 804(b)(3). The Department asserts that the existing rule "is already symmetrical as the Government's Constitutional burden counterbalances the rule's requirement that defendants establish the corroborating circumstances in order to introduce exculpatory statements." Specifically, "the Confrontation Clause of the Constitution imposes a unique burden on the Government to demonstrate the trustworthiness of out-of-court statements before they can be introduced for their truth. This Constitutional requirement offsets the defendant's corroboration requirement now in the rule." The Department also states that any potential concerns about government misuse of the Rule 804(b)(3) exception have already been addressed by the Supreme Court in *Williamson v. United States,* 512 U.S. 594 (1994) and *Lilly v. Virginia*, 527 U.S. 116 (1999). The Department concludes that the proposed amendment "might encourage mischief by implying incorrectly that the Government must satisfy some more restrictive standard than that already set forth by the Supreme Court."

**The Federal Bar Association, Western Michigan Chapter (01-EV-012)** supports the

proposed amendment.

**The State Bar of California's Committee on Federal Courts (01-EV-013)** supports the proposed modification of Rule 804(b)(3), noting that it "provides for the balance that is currently lacking, and simply equals the requirements for admitting a statement against penal interest." The Committee states that the "circumstances under which exculpatory statements are made are not, as a bright line rule, different from those surrounding the making of inculpatory statements. In fact, as a result of the government's use of 'snitches' or 'informants', an inculpatory statements made by a certain government witness . . . may have a greater degree of trustworthiness when required to have corroboration."

**Professor James J. Duane (01-EV-014)** states that the proposed amendment to Rule 804(b)(3) is "a nice step in the directions of logical consistency and fairness between the Government and the accused in criminal cases." But "a much better answer to these same concerns would be to abolish the requirement of corroboration, delete the second sentence of Rule 804(b)(3), and issue a clear direction and reminder that federal courts must take seriously the requirements of the first sentence of the rule." Alternatively, "if the corroboration requirement is not abolished but is extended as the Committee has proposed, it should be reworded to clarify that it applies only to statements offered and admitted under that subsection of the hearsay rules, and not to self-inculpatory statements offered under some other hearsay exception." Professor Duane also contends that there is "no conceivable reason to require independent corroboration of all statements exposing the declarant (at least in part) to criminal liability, but not if the statement exposed him to only civil liability." He concludes that "[c]onsistency demands that the corroboration requirement either be abolished, as I have proposed, or else extended to *all* statements against interest, including those that tend to subject the speaker 'merely' to civil liability."

**Professor David A. Sklansky (01-EV-015)** supports the proposed amendment, noting that the asymmetry in the existing rule "is indefensible and should be eliminated." He states that the current asymmetry in the rule "can be justified only if (a) uncorroborated statements against penal interest are inherently more reliable when offered to inculpate that when offered to exculpate, or (b) it makes sense to hold exculpatory evidence to a higher standard of reliability than inculpatory evidence." Professor Sklansky believes that the first of these propositions "has never been substantiated" and the second proposition "seems inconsistent with the general thrust of our system of justice." He concludes that the Supreme Court's decisions in *Williamson v. United States* and *Lilly v. Virginia* do not make superfluous the proposed amendment's extension of the corroborating circumstances requirement to inculpatory statements against penal interest. For one thing, "the Court was badly splintered in both cases." For another, "it is easy to identify statements that would fail a corroboration requirement but that a majority of the Court might well find admissible" under both the existing Rule 804(b)(3) and the Confrontation Clause.

**The Committee on the United States Courts of the State Bar of Michigan (01-EV-016)** supports the proposed amendment to Rule 804(b)(3).

**The National Association of Criminal Defense Lawyers (01-EV-017)** believes that "asymmetry in the Rule is quite justifiable, but the direction of the asymmetry should be reversed." The Association proposes that hearsay statements against penal interest offered by the prosecution to inculpate an accused should be subject to "the additional showing of reliability that the Rule now applies to statements against penal interest offered to exculpate". In contrast, statements against penal interest offered to exculpate the accused "should be admissible without a further showing, subject only to a cautionary instruction in appropriate cases."

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| Memorandum To: | Advisory Committee on Evidence Rules |
| From: | Dan Capra, Reporter |
| Re. | Public comments on, and possible revisions to, Proposed Amendment to Evidence Rule 608(b) |
| Date: | March 15, 2002 |

This memorandum discusses some of the comments received concerning the proposed amendment to Evidence Rule 608(b), and analyzes whether any changes might or should be made to the proposed amendment as it was issued for public comment

The memorandum is divided into three parts. Part one sets forth the proposed amended Rule as it was approved by this Committee and the Standing Committee to be released for public comment. Part Two discusses the problem addressed by the amendment, and the pertinent case law. Part Three analyzes the comments received, to the extent that they suggest that the proposal be modified in some respect.

# I. The Proposed Amendment to Rule 608(b), as Released for Public Comment

The proposed amendment would clarify that the Rule 608(b) exclusion of extrinsic evidence would apply only when that evidence is offered to prove the character for truthfulness of a witness. The proposed amendment and Committee Note read as follows:

**Advisory Committee on Evidence Rules**
**Proposed Amendment: Rule 608**

**Rule 608. Evidence of Character and Conduct of Witness***

(a) Opinion and reputation evidence of character. — The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. — Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' ~~credibility~~ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence They may, however, in

* New matter is underlined and matter to be omitted is lined through.

the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

* * *

## COMMITTEE NOTE

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel,* 469 U.S. 45 (1984); *United States v. Fusco,* 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment restores the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only

if the sole purpose for offering the evidence was to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . .").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g., United States v. Winchenbach,* 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann,* 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403). Rules 402 and 403 displace the common-law rules prohibiting impeachment on "collateral" matters. *See* 4 Weinstein's Evidence, § 607.06[3][b][ii] (2d ed. 2000) (advocating that courts substitute "the discretion approach of Rule 403 for the collateral test advocated by case law").

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis,* 183 F.3d 231, 257, n. 12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").

# II. Background to the Proposed Amendment

### *The Current Rule*

The first sentence of the current Rule 608(b) by its terms prohibits the use of extrinsic evidence when offered for the purpose of attacking or supporting a witness' "credibility." (Extrinsic evidence is generally defined as that evidence "which is offered through documents or other witnesses, rather than through cross-examination of the witness himself or herself." *Weinstein's Evidence* § 608.20.).

The Rule is intended to preclude extrinsic evidence when it is offered to prove that a witness has a bad character for truthfulness–that is, where it is offered to show that a person has a propensity to lie. The original Advisory Committee Note refers to the need for a "conformity" with Rule 405, "which forecloses use of evidence of specific incidents as proof in chief of character."

The justification for exclusion of extrinsic evidence when offered to prove a witness' character is that it would "entail an undue consumption of trial time." *McCormick on Evidence* at 156 (5th ed.). See also Mueller and Kirkpatrick, 3 *Federal Evidence* at 180 (the Rule "helps keep the focus on substance and matters bearing immediately on credibility by keeping trials from being sidetracked on peripheral issues.").

The original Advisory Committee Note makes fairly clear that Rule 608(b)'s exclusion of extrinsic evidence is applicable only if the opponent's goal is to attack the witness' character for veracity. Other forms of impeachment–such as for bias, prior inconsistent statements, contradiction and capacity–are not intended to be covered by the absolute exclusion on extrinsic proof in Rule 608(b).

The problem giving rise to the possible need for amendment is that the text of the Rule by its terms prohibits extrinsic evidence when offered to address the witness' "credibility." This could be read to bar extrinsic evidence for bias, competency and contradiction impeachment since they too bear upon "credibility."

Most courts do read Rule 608(b) the way it was intended – to apply only where the extrinsic evidence is offered to prove the witness' character for truthfulness. But there are many decisions applying the Rule more broadly to mean what it appears to say – that extrinsic evidence is completely prohibited whenever offered on any aspect of the witness' credibility.

## *Advisory Committee Determinations*

At its April 2001 meeting, the Advisory Committee unanimously agreed on the following points:

1. Rule 608(b) as originally intended takes the correct approach to the admissibility of extrinsic evidence offered for impeachment. That approach distinguishes a character attack (as to which extrinsic evidence is absolutely inadmissible) from all other forms of impeachment (as to which extrinsic evidence can be admitted subject to Rule 403).

2. Rule 608(b) should be amended to accord with what the Rule is supposed to mean--i.e., that extrinsic evidence is absolutely prohibited when offered to prove a witness' character for truthfulness, and that Rule 403 governs use of extrinsic evidence for all other forms of impeachment. An amendment was considered necessary to prevent and rectify case law that misapplies the Rule to preclude extrinsic evidence offered for non-character forms of impeachment. Committee members also expressed concern that litigants are misapplying the Rule at the trial level, and that many litigants do not proffer extrinsic evidence for non-character impeachment because they read the Rule on its face as prohibiting such evidence.

3. After considering several options, the Committee agreed that the amendment should simply substitute the term "character for truthfulness" for the word "credibility" in Rule 608(b). The Committee also agreed that the Note would specify that the use of extrinsic evidence to prove prior inconsistent statement, bias, contradiction and lack of capacity is governed by Rules 402 and 403. The Note would also emphasize that where extrinsic evidence is prohibited, it cannot be referred to directly or indirectly by the questioning party. This proposed language is intended to prevent an abusive practice by which parties seek to smuggle in extrinsic evidence by referring to consequences suffered by the witness for his alleged misconduct (e.g., that the witness had been suspended or disciplined for the underlying misconduct).

## *Case Law Under the Existing Rule*

In *United States v. Abel*, 469 U.S. 45 (1984), the Court held that the Rule 608(b) exclusion of extrinsic evidence does not prohibit proof that a witness is biased. It reasoned that Rule 608(b) only limits extrinsic evidence when it is offered to show the witness' character for truthfulness (or untruthfulness).

*Abel* does not hold that extrinsic impeachment evidence *must* always be admitted when it is offered for a purpose other than proving the witness' character for truthfulness. The Court specified that Rule 403 may be used to exclude extrinsic evidence offered for purposes other than character when that evidence is unduly prejudicial, confusing, or time-consuming. *See, e.g., United States v. Phillips*, 888 F.2d 38 (6th Cir. 1989) (trial court did not err in prohibiting extrinsic evidence of bias where "the only bias defendant can point to is a desire by the government witnesses to save their jobs by allegedly lying on cross-examination about a remote matter as opposed to lying about a fact material to the case.")

Most courts have held, consistently with *Abel*, that the extrinsic evidence limitation of Rule 608(b) applies only if the sole reason for the impeachment evidence is to prove the witness' character for (un)truthfulness. If the evidence is offered for other forms of impeachment (e.g., prior inconsistent statement, contradiction, bias), the controlling Rule is 403, not 608(b). See, e.g., *United States v. Smith*, 232 F.3d 236 (D.C. Cir. 2000) (no error to admit extrinsic evidence of past acts of truthful cooperation by a government witness; the past acts were offered to rebut allegations of the witness' bias); *United States v. Winchenbach*, 197 F.3d 548 (1st Cir. 1999) (admissibility of prior inconsistent statement is governed by Rules 613(b) and 403, not Rule 608(b)); *United States v. Garcia*, 900 F.2d 571 (2d Cir. 1990) (drug activity was not admissible to impeach the defendant's general character for veracity; however, when the defendant took the stand and made a sweeping denial of any contact with narcotics, the trial court did not abuse its discretion in admitting extrinsic evidence of his drug activity; impeachment by extrinsic evidence contradicting the testimony is permissible within the confines of Rule 403); *United States v. Grover*, 85 F.3d 617 (4th Cir. 1996) extrinsic evidence is not admissible to attack a witness' character for truthfulness, but it is admissible for impeachment by way of contradiction, subject to Rule 403); *United States v. Curtsinger*, 9 F.3d 110 (6th Cir. 1993) (Rule 608(b) prohibits extrinsic evidence offered to prove that a prosecution witness robbed a gas station; this was simply a general attack on the witness' character for veracity); *United States v. Lindemann*, 85 F.3d 1232 (7th Cir. 1996) ("The admissibility of evidence regarding a witness's bias, diminished capacity, and contradictions in his testimony is not specifically addressed by the Rules and thus admissibility is limited only by the relevance standard of Rule 402. Therefore, because the attack at issue was on Burns' bias, and not on his character for truthfulness in general, Lindenmann's contention that the limitations of Rule 608 should have applied is incorrect."); *United States v. Castillo*, 181 F.3d 1129 (9th Cir. 1999) (Rule 608(b) "is limited to attacks on character for veracity–that is, situations where the evidence's only relevance is to impeach a witness' general credibility by showing specific instances of misconduct–and does not exclude extrinsic evidence used to impeach a witness' testimony by contradiction of facts asserted in that testimony."); *United States v. Keys*, 899 F.2d 983 (10th Cir. 1990) (proof of bias is not covered by Rule 608(b), and the trial court

did not abuse its discretion under Rule 403 in admitting the bias evidence).

But despite the holding in *Abel* and the intent of the drafters of Rule 608, several courts have read the term "credibility" in Rule 608(b) to bar extrinsic evidence offered for non-character forms of impeachment. An example of a literal but incorrect result under Rule 608(b) is *United States v. Bussey*, 942 F.2d 1241 (8th Cir. 1991). Bussey was charged with filing false tax returns. He claimed that his accountant failed to inform him of certain important information. The government called the accountant who stated that he imparted the information to Bussey. Bussey tried to call an expert who would have testified, on the basis of documents, that it is standard operating procedure to check off certain matters if they are imparted to the client, and that no relevant checkoff existed in the subject documents. The trial court held the expert testimony inadmissible. The Court found no error. It reasoned that the expert testimony was extrinsic evidence, and declared as follows:

> Bussey's offer of proof at trial unquestionably shows that Conway's testimony was intended to show that Steiner did not tell Bussey to get the K-1 amended. By addressing this specific instance of Steiner's conduct, Bussey obviously sought to use Conway to attack Steiner's credibility. Rule 608(b)'s plain language prohibits the use of extrinsic evidence for such purposes.

It is true that Rule 608(b)'s "plain language" bars all extrinsic evidence impeaching credibility. But that is not the way that the Rule was intended or is to be applied. The extrinsic evidence was offered to contradict the accountant's testimony; it was not offered as a general attack on the accountant's character for veracity. Moreover, the contradiction went to a critical issue in the case–whether the accountant had imparted material information to the defendant. So it should have been admitted under Rule 403. The error was apparently caused by the court's applying literally Rule 608(b)'s overbroad reference to "credibility."

Some other cases can be found in which the court fell into the same trap of applying the Rule 608(b) prohibition literally to exclude extrinsic evidence whenever offered to prove even non-character forms of "credibility." See, e.g. *Becker v. ARCO Chemical Co.*, 207 F.3d 176 (3rd Cir. 2000) ("plain language" of Rule 608(b) precludes extrinsic proof of bias); *United States v. Graham*, 856 F.2d 756 (6th Cir. 1988) (stating that Rule 608(b) "specifically prohibits a party from introducing extrinsic evidence to prove specific instances of conduct of a witness for the purpose of attacking or supporting his credibility"; the extrinsic evidence was offered to prove the witness' bias); *United States v. Miller*, 159 F.3d 1106 (7th Cir. 1998) (Rule 608(b) cited as authority for excluding extrinsic evidence of bias, though under the circumstances of the case, the extrinsic evidence probably should have been excluded under Rule 403 anyway as it was remote). See also Mueller and Kirkpatrick, 3 *Federal Evidence* at 190, n.10, for a "sampling of cases that might be justified by proper application of rules relating to contradiction, but wrongly citing FRE 608 as controlling."

Another problem in the case law involves the term "extrinsic evidence." Rule 608(b) does not define the term, and some confusion in the decisions has arisen about the meaning of "extrinsic evidence" in one particular fact situation. Suppose the witness has been suspended from law practice

because he stole money from clients. The underlying conduct is certainly probative of character for truthfulness, and the trial court in its discretion could permit the adversary to ask on cross-examination whether the witness had stolen money from clients. But can the adversary ask the witness whether he has been *suspended from practice* for stealing money from clients? Relatedly, if the witness were asked about the underlying conduct and denied it, could the adversary ask: "Isn't it true that you were suspended from law practice for the conduct that you now deny?"

This cross-examination could arguably be permissible under Rule 608(b) because the adversary is not trying to introduce a document or witness testimony to prove a fact. Thus, the adversary who refers to consequences suffered by a witness for committing a bad act has arguably not sought to introduce "extrinsic evidence". The contrary argument is that the adversary is violating the extrinsic evidence bar because he is referring to outside sources (in this hypothetical, the disciplinary authority) to support his allegations that the impeaching fact actually occurred.

*United States v. Davis,* 183 F.3d 231 (3d Cir. 1999), is a case prohibiting an oral reference to outside sources to disprove a denial. A transit police officer on trial for witness tampering was asked on cross-examination about a forty-four-day suspension that he had received for misappropriating departmental gasoline for use in his personal vehicle and putting a false name in a gas log. He was also asked about an incident in which he was found by Internal Affairs to have lied about taking a subway pass away from a young man and ripping it up. In response to the prosecutor's questions, Davis gave exculpatory accounts of his acts in those three instances. The case was remanded for a new trial on other grounds, and Judge Becker gave the following instruction for the court on remand:

> This does not suggest that the government may introduce either reports or evidence that Davis was suspended for forty-four days, or documentation of the Internal Affairs determination that Davis lied about the subway-pass incident. Such evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b). More precisely, the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about the subway-pass incident. The government needs to limit its cross-examination to the facts underlying those events. To impugn Davis's credibility, the government properly can question Davis about misappropriating departmental gasoline for personal use and putting a false name in a gas log, and it may question Davis about lying to an Internal Affairs officer about ripping up an individual's subway pass. If he denies that such events took place, however, the government cannot put before the jury evidence that he was suspended or deemed a liar by Internal Affairs. As Professor Saltzburg aptly warns, "counsel should not be permitted to circumvent the no-extrinsic-evidence provision [in Rule 608(b)(1)] by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act." Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*. 7 CRIM. JUST. 28. 31 (Winter 1993). Allowing such a line of questioning not only puts hearsay statements before the jury, it injects the views of a third person into the case to contradict the witness. This injection of extrinsic evidence not only runs afoul of Rule 608(b),

but also sets the stage for a mini-trial regarding a tangential issue of dubious probative value that is laden with potential undue prejudice.

Thus, the *Davis* court held that a reference in cross-examination to consequences flowing from a bad act is an attempt to introduce extrinsic evidence, prohibited by Rule 608(b); the extrinsic evidence bar is triggered even though the cross-examiner does not attempt to call a witness or introduce a document. See also 1 *McCormick on Evidence* at 155 ("It is improper to inquire whether the witness was 'fired', 'disciplined' or 'demoted' for the alleged act– those terms smuggle into the record implied hearsay statements by third parties who may lack personal knowledge."); *United States v. Morrison,* 98 F.3d 619 (D.C. Cir. 1996) (in a drug case, the trial court properly prohibited defense counsel from asking the prosecution witness whether a complaint was filed against her; this was a reference to extrinsic evidence and it was offered only to prove her untruthful character).

There are some cases, however, that permit reference to the extrinsic consequences resulting from bad acts that are offered to impeach a witness' character for truthfulness. See, e.g., *Hampton v. Dillard Dept. Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001) (trial court did not abuse its discretion in permitting the plaintiff to question a security guard about his suspension from the Kansas Highway Patrol in 1977 for falsifying a report); *United States v. DeSantis*, 134 F.3d 760 (6th Cir. 1998) (defendant could be asked about administrative agency findings concerning underlying conduct, but could not be required to read the findings into the record); *United States v. Whitehead,* 618 F.2d 523 (4th Cir. 1980) (finding it permissible to question the defendant about his suspension from the practice of law).

At the April 2001 meeting the Committee determined that a party who refers to the consequences of a witness' bad acts is engaged in abuse of the extrinsic evidence limitation of Rule 608(b). This risk of abuse was found serious enough to warrant treatment in the proposed amendment to Rule 608(b). The Committee resolved, however, that it would be extremely difficult to craft language in the text of the Rule that would cover only the perceived problem of referring to the consequences suffered by the witness from his or her alleged misconduct; it would be likely that any amendment would prohibit more than would be intended. The Committee agreed that it would be sufficient to refer to the problem in the Committee Note.

# III. Comments on the Proposed Amendment and Potential Responses

The comments on the proposed amendment uniformly praised the Advisory Committee's deletion of the overbroad term "credibility" and agreed that the Rule should be restored to its original intent–prohibiting extrinsic evidence only when it is offered to prove a witness' character for truthfulness, and leaving all other uses of extrinsic evidence to be regulated by the Rules 402 and 403.

Two comments, while agreeing with the goal of the amendment, suggested that the proposal be modified in some important respects. These comments are discussed in detail in this section.

## *A. Replacing "credibility" with "character for truthfulness" in other parts of Rule 608 and in other Evidence Rules.*

Professor James Duane (01-EV-014) notes that the Advisory Committee "sensibly proposes" to replace the term "credibility" with the term "character for truthfulness" in Rule 608(b). He argues, however, that the term "credibility" is also misused in other parts of Rule 608, as well as in Rules 609 and 610. He suggests that the change proposed by the Advisory Committee should be made, "but only if the word 'credibility' is also replaced with 'character for truthfulness' throughout all of Rules 608, 609 and 610." He contends that if the term "credibility" is substituted in only one place, there will be an "inconsistent usage" of the term that will be even more confusing and problematic than the current state of affairs.

Professor Duane suggests that in addition to the proposed amendment, the term "credibility" should be replaced with the term "character for truthfulness" in four separate places in the Rules:

1. In Rule 608(a), which currently provides:

> The *credibility* of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:(1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

2. In the final sentence of Rule 608(b), which currently provides:

> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to *credibility*.

3. In Rule 609(a) , which provides:

> (a) General rule.—For the purpose of attacking the *credibility* of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

4. In Rule 610, which provides:

> Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' *credibility* is impaired or enhanced.

This memo will consider the merit of each of these respective changes.

## *1. Changing Rule 608(a)*

When the Committee first considered a proposed amendment to Rule 608(b), it also considered whether the reference to "credibility" in Rule 608(a) was problematic and should be changed accordingly. At that time, the Committee decided that a change was unnecessary. The reasoning was that the reference to "credibility" in Rule 608(a) was tempered by the subsequent language in Rule 608(a) that limits evidence attacking or supporting "credibility" to such evidence that refers "only to character for truthfulness or untruthfulness." This language was thought sufficient to indicate that the Rule must be read as limited to impeachment of the witness' character for truthfulness, rather than a broader coverage of all matters pertaining to "credibility".

Professor Duane's response is that Rule 608(a), if read literally, would actually prohibit forms of impeachment that it was not designed to prohibit. He reads the existing Rule as potentially limiting

any proof of impeachment by way of opinion or reputation if it is not offered to attack or support the witness' character for truthfulness. He posits that a witness would be prohibited from giving an opinion that another witness was intoxicated, or biased, or mentally disturbed, because such a witness would be testifying about "credibility" and yet would not be attacking or supporting the witness' character for untruthfulness, as is required by the language of Rule 608(a)(1).

Professor Duane admits that there is little or no case law reading Rule 608(a) as he posits it might be applied. But he argues that misguided case law is possible, and becomes more possible if the overbroad term "credibility" remains in one part of the Rule after the amendment takes "credibility" out of another part of the Rule

Professor Travis Lewin, in an email to the Evidence professors bulletin board, has taken issue with Professor Duane's contention that an amendment to Rule 608(a) is necessary. He states as follows:

> I am . . . troubled by [Professor Duane's] analysis of Rule 608(a). * * * The rule clearly spells out that "credibility" is limited to the character trait of truthfulness or untruthfulness. Thus, I do not understand the need for Prof. Duane's suggested change with regard to Rule 608(a).

***a. Reporter's Comment***

Professor Duane presents a situation that has not yet created a problem in the cases. So far as I can tell, no court has prohibited opinion evidence attacking or supporting a witness' bias, capacity, etc., on the ground that it is prohibited by Rule 608(a). Courts have instead read Rule 608(a) as merely regulating the form and timing of proof *if* it is offered to support or attack the witness' character for truthfulness. For example, in *United States v. Universal Rehabilitation Services,* 205 F.3d 657 (3d Cir. 2000) (en banc), the Court held that Rule 608(a) did not prohibit the government from introducing the plea agreements of government witnesses on direct examination. The Court reasoned that Rule 608(a) was inapplicable because it is limited to attempts to attack or support the witness' character. A plea agreement is not evidence of truthful character, but rather is offered to remove the sting of a probable attack for bias, and to limit speculation about selective prosecution. Thus, the *Universal* Court did not succumb to any temptation to read Rule 608(a) to cover all attempts to address the credibility of a witness. And of course the federal courts routinely follow the same course as *Universal*, admitting evidence of cooperation agreements without regard to Rule 608(a). See Capra, *Admissibility of Plea Agreements on Direct Examination: The Limits Vanish*, 55 Univ. Miami L. Rev. 751 (2001).

On the other hand, the fact that courts have refused to read Rule 608(a) to limit every effort to address a witness' "credibility" does not mean that it could never happen. It is up to the Committee to determine whether the risk of such a misreading warrants a change to the Rule. It is clear that a

change to Rule 608(a) would not warrant an amendment on its own. But the question for the Committee is whether such a clarification is worthwhile as part of a larger amendment. There is something to be said for using parallel language throughout the entire Rule. All things being equal, it would seem to make sense to change the term "credibility" wherever it is intended to mean "character for truthfulness."

If the Committee decides that a change to Rule 608(a) might be worthwhile, the question is whether that change can be made *at this stage in the rulemaking process*. Specifically, the question is whether the change is so substantial that it requires that the proposed amendment be issued for another round of public comment. If new public comment were deemed necessary, this would result in a delay of one year in the promulgation of the universally praised proposed amendment to Rule 608(b).

There is a strong argument, though, that a change to Rule 608(a) that parallels the proposed change to Rule 608(b) is not so significant as to require a new round of public comment. The change proposed by Professor Duane is not really controversial. Rather, it simply provides parallelism and consistent use of terminology throughout the Rule. There is precedent for making noncontroversial changes of substance in response to public comment that do not then require a new round of public comment. Indeed, the 2000 amendments to the Evidence Rules were changed in many significant respects in response to public comment, without the need for a new round of comment. For example, the proposed language codifying *Luce* in Rule 103 was deleted.

Ultimately it is for the Standing Committee to determine whether a change is so material that a new round of public comment is required. One option for the Advisory Committee is to propose the change to Rule 608(a), and if the Standing Committee decides that a new round of public comment would be required, the Committee might retain the option to withdraw the amendment to Rule 608(a) and press onward with the existing proposal to amend Rule 608(b).

### *2. Changing the Last Sentence of Rule 608(b)*

The last sentence of the Rule states that a witness does not waive the Fifth Amendment privilege when examined with respect to matters relating solely to *credibility*. Professor Duane argues that the drafters of the Rule "intended to restrict its application to situations where a witness is asked about criminal acts that are relevant to nothing in the case but the character of the witness for honesty, and not some other form of impeachment." Professor Duane contends that if the Rule is read literally, a witness could claim the privilege when cross-examined about whether he "has a grudge

against the accused because he believes the accused cheated him out of his share of a major illegal drug sale two years ago" and that he accepted a bribe to change his testimony. He contends that the Rule should be read to allow the privilege to be invoked only as to matters bearing solely on the witness' character for truthfulness (such as an alleged fraud on the government unrelated to the instant case).

Again, Professor Duane cannot point to any case law that reads the term "credibility" to mean anything other than "character for truthfulness." The sparse case law on the last sentence of Rule 608(b) provides that a witness can invoke the privilege with respect to crimes that are unrelated or "collateral" to the facts of the case–i.e., crimes that are offered only to attack the witness' character for truthfulness. *See, e.g., United States v. Pelusio,* 725 F.2d 161 (2d Cir. 1983) (witness permitted to invoke his privilege with respect to unrelated criminal charges pending against him); *United States v. Viera,* 839 F.2d 1113 (5th Cir. 1988) (no error in limiting the cross-examination of a witness in order to protect his privilege as to collateral offenses; the defendant was able to explore the witness' bias). See also 3 Mueller & Kirkpatrick, *Federal Evidence* 179, stating that the last sentence of Rule 608(b) is "a savings clause, preserving whatever right the witness has under the privilege against self-incrimination to decline to answer questions relating only to character for truth and veracity, and does not create a new right to exclude statements relevant to impeachment by contradiction."

***a. Reporter's Comment***

The courts have had no problem applying the last sentence of Rule 608(b) as it stands, so the traditional need for an amendment does not exist. But again, the question is whether the change is worthwhile as part of a larger amendment. It seems good policy to employ a consistent use of the term "character for truthfulness" in place of the overbroad term "credibility" throughout the Rule. Indeed, there might be more to be said for changing the term "credibility" in the last sentence of Rule 608(b) than there is for making such a change in Rule 608(a). In Rule 608(a) the term "credibility" is already tempered by subsequent language in Rule 608(a)(1); that is not the case with the last sentence of Rule 608(b).

As discussed above, if the last sentence of Rule 608(b) is to be amended, the Committee must address the question whether the change requires submitting the entire proposal for a new round of public comment. If that is required, this cuts against making any change to the last sentence–a neat parallelism in the Rule would not seem to justify a delay of a year in making the necessary change to the first sentence of Rule 608(b).

A strong argument can be made, however, that a change to the last sentence of Rule 608(b) is more stylistic than substantive–all it does is provide parallel language throughout the Rule, without any actual change in the Rule's application. As such, the change would not seem to require a new round of public comment.

## *What Rule 608 Would Look Like If the Term "Credibility" Were Changed Throughout*

Assuming that the Committee decides that the term "credibility" should be changed consistently throughout Rule 608–and assuming that this can be done without issuing the proposal for further public comment–the Rule and the Committee Note recommended to the Standing Committee would look like this:

**Rule 608. Evidence of Character and Conduct of Witness**

(a) *Opinion and reputation evidence of character.* — The ~~credibility of a witness~~ character of a witness for truthfulness may be attacked or supported by evidence in the form of opinion or reputation, but ~~subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2)~~ evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct.* — Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' ~~credibility~~ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to ~~credibility~~ character for truthfulness

**COMMITTEE NOTE**

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel,* 469 U.S. 45 (1984); *United States v. Fusco,* 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid 608(b). On occasion the Rule's use

of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment restores the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . ."). For purposes of consistency the term "credibility" has been replaced by the term "character for truthfulness" throughout the Rule.

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g., United States v. Winchenbach,* 197 F.3d 548 (1st Cir 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann,* 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403). Rules 402 and 403 displace the common-law rules prohibiting impeachment on "collateral" matters. *See* 4 Weinstein's Evidence, § 607.06[3][b][ii] (2d ed 2000) (advocating that courts substitute "the discretion approach of Rule 403 for the collateral test advocated by case law").

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis,* 183 F.3d 231, 257, n. 12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").

### *3. Changing Rule 609*

Rule 609 permits, within certain limitations, admission of a witness' convictions when offered "[f]or the purpose of attacking the *credibility* of a witness." Professor Duane contends that as with Rule 608, the term "credibility" is used incorrectly–what is meant is that convictions can be introduced to attack the witness' character for truthfulness.

The question is whether this misuse can result in any negative consequences that would justify the costs of an amendment to the Rule. (It should be recalled that this Rule has already been amended, in 1990, and no problem was raised at that time about the term "credibility"). It seems obvious that the only purpose to which the Rule is directed is an attempt to impeach a witness with prior convictions. The basic purpose for admitting prior convictions is to prove that the witness is a liar, i.e , he has an untruthful character.

Professor Duane has not pointed to any case law in which the Court has been confused about the scope of Rule 609. He does posit an example which assertedly could lead to a problem in applying the overbroad term "credibility" in that Rule. Suppose a police officer is charged with misconduct. A witness testifies against him and the officer wants to impeach the witness with evidence that the officer previously arrested and testified against that witness, who was then convicted and served a jail sentence. This evidence would be offered to prove bias, not character for untruthfulness. Yet if Rule 609 is read to cover any attempt to impeach "credibility" through the witness' convictions, the convictions would have to pass under the complicated tests for admissibility under Rule 609, rather than under the Rule 403 balancing test that usually governs evidence of bias

There are at least two reasons why the hypothetical misapplication of Rule 609 posited by Professor Duane has not arisen in the cases. First, presuming that a court applies Rule 609 to convictions offered to prove bias, the result will usually be the same as if the court had applied the Rule 403 test. This is because Rule 609 itself provides that the Rule 403 test applies to many of the convictions offered under that Rule–specifically convictions less than ten years old that do not involve dishonesty or false statement and are offered against witnesses other than an accused. Thus, the risk of misapplication of Rule 609 with respect to convictions offered for bias or other non-character forms of impeachment is limited by the fact that the Rule 403 test already applies to a good number of those convictions.

Second, the reported decisions indicate that the courts have found no difficulty in limiting Rule 609 to convictions offered to attack the witness' character for truthfulness. If a conviction is offered for an impeachment purpose other than character, such as contradiction, courts have held that Rule 609 is inapplicable and admissibility is governed by Rule 403. The following is an excerpt from *Federal Rules of Evidence Manual* that speaks to this point:

> The special rules set forth in Rule 609 are applicable only if the proponent is

attempting to use prior convictions to impeach the witness' character for truthtelling. If there is another purpose for introducing the conviction, then Rule 609 poses no bar, and the Trial Court should admit the conviction subject to the balancing test of Rule 403. For example, in *United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992), the defendant in a drug case testified to his innocence and implied that he had never been in contact with drugs. On cross-examination the government asked the defendant whether he had ever personally seen marijuana. He answered that he had not. The prosecution then offered in rebuttal, and the Trial Court admitted, the defendant's fifteen-year-old conviction for possession of marijuana. The jury was given a limiting instruction. The Court also held that Rule 609 did not apply because that Rule has nothing to say about "the admissibility of relevant evidence introduced to contradict a witness's testimony as to a material issue." The Court reasoned that the admissibility of the conviction should be determined under Rule 403, rather than under the more exclusionary balancing test of Rule 609(b). It found that Rule 403 provided valid grounds to admit Lopez's prior conviction: because the defendant had brought up his unfamiliarity with drugs on his own, the prejudicial effect of the old conviction did not substantially outweigh the probative value.

*See also United States v. Norton,* 26 F.3d 240 (1st Cir. 1994) (in a felon-firearm prosecution, the court properly allowed the government to introduce the defendant's prior firearm conviction; the defendant had testified on direct that he had never possessed a gun in his life, so the prior conviction provided proper contradiction).

***a. Reporter's Comment***

The discussion above indicates that the potential misuse of the term "credibility" in Rule 609 is not as serious as is the case under Rule 608(b). In Rule 608(b), if the term is applied literally, it means that extrinsic evidence offered to prove bias, contradiction and the like would be excluded automatically, even if it would be admissible under Rule 403–and some cases have made that very mistake. In Rule 609, if "credibility" is applied literally, the admissibility of convictions offered to prove bias, contradiction and the like will often be governed by the same Rule 403 test whether or not Rule 609 is used. More importantly, no cases have been found that make the mistake of interpreting Rule 609 to cover evidence of bias, contradiction, etc.

The Committee might believe it worthwhile, for purposes of consistency, to propose a change to Rule 609 that parallels the change in Rule 608(b). Even if there is no problem in the cases, there is some virtue in consistent use of identical terms in the Rules, and in avoiding incorrect usage of the term "credibility." It is clear, however, that if such a change to Rule 609 is to be made, is must be done subject to the usual time periods of the rulemaking process. The change obviously cannot be "added" at this point to the proposed change to Rule 608(b), which has already gone through the public comment period. So even if the Committee decides that it is appropriate to amend Rule 609, the immediate question for the Committee is whether the proposed amendment to Rule 608 should

be *delayed* until an amendment to Rule 609 is proposed and goes through the public comment period.

Professor Duane argues that if the amendment to Rule 608 goes forward without a companion amendment to Rule 609, there will be more confusion because the term "credibility" will have been properly deleted from one Rule and yet allowed to remain in another. It is for the Committee to decide whether this risk of confusion is serious enough to justify delaying the proposed amendment to Rule 608 for at least a year. There is a strong argument that such a delay is unwarranted. For one thing, as discussed above, the risk of misapplication of Rule 609 is nowhere near as great as the risk of misapplication of Rule 608. Courts do not at all appear confused about the scope of Rule 609. And at any rate, whatever confusion would arise from amending one Rule and not another would be rectified in a finite period of time, if the Committee decides eventually to propose an amendment to Rule 609.

It should be noted that this agenda book includes a memorandum of possible Rule amendments for the Committee to consider for future action. The proposal to change Rule 609 to replace the term "credibility" with the term "character for truthfulness" is discussed in that memorandum.

### *4. Changing Rule 610*

Rule 610 prohibits evidence of religious beliefs of a witness "for the purpose of showing that by reason of their nature the witness' *credibility* is impaired or enhanced." The Committee Note indicates that the Rule is not intended to prevent evidence of religious belief or affiliation when offered to prove bias. It is apparent, then, that the use of the term "credibility" in the Rule is overbroad because applied literally it would preclude evidence of religious belief even when offered to prove bias.

There is not much case law construing Rule 610. But there is at least one case in which the Court found error under Rule 610 when a witness was impeached with a religious affiliation even though that affiliation was admitted to show bias and was not a general attack on the witness' character. That case is discussed in an excerpt from the *Federal Rules of Evidence Manual*:

> An example of a case where a bias exception to Rule 610 should have been applied is *Malek v. Federal Ins. Co.*, 994 F.2d 49 (2d Cir. 1993). *Malek* was an insurance dispute in which the plaintiffs' financial stability became a contested issue The plaintiffs, who were Hasidic Jews, called an accountant to testify. The Trial Court permitted defense counsel on cross-examination to bring out the fact that the accountant was a member of the Hasidic community, as were the plaintiffs, and that the accountant had many clients in the Hasidic community.
>
> On appeal, the Court found that this cross-examination was prohibited by Rule 610,

and it reversed the judgment for the defendants. The Court objected to what it stated was the defendant's attempt to show that the accountant's "character for truthfulness was affected by his religious beliefs." The Court found this line of inquiry particularly troubling because "the impeached witness' religious affiliation is the same as that of the plaintiffs."

We believe, however, that the dissenting Judge in *Malek* had the better of the argument. He concluded that "the questioning represented a completely legitimate attempt to impeach [the accountant] by showing that his livelihood depended in large part on his relationship with the Hasidic community, a community of which Mr. Malek was a member." Thus, the fact that the plaintiffs and the accountant had a shared religious affiliation was more, and not less, reason to allow the inquiry. As the dissenter noted, the questions on cross-examination were directed primarily at the witness' livelihood. The accountant was not asked whether he was devout, what his particular beliefs were, or any similar questions that would have dealt with his religious belief and thus would clearly have violated Rule 610. In our view, a bias exception to Rule 610 should be applicable in a case such as *Malek*. While there may be cases requiring difficult line-drawing, Rule 610 should not be read to preclude all references to the witness' religion.

Other cases have properly declared that Rule 610's reference to "credibility" does not preclude proof of bias. *See, e.g., United States v. Teicher,* 987 F.2d 112 (2d Cir. 1993) (impeachment of a prosecution Jewish witness for his belief in "Messianic thought," where the defendants were Jewish, was properly prohibited under Rule 610; that Rule does provide an exception to permit inquiry into religious beliefs to show a witness' bias; however, the witness' religious views were not probative of bias in this case").

***a. Reporter's Comment***

As with the use of the term "credibility" in Rule 609, the use of the same term in Rule 610 is overbroad, and in a perfect world it would be good to have terms used correctly and consistently throughout the Rules. Moreover the case for changing Rule 610 would seem somewhat more compelling than a change to Rule 609 because there is some indication of case law construing the term improperly to prohibit impeachment on all aspects of credibility–and this misapplication makes a difference because if Rule 610 is applied, the evidence is completely inadmissible, whereas otherwise it would be presumptively admissible under the Rule 403 test.

On the other hand, it could be argued that it might be too limiting to change Rule 610 to prohibit evidence of religious beliefs only when offered to prove the witness' character for truthfulness. For example, assume a party wants to impeach a witness because he is a member of a religious cult that believes its members will be transported to a comet as soon as the Beatles reunite. The adversary wants to bring out evidence of the witness' wacky religious affiliation not to show character for untruthfulness, but rather to show that the witness is mentally unstable. This is an attack

on "credibility" but it is not an attack on the witness' "character for truthfulness." Should the attack be prohibited by Rule 610, or should admissibility be left to the Rule 403 balancing test? This is a fairly complex policy question on which reasonable minds can differ. So it is not necessarily the case that a change to Rule 610 is mandated in order to make it consistent with the change to Rule 608(b). It may be that a change to Rule 610 is necessary to provide for a bias exception, but to prohibit other forms of impeachment such as for incapacity or character. In other words, a change to Rule 610 raises a more difficult policy question than any of the other changes proposed by Professor Duane.

At any rate, the immediate question is not whether Rule 610 should be amended; the immediate question for the Committee is whether the amendment to Rule 608(b) should be delayed until an amendment to Rule 610 is proposed and released for public comment. Given the fact that Rule 610 is so rarely invoked and applied, and given the fact that any decision to amend the Rule will be present somewhat difficult drafting and policy issues, it does not seem necessary or justified to delay the amendment to Rule 608(b).

It should be noted that this agenda book includes a memorandum of possible Rule amendments for the Committee to consider A proposal to amend Rule 610's reference to "credibility" is discussed in that memorandum.

## *B. Comment on Committee Note*

At the Standing Committee meeting in which the proposed amendment to Rule 608(b) was approved for public comment, a member of that Committee expressed concern about some of the exposition in the proposed Committee Note. This member has taken the position that Committee Notes in general should simply state the intent behind the amendment and should not serve as an explication of legal doctrine. His view is that if something is not covered in the text of the Rule, it should not be addressed in the Note. In other words, anything important enough to talk about in the Note is important enough to include in the text.

The position taken by that member of the Standing Committee was not joined by other members of that Committee when a vote was taken on the proposed amendment to Rule 608(b) and the proposed Committee Note. Nonetheless, it is a position that the Advisory Committee may wish to discuss and prepare for in advance of the next Standing Committee meeting.

The member of the Standing Committee would delete the last paragraph of the proposed Committee Note, as follows:

**COMMITTEE NOTE**

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel,* 469 U.S. 45 (1984); *United States v. Fusco,* 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998) The amendment restores the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . .").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g., United States v. Winchenbach,* 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is

governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann*, 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403). Rules 402 and 403 displace the common-law rules prohibiting impeachment on "collateral" matters. *See* 4 Weinstein's Evidence, § 607 06[3][b][ii] (2d ed. 2000) (advocating that courts substitute "the discretion approach of Rule 403 for the collateral test advocated by case law")

~~It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis*, 183 F.3d 231, 257, n. 12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").~~

***Reporter's Note:***

It is for the Committee to determine in the first instance whether the last paragraph of the Committee Note is so extraneous to the proposed amendment that it should be deleted. It should be noted that this paragraph was added to the Note because the Committee found it impossible to draft language in the text of the Rule that would adequately and precisely cover the point addressed. An initial draft of the amendment attempted to cover the problem of impermissible references to extrinsic evidence with the following language:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' ~~credibility~~ <u>character for truthfulness</u>, other than conviction of crime as provided in rule 609, may not be proved by <u>reference to or introduction of</u> extrinsic evidence. * * *

But this language was problematic, as indicated in the minutes of the last meeting of the Committee:

> The Reporter expressed concern that the language prohibiting "reference to or introduction of" extrinsic evidence was overbroad. Such language could prohibit the cross-examiner from referring even to a document prepared by the witness. The Reporter noted that

it would be extremely difficult to craft language that would cover only the perceived problem of referring to the consequences suffered by the witness from his or her alleged misconduct; it would be likely that any amendment would prohibit more than would be intended. Moreover, it is probably not necessary to amend the Rule to prevent the practice of referring to the consequences of alleged misconduct, because a cross-examiner who does so is independently violating the hearsay rule (by referring to assertions by out-of-court declarants about the witness' misconduct, and offering those assertions as true). Because the hearsay rule prohibits the practice already, it seems unnecessary to add language covering the problem to Rule 608(b)–especially if that language could create problems of construction and application for lawyers and judges. The Committee resolved to delete the proposed language prohibiting "reference to or introduction of" extrinsic evidence. The Committee agreed that it would be sufficient to refer to the problem in the Committee Note.

The above example indicates that it is probably not always true that "if it is important enough to be put in the Note, it should be put in the text." Many principles might be important enough to put in text, but are too complex to be set forth correctly in the text of an Evidence Rule. For example, tests of admissibility based on numerous nondispositive factors are probably better placed in a Note than in the text. See, for example, the Committee Note to the amended Rule 702. Other points might not be important enough to address in what is supposed to be a set of clear and concise Evidence Rules–but addressing such points in the Note might provide a valuable service to the bench and bar.

If the Committee decides to recommend that the last paragraph in the Note should be retained, the argument can be made to the Standing Committee that the paragraph addresses a problem that arises frequently enough that guidance to bench and bar is needed, but is impossible to address with sufficient precision in the text of the Rule. At any rate, there seems no reason to delete the paragraph at this point. If the Standing Committee feels strongly that the paragraph should be deleted, then it can make the deletion on its own

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Public comments on, and possible revisions to, Proposed Amendment to Evidence Rule 804(b)(3)
Date: March 15, 2002

This memorandum discusses some of the comments received concerning the proposed amendment to Evidence Rule 804(b)(3), and analyzes whether the Committee should decide to proceed with the amendment and, if so, whether any changes might or should be made to the proposed amendment as it was issued for public comment.

The memorandum is divided into six parts. Part one sets forth the proposed amended Rule as it was approved by the Advisory Committee and the Standing Committee to be released for public comment. Part Two discusses the problem addressed by the amendment, the pertinent case law and the positions taken by the Advisory Committee and the Standing Committee on the proposed amendment to this point. Part Three analyzes the public comment (most importantly from the Justice Department) that opposes any attempt to extend a corroborating circumstances requirement to inculpatory declarations against penal interest. Those objections are addressed first because if the Committee agrees with the objections, the proposed amendment should then be withdrawn or reworked. Part Four provides a short discussion of the application of the corroborating circumstances requirement to civil cases. Part Five analyzes those public comments suggesting that the proposed amendment be modified in certain respects. Those commentators are not opposed to an attempt to provide for symmetry in the Rule; rather they have provided suggestions that they believe would improve the proposal. Part Six sets forth models that would incorporate the various suggestions for modification addressed in the memorandum.

# I. The Proposed Amendment to Rule 804(b)(3), as Released for Public Comment

The proposed amendment would extend the corroborating circumstances requirement to all proffered declarations against penal interest. The proposed amendment and Committee Note read as follows:

**Advisory Committee on Evidence Rules**
**Proposed Amendment: Rule 804**

**Rule 804. Hearsay Exceptions; Declarant Unavailable***

* * *

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

* * *

(3) Statement against interest. – A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the

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* Matter to be omitted is lined through.

statement.

* * *

## COMMITTEE NOTE

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest, whether proffered in civil or criminal cases. See Ky.R.Evid. 804(b)(3); Tex. R.Evid. 804(b)(3). Most 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 (5thCir. 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. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring corroborating circumstances for against-penal-interest statements offered by the government). The corroborating circumstances requirement has also been applied to declarations against penal interest offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (noting the advantage of a "unitary standard" for admissibility of declarations against penal interest). This unitary approach to declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception.

The Committee notes that there has been some confusion over the meaning of the "corroborating circumstances" requirement. *See United States v. Garcia,* 897 F.2d 1413, 1420 (7th Cir. 1990) ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain"). For example, some courts look to whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant's account). Other courts hold that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required

by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995)):

> (1) the timing and circumstances under which the statement was made;
>
> (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;
>
> (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
>
> (4) the party or parties to whom the statement was made;
>
> (5) the relationship between the declarant and the opponent of the evidence; and
>
> (6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985).

The corroborating circumstances requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-

inculpatory" to be admissible under Rule 804(b)(3)). "Corroborating circumstances" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a corroborating circumstance.

# II. Background to the Proposed Amendment

## *The Current Rule*

In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest; but by its terms the Rule imposes no similar requirement on the prosecution. Nor does the Rule require a showing of corroborating circumstances in civil cases.

A hypothetical illustrates the asymmetry in the text of the current Rule: A bank robber comes home one day and is having a casual, intimate conversation with his girlfriend. She asks him how his day went. He says:

> "Fine. I robbed a bank with Bill. I wanted to get Jimmy to help me because it was a complex job, but I couldn't persuade him to come. Things went well, except for Bill shot the teller."

Virtually all of this statement is against the declarant's penal interest under *Williamson v. United States,* 512 U.S. 594 (1994). *Williamson* requires each declaration, including identification of other individuals, to be "truly self-inculpatory." In this example, identification of Bill is disserving to the speaker because it demonstrates inside information and involves the declarant in a conspiracy as well as felony murder. Identification of Jimmy is also inculpatory of the speaker because it is an admission that he tried to enlist another person in the conspiracy. Moreover, the declarant made his statement to a trusted loved one, with no apparent intent to shift blame to others or curry favor with the authorities. Statements such as those in the example are routinely found to be disserving even after *Williamson.* See, e g., *United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (statements made by cohorts to another cohort about a prior crime involving Shukri and identifying Shukri by name were against the declarants' penal interest, because they were made to friends and "because Kartoum discussed his intimate knowledge of and involvement in the multiple thefts for which both he and Shukri were arrested."); *United States v. Desena,* 260 F.3d 150 (2d Cir. 2001) (statements at a Hell's Angel's meeting about an arson in which defendant was involved was disserving because it was made to associates and identified the declarant and the defendant as conspirators).

The way the Rule currently reads, the declarant's statement to his girlfriend (assuming he is unavailable) would be admissible against Bill simply because it is against the declarant's penal

interest – no additional admissibility requirement must be met In contrast, more is required for Jimmy to have the exact same statement admitted in his favor at his trial. Jimmy must show not only that the statement is disserving to the declarant, but also that there are corroborating circumstances clearly indicating the trustworthiness of the statement.

Thus, the text of the Rule is asymmetrical. It imposes an admissibility requirement on the defense that is not imposed on the prosecution for the same category of hearsay statement. Moreover, the way the Rule currently reads, there is no corroborating circumstances requirement if the statement is offered in any civil litigation arising from the robbery.

## *The Legislative History*

The legislative history of the asymmetrical corroborating circumstances requirement can be summarized as follows (most of this is taken from Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 Georgetown L.J. 851 (1981)):

1. The corroborating circumstances requirement was not included in the initial Advisory Committee draft. To the contrary, the initial proposal provided that "a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused", was not admissible under the exception. Members of Congress adamantly demanded that a corroborating circumstances requirement be added for exculpatory statements. They were concerned that defendants would get unsavory characters to claim out of court that they and not the defendant did the crime charged--then these unreliable declarants would simply invoke the privilege and refuse to testify at the defendant's trial. The Advisory Committee complied by adding a corroborating circumstances requirement for exculpatory statements against penal interest.

2. Nobody focused on whether the corroborating circumstances requirement should apply to inculpatory statements, because at the time the sentence was added, the Rule prohibited statements implicating both the declarant and the accused. There was no need to consider a corroborating circumstances requirement for inculpatory statements because they were inadmissible anyway.

3. Congressional pressure was then put on the Advisory Committee to delete the sentence that precluded admissibility of inculpatory statements. The Advisory Committee succumbed to this pressure and deleted the sentence. (It was later restored and then deleted again, this time by Congress). But the Committee never addressed or recognized the disparity it then created by imposing a corroborating circumstances requirement on the accused but not on the prosecution. This seems simply to have been an oversight due to the sequencing of the changes--first the addition of a corroborating circumstances requirement at a time when inculpatory statements were inadmissible under the Rule; then a change to the Rule to permit some admissibility for inculpatory statements, without thinking about how the two changes would fit together.

4. Only one person in the entire legislative process flagged the anomaly of the one-way corroborating circumstances requirement. During a markup session in the House Subcommittee, Representative Holtzman asked why the corroborating circumstances requirement should not be imposed on the government. Associate counsel to the Subcommittee responded that a corroborating circumstances requirement imposed on the government would be superfluous "because *Bruton* created a confrontation clause bar to all government offered penal interest statements by an unavailable declarant." In fact this was a misreading of *Bruton*, as subsequent case law has clearly proved out. *Bruton* does not prohibit inculpatory declarations against penal interest that are admissible under Rule 804(b)(3). Thus, the Subcommittee was (mis)informed that inculpatory penal interest statements would *never* be admissible as a constitutional matter, which would have made a corroborating circumstances requirement for such statements unnecessary.

### *Conclusion on Legislative History*

It is fair to state that the one-way corroborating circumstances requirement for declarations against penal interest did not result from a considered decision by anybody involved in the process. Rather, it is a product of mistaken assumptions and oversight. Thus, an amendment extending the the corroborating circumstances requirement to all declarations against penal interest would not be contrary to the legislative history. On the other hand, an amendment that would *delete* the corroborating circumstances requirement would be contrary to the legislative history, because Congress was clearly concerned about the reliability of declarations against penal interest when offered to exculpate an accused.

## *Case Law on the Corroborating Circumstances Requirement*

Most of the Circuits apply the corroborating circumstances requirement equally to inculpatory and exculpatory against penal interest statements. That is, most courts apply the Rule differently from the way it actually reads. Thus, an amendment extending the corroborating circumstances requirement to all declarations against penal interest would bring the text of the Rule in accord with most of the case law.

Roger Pauley had previously argued that the case law applying the corroborating circumstances requirement to inculpatory statements was all decided before the Supreme Court's decision in *Williamson v. United States,* 512 U.S. 594 (1994). In *Williamson,* the Court held that for a statement to be "against interest" under Rule 804(b)(3), the statement had to be "truly self-inculpatory" of the declarant's interests. The Court further held that confessions by accomplices to police officers are usually not self-inculpatory to the extent the declarant specifically identifies other

perpetrators. This is because a person confessing to a police officer may have a desire to shift blame or curry favor with the authorities by identifying cohorts. Thus, *Williamson* imposes relatively rigorous standards for the "against penal interest" requirement in Rule 804(b)(3). The Court in *Williamson* specifically declined to decide whether Rule 804(b)(3) imposed a corroborating circumstances requirement on declarations against penal interest offered by the prosecution.

Roger Pauley relied on two premises for his contention that the circuit courts would not be imposing a corroborating circumstances requirement on inculpatory against penal interest statements after *Williamson:* 1. *Williamson* left the question open; and 2. By ratcheting up the "against penal interest" requirement, the *Williamson* Court rendered a corroborating circumstances requirement unnecessary at best and unduly burdensome on the prosecution at worst.

Whatever the merits of Roger's premises, the fact is that most Circuits impose a corroborating circumstances requirement on inculpatory against penal interest statements, and that the case law on this point *has not been changed* by *Williamson.*

**Here is a short summary of case law in the circuits imposing a corroborating circumstances requirement on the prosecution:**

**First Circuit:**

*United States v. Barone,* 114 F.3d 1284 (1st Cir. 1997) ("Although this court has not expressly extended the corroboration requirement to statements that inculpate the accused, we have applied the rule as if corroboration were required for such statements."). (post-*Williamson*).

**Fifth Circuit:**

*United States v. Alvarez,* 584 F.2d 694 (5thCir. 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)").

**Sixth Circuit:**

*United States v. Tocco,* 200 F.3d 401 (6th Cir. 2000) (specifically requiring corroborating circumstances for statements offered by the prosecution, and finding such circumstances met because the declarant made statements to his son without a motive to shift blame or curry favor, and independent evidence indicated that the statements were true). (post-*Williamson*)

**Seventh Circuit:**

*United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) ("For the Rule 804(b)(3) exception to apply, the proponent of an inculpatory statement must show that * * * corroborating circumstances bolster the statement's trustworthiness."). (post-*Williamson*).

**Eighth Circuit:**

*United States v. Gjerde,* 110 F.3d 595 (8th Cir. 1997) (corroborating circumstances required for statements offered by the prosecution; here, the truthfulness of the declarant's statement was corroborated by the defendant's own statement) (post-*Williamson*); *United States v. Hazelett,* 32 F.3d 1313 (8th Cir. 1994) (requiring corroborating circumstances for inculpatory declarations against penal interest; confession of accomplice to police officers inadmissible because it was not truly self-inculpatory under *Williamson*).

**Eleventh Circuit:**

*United States v. Taggart,* 944 F.2d 837 (11th Cir. 1991): (requiring corroborating circumstances for prosecution-offered statements; no analysis given).

**Some Circuits have not decided whether to impose a corroborating circumstances requirement on statements offered by the government:**

**D.C. Circuit:**

No discussion found.

**Third Circuit:**

*United States v. Moses,* 148 F.3d 277 (3rd Cir. 1998) (statement found disserving after *Williamson* where it was made to a friend and there was no indication that the declarant was shifting blame; no discussion of corroborating circumstances in the context of the hearsay exception, but the court looks to corroborating circumstances and determines that they are sufficient to meet the trustworthiness requirement of the Confrontation Clause); *United States v. Palumbo,* 639 F.2d 123

(3d Cir. 1981) (post-custodial statement implicating defendant was not sufficiently disserving to be admissible, concurring opinion urges that prosecution be required to provide corroborating circumstances clearly indicating trustworthiness).

**Ninth Circuit:**

*United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995): In a prosecution arising out of arson of a home, the Court declined to decide whether corroborating circumstances are required when a declaration against interest is offered to inculpate an accused The Court found that, even if such circumstances are required, they existed in this case.

**Two Circuits have case law going both ways:**

**Second Circuit:**

*United States v. Desena,* 260 F.3d 150 (2d Cir. 2001) (statement at a Hell's Angel's meeting about an arson in which defendant was involved was properly under Rule 804b3–it was disserving because made to associates, and it was sufficiently corroborated by other witnesses and by the fact that the identified perpetrators had a motive to commit the crime) (post-*Williamson*).

*United States v. Casamento,* 887 F.2d 1141 (2d Cir. 1989) ("this Circuit requires corroborating circumstances even when the statement is offered, as here, to inculpate the accused.").

*United States v. Bakhtiar,* 994 F.2d 970 (2d Cir. 1993) (noting that corroborating circumstances are required only if the statement is offered to exculpate the accused: "here, of course, it was offered by the government" so the statement could be admitted without a showing of corroborating circumstances).

**Fourth Circuit:**

*United States v. Workman,* 860 F.2d 140 (4th Cir. 1988) ("The statement by Davis subjected him to criminal liability under the first sentence of the rule. It did not exculpate an accused, so it is not subject to the second sentence of the rule.").

*United States v. Carvalho,* 742 F.2d 146 (4th Cir. 1984) (inculpatory statement excluded because the government presented no corroborating evidence indicating the trustworthiness of the statement).

## *Previous Determination By the Advisory Committee*

At its April 2001 meeting, the Advisory Committee made the following determinations with respect to the corroborating circumstances requirement of Rule 804(b)(3):

1 Committee members recognized that most courts in fact apply the corroborating circumstances requirement to government-proffered declarations against penal interest. But it is possible that criminal defense counsel do not demand corroboration of government-proffered statements because a look at the text of the Rule indicates that the requirement is inapplicable. Therefore the Committee resolved that a two-way corroborating circumstances requirement would not only codify the predominant case law, but would also avoid a trap for the unwary.

2. Committee members stated that the proposed amendment was a necessary change that leveled the playing field in criminal cases. Other members noted that it was important to extend the corroborating circumstances requirement to civil cases. The stakes are often as high in civil as in criminal cases, and therefore the risks of admitting unreliable hearsay are just as profound. Those members also saw a positive benefit to a unitary treatment of against penal interest statements in all cases.

3. Committee members expressed the opinion that it would be helpful to set forth in the Note some guidelines on how the courts have applied the corroborating circumstances requirement. It was generally agreed that the Note should be simply descriptive of the case law, rather than an expression of the Committee's opinion on how the corroborating circumstances requirement should be applied. Members also agreed that the Note should make clear that a court applying Rule 804(b)(3) must find that the statement is "against interest" before it considers whether corroborating circumstances exist. Moreover, the factors supporting corroborating circumstances must be independent of the fact that the statement is against the declarant's penal interest, i.e., the against-interest factor is not to be double-counted as a corroborating circumstance indicating the trustworthiness of the statement.

4. The Committee rejected an alternative that would have leveled the playing field by deleting the corroborating circumstances requirement from the Rule, so that neither the accused nor the prosecution would have to provide corroborating circumstances for an against penal interest statement. This solution would result in a substantial change to the case law, and would be contrary to the legislative history of Rule 804(b)(3), in which Congress expressed strong concern about the reliability of against penal interest statements. The Committee could point to nothing indicating that the reliability of against penal interest statements has increased over time in such a way as to justify dispensing with the corroborating circumstances requirement.

5. Ultimately, the Committee voted to recommend to the Standing Committee that the amendment to Rule 804(b)(3) and the accompanying Committee Note (both set forth in Part One) be released for public comment. One Committee member, the Department of Justice Representative, dissented. (The DOJ objections to the proposed amendment will be discussed in Part Three, below).

### *Determination By the Standing Committee*

The Standing Committee approved the proposed amendment for release for public comment, but there were two dissenting votes–which is rare at the public comment stage–and it is fair to state that a number of Standing Committee members were sympathetic to the Department of Justice's position that a two-way corroborating circumstances requirement should not be added to the Rule. The concerns expressed by some Standing Committee members, which basically tracked those of the Justice Department, will be discussed in detail in Part Three.

But beyond those concerns, the Standing Committee instructed the Advisory Committee to focus on several specific points during the public comment period. Those points are:

1. Several Standing Committee members thought that exculpatory statements are usually made under a different set of circumstances than inculpatory statements. They reasoned that if exculpatory statements are made under especially unreliable circumstances, it would make sense to impose a corroborating circumstances requirement on such statements, but not on inculpatory statements against penal interest. The Advisory Committee was instructed to consider whether there is a reliability-based difference between exculpatory and inculpatory statements that would justify applying the corroborating circumstances requirement to one set of statements and not the other.

2. Several Standing Committee members were unconcerned about the apparent asymmetry in the current Rule 804(b)(3). They seemed to believe that any disparity is answered by the fact that the prosecution has the burden of proof beyond a reasonable doubt. Committee members were interested in whether there are other evidentiary rules that impose a similar comparative disadvantage on the accused.

3. Committee members noted that the merits of the proposed amendment had been argued at an abstract level. They requested a concrete fact situation in which the corroborating circumstances requirement would make a difference. That is, in what cases would a government-proffered statement satisfy the against interest requirement of the Rule but not satisfy the corroborating circumstances requirement? It is such a statement–one that satisfies one hurdle but not the other–that would be admissible under a literal reading of the current Rule and inadmissible under the predominant case law and the Rule as amended. The Standing Committee requested a concrete factual situation in order to get a handle on whether the amendment would make a needed change.

4. DOJ argued that a corroborating circumstances requirement would be redundant in light of the government's obligation to satisfy the reliability requirements of the Confrontation Clause. The Standing Committee asked the Advisory Committee to provide some guidance on the relationship, if any, between the corroborating circumstances requirement and the reliability requirements of the Confrontation Clause.

5. DOJ's alternative argument was that to add a corroborating circumstances requirement to the "truly self-inculpatory" requirement after *Williamson* would set such a high bar that the government would never be able to admit a hearsay statement under Rule 804(b)(3). The Standing Committee noted that a two-way corroborating circumstances requirement already exists in a number of states. It asked the Advisory Committee to investigate the practice in those states to determine whether the corroborating circumstances requirement has imposed an insurmountable burden on the government in those states.

In response to the suggestions of the Standing Committee, the Advisory Committee's Chair and Reporter devised a list of questions that were sent out together with the proposed amendment for public comment. Those questions are as follows:

1. In terms of trustworthiness, is there a difference between statements against penal interest when offered to exculpate an accused and such statements when offered to inculpate the accused? Are the circumstances under which exculpatory statements are or may be made different from those surrounding inculpatory statements in such a way as to justify, as a bright-line rule of law, the asymmetry of the corroborating circumstances requirement in the current Rule?

2 Are there other examples of rules, evidentiary or otherwise, that are asymmetrical in the government's favor? If so, what is their justification?

3. Are there examples of government-proffered statements that have satisfied or would satisfy the against-penal-interest requirement of Rule 804b3 but have not satisfied or would not satisfy a corroborating circumstances requirement?

4. Would the corroborating circumstances requirement add anything to the Rule that is not already required by the Confrontation Clause?

5. Several states, e.g., Kentucky and Texas, have written a two-way corroborating circumstances requirement into the state version of Rule 804(b)(3). How has the Rule operated in practice in those states? Have prosecutors been unduly burdened by the Rule?

## III. Extending the Corroborating Circumstances Requirement to Against Penal Interest Statements Offered By the Government–Criticisms and Responses

The Justice Department has understandably taken the lead in objecting to the proposed amendment's extension of the corroborating circumstances requirement to inculpatory statements against penal interest But DOJ is not alone. Several Standing Committee members seemed sympathetic to the Department's arguments. Also, one public commentator, Professor Lynn McClain (01-EV-005), opposed the proposed amendment on the ground that it would add "an extra complication for the trial judge and another hurdle for the prosecution, when the Supreme Court's decision in *Williamson* has already made the route to admissibility of a statement against penal interest a long and winding one."

It is appropriate, therefore, to discuss in detail the basic objections to the proposed amendment, as well as any possible responses that might be made to those objections. The first part of this section outlines the objections; the second part outlines the potential responses.

## *Objections to a Two-Way Corroborating Circumstances Requirement*

### *1. The Rule Is Already Symmetrical*

DOJ argues that "the rule is already symmetrical as the Government's Constitutional burden counterbalances the rule's requirement that defendants establish the corroborating circumstances in order to introduce exculpatory statements." The Confrontation Clause requires the government to show that a hearsay statement is reliable. After *Lilly v. Virginia,* 527 U.S. 116 (1999), courts have held that the federal hearsay exception for declarations against penal interest is not "firmly rooted", meaning that a hearsay statement does not automatically satisfy the Confrontation Clause simply because it fits into the exception. See, e.g., *United States v. Robbins,* 197 F.3d 829 (7th Cir. 1999) (Rule 804(b)(3) is not a firmly-rooted exception, relying on the plurality opinion in *Lilly*). (*Lilly* held that a state version of the exception was not firmly rooted). Therefore, to admit a declaration against penal interest consistently with the Confrontation Clause after *Lilly*, the government is required to show that the statement carries "particularized guarantees of trustworthiness" that indicate it is reliable. According to DOJ, this requirement imposed by the Confrontation Clause "offsets the defendant's corroboration requirement now in the rule." If a corroborating circumstances requirement is added on top of all that, this could "create an imbalance that would unjustifiably place a greater burden on the Government than on the defendant in presenting statements against interest." On this point, the Department concludes as follows:

> As drafted, the rule could be read to place an additional burden on the Government beyond that required by the Constitution. Rather than leveling the playing field, the rule could be read

to tilt in the defendant's favor by subjecting evidence offered by the Government to more rigorous screening (i.e., both the rule's corroboration requirement and the Confrontation Clause reliability test) than that offered by the defense.

### *2. The Corroborating Circumstances Requirement Is Too Rigorous When Added To the Existing Requirements in the Rule and Under the Confrontation Clause.*

DOJ argues that if a corroborating circumstances requirement is added to the *Williamson* "truly self-inculpatory" requirement and the Constitutional requirement of particularized guarantees of trustworthiness, the combination of these three requirements will be so rigorous that it will be virtually impossible to admit an against penal interest statement. DOJ elaborates as follows:

> It is unclear what inculpatory statements against penal interest that satisfy *Williamson* and *Lilly* reliability tests would remain so insufficiently reliable as to warrant the creation of a further hurdle under which such statements would be admissible only if "corroborating circumstances clearly indicate . . . trustworthiness . . . ." The proposed rule might encourage mischief by implying incorrectly that the Government must satisfy some more restrictive standard than that already set forth by the Supreme Court. As the agency with responsibility for prosecuting all federal criminal cases, and with the constitutional duty to prove charges beyond a reasonable doubt, we are concerned with any obstacle that needlessly and improperly impairs our ability to present reliable and probative evidence to the trier of fact.

### *3. The Corroborating Circumstances Requirement Would Needlessly Track the Reliability Requirements Already Imposed by the Confrontation Clause.*

The argument in #2, *supra*, is that the corroborating circumstances test adds an admissibility requirement *in addition* to that already imposed by the reliability requirement of the Confrontation Clause. If that is not the case, then the only effect of extending the corroborating circumstances requirement in the Rule would be to *codify* the Confrontation Clause requirement that the government prove "particularized guarantees of trustworthiness"for hearsay that does not fit into a firmly rooted exception. In other words, the term "corroborating circumstances clearly indicating trustworthiness" would be construed as equivalent to "particularized guarantees of trustworthiness."

The Department argues that it is unnecessary to codify the constitutional requirement of particularized guarantees of trustworthiness. Because the Constitution already requires that standard to be met, the argument is that nothing is gained by adding the standard to the hearsay exception. Professor McClain puts it this way:

> The proposed amendment would serve only to add one life preserver on top of another, with

more buckles to buckle – taking up time and weighing us down, but not adding any measure of safety. If the Committee cannot demonstrate a need for the amendment, there is no reason to make it.

Another point to be made in criticism of the proposal is that if it is an attempt to codify the constitutional requirement of "particularized guarantees of trustworthiness," then it is a problematic attempt because the language of the Rule is different from the language defining the constitutional standard in the case law. "Corroborating circumstances clearly indicating the trustworthiness of the statement" is not necessarily identical to "particularized guarantees of trustworthiness." See *Idaho v. Wright*, 497 U.S. 805 (1990) ("particularized guarantees of trustworthiness" required for hearsay admitted under a non-firmly rooted exception); *Lilly v. Virginia, supra* (requiring a finding that hearsay admitted under a non-firmly rooted exception must bear "particularized guarantees of trustworthiness"). Nor is the case law construing the two standards congruent. Under Rule 804(b)(3), many courts have found that corroborating *evidence* can satisfy the standard of "corroborating circumstances clearly indicating the trustworthiness of the statement." So for example, corroborating circumstances can be found if the statement is verified by the defendant's own statement, testimony of eyewitnesses, or the existence of physical evidence. See, e.g., *United States v. Desena*, 260 F.3d 150 (2d Cir. 2001) (declarant identified himself and the defendant as perpetrators of an arson; the corroborating circumstances requirement was met in part by the testimony of an eyewitness whose description of the scene of the arson the day of the crime matched the declarant's description of the defendant's actions). In contrast, under the Confrontation Clause, the requirement of "particularized guarantees of trustworthiness" cannot be met by reference to corroborating evidence; the statement must be found reliable by reference to the circumstances surrounding the statement, e g., that it was spontaneous, made to a trusted person, etc.. See *Idaho v. Wright, supra* ("[W]e are unpersuaded by the State's contention that evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness.' To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.").

Thus, if the intent of extending the corroborating circumstances requirement to inculpatory statements is to codify the reliability requirements of the Confrontation Clause, the attempt is arguably misguided because the language chosen carries a case law construction that differs from existing Constitutional standards. A more effective codification would track the language in the case law of "particularized guarantees of trustworthiness"–again assuming that the intent of the amendment is to codify the constitutional test. Yet this amendment could be problematic in its own right because it would change the case law applying Rule 804(b)(3) to *exculpatory* statements, in which the lack of corroborative *evidence* has often been found a good reason for excluding statements that are disserving and offered by the accused. See, e.g., *United States v. Pohlman*, 1996 WL 534161 (10th Cir.) (statements by defendant's boyfriend that the defendant was duped into transporting drugs was properly excluded for lack of corroboration; there was no supporting evidence other than the defendant's own statements that she knew nothing about the drugs).

***4. Assuming the Rule is Asymmetrical, There Is Good Reason for That Asymmetry.***

Professor McLain has stated that whatever asymmetry exists in the Rule is justified, and some members of the Standing Committee have intimated agreement with that view. The contention is that exculpatory statements are on the whole less reliable than inculpatory statements. The asserted difference in reliability is based on an assumption that there is a difference in the context in which the respective statements are ordinarily made. The following discussion considers the contexts in which inculpatory and exculpatory declarations against interest are usually made, in an effort to determine whether there is some class-wide differential in reliability between inculpatory and exculpatory statements against penal interest.

*Contexts for Inculpatory Declarations Against Penal Interest*

Of course, inculpatory statements are often made to police officers–e.g., a confession from an accomplice that "Joe and I robbed the bank" or "Joe supplied me with drugs." These statements are made under unreliable circumstances insofar as they identify another person, because the declarant may have an interest in currying favor with the authorities. But these are the kind of statements that, after *Williamson*, are not admissible because to the extent they identify the accused they are not "truly self-inculpatory" with respect to the declarant. See, e.g., *United States v. Valenzuela,* 53 F.Supp.2d 992 (N.D.Ill. 1999) (statements by an accomplice made to a police officer after arrest, identifying the defendant as a participant in drug transactions, are not sufficiently disserving of the declarant's interests to be admissible under Rule 804(b)(3)).

After *Williamson*, most of the inculpatory statements found to be against the declarant's penal interest under Rule 804(b)(3) have been made to friends or associates under informal circumstances, in which there is no indication that the declarant is currying favor with the authorities or attempting to shift blame to the accused. See, e.g., *United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (statements made among cohorts about a prior crime involving Shukri and identifying Shukri by name; the statements were self-inculpatory, even insofar as they identified Shukri, because they were made to friends and "because Kartoum discussed his intimate knowledge of and involvement in the multiple thefts for which both he and Shukri were arrested."); *United States v. Robbins,* 197 F.3d 829 (7th Cir. 1999) (accomplice's statement to his former fiancé that he "sold pot" with Robbins was self-inculpatory as to the accomplice; the statement was not a confession to law enforcement officers, where the declarant may have been trying to shift blame to others; rather, the statement was made voluntarily in a conversation between the declarant and a trusted confidante); *United States v. Boone*, 229 F.3d 1231 (9th Cir. 2000) (statement by an accomplice who implicated himself and the defendant in a robbery was self-inculpatory as to the accomplice; the statement was not made to police, and "[h]e simply was confiding to his girlfriend, unabashedly inculpating himself while making no effort to mitigate his own conduct ").

Another fact situation in which inculpatory statements are considered against the declarant's

penal interest arises when the declarant confesses to a crime and the statement inculpates the defendant only by inference, not by directly naming him. An example is a plea allocution in which an accomplice admits to entering a conspiracy, but any direct reference to the defendant as a conspirator is either not made or is deleted from the statement when it is admitted at the defendant's trial. See, e.g., *United States v. Centracchio,* 265 F.3d 518 (7th Cir. 2001) (plea allocutions of coconspirators were properly admitted to show that a conspiracy existed, defendant not directly named, and limiting instruction given; the court notes that "the plea allocution is admissible under Rule 804(b)(3) even if it tends to incriminate the other defendants when coupled with other evidence at trial"). The statement, as redacted, is not considered to "curry favor" with the authorities because after redaction it directly implicates only the declarant. *Compare United States v. Tropeano,* 252 F.3d 653 (2d Cir. 2001) (three people allegedly involved in a conspiracy and two enter plea allocutions; a plea allocution statement that the declarant conspired with "more than one person" was not disserving under *Williamson*; it would have been sufficient to say that he conspired with one person; the reference to more than one person did not disserve the declarant's interest, and may have been currying favor with the prosecution because the third conspirator was still to be tried).

*Contexts for Exculpatory Declarations Against Penal Interest*

The circumstances in which exculpatory statements– e.g., the declarant says something like, "the drugs were mine, not the defendant's" or "the defendant is being charged with something that I did, not him"– have been offered have fallen into three basic categories: 1 Confessions to law enforcement officers; 2. Formal statements made to a lawyer, investigator, or the like, with the apparent intent to influence a litigation; and 3. Informal statements to friends or associates.

Unlike inculpatory statements, confessions made to law enforcement officers that directly *exculpate* the accused have sometimes been found self-inculpatory of the declarant even after *Williamson*. See, e.g., *United States v. Price,* 134 F.3d 340 (6th Cir. 1998) (statements made by declarant in custody, indicating that the drugs were the declarant's and that Price was present but not involved, were self-inculpatory). The reason for this "asymmetry" has been expressed by the Ninth Circuit in *United States v. Paguio,* 114 F.3d 928 (9th Cir. 1997):

> When the prosecution attempts to take advantage of the rule, as in *Williamson*, the statement is typically in the form, "I did it, but X is guiltier than I am." As a matter of common sense, that is less likely to be true of X than "I did it alone, and not with X." That is because the part of the statement touching on X's participation is an attempt to avoid responsibility or curry favor in the former, but to accept undiluted responsibility in the latter.
>
> Prosecution use of an unavailable declarant's accusation of the defendant, as in *Williamson*, raises different concerns from a defendant's use of an unavailable declarant's confession which exonerates him. ... The Constitution gives the "accused," not the government, the right of confrontation. ... The accused's right to present witnesses in his own defense may be implicated where an absent declarant's testimony is improperly excluded from evidence. ... We raise the constitutional asymmetry because it helps explain why application

of the rule of evidence is to some extent asymmetrical between defense and prosecution.

Thus, an exculpatory statement in custody usually tends to disserve the declarant's interest because it is not an attempt to curry favor with the authorities (far from it) and could serve to aggravate the declarant's offense. In contrast, a statement in custody identifying the defendant as a perpetrator does not tend to inculpate the declarant after *Williamson* because of the likelihood that the declarant is currying favor with the authorities by identifying other participants in the crime. *See also United States v. Nagib*, 56 F 3d 798 (7th Cir. 1995) (statements exculpating the defendant, made by the declarant at his own sentencing, were all sufficiently against the declarant's penal interest: "[T]here is no indication in the record that [the declarant] attempted to curry favor with the authorities when making his statement at sentencing. There is no record of any plea agreement or downward departure for cooperation.").

None of this proves the proposition, however, that exculpatory statements are made under less reliable circumstances than inculpatory statements. Rather, in the context of statements made in custody, it shows that the statements are made under the same circumstances but that exculpatory statements are *more* reliable than inculpatory statements.

The second type of situation in which exculpatory statements are made is where the declarant makes a prepared statement that takes responsibility for the crime and exculpates the defendant, after the defendant has already been charged with the crime. These statements often are made in defense counsel's office or to a private investigator retained by the defendant. They are roughly comparable to plea allocutions that inculpate the defendant, in the sense that they are made in the context of the formalities of litigation.

In a few cases, formal statements exculpating an accused and made in anticipation of litigation have been found self-inculpatory with respect to the declarant's penal interest. As such they have been found admissible (so long as corroborating circumstances are found) without the need to redact any direct references to the accused. The leading case is *Paguio, supra,* in which the defendant's father made statements to the defense attorney, to the effect that the father had masterminded a scheme and the defendant was an unwitting dupe who had "nothing to do with" the charged fraud. The trial court admitted only the statements in which the father admitted his own activity, and excluded all direct references to the defendant's innocence. The Court of Appeals reversed, finding that the statements directly exculpating the defendant were disserving to the father's penal interest and so should have been admitted. The Court stated that in context, "the father's statement that his son had nothing to do with it was inculpatory of the father as well as exculpatory of the son. The father admitted not only participation but leadership, leading his son and daughter-in-law into the abyss. Because leading others into wrongdoing has always been seen as especially bad, there is a sentencing enhancement for it." The Court also found sufficient corroborating circumstances guaranteeing the trustworthiness of the statement–there was a good deal of evidence supporting the contention that the father was the lead player and the son did not know what was going on, and while the father may have been acting under a motive of love for his son, this was not enough to overcome the corroborating evidence.

Most courts, however, have excluded exculpatory statements when they are made under formal circumstances in an apparent attempt to influence the defendant's trial. Sometimes the reasoning is that the declarant has some motive that overwhelms any disserving aspect of the statement, and therefore the statement is not sufficient disserving under *Williamson*. Thus, in *United States v. Alvarez,* 266 F.2d 587 (6th Cir. 2001), the defendant was charged with murdering a drug dealer who owed him money on a drug deal. The defendant proffered a statement from another drug dealer that the victim owed that dealer money on a different drug debt. This statement was offered to show that others had the motive to kill the victim. The statement was made in defense counsel's office, after counsel told the declarant that there was no way that he could be convicted on the basis of the statements. The Court found that under these suspicious circumstances, the statement was not sufficiently disserving of the declarant's interest to qualify under *Williamson*.

Other courts have held statements made in an apparent attempt to influence the defendant's trial to be inadmissible because the accused failed to provide corroborating circumstances clearly indicating trustworthiness. See, e.g., *United States v. Johnson,* 19 F.Supp.2d 720 (W.D.Tex. 1998) (officers found drugs stashed in a rental car operated by the defendant; defendant proffers a notarized letter to a private investigator indicating that the declarant mistakenly left drugs stashed in the rental car that was, by coincidence, later rented by the defendant; the corroborating circumstances requirement not met, the declarant was a friend of the defendant, and the story was implausible because it depended on an assumption that the declarant didn't keep very good track of large quantities of drugs and the coincidence that the defendant later rented the drug-laden car); *United States v. Jones*, 124 F.3d 781 (6th Cir. 1997) (letter to the defendant from the defendant's son, in which the son takes responsibility for some of the acts charged to the defendant, was properly excluded due to lack of corroborating circumstances; besides the possible motive of a son to exculpate his father, the timing of the letter was suspect, because the son wrote the letter on the eve of defendant's trial; the letter was sent in response to two letters the defendant had written to the son, specifically directing the son what to say to the lawyer and at trial; and the letter was written after a visit from defendant's attorney, who told the son that he could get immunity for him); *United States v. Lowe,* 65 F.3d 1137 (4th Cir. 1995) (defendant charged with shooting a person at a picket line with a Colt revolver; the defendant wants to prove that before the incident he sold his Colt revolver to Starkey, a fellow union member; Starkey made a statement to his attorney that he bought the gun from the defendant; this statement was properly excluded for lack of corroborating circumstances; the statement was made in an apparent attempt to exculpate a fellow union member who had already been charged; while the statement was technically disserving, it was not substantially so, because the evidence pointed to the defendant's presence at the crime, not Starkey's).

In sum, where an exculpatory statement is made in an apparent attempt to influence the defendant's litigation, there are often trustworthiness problems, and these problems are handled by a finding either that the statement is not disserving to the declarant or that there is an insufficient showing of corroborating circumstances indicating trustworthiness. This does not mean, however, that comparable statements are necessarily more reliable. Indeed, they are redacted insofar as they directly implicate the defendant.

The third situation in which exculpatory statements are made is identical to the circumstances in which most admissible inculpatory statements are made–the declarant makes a statement informally to a trusted friend, relative or associate. These statements are ordinarily found disserving, but sometimes they are eventually excluded because the defendant is unable to prove corroborating circumstances clearly indicating the trustworthiness of the statement. See, e.g., *United States v. Camacho,* 163 F.Supp.2d 287 (S.D.N.Y. 2001) (motion for new trial based on statement made by declarant to a friend in a prison library that the defendant was convicted for a crime that the declarant committed; the Court founds the statement disserving to the declarant's interests, but finds corroborating circumstances unclear, because the declarant has made some inconsistent statements and the evidence of the defendant's participation cuts both ways); *United States v. Brown,* 1997 WL 570348 (6th Cir. ) (unpublished) (statement from the defendant's brother to his friend that the brother committed robberies charged to the defendant was against the brother's penal interest; but the statements were properly excluded for lack of corroborating circumstances, because the evidence indicated that the brother was not in town on the dates on which the robberies occurred). Thus, in an identical fact situation–informal statements made to trusted persons–inculpatory statements can be admitted without a showing of corroborating circumstances while exculpatory statements are excluded without such a showing. There seems to be no justification for this distinction.

**To sum up on the question of whether asymmetry is justifiable due to difference in circumstances under which inculpatory and exculpatory statements are mad:**

Inculpatory statements and exculpatory statements found disserving are often made under similar circumstances–informally to a friend or associate. In this circumstance, it seems hard to justify the asymmetry of the corroborating circumstances requirement. Exculpatory statements are also made under more suspicious circumstances, such as in an apparent attempt to influence litigation. In this situation, there is good reason to impose a corroborating circumstances requirement, but it does not follow that inculpatory statements made under similar circumstances (such as plea allocution statements) should therefore be excused from such a requirement. In a third situation, statements in custody, exculpatory statements are usually found disserving and inculpatory statements are not. There is good reason to require corroborating circumstances in this situation for exculpatory statements; but again it does not follow that corroborating circumstances are unnecessary in those cases where inculpatory statements are found disserving.

***5. Any Asymmetry in the Rule Is Offset By the Government's Obligation to Prove the Charges Beyond a Reasonable Doubt.***

Two members of the Standing Committee were not troubled by any alleged asymmetry in the corroborating circumstances requirement in the current Rule. Assuming a disparity in favor of the

government, those members found the disparity offset by the burden on the government to prove its case beyond a reasonable doubt. They admitted that this argument would be stronger if there are other evidence rules that give a similar comparative advantage to the government. Whether other Evidence Rules contain a similar disparity will be addressed in the responses to criticisms set forth in this section, *infra*.

***6. If a Statement is "Truly Self-Inculpatory" Under Williamson, It Will Automatically Satisfy Any Corroborating Circumstances Requirement, So It Is Unnecessary To Include the Requirement In the Rule.***

Some members of the Standing Committee believed that the corroborating circumstances requirement, in application, adds nothing to the stringent "against interest" requirement imposed by *Williamson*. Put another way, they assumed that a statement found "truly disserving" under *Williamson* would by that very fact carry corroborating circumstances that clearly indicate trustworthiness. Those members were particularly interested in whether the Advisory Committee could articulate a case in which a statement would be "truly self-inculpatory" under *Williamson* and yet would not possess sufficient corroborating circumstances to justify admission.

## *Possible Responses to the Objections to a Two-Way Corroborating Circumstances Requirement*

Most of the possible responses to the criticisms of DOJ and others are muddled by the fact that the term "corroborating circumstances clearly indicating trustworthiness" is nowhere defined and is subject to two possible interpretations. One possibility might require corroborative *evidence*, either alone or in addition to circumstantial guarantees of reliability. The other possibility is to define corroborating circumstances solely by reference to circumstantial guarantees of reliability inherent in the making of the statement itself–without any reference to independent evidence indicating that the statement is in fact true. This latter definition would be analogous to the test for "particularized guarantees of trustworthiness" under the Confrontation Clause; as discussed above. In *Idaho v. Wright,* the Court, construing the Confrontation Clause, distinguished between corroborating evidence and particularized circumstantial guarantees indicating the trustworthiness of the statement.

Under Rule 804(b)(3), most courts hold that corroborating evidence is either permitted or required to meet the corroborating circumstances requirement; but others focus solely on the circumstances under which the statement is made. The proposed Committee Note to the amendment makes this point:

> For example, some courts look to whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the

declarant's account). Other courts hold that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

See also *United States v. Doyle,* 130 F.3d 523 (2d Cir. 1997) (corroborating circumstances requirement mandates a showing of both evidentiary corroboration and circumstantial guarantees of trustworthiness)

The Committee Note to the proposed amendment does not take an explicit position on which of these views is correct. It does mention that corroborative evidence is a relevant factor, but only in the context of what the case law has held. The Association of the Bar of the City of New York (01-EV-010) argues that the Note is troubling because it "leaves some ambiguity as to whether the corroborating-circumstances requirement may be satisfied by evidence suggesting the reliability of the statement even in the absence of independent proof of its truth." The Committee Note is purposely ambiguous because the intent was simply to describe the case law–and the case law is ambiguous and conflicted about what is meant by "corroborating circumstances".

The difference between meeting the evidentiary requirement through corroborative evidence or instead through circumstantial guarantees of trustworthiness is an important one. For example, under the "circumstantial guarantees of reliability" test, a disserving statement could be admissible if it is particularly reliable, even if there is no independent evidence that the statement is true. Under the "corroborative evidence" test, a statement that is barely disserving (e.g., made to a trusted person while the declarant is obviously bragging in order to make an impression) will be admissible if the proponent can show some independent supporting evidence (e.g., eyewitness testimony or forensic evidence).

The lack of unanimity about the meaning of "corroborating circumstances" means that the response to the criticisms of the amendment will often have to proceed on dual tracks–one response is appropriate if "corroborating circumstances" means corroborative evidence, and a different response must be made if "corroborating circumstances" means particularized guarantees of trustworthiness.

The fact that the response to critics of the proposed amendment must proceed along two tracks could be cause for a reconsideration of the amendment itself. It might be difficult to argue to the Standing Committee for example: "Our response is X if corroborating circumstances means one thing and Y if it means the other." One who heard that response might well ask, "Why don't you clarify what corroborating circumstances means before you try to extend it across the board?" The Committee might consider whether the proposal should be altered to define, either in the text of the Rule or perhaps in the Note, whether "corroborating circumstances" requires some showing of corroborating evidence, or whether the focus is exclusively on circumstantial guarantees of

trustworthiness.

An attempt to define "corroborating circumstances" in the text raises important questions of policy that could not be made on the fly. It would also undoubtedly result in a material change to the current proposal that could not be made without further public comment. It is for the Committee to determine whether it needs to withdraw the proposed amendment in order to attempt to provide a clear definition of the term "corroborating circumstances."

On the other hand, it could be argued that it is unnecessary to define the term because it can be left to case law development. One could argue that the point of the amendment is to make the corroborating circumstances requirement– *whatever that is* –equally applicable to the defendant and the government. This attempt to level the playing field is not dependent on precisely defining "corroborating circumstances"; it is simply based on equality of treatment. The response to the DOJ criticisms would be that the Department has no cause for complaint because whatever burdens it is suffering are suffered by the defendant as well.

Assuming that the Committee finds it unnecessary to define "corroborating circumstances" with any more precision than is currently used in the Rule, the following responses could be made to the criticisms of the proposed amendment. The responses are in the same numerical order as the criticisms set forth above.

### *1. Symmetry Restored by the Confrontation Clause*

DOJ's argument, outlined above, is that the apparent asymmetry in the corroborating circumstances requirement is offset by the government's constitutional obligation to prove particularized guarantees of trustworthiness. There are two responses to this argument, depending on whether "corroborating circumstances" includes evidentiary corroboration or is limited to circumstantial guarantees of trustworthiness:

a. *Evidentiary Corroboration:* If "corroborating circumstances" includes or requires evidentiary corroboration, then DOJ is incorrect in stating that symmetry is restored by its obligation to prove particularized guarantees of trustworthiness. This is because the constitutional standard does not permit reference to corroborating evidence. So the defendant would have an obligation to show corroborating evidence for exculpatory statements, whereas the prosecution would have no similar obligation with respect to inculpatory statements.

A possible response to that response is that the government will indeed have to provide corroborating evidence in order to survive a directed verdict, whereas the accused is not similarly obligated. Thus it might make sense to impose a corroborating evidence requirement on the accused, without the need to explicitly impose what ends up to be a redundant requirement on the government.

Yet it might not always be the case that the government provides substantial corroborating

evidence to support a declaration against penal interest. It is not unheard of for the government to present the hearsay statement as the linchpin of the prosecution, tying a number of circumstances together that would seem inconsequential without the statement. For example, in *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981), the government relied mainly on hearsay statements of accomplices to convict the defendant of participation in a narcotics conspiracy. Other than the hearsay statements, the government provided no direct evidence of the defendant's involvement. The defendant had been observed picking up the principal admitted conspirators, his brother-in-law Ybanez and friend Aguilar, at the airport; he was present at the Ramada Inn parking lot when the cocaine was apparently obtained by Aguilar and Ybanez, and a box was taken out of his car at that time that might have been drugs. The Court held that the hearsay statements were erroneously admitted under Rule 804(b)(3) and reversed the conviction, finding that the remaining evidence was completely consistent with innocent conduct. In cases like *Sarmiento*, a more rigorous corroborating evidence requirement might be thought necessary to protect the accused from conviction principally on the basis of dubious hearsay.

*b. Circumstantial Guarantees*: If "corroborating circumstances" is defined solely by reference to circumstantial guarantees of reliability inherent in the making of the statement itself, then DOJ is correct that the asymmetry in the text of the Rule is offset by the government's obligation to satisfy the constitutional standard of particularized guarantees of trustworthiness It might still be, though, that it would make sense to codify that symmetry in the text of the Rule. The fact that the asymmetry is offset by the constitutional requirement does not mean that the Rule as written should remain asymmetrical. See the further discussion in point #3, below.

***2. Adding Corroborating Circumstances To the Government's Existing Obligations Imposes Too Rigorous a Standard.***

Again there are two responses, depending on whether or not "corroborating circumstances" permits or requires corroborating evidence:

*a. Evidentiary Corroboration:* There is arguably good sense in requiring a showing of corroborating evidence in addition to the requirements that the statement be "truly self-inculpatory" and also carry particularized circumstantial guarantees of trustworthiness. A corroborating evidence requirement will assure that an accused is not convicted solely on the basis of a hearsay statement, however reliable.

It would not seem unduly burdensome for the government to provide some evidence corroborating the truth of a hearsay statement offered to prove the defendant's guilt. Hopefully such corroborative evidence would be provided as a matter of course. In the somewhat analogous area of coconspirator statements, the government is required by Rule 801(d)(2)(E) to provide independent corroborating evidence of a conspiracy before coconspirator hearsay can be considered by the jury. This requirement has not seemed unduly burdensome, and has served to protect defendants from

being convicted solely out of the mouths of self-appointed coconspirators.

Indeed there is an anomaly that exists when corroborating evidence is required for the coconspirator exception but not for the against penal interest exception. As pointed out by Professor Fishman (01-EV-007), if a statement of a coconspirator is offered under Rule 801(d)(2)(E) it must be corroborated with independent evidence of conspiracy. Yet under Rule 804(b)(3), as it currently reads, the same statement is admissible without any corroboration, because it is disserving to the declarant's interests when made to associates and the like in furtherance of the conspiracy. So the absence of a corroborating evidence requirement in Rule 804(b)(3) "often allows a prosecutor to ignore the procedural and substantive safeguards of Rule 801(d)(2)(E)."

State practice might give some insight into whether a corroborating evidence requirement imposes an insurmountable burden on the government. A number of states–Kentucky, North Carolina, Ohio, Texas and Washington–include a two-way corroborating circumstances requirement in their version of Rule 804(b)(3). All of these states except North Carolina have adopted the *Williamson* approach, requiring that each statement must be "truly self-inculpatory" of the declarant's interest before it can be admitted against the defendant. The practice in these states indicates that the burden of establishing corroboration, including corroborating evidence, has not been insurmountable for the government. See, e.g., *White v. State,* 982 S.W.2d 642 (Tex. App. 1998) (statement identifying the defendant as an accomplice was properly admitted; the statement was made to a relative with no attempt to shift blame or curry favor; and the statement was adequately corroborated: the declarant said he stole a gun to do the crime and a gun was stolen; he said he went with the defendant to a house where they counted the money, and a witness saw them there counting money); *Howard v. State,* 945 S.W.2d 303 (Tex. App. 1997) (statements made to mother and doctor, directly inculpating the defendant and labeling him as the shooter; sufficient corroboration found in evidence confirming the place and day of the robbery and the manner in which the victim was killed, as well as the defendant's own statements on the matter); *State v. Drone,* 906 S.W.2d 608 (Tex. App. 1995) (statement by defendant's girlfriend, made to friends, that she was sorry that she had washed out his bloody clothes for him, properly admitted as declaration against penal interest; the statement was corroborated by forensic evidence indicating the defendant's guilt); *State v. Valladares,* 99 Wn.2d 663, 664 P.2d 508 (1983)(corroboration requirement met by the defendant's own statements; the declarant revealed no more than the defendant himself volunteered); *State v. Parris,* 98 Wn.2d 140, 654 P.2d 77 (1982) (corroborating circumstances includes "the circumstances of the declarations themselves, and also other independent evidence of the truthfulness of the statements"; statement made to friends, implicating the defendant in a drug deal, was properly admitted; corroborating evidence indicated that the defendant was at the transaction point at the time the declarant said the source was there, and that he received an object at that point consistent with drug activity); *State v. Woods,* 1997 WL 602963 (Ohio App.) (statement by secretary about her boss' criminal activity was properly admitted; sufficient corroboration found through records of the illegal transactions, and by an indication that the secretary was indeed employed during the time of those transactions).

I have been unable to find any case from the two-way corroboration state in which the statement was found sufficiently disserving under a *Williamson* analysis and yet faltered for lack of

corroborating evidence. This state experience seems to indicate that a corroborating evidence requirement does not impose an undue burden on the government.

The most telling response to DOJ's objection that the amendment would impose an insurmountable hurdle is this: the amendment simply provides equal treatment. It imposes nothing on the government that is not already imposed on the defendant for the same type of statement. By arguing that the government would be saddled with an insurmountable evidentiary burden, isn't DOJ saying that the defendant is saddled with an insurmountable burden under the current Rule?

*Rule More Rigorous Than the Constitution?*

One possible problem with adding a corroborating evidence requirement to the Rule is that the hearsay exception would impose an admissibility requirement more rigorous than that imposed by the Confrontation Clause Generally speaking, the hearsay exceptions in the Federal Rules of Evidence are construed to be contiguous with the Confrontation Clause. See Saltzburg, Martin & Capra, *Federal Rules of Evidence Manual*, chapters 801, 803, 804, and 807 (noting the congruence between the Federal Rules hearsay exceptions and the Confrontation Clause).

It is not unprecedented, however, to enact a hearsay exception that requires a stronger showing of reliability than the Confrontation Clause. One such exception, found in many states, is the so-called "Tender Years"exception to the hearsay rule. A typical example is found in Arizona. AZ St. § 13-1416 provides that a hearsay statement made by a minor under the age of ten years describing any sexual offense or physical abuse performed with, on or witnessed by the minor, is admissible

> "if both of the following are true:
> 1. The court finds, in an in camera hearing, that the time, content and circumstances of the statement provide sufficient indicia of reliability.
> 2. Either of the following is true:
>
> (a) The minor testifies at the proceedings.
>
> (b) The minor is unavailable as a witness, provided that if the minor is unavailable as a witness, the statement may be admitted only if there is corroborative evidence of the statement."

The requirement of corroborative evidence, when it applies, imposes a standard more rigorous than required by the Constitution. Under *Idaho v. Wright*, the Confrontation Clause is satisfied by clause (1) of the Arizona exception.

While there is thus some precedent for imposing admissibility requirements beyond those

established by the Confrontation Clause, the Committee might wish to decide whether doing so is good policy–or whether this is a policy question that can be avoided on the ground that the intent of the amendment is simply to level the playing field. Thus, it could be argued that imposing an evidentiary requirement beyond the Confrontation Clause is acceptable simply because the same requirement is imposed on the defendant.

*b. Circumstantial Guarantees of Trustworthiness*: If "corroborating circumstances" means "circumstantial guarantees of trustworthiness" then a strong argument can be made that extending the requirement to inculpatory statements would not add an extra burden to the government. This is because the Confrontation Clause already requires the government to establish particularized circumstances of trustworthiness for against penal interest hearsay statements. In other words, extending the corroborating circumstances requirement to against penal interest statements would simply be codifying constitutional doctrine, and would not add to the government's burden of proving reliability. Whether such codification is a good idea is considered in the next point.

### *3. Needlessly Tracking the Reliability Requirements of the Confrontation Clause*

As discussed above, Professor McLain contends that there is no need to extend the corroborating circumstances requirement to against penal interest statements because the Confrontation Clause already requires such a showing. If "corroborating circumstances" means "corroborating evidence", then Professor McLain's argument fails, because the Confrontation Clause does not require or even permit a showing of corroborating evidence for against penal interest statements. In contrast, if "corroborating circumstances" means "circumstantial guarantees of reliability" then Professor McLain is probably correct that the extension of the corroborating circumstances requirement to inculpatory against penal interest statements would do little more than codify constitutional requirements. The question remains, however, whether codification is problematic or worthwhile. The remainder of this section considers the virtues and vices of codifying the protections of the Confrontation Clause in this context.

If codification of the Confrontation Clause is the goal of the proposed amendment, there are three potential problems with that effort. First, it would seem that the best way to track the requirements of the Confrontation Clause is to use the same language that is employed in the decisions construing that clause. Thus, if the intent of the amendment is to codify the requirements of the Confrontation Clause, a better solution would be to require the government to show "particularized guarantees of trustworthiness" before a declaration against penal interest could be admitted. That is the language used by the Supreme Court in both *Wright* and *Lilly*.

A second problem with codification is that the case law is not static. There is a risk that the Supreme Court will change course in its Confrontation Clause jurisprudence, focusing on factors additional to or different from "particularized guarantees of trustworthiness." If the constitutional

analysis changes, the Rule will be left behind the case law and would have to be amended again. The chance of a sea change in Confrontation Clause jurisprudence is unlikely but not impossible. The Court has been sharply divided in its recent Confrontation Clause cases, and various Justices (e.g., Breyer, Scalia and Thomas) have argued for a fresh start that would separate the constitutional analysis from the hearsay exceptions.

The third problem with the argument equating corroborating circumstances with particularized guarantees is: why codify the Confrontation Clause in a hearsay exception? Since the government already has the burden of proving trustworthiness under the Constitution, what would be the point of adding it to the hearsay exception as well?

There are several possible answers to the question, "what is the point of codifying the requirements of the Confrontation Clause?" First, it could be argued that it is simply bad policy to have a hearsay exception that requires *less* than the Constitution. It would mean that there is a rule in the Federal Rules of Evidence that is unconstitutional if applied literally. It just seems to be a bad idea to have Evidence Rules that are facially unconstitutional.

It is notable that courts have struggled mightily to read Evidence Rules as if their text was consistent with the Constitution, they are obviously uncomfortable with having Evidence Rules that are facially unconstitutional. One example is the cases construing Rules 413-415 Courts have gone a long way to read those Rules as incorporating a Rule 403 balancing test, even though that is not evident in the text of those Rules. The rationale for that tenuous construction is that otherwise the Rules would violate the due process rights of a defendant charged with a sex crime. See *Federal Rules of Evidence Manual*, sections 413-414. And another example of a tortured construction found necessary due to the constitutional infirmity of the text of the Rule is Rule 804(b)(3) itself. The leading case on the subject, *United States v. Alvarez*, 584 F.2d 694 (5thCir. 1978), construed Rule 804(b)(3) as requiring corroborating circumstances for inculpatory statements against penal interest even though the text does not abide that construction. The Court reasoned that unless such a requirement were read into the Rule, the Rule would violate the defendant's right to confrontation. In sum, if courts are going to read language into a Rule to prevent the possibility that the Rule is facially unconstitutional, it makes sense to write the Rule in compliance with the Constitution in the first place.

Second, codifying constitutional doctrine provides a protection for defendants against an inadvertent waiver of the reliability requirements imposed by the Confrontation Clause. A defense counsel might be under the impression that the hearsay exceptions as written comport with the constitution. Indeed this is a justifiable assumption for all the hearsay exceptions in the Federal Rules of Evidence, which generally have been found "firmly rooted"–except for Rule 804(b)(3). A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking that an additional, more specific objection on constitutional grounds would be unnecessary. If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements would be eliminated. See, e.g., *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (court considers only admissibility under Rule

804(b)(3) because defense counsel never objected to the hearsay on constitutional grounds; yet there is no harm to the defendant because this Circuit requires corroborating circumstances for inculpatory statements against penal interest).

Third, it is notable that a number of the Federal Rules of Evidence are written with constitutional standards in mind. For example, Rule 412, the rape shield law, provides that evidence of the victim's sexual conduct is admissible if its exclusion "would violate the constitutional rights of the defendant." Rule 803(8)(B) and (C), covering law enforcement reports in criminal cases, contain exclusionary language that is designed to protect the accused's right to confrontation. See *United States v. Oates*, 560 F.2d 45 (2d Cir 1977) (noting the constitutional basis for that exclusionary language). And Rule 201(g) contains a limitation on judicial notice in criminal cases, in specific deference to the defendant's constitutional right to jury trial. So it is hardly unusual for Evidence Rules to be written in light of constitutional standards.

In sum, there are good reasons for codifying the Confrontation Clause requirements in Rule 804(b)(3). But there are also certain risks. And if the Committee desires to so codify, it will have to consider whether the proposed amendment should be altered to track the language used in the confrontation cases. On the other hand, if the Committee is simply interested in providing equality, a level playing field, then it probably does not have to get into the complexities of codification.

Another problem to consider is whether codifying the constitutional requirement with respect to *inculpatory* statements could result in an unwanted change in the law with respect to *exculpatory* statements. Currently, most courts rely upon, and some require, corroborating *evidence* to satisfy the Rule's requirement of corroborating circumstances clearly indicating trustworthiness. There are many examples of exculpatory hearsay statements held properly excluded at least in part because the defendant could not come up with enough independent evidence corroborating the truth of the statement. See, e.g., *United States v. Hall,* 165 F.3d 1095 (7th Cir. 1999) (exculpatory statements properly excluded for lack of corroborating circumstances, court notes the lack of physical evidence or eyewitness testimony tying the declarants to the crime); *United States v. Lowe,* 65 F.3d 1137 (4th Cir 1995)(exculpatory statement that the declarant, and not the defendant, possessed a gun used in a shooting, held properly excluded for lack of corroborating circumstances; there was no evidence to indicate that the declarant had the gun, and the government could place the defendant at the scene and not the declarant); *United States v. Doyle,* 130 F.3d 523 (2d Cir. 1997) (statement to government investigators that the defendant did not know that products were going to Libya was properly excluded because of insufficient corroborating circumstances; the evidence at trial was inconsistent with that statement).

If the Rule is clarified to require "particularized guarantees of trustworthiness", tracking the Confrontation Clause standard, then corroborating evidence will be neither permitted nor required to satisfy that standard. This is because, as discussed above, the constitutional requirement must be met solely by reference to the guarantees of trustworthiness inherent in the statement itself. See *Lilly, supra* ("That other evidence at trial corroborated portions of Mark's statements is irrelevant. We have squarely rejected the notion that evidence corroborating the truth of a hearsay statement may properly

support a finding that the statement bears 'particularized guarantees of trustworthiness.").

Codifying the constitutional test would therefore mean that the case law permitting or requiring corroborative evidence with respect to exculpatory statements would be changed. Query whether that change is appropriate, or whether, alternatively, an attempt at codifying the constitutional standard for inculpatory statements should be coupled with a different treatment for exculpatory statements– perhaps requiring corroborative evidence for the latter and not the former. But if different treatment is found necessary, the amendment would perpetuate the very asymmetry that it was originally designed to remedy.

Obviously, an attempt to codify the constitutional reliability requirement has costs and benefits and involves important and complex policy questions. If the Committee does intend to codify the constitutional test, it would require withdrawing the current proposal. If, on the other hand, the Committee is simply interested in leveling the playing field, then these more difficult policy questions could possibly be put aside.

### *4. Good Reason For Symmetry*

As discussed above, one argument against the proposed amendment is that there is good reason for the asymmetry in the current Rule because inculpatory declarations against penal interest are said to be made under more reliable circumstances than exculpatory statements. But the previous discussion appears to belie this contention.

After *Williamson*, admissible inculpatory statements are made under one of two factual circumstances: 1) A statement is made informally to a friend, relative, or associate, with no apparent attempt to shift blame or curry favor; and 2) a statement is made under formal circumstances, such as while the declarant is in custody or doing a plea allocution, but there is no direct identification of the defendant, or if there is the identification is redacted before the statement is admitted against the defendant.

By way of comparison, after *Williamson*, potentially admissible exculpatory statements are made under one of three factual circumstances: 1) A statement is made informally to a friend, relative or associate, with no apparent ulterior motive; 2) a statement is made when the declarant is in custody; and 3) a statement is made under formal circumstances to an attorney or investigator in anticipation of litigation. In the third circumstance, however, while there are a few cases in which the statements have been found sufficiently disserving and trustworthy to be admissible, the majority of cases exclude such statements as being insufficiently trustworthy or insufficiently self-inculpatory under the circumstances.

So the real difference in the cases appears to be that statements specifically inculpating a defendant are not admissible if they are made by an accomplice in custody, whereas the chances for admitting an exculpatory statement in similar circumstances are higher. The most likely scenario for admissibility for both exculpatory and inculpatory statements involves an identical set of circumstances–a statement made under informal circumstances to a trusted person, with no ulterior motive to either shift blame or to influence a litigation. Where the circumstances are common to both types of statements, as in the vast majority of cases, there seems to be no justification for differing admissibility requirements.

In sum, there appears to be no basis for differentiating exculpatory and inculpatory against penal interest statements as a class–the need to guarantee reliability by requiring corroborating circumstances is basically the same for both kinds of statements.

### *5. The Government's Burden of Proof Beyond a Reasonable Doubt*

As discussed above, it has been argued that asymmetry in favor of the government is offset by the government's burden of proof beyond a reasonable doubt. If that argument were sound as applied to Evidence Rules, one would expect that a large number of rules would be tilted in the government's favor Yet this is not the case.

There is only one instance in the Evidence Rules, other than Rule 804(b)(3), in which the government enjoys a real advantage. That is found in Rules 412-414. Under Rule 412, evidence of the victim's prior sexual activity is severely circumscribed. Under Rules 413 and 414, evidence of the defendant's prior sexual activity is presumptively admissible. This disparity can perhaps be explained by the sui generis nature of sex crimes, the difficulty of proving such crimes, and the special need for protecting the privacy of victims of such crimes A similar justification cannot be found for differentiating declarations against interest, which are potentially admissible in any criminal case.

Most of the examples of asymmetry in the Evidence Rules work in *favor* of the criminal defendant. Thus, Rule 609 contains a special balancing test to protect criminal defendants from impeachment with their prior convictions. Rule 404(b) contains a notice provision that applies only to the government, not the defendant. Rule 404(a) allows the defendant to proffer character evidence, while the government is permitted to do so only after the defendant opens the door to such evidence. Rule 104(d) provides protection for an accused who testifies on preliminary matters–no other witness is given that protection. Rule 803(8)(C) provides that certain investigative reports in criminal cases can be admitted against the government, but not in the government's favor. Rule 803(22) imposes a limit on admission of judgments of previous conviction that applies solely against the government in criminal cases.

It is true, of course, that the government does have substantial comparative advantages outside the Evidence Rules, and that these advantages are often justified by the government's need to prove the case beyond a reasonable doubt. The most obvious advantage is the power to grant

immunity. But in the context of the Evidence Rules, the argument that the government should be given an advantage in light of its burden of proof has been virtually unrecognized. Almost all of the evidentiary disparities are tilted the other way.

### *6. The Relevance, If Any, of the Corroborating Circumstances Requirement After Williamson.*

As discussed above, some members of the Standing Committee argued that an inculpatory statement that is "truly self-inculpatory" under *Williamson* would by that very fact possess corroborating circumstances that clearly indicate trustworthiness. Their position was that it made no sense to add a corroborating circumstances requirement that would in practice be superfluous. Those members were particularly interested in whether the Advisory Committee could articulate a case in which a statement would be "truly self-inculpatory" under *Williamson* and yet would possess insufficient corroborating circumstances to justify admission.

As with other criticisms of the proposed amendment, the response depends on whether the term "corroborating circumstances" requires corroborative *evidence* or refers only to the circumstances under which the disserving statement was made.

It should be noted, however, that I have not found a case in which an exculpatory statement was properly found disserving under *Williamson* and yet excluded due to an insufficient showing of corroborating circumstances (however that term is defined). There is one case, *United States v. Westmoreland*, 240 F.3d 618 (7th Cir. 2001), which holds that statements made to police officers in custody, directly implicating the defendant, were self-inculpatory under *Williamson* and yet were improperly admitted because they lacked the "particularized guarantees of trustworthiness" required by the Confrontation Clause after *Lilly*. That opinion, however, is simply rife with misguided analysis. The Court finds statements made to police officers specifically identifying the defendant to be disserving even when *Williamson* clearly says they are not, and the Court later finds the statements to be untrustworthy under the Confrontation Clause because the declarant sought to shift blame–which is the very reason that statements to police officers are not "truly self-inculpatory" under *Williamson*. There is another case, *United States v. Ochoa*, 229 F.3d 631 (7th Cir. 2000), in which the Court relied on the lack of corroborating circumstances to exclude an inculpatory statement, but the statement was made to curry favor with authorities and so would have been properly excluded as not against interest under *Williamson*.

Thus, the existing case law indicates that the corroborating circumstances requirement–at least as currently applied by the courts–is possibly unnecessary after the stringent requirements imposed on against penal interest statements by *Williamson*. There are only a limited number of post-*Williamson* cases, however, so it is hard to draw a final conclusion from the case law.

*a. Corroborating Evidence:* If "corroborating circumstances" means "corroborating

evidence", then the requirement clearly adds something to the post-*Williamson* "against interest" requirement. The against interest requirement focuses solely on whether the statement tended to subject the declarant to a risk of criminal liability in the context in which it was made. Whether the truth of the statement is supported by independent evidence is a completely separate inquiry. In the decided cases, courts have generally had no trouble finding sufficient corroborating evidence for a statement that satisfies the *Williamson* against interest requirement. But the potential usefulness of a corroborating evidence requirement can be posited by considering a typical *post-Williamson* case and taking away the corroborating evidence from the facts of that case.

A good example for considering the impact of corroborating evidence is *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000). Kartoum and Al-Qaisi were brothers-in-law involved in a theft operation. Kartoum made statements to Al-Qaisi concerning a prior theft operation in which he and Shukri were involved. He mentioned Shukri by name as his former confederate. On appeal, Shukri conceded that Kartoum's statements were disserving under *Williamson*: they were not made to curry favor or shift blame, and by identifying Shukri, Kartoum admitted not only to theft, but also to a conspiracy with an identified individual Thus, the statement was "truly self-inculpatory" even insofar as it identified Shukri by name. Shukri argued, however, that Kartoum's statement did not satisfy the "corroborating circumstances" requirement of the Rule.

The Court noted that Shukri's strategy of conceding that the statement was against interest but that there were insufficient corroborating circumstances was a sound one, because lack of corroborating circumstances was the stronger argument–thus the Court implicitly noted that there is a difference between the two requirements.

The *Shukri* Court found that the corroborating circumstances requirement (that the Seventh Circuit has read into the Rule for inculpatory statements) was met under the facts of the case:

> Carrying $2,800 in case, Shukri suddenly left his store in the middle of the day to help Kartoum * * * rent storage space and move merchandise from the Orland Park warehouse. Shukri assisted Kartoum * * * even though he [subsequently admitted that he] felt that the goods were stolen and knew that the police were investigating. Furthermore, Kartoum and Al-Qaisi [the witness] shared a confidential relationship within which candor is presumed: they are brothers-in-law and were confederates in a theft conspiracy at the time of Kartoum's statements. Statements between confidants are generally more reliable and trustworthy because such relationships bespeak candor and confidence. Shukri was closely involved with Kartoum * * * in possessing and transporting stolen goods, and Kartoum's statements were consistent with Shukri's involvement."

Most of the corroborating circumstances pointed to are in the nature of corroborating evidence. One factor–the statement was made to a trusted confidant– is a circumstantial guarantee of reliability.

To show the necessity for the corroborating circumstances requirement as defined to include *both* evidentiary corroboration and circumstantial guarantees of reliability, consider the situation if

all of the factors in the blocked paragraph are missing. Then what would be admitted is Kartoum's statement to an associate that Shukri was involved in a prior theft operation. While this is technically disserving, its admission should be questioned if the government could provide nothing else to support the truth of the statement. Certainly Kartoum could have had other motivations for implicating Shukri in a prior crime–he might hate Shukri, he might be settling a score, Shukri might have stolen his wife. He might be crazy. And while mentioning Shukri by name does in some sense subject Kartoum to a risk of conviction for conspiracy, it would not take much for Kartoum to falsely substitute the name of Shukri for the real coconspirator.

These reliability concerns are significantly mitigated by the factors that are listed in the blocked paragraph. Most importantly, the presence of significant corroborating evidence indicates that Kartoum was not in fact making up a story and was not falsely implicating Shukri for some nefarious motive. Indeed, the corroborating evidence seems to answer any reliability concerns even without the circumstantial guarantee that Kartoum was speaking to his trusted brother-in-law. Taken from another angle, if one were to consider the statement without any corroborating evidence–disserving because made to a trusted confidante with no attempt to shift blame–there would still be cause for concern about the reliability of the statement. People say many things to their in-laws that are not true. Kartoum could think that there is really no cost to smearing Shukri by an assertion of criminal conduct: because the statement is made to his brother-in-law, it is unlikely to be disclosed to the authorities and therefore unlikely to get Kartoum in trouble.

Thus, it is the corroborating evidence that provides the most assurance that Kartoum is telling the truth. The importance of corroborating evidence is recognized in trials every day. A witness' testimony about a financial transaction might seem highly doubtful–until the records are produced. The statement of a dubious eyewitness that the defendant robbed a bank may seem untrustworthy–until trace money and an exploded paint canister are found in the defendant's bedroom. It is clear that corroborating evidence can alleviate concerns over the unreliability of hearsay in the same way as it does with respect to witness testimony.

It is for the Committee to determine whether a corroborating evidence requirement in itself, or a requirement of corroborating circumstances and corroborative evidence, are necessary to assure that apparently disserving statements are in fact reliable. But given the traditional suspicion about against penal interest statements, a strong argument can be made that a showing of corroborating evidence is essential.

*b. Circumstantial Guarantees of Trustworthiness:* If "corroborating circumstances" means "particularized guarantees of trustworthiness"–i.e., if the effect is to codify the Confrontation Clause standard after *Lilly*–then the argument that "corroborating circumstances" is unnecessary after *Williamson* misses the point. Even if such a requirement were redundant, it must be analyzed and satisfied as a matter of constitutional law. The question then is whether it is wise to codify the constitutional requirements in an Evidence Rule, however practically superfluous they might be–a

question discussed above.

More importantly, the argument that "circumstantial guarantees" is equivalent to "against interest" after *Williamson* is wrong on the merits. The plurality in *Lilly* noted that the constitution's "particularized guarantees of trustworthiness" requirement was completely distinct from the "against interest" requirement. The Commonwealth in *Lilly* argued that an accomplice's confession satisfied the "particularized guarantees of trustworthiness" requirement in part because the accomplice knew he was exposing himself to criminal liability. But the Court rejected this as a particularized guarantees factor because it "merely restates the fact that portions of his statements were technically against penal interest." Thus, the against interest factor cannot be double-counted as a corroborating circumstances factor–a point made in the Committee Note to the proposed amendment.

## *Preliminary Conclusion on Criticisms and Response to Criticisms Concerning the Two-Way Corroborating Circumstances Requirement*

The merit of both the criticisms and responses depend on what is meant by "corroborating circumstances". Does it mean, or include, a requirement of corroborating evidence, or is it limited to a showing of circumstantial guarantees inherent in the making of the statement?

If the former, evidentiary corroboration view is taken, the criticism is that the requirement is too strenuous when added to the government's existing obligations to prove that the statement was "truly self-inculpatory" (under *Williamson*) and that the statement was made subject to "particularized guarantees of trustworthiness" (under the Confrontation Clause). The responses are:

1. An extra requirement of corroborating evidence is not onerous, because the prosecution can be expected to provide such evidence in the ordinary course.

2. An evidentiary corroboration requirement is necessary to protect the defendant from being convicted solely out of the mouth of an unavailable declarant with possibly suspect motives.

3. The requirement is necessary to prevent the government from evading the corroborating evidence requirement of the coconspirator hearsay exception.

4. An evidentiary corroboration requirement is justified as a matter of equity because the burden on the government is no more than is already imposed on defendants offering exculpatory statements under the Rule

If the latter, circumstantial guarantees of trustworthiness view is taken, the criticisms are that the requirement is superfluous because the government already has that obligation under the

Confrontation Clause; and if the intent is to track the constitutional requirements, the Rule should be framed in terms of "particularized guarantees of trustworthiness" which is the constitutional standard. The response is that codifying the constitutional requirement is salutary, because:

1. It avoids having an Evidence Rule that is unconstitutional on its face.

2. It protects defendants from an inadvertent waiver of the constitutional reliability requirements.

* * *

The Committee may wish to consider that the debate on the proposed amendment would be better resolved if it took the following steps:

1 Decide whether it wishes to codify the constitutional "particularized guarantees" requirement, or whether it wishes to impose an additional requirement of corroborating evidence.

2. Decide whether it wants to keep the requirement identical for exculpatory and inculpatory statements–recognizing that if the intent is to codify the constitutional requirement of "particularized guarantees," and to impose an identical test on exculpatory statements, this will result in a rejection of case law requiring corroborating evidence for exculpatory statements.

3. Propose an amendment to the term "corroborating circumstances" that will clarify whether the test permits or requires corroborating evidence.

In sum, the straightforward amendment currently proposed–to simply extend the corroborating circumstances requirement to inculpatory statements–creates complex questions given the interrelationship of the hearsay exception with the Confrontation Clause, and given the lack of unanimity over the term "corroborating circumstances." An argument can be made that an amendment to Rule 804(b)(3) will be more effective if the goal of equal treatment is coupled with a studied attempt to rework and clarify the problematic term "corroborating circumstances."

On the other hand, the Committee could agree on a more limited agenda–that the only goal of an amendment would be to level the playing field. If so, the Committee could resolve that the meaning of "corroborating circumstances" should be left to the courts, as the current proposal does. Whatever "corroborating circumstances" means, the point is that it should be applied equally–and the government should not be heard to complain if it is subject to the same evidentiary burdens, whatever they are, as the defendant. If this more limited "equality" agenda is pursued, then the proposed amendment does not need to be reworked–it strikes the right note of equality between the government and defendant as is.

# IV. Extending the Corroborating Circumstances Requirement to Civil Cases

Assuming that the Committee decides not to rework the corroborating circumstances requirement and to proceed with the current proposed amendment, the merits of the proposal to extend that requirement to civil cases must be addressed.

The public comment did not turn up much reaction to the proposed extension of the corroborating circumstances requirement to declarations against penal interest in civil cases. The few comments received on that question were positive, apparently agreeing that it is appropriate to take a unitary approach to all declarations against penal interest. However, one mildly negative comment was received, from the Justice Department, which in a footnote states that the proposal "is unnecessary and premature given that only a single court of appeals has spoken on the question."

It is for the Committee to decide whether an amendment is justified when only one circuit has spoken on the matter. But it should be noted that there is a good reason for the lack of case law. Declarations against penal interest are rarely offered in civil cases. The reported civil cases in which a statement against penal interest has been offered since the beginning of the Federal Rules can be counted on two hands. Thus, if the Committee is to wait for some groundswell of case law on whether the corroborating circumstances requirement should be applied to declarations against penal interest in civil cases, it will have a long wait.

It is clear that there is no great need to amend the Rule to extend the corroborating circumstances requirement to civil cases. The problem, if any, certainly is not grave enough to require an amendment on its own. The real question, however, is whether the requirement should be extended to civil cases *as part of a broader amendment*. There is a good argument that if the corroborating circumstances requirement (or some reworked variant of that requirement) is extended to inculpatory statements in criminal cases, it should also be extended to civil cases as part of that more important amendment. As the Committee has already determined and the Seventh Circuit has held, there is virtue in a unitary approach.

# V. Suggestions for Modification of the Proposed Amendment

Several public commentators provided suggestions for ways in which the proposed amendment could be improved. This section considers those proposals.

## *1. Delete the Corroborating Circumstances Requirement*

Professor James Duane (01-EV-014) agrees with the Committee that the asymmetry in the current Rule is unjustified. He suggests a different solution to the problem, however. He argues that the second sentence of the Rule should simply be deleted, thus disposing of the "mean-spirited

corroboration requirement" for *all* declarations against interest.

There is certainly some virtue in this simple proposal. It will eliminate the asymmetry in the Rule that the Advisory Committee has found problematic. It will eliminate the confusion over what the Rule means by "corroborating circumstances." It will avoid the difficult questions that will arise if the Committee decides to rework the amendment to revise that ambiguous term. It will respond to the Justice Department's argument that an extension of the corroborating circumstances requirement to inculpatory statements is either superfluous or unduly burdensome.

A further argument could be made that the corroborating circumstances requirement should be deleted because it has sometimes been used by courts to exclude exculpatory statements that probably were reliable enough to be admissible. Examples exist where claims can be made that the corroboration requirement has been set too high for criminal defendants–who, after all, have a constitutional right to an effective defense. See, e g., *United States v. McDonald,* 688 F.2d 224 (4th Cir. 1982) (statement by a declarant that she was involved in the murder of the defendant doctor's family was held not sufficiently corroborated, in part because the declarant was a drug addict, even though the defendant's claim was that his family was killed by drug addicts looking for drugs in his home); *United States v. Amerson,* 185 F.3d 676 (7th Cir. 1999) (statement that the defendant, not the declarant, threw drugs from a home held properly excluded due to insufficient corroborating circumstances; some evidence contradicted the declarant' account, and some evidence supported it; the court decided to believe the evidence that contradicted the account). See also *Federal Rules of Evidence Manual,* §804.02[10] ("We believe that the burden placed on the accused has in many cases been too high — so high that the exception itself often has little utility. It makes no sense to apply the corroboration standard so strictly that, if the defendant can meet it, he will probably never have been charged or tried in the first place.").

But Professor Duane's proposal also carries at least two serious costs:

1. As discussed in Part Three, a Rule that requires the government to prove only that a declaration against penal interest is "truly self-inculpatory" is unconstitutional on its face. This clearly seems to be bad policy–retaining Rules that as written fail to comport with constitutional requirements. What will probably occur is that the courts will construe the Rule to require something like "corroborating circumstances" for inculpatory statements–this seems likely because most courts have construed the current Rule to so provide even though this is not what the Rule says. If the corroborating circumstances requirement is deleted, and the courts retain the requirement anyway with respect to inculpatory statements, then there will be an asymmetry in the Rule–only it will be a reverse asymmetry, in which the government must prove more than the accused with respect to the same kind of hearsay statement. No justification has been given, or exists in the cases, for reversing the presumption in this way.

Even if the Rule is not construed to add a trustworthiness requirement for inculpatory statements, it is clear that the Confrontation Clause requires such an analysis anyway. So the end

result of deleting the corroborating circumstances requirement is that the asymmetry in the current Rule will simply be reversed.

2. More importantly, the deletion of the corroborating circumstances requirement as it applies to exculpatory statements would be contrary to the legislative history of the Rule and would reverse thirty years of case law. If one thing is clear, it is that Congress was extremely concerned about the reliability of exculpatory declarations against interest–in fact so concerned that it was prepared to scuttle the whole project unless the "corroborating circumstances" requirement was included in Rule 804(b)(3). Assuming that Congressional concern had some merit, nothing in the past thirty years has occurred to indicate that exculpatory declarations against penal interest are more reliable than they once were. There is still the danger that an accomplice will make a statement to a friend or associate that takes responsibility for a crime, in an attempt to get the defendant off the charges, with the declarant safe in the knowledge that there is insufficient evidence to convict him, or that he can simply disappear, or invoke the privilege.

An example will show the importance of the corroborating circumstances requirement when applied to exculpatory statements. In *United States v. Lowe*, 65 F.3d 1137 (4th Cir. 1995), the defendant was charged with shooting somebody who crossed a picket line. Evidence indicated that the shooter used a Colt revolver, and that the defendant owned a Colt revolver. The defendant offered a hearsay statement from a fellow union member, Starkey, in which Starkey claimed that he bought the gun from the defendant before the incident. This statement was probably disserving under *Williamson*, because it could tend to subject Starkey to a risk of prosecution. But the Court held the statement properly excluded for lack of corroborating circumstances. The Court noted that there was no other evidence to indicate that Starkey ever had the gun. Moreover, the government could place the defendant at the scene, but not Starkey.

*Lowe* shows the danger of admitting exculpatory declarations against penal interest without any corroborating circumstances requirement. Starkey might well have made the statement in an effort to free Lowe, a fellow union member, from any charges, knowing that the actual risk of being charged himself was minimal–after all, no evidence put him at the scene of the crime. *Lowe* is simply one of a large number of cases that have excluded exculpatory declarations against penal interest for lack of corroboration. See, e.g., *United States v. Johnson*, 19 F.Supp.2d 720 (W.D.Tex. 1998); *United States v. Doyle*, 130 F.3d 523 (2d Cir. 1997); *United States v. Millan*, 230 F.3d 431 (1st Cir. 2000); *United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999). The proposal to delete the corroborating circumstances requirement would invalidate all this case law.

It should be noted that this Committee at its last meeting rejected a proposal to delete the corroborating circumstances requirement from the Rule. The Committee reasoned that this solution would result in a substantial change to the case law and would be contrary to the legislative history of Rule 804(b)(3), in which Congress expressed strong concern about the reliability of against penal interest statements. At that time the Committee could point to nothing indicating that the reliability of against penal interest statements has increased over time in such a way as to justify dispensing with the corroborating circumstances requirement. Of course, that prior Committee determination is not

res judicata and the Committee is free to consider whether to propose an amendment that would delete the corroborating circumstances requirement from the Rule.

If the Committee approves the proposal to delete the second sentence of the Rule, the question arises whether that change could be made without another round of public comment. It would seem that the change is relatively sweeping in effect by abrogating a good deal of case law; and it is clearly a change that is substantially different from the amendment initially proposed. So there is a strong argument that deletion of the second sentence of the Rule should be subject to another round of public comment.

It should also be noted that the NACDL (01-CR-017) makes a proposal that is similar to Professor Duane's but more radical. NACDL proposes that the corroborating circumstances requirement be retained in the Rule, but that it be modified to apply *only* to statements offered by the government. For reasons discussed above, any attempt to lift the corroborating circumstances requirement from exculpatory statements runs against clear legislative history and extensive case law. As to whether the corroborating circumstances requirement should be extended to inculpatory statements–see the discussion in Part Three.

### *2. Extend the Corroborating Circumstances Requirement to Statements Against Pecuniary Interest*

Professor Duane argues that if the corroborating circumstances requirement is not deleted from the Rule, then it should be extended to all declarations against interest offered under the Rule–that would include declarations against *pecuniary* interest as well as declarations against penal interest. The American College of Trial Lawyers (01-EV-009) similarly argues that there is no reason to distinguish between declarations against penal interest and declarations against pecuniary interest in terms of reliability. As the College puts it: "It is difficult to explain exactly why an out-of-court statement that can have enormous impact upon a declarant's fortunes can come into evidence without corroborating circumstances while an admission of some minor criminal misstep requires them." The College points out that the distinction between penal and pecuniary interest could possibly be difficult to apply in practice. The parties might argue that some criminal statute was potentially applicable to the declarant's statement, when in fact the statement was predominantly contrary to the declarant's pecuniary interest. (Note that the Rule requires corroborating circumstances whenever the statement could tend to expose the declarant to criminal liability. Thus, if a statement could expose the declarant to *both* pecuniary and criminal liability, the corroborating circumstances requirement will apply)

There is certainly merit to the argument that the corroborating circumstances requirement (or a reworked version of that requirement) should apply to all declarations against interest. The Committee Note to the proposed amendment cites the benefit of a "unitary approach". The current

proposal is "unitary" with respect to declarations against penal interest, but a truly unitary approach wold apply the corroborating circumstances requirement to every statement offered under the exception.

It should also be noted that the few court opinions on the subject have tended to treat the two types of statements as equivalent. For example, a court has recently held that the *Williamson* test for determining whether a statement is against penal interest–that each part of a statement must be truly self-inculpatory–should apply equally to statements against pecuniary interest. *Silverstein v. Chase*, 260 F.3d 142 (2d Cir. 2001).

There are some arguments for distinguishing pecuniary and penal interest statements, however. Those arguments obviously convinced the original Advisory Committee, because the existing Rule differentiates between pecuniary and penal interest statements, requiring corroborating circumstances for the latter but not for the former.

The Advisory Committee's rationale for distinction stems from common law decisions. The common-law exception for declarations against interest covered *only* declarations against pecuniary interest. These were admissible without any showing of corroborating circumstances. In contrast, declarations against penal interest were always considered of suspect reliability, and were not admissible under common law. See Advisory Committee Note to Rule 804(b)(3). In the Note, the Advisory Committee explains the extension of the exception to against penal interest statements as based in logic. The Committee thought it illogical to admit the statement "I owe you five dollars" as sufficiently disserving to be reliable, but to exclude the statement "I killed the gardener" as insufficiently disserving. On the other hand, the Committee noted that "one senses in the decisions a distrust" of the statements of criminals that might technically be disserving but could be made for nefarious motives. The Committee noted that the requirement of corroboration "is included in the rule in order to effect an accommodation between these competing considerations."

The common law suspicion of against penal interest statements, as compared to statements exposing the declarant to civil liability, recognizes the difference between the kind of person who makes one statement rather than the other. Statements exposing the speaker to civil liability (e.g., "I owe you $100" or "I'm sorry I sideswiped your car") can be made by any reliable, upstanding individual–doctors, lawyers, plumbers, rescue workers, everyone. There is no reason to think that such statements are made by persons of suspect reliability as a class. In contrast, declarations against penal interest by definition are made by those of dubious credibility. A person who admits to a crime either committed the crime–so that his character for truthfulness is questionable (see Rule 609)–or is lying about committing the crime. One way or another, such a person is not the most reliable of hearsay declarants. And besides the general concern over the questionable character of a declarant who admits a crime, there are a number of suspect motivations that are often at play when a declarant confesses to a crime and that confession is offered against another person. The declarant may have the motive to cast blame, to get somebody else in trouble, to brag, to get somebody off from a charge, etc. Rarely are these motives at work when a person admits to civil liability.

Because of substantial questions about their reliability, the original Advisory Committee thought it appropriate to impose a corroborating circumstances requirement on statements against penal interest. But it saw no reason to change the common law assumption that declarations against pecuniary interest are generally made by reliable declarants in reliable circumstances; so the corroborating circumstances requirement was not extended to these statements.

It is for the Committee to decide whether the working assumptions of the original Advisory Committee were unjustified or have become outmoded in the intervening years. The Committee could also decide that even if the assumption is correct–that penal interest statements are less reliable than pecuniary interest statements–there are countervailing benefits in establishing a unitary approach for all statements offered under Rule 804(b)(3). If the Committee determines that the corroborating circumstances requirement should apply to pecuniary interest statements, such a change could easily be made–a model for that change is included in Part Six of this memo. Such a change could probably be made without further public comment, because it is simply extending the rationale of the proposed amendment to a relatively small class of statements offered under the Rule. The number of reported opinions concerning against pecuniary interest statements is quite small, largely because a statement admitting civil liability will often expose the declarant to a risk of criminal liability as well.

If the Committee resolves to rework the corroborating circumstances requirement, as discussed in Part Three, then it might wish to apply that reworked requirement to pecuniary interest statements. A model for such a proposal is set forth in Part Six.

### *3. Stylistic Suggestion Clarifying That the Corroborating Circumstances Requirement Is Limited To Statements Offered Under Rule 804(b)(3)*

Professor Duane points out that the proposed amendment would provide that a declaration against penal interest is "not admissible" unless corroborating circumstances are shown. He argues that this language should be qualified, otherwise self-incriminating statements could not be admitted under other exceptions without a showing of corroborating circumstances. For example, the Rule could be read to require corroborating circumstances before the defendant's own confession could be admitted under Rule 801(d)(2)(A).

Professor Duane suggests that the following language be added to the second sentence of the Rule:

> A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible under this subdivision unless corroborating circumstances clearly indicate the trustworthiness of the statement.

This suggestion appears meritorious. While it is unlikely that a court would construe the language of Rule 804(b)(3) to apply to statements offered under other hearsay exceptions, it is at least possible. There is no reason to leave an ambiguity. It is notable that there is no other hearsay exception that uses the broad language "is not admissible". Limitations in other hearsay exceptions are written to be confined to the individual exception (see, e.g., Rule 803(3) and Rule 803(6)) Therefore, it would be appropriate to add language that clearly limits the corroborating circumstances requirement to statements offered under Rule 804(b)(3).

Should the Committee decide that Professor Duane's suggestion has merit, the change can easily be made, and it would clearly not require further public comment. The models set forth in Part Six incorporate Professor Duane's suggestion.

If the Committee decides to rework the corroborating circumstances requirement, then language limiting the new requirement to statements offered under Rule 804(b)(3) can be included.

# VI. Models for Changes to the Proposed Amendment to Rule 804(b)(3)

This section sets forth a number of models for the Committee to consider, if it decides that the current proposal to amend Rule 804(b)(3) should be changed in some respect that has been discussed in this memo.

The first model assumes that the Committee wishes to continue the use of the term "corroborating circumstances." It incorporates only the minor changes suggested in this memo· 1. Extending the corroborating circumstances requirement to all declarations against interest; and 2. Explicitly limiting the corroborating circumstances requirement to statements offered under Rule 804(b)(3).

The second model deletes the corroborating circumstances requirement entirely. The merits of such a deletion are discussed in Part Five.

The third model reworks the corroborating circumstances requirement so that it tracks the constitutional standard of "particularized guarantees of trustworthiness." It also retains the minor changes set forth in the first model–though those minor changes easily could be deleted.

The fourth model reworks the corroborating circumstances requirement so that it refers to corroborating evidence. As with model three, the minor suggestions for amendment are included–but could be deleted.

Models three and four present an "either/or" reworking of the corroborating circumstances requirement–either it means circumstantial guarantees of trustworthiness or it means independent

corroborating evidence. Another model is possible: one that would redefine "corroborating circumstances" as a combination of both particularized guarantees and independent evidence. Such a "mixed" model is problematic for a number of reasons, however:

1. It would not codify constitutional doctrine if that were the intent, because independent evidence cannot be considered as part of the reliability inquiry under the Confrontation Clause.

2. It would not necessarily impose an evidentiary requirement greater than the Confrontation Clause if that were the intent, because the court would not have to find independent evidence–it could simply find circumstantial guarantees of trustworthiness.

3. Most importantly, the "mixed" model could be applied to inculpatory statements in an unconstitutional fashion. A court could find a statement admissible under the Rule by combining circumstantial guarantees and independent evidence, when the circumstantial guarantees looked at alone are insufficient to satisfy the Confrontation Clause.

In effect, a mixed model is essentially equivalent to the model currently being employed by the courts construing the existing term "corroborating circumstances." Thus there seems little reason to seek to clarify the term in such a way as will simply highlight the problems that courts are currently having in relating the hearsay exception to the requirements of the Confrontation Clause.

## *Model One: Applying, and Limiting, the Corroborating Circumstances Requirement to All Statements Offered Under Rule 804(b)(3)*

(Blacklined from proposed amendment released for public comment)

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

* * *

(3) Statement against interest. – A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement ~~tending to expose the declarant to criminal liability and offered to exculpate the accused~~ is not admissible under this subdivision unless corroborating circumstances clearly indicate the trustworthiness of the statement.

* * *

## COMMITTEE NOTE

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against ~~penal~~ interest, whether proffered in civil or criminal cases. ~~See Ky.R.Evid. 804(b)(3); Tex. R.Evid. 804(b)(3).~~ Most 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 (5thCir. 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. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring corroborating circumstances for against-penal-interest statements offered by the government). The corroborating circumstances requirement has also been applied to declarations against penal interest offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (noting the advantage of a "unitary standard" for admissibility of declarations against penal interest). ~~This unitary approach to declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception.~~ The amendment establishes a unitary approach to corroborating circumstances to assure that only reliable statements will be admitted under the exception. With respect to corroborating circumstances, the Committee found no reason to distinguish between statements against pecuniary interest and statements against penal interest.

The Committee notes that there has been some confusion over the meaning of the "corroborating circumstances" requirement. *See United States v. Garcia,* 897 F.2d 1413, 1420 (7th Cir. 1990) ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain"). For example, some courts look to whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant's account). Other courts hold that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Bumpass,* 60 F.3d 1099, 1102 (4th Cir. 1995)):

(1) the timing and circumstances under which the statement was made;

(2) the declarant's motive in making the statement and whether there was a reason for

the declarant to lie;

(3) whether the declarant repeated the statement and did so consistently, even under different circumstances;

(4) the party or parties to whom the statement was made,

(5) the relationship between the declarant and the opponent of the evidence; and

(6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses. *United States v. Katsougrakis,* 715 F.2d 769 (2d Cir. 1985). See also *United States v. Shukri,* 207 F.3d 412, 418 (7th Cir. 2000) ("The key for Rule 804(b)(3), and indeed any hearsay exception, is the reliability of the declarant's original statement, not the reliability of the hearsay witness.").

The corroborating circumstances requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant's ~~penal~~ interest. *See Williamson v. United States,* 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Corroborating circumstances" therefore must be independent from the fact that the statement tends to subject the declarant to criminal or civil liability. The "against ~~penal~~ interest" factor should not be double-counted as a corroborating circumstance.

## *Model Two: Deleting the Corroborating Circumstances Requirement Entirely*

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

* * *

(3) Statement against interest. – A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. ~~A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.~~

* * *

**COMMITTEE NOTE**

The second sentence of Rule 804(b)(3) has been deleted. The corroborating circumstances requirement has caused considerable confusion in the courts. Many courts have required the government to establish corroborating circumstances for inculpatory declarations against penal interest, even though the Rule as written imposed no such requirement. *See, e.g., United States v. Alvarez,* 584 F.2d 694, 701 (5thCir. 1978); *United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1990). Courts have also defined the term "corroborating circumstances" in various and conflicting ways. *See United States v. Garcia,* 897 F.2d 1413, 1420 (7th Cir. 1990) ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain"). For example, some courts have looked to whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant's account). Other courts have held that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made."). Moreover, the corroborating circumstances requirement has applied to statements against penal interest but not to statements that could subject the declarant to a risk of civil liability. There is no logical reason for such a distinction.

To the extent that the corroborating circumstances requirement was designed to guarantee that only reliable statements would be admissible under this exception, this concern has been addressed by the Supreme Court in *Williamson v. United States,* 512 U.S. 594 (1994). The Court in *Williamson* narrowed the prevailing understanding of what constitutes

a "statement" against interest under the Rule and held that only those parts of a statement that are "truly self-inculpatory" can be admitted under the exception. The *Williamson* standard provides sufficient assurance that only reliable statements will be admitted under the exception.

## *Model Three: Reworking the Corroborating Circumstances Requirement to Track the Standard of Reliability Under the Confrontation Clause (and Applied To All Declarations Against Interest)*

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

* * *

(3) Statement against interest. – A statement ~~which~~ that (A) was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true, and (B) possesses particularized guarantees of trustworthiness. ~~A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.~~

* * *

**COMMITTEE NOTE**

The "corroborating circumstances" requirement of the Rule has been reformulated to clarify that the additional trustworthiness factor in the Rule must be found in the circumstances surrounding the making of the statement itself. Some courts in determining corroborating circumstances have looked to whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F 2d 403 (4th Cir 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant's account). Other courts have held that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made."). The amendment adopts the latter view as more consistent with notions of evidentiary reliability applied to the hearsay exceptions.

The amendment takes a unitary approach by requiring a showing of particularized guarantees of trustworthiness for all statements offered under the Rule. The Committee found no basis for distinguishing among any statements against interest. All such statements raise reliability concerns that should require an extra showing of particularized guarantees of trustworthiness.

In criminal cases, the amendment does not alter the burden imposed on the government in establishing the admissibility of an inculpatory declaration against penal

interest. The Confrontation Clause already requires the government to establish that a declaration against interest carries "particularized guarantees of trustworthiness." See *Lilly v. Virginia*, 527 U.S. 116 (1999) (rejecting the notion that "evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears particularized guarantees of trustworthiness" and noting that hearsay offered against the accused "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.").

## *Model Four: Reworking the Corroborating Circumstances to Refer to Corroborating Evidence (and Applying That Standard to All Declarations Against Interest)*

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

* * *

(3) Statement against interest. – A statement ~~which~~ that (A) was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true, and (B) is supported by corroborating evidence indicating that the statement is true. ~~A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.~~

**COMMITTEE NOTE**

The "corroborating circumstances" requirement of the Rule has been reformulated to clarify that the proponent must provide corroborating evidence indicating that the statement is true. Some courts in determining corroborating circumstances have looked to whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United State v. Mines,* 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant's account). Other courts have held that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone,* 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made."). The amendment adopts the former view because it provides a substantial guarantee that the hearsay statement is actually true.

The amendment takes a unitary approach by requiring a showing of corroborating evidence for all statements offered under the Rule. The Committee found no basis for distinguishing among any statements against interest. All such statements raise trustworthiness concerns that should require an extra showing of corroborating evidence.

**Note: Models three and four use a different structure than the current Rule. Instead of two sentences, the models use a single sentence with two subparts. The reason for this is that the models take a totally unitary approach, so there is no difference between penal interest and pecuniary interest statements. The second sentence of the current Rule is made necessary because the corroborating circumstances requirement applies only to certain statements offered under the exception.**

**If the Committee were to decide that the reworked corroborating circumstances requirement should apply only to declarations against penal interest, then the two-sentence structure should be retained. Here is what the language would look like:**

*For particularized guarantees of trustworthiness:*

> 3) Statement against interest. – A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless ~~corroborating circumstances clearly indicate the trustworthiness of the statement~~ it possesses particularized guarantees of trustworthiness.

*For evidentiary corroboration:*

> 3) Statement against interest. – A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless ~~corroborating circumstances clearly indicate the trustworthiness of the statement.~~ it is supported by corroborating evidence indicating that the statement is true.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter and Ken Broun, Consultant
Re: New Drafts of Privileges
Date: March 21, 2002

Attached are draft rules of some privileges and some supporting memoranda. All of this material has been reviewed and revised by the Subcommittee on Privileges. Some of the material has not yet been reviewed by the Committee as a whole. The material not yet reviewed by the Committee is set forth first and covers:

1. A doctor and mental health provider-patient privilege, with a supporting memorandum prepared by Ken Broun. For important background on this proposal, the Committee may wish to consult Professor Aronson's article on this privilege in the copy of the Oklahoma Law Review dedicated to the Uniform Rules of Evidence that was sent to each Committee member.

2. A privilege for confidential communications to clerics, with notes and comments attached to the Rule.

3. A privilege for confidential marital communications, with a supporting memorandum prepared by Ken Broun. This privilege was prepared for the April 2001 meeting, but was not considered by the Committee at that meeting.

Next in the packet are the draft privileges that have been modified in response to positions taken by the full Committee at the April 2001 meeting. That material covers:

1. An amended draft of Rule 501, with supporting notes and comments, as well as a memorandum prepared by Dan Capra setting forth the governing law on the question of whether state or federal privilege law applies in cases where both federal and state claims are joined. The Committee requested further research on this matter to determine whether the draft of Rule 501 should include language (as it currently does) providing that federal law

always controls in mixed claims cases. The attached memo reports on that research and sets forth the issues for the Committee to address.

2. An amended draft of the attorney-client privilege, with notes indicating the changes from the previous draft. One question remaining, to be addressed by the Subcommittee and Committee, is whether the language permitting confidences to be used by the lawyer for self-defense might be too broadly written for retaliatory discharge cases. Another question is whether language should be added to clarify that client identity and fees are generally not protected by the privilege.

In addition, there are two draft privilege rules on which no further comment or review appears necessary at this point. These rules are:

1. The rule on waiver, the text of which was tentatively approved at the April 2001 meeting.

2. The rule granting a witness a privilege to refuse to testify against a spouse. At the April 2001 meeting, the Committee resolved not to proceed with such a privilege at this point.

These Rules are included at the end of the materials for the convenience of the Committee.

# Physician and Mental Health Provider-Patient Privilege and Supporting Material

(a)Definitions. As used in this rule:

(1) A "communication" is any expression through which a privileged person intends to convey information to another privileged person or any record containing such an expression;

(2) A "patient" is a person who consults a physician or mental health provider for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional condition including addiction to alcohol or drugs.

(3) A "physician" is a person authorized **[licensed]** in any domestic or foreign jurisdiction, or reasonably believed by the patient to be authorized **[licensed]**, to practice medicine.

(4) A "mental health provider" is a person authorized **[licensed]** in any domestic or foreign jurisdiction, or reasonably believed by a patient to be authorized **[licensed]**, to engage in the diagnosis or treatment of a mental or emotional condition, including addiction to alcohol or drugs.

(5) A "privileged person" is a patient, physician, mental health provider or an agent of any of these persons who is reasonably necessary to facilitate communications between the patient and the physician or mental health provider or who is participating in the diagnosis or treatment of the patient under the direction of a physician or mental health provider.

(5) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one except a privileged person will learn the contents of the communication.

**(b) General Rule of Privilege.**

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purpose of obtaining or providing diagnosis or treatment of the patient's physical, mental, or emotional condition including addiction to alcohol or drugs.

**(c) Who May Claim the Privilege.**

A patient or a personal representative of an incompetent or deceased patient may invoke the privilege A patient may, implicitly or explicitly, authorize a physician or mental health provider, the agent of either, or any person who participated in the diagnosis or treatment of the patient under the direction of a physician or mental health provider to invoke the privilege on behalf of the patient.

**(d) Exceptions.** The physician or mental health provider privilege does not apply to a communication

(1) relevant to an issue in proceedings to hospitalize the patient for physical, mental or emotional illness if the physician or mental-health provider, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization;

(2) made in the course of a court-ordered investigation or examination of the physical, mental, or emotional condition of the patient, whether a party or a witness, with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise;

(3) relevant to the issue of the physical, mental, or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense;

(4) that occurs when a patient consults a physician or mental health provider to obtain assistance to engage in a crime or fraud **[or to escape detection or apprehension after the commission of a crime or fraud]**. Regardless of the patient's purpose at the time of consultation, the communication is not privileged if the patient uses the physician's or mental health provider's services to engage in or assist in committing a crime or fraud;

(5) in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual and the disclosure of such information is necessary to prevent that death or injury;

(6) relevant to an issue in a proceeding challenging the competency of the physician or mental health provider;

(7) relevant to a breach of duty by the physician or mental-health provider; or

(8) that is subject to a duty to disclose under the laws of the United States **[or of any State or political subdivision thereof]**.

## Sources and Comments on the Physician and Mental Health Provider - Patient Privilege

**(Draft, 2/28/02)**

In form, this draft privilege is based upon our draft of the attorney-client privilege. However, much of the substantive content of the rule is based upon the 1999 amendment to Uniform Rule of Evidence 503. Most importantly, the concept of a "mental health provider" is based on that Rule as are the exceptions to the application of the privilege. Following are some comments with regard to specific aspects of the draft rule and my proposed variations from the content of the Uniform Rule.

### *1. A general physician-patient privilege?*

A basic decision to be made with regard to this privilege is whether to extend it to general physician-patient communications. This draft extends the privilege.

Uniform Rule 503 provides options for what health professionals are to be included in the rule. A general physician-patient privilege is one of the options.

At present, there is no general physician-patient privilege in federal law. See, *e.g., Hancock v. Dodson,* 958 F.2d 1367 (6th Cir. 1992); *United States v. Moore*, 970 F.2d 48 (5th Cir. 1992); *United States v. Bercier*, 848 F.2d 917 (8th Cir. 1988) Language in *Jaffee v. Redmond,* 518 U.S. 1, 10 (1996), which recognized a psychotherapist-patient privilege, distinguished the need for confidentiality in that relationship from general physician-patient communications. On the other hand, the absence of a general physician-patient privilege in the Proposed Federal Rules of Evidence was the subject of considerable debate in Congress and the absence of such a privilege was, at least in part, why the privilege rules contained in the original proposal were rejected. *See, e.g.,* the arguments made in Charles L. Black., Jr., *The Marital and Physician Privileges – A reprint of a Letter to a Congressman,* 1975 Duke L. J. 45. Forty states have a general physician-patient privilege.

### *2. Mental Health Provider*

The Uniform Rules adopt the term "mental health provider" in order to recognize the extension of the privilege beyond psychiatrists and psychologists in *Jaffee v. Redmond, supra.* The *Jaffee* case extended the privilege to licensed social workers. See Robert H. Aronson, *The Mental Health Provider Privilege in the Wake of* Jaffee v. Redmond, 54 Okla.L.Rev. 591 (2001). But, as stated in the Uniform Commissioner's comments, the intention of Uniform Rule 503 is to adopt a somewhat "narrower form of the privilege." As Aronson states, the "mental health provider" privilege, unlike the social worker privilege existing in many state statutes, would not include all communications with a social worker in all aspects of his or her work. Social worker privileges broadly define "social work" as the counseling of clients to "enhance or restore their capacity for

physical, social and economic functioning." Aronson, *supra* at 608-609, citing 59 Okla. Stat. §§ 1250.1(2), 1261.6 (1995). Uniform Rule 503 and this draft rule limit the privilege to communications relating to "diagnosis or treatment of a mental or emotional condition, including addiction to alcohol or drugs."

Lower court cases decided after *Jaffee* have, with somewhat mixed results, dealt with the application of the privilege articulated in that case to professionals such as rape crisis counselors, *United States v. Lowe,* 948 F. Supp. 97 (D. Mass. 1996) (privilege extended), Employee Assistance Program counselors, *Oleszko v. State Compensation Insurance Fund,* 243 F 3d 1154 (9th Cir. 2001) (privilege extended); Alcoholic Anonymous hotline volunteers, *United States v. Schwensow,* 151 F.3d 650 (7th Cir. 1998) (no privilege under circumstances where the patient did not seem to be seeking diagnosis or treatment), and Marriage, Family and Child Counselors, *Speaker v. County of San Bernardino,* 82 F. Supp.2d 1105 (C.D. Cal. 2000) (privilege applied where patient reasonably believed that the therapist was a licensed psychologist). See discussion in Aronson, *supra,* at 599-601.

The Uniform Rule would clearly cover licensed social workers under facts such as those in *Jaffee*. Aronson believes that the rule would also cover Employee Assistant Program counselors in cases such as *Oleszko. Supra* at 611. The question, however, is whether we want the federal rule to apply in such situations that may be beyond the reasoning of the Supreme Court in *Jaffee.* One way to further limit the application of the privilege would be to substitute the bracketed word "licensed" for "authorized" in sections (a) (3) and (4) of the rule. Such a substitution would require that any mental health provider at least have a state license to diagnose or treat mental or emotional conditions. It probably would preclude application of the rule to counselors in cases such as *Oleszko* and *Lowe.*

***3. Definition of physician***

The draft keeps the "practice medicine" language of the Uniform Rule. The Committee may want to consider whether this includes health professionals such as dentists, chiropractors, podiatrists and optometrists, and if so, whether we want to include them in the privilege. My intention, and I believe that of the Uniform Rule, is to exclude them from the coverage of the privilege.

***4. Who may claim the privilege***

This paragraph is, in form, based on the corresponding provision in our draft of the attorney-client privilege. The language of the second sentence is based upon the definition of "privileged person" contained in Paragraph (a)(5) of the Rule.

***5. Hospitalization proceedings***

Unlike the Uniform Rule, this draft expands the exception in part (d)(1) to include proceedings to hospitalize the patient for physical and emotional as well as mental illness. Although

proceedings to hospitalize for other than mental illness are rare, they can occur. The change would also avoid the problem of deciding what type of illness the hospitalization is for. The language is based on Alaska R. Rev. 504(d)(4). *See also* Neb. Rev. Stat. Ann. § 27-504(4)(a) (Michie 2001).

***6. Crime or fraud***

The language of this paragraph tracks, at least in part, the corresponding exception in our draft of the attorney-client privilege. The phrase "or aiding a third person to do so," contained in the attorney-client exception, is not included here. It is difficult to imagine a confidential communication between physician and patient that would aid a third party to commit a crime or fraud without also implicating the patient in the crime. The bracketed phrase referring to "escape detection or apprehension after the commission of a crime or fraud" is based on language contained in the rules of some states. See Alaska R. Rev. 504(d)(2); Kan. Stat. § 60-427 (2000). The language is probably not necessary in light of the fact that escape or avoiding detection is itself likely to be a crime or an act in furtherance of a fraud.

***7. Dangerous Patient***

This draft adds to the language of the Uniform rule the clause "and the disclosure of such information is necessary to prevent death or injury."

The dangerous patient exception, embraced by this exception, can be attributed to a footnote in the *Jaffee* case, where the Court said:

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

*Jaffee v. Redmond,* 518 U.S. at 18, n. 19.

Despite this language, two lower court cases have refused to recognize such an exception where the danger to others had past. In *United States v. Glass,* 133 F.3d 1356 (10th Cir. 1998) recognized the possibility of a dangerous patient exception to the privilege but found it inapplicable.

> . . . on the record before us, we have no basis upon which we can discern how ten days after communicating with his psychotherapist, Mr. Glass' statement was transformed into a serious threat of harm which could only be averted by disclosure.

In United States v. Hayes, 227 F.3d 578 (6th Cir. 2000), the court refused to recognize a dangerous patient exception to the privilege. The court distinguishes between a duty to disclose in order to protect the patient or others and the disclosure of the threat in a court proceeding after the danger had past.

Based upon *Jaffee, Glass and Hayes,* this draft recognizes the possibility that the privilege ought not attach when there is a need to protect others based upon a threat from the patient. However, there seems to be no need to create an exception to the privilege once that danger has past. The Uniform Rule does not seem to recognize this distinction.

***8. Duty to Disclose***

Exception (d) (8) is based on a comparable exception in Uniform Rule 503. Without the bracketed language, it would leave the question of duty to disclose within the province of federal law. With the bracketed language, the exception would cover state law as well. If state duties to disclose are included, the Advisory Committee notes ought to make clear that the language is intended to address affirmative duties to disclose rather than simply the absence of a state privilege. Otherwise, narrower state privilege laws would automatically supplant the federal rule. The Committee should also consider whether the duty to disclose must be imposed by statute, rule or regulation as opposed to case law.

***9. Other Possible Exceptions***

Some states have other exceptions to their privileges. For example, Vermont R.Rev 503(d)(4) excepts dentists dealing with identification issues. Wisconsin has a broad exception for homicide cases, see Wisc.Stat. Ann.§ 905.04(4)(d). There are a multitude of others.

# Privilege for Communications to Clerics

# With Notes and Comments

## Rule 5-: Privilege for Confidential Communications to Clerics

**Draft date March 21, 2002**

**(a) Definitions.** As used in this rule:

(1) A "communication" is any expression through which a person intends to convey information to another person or any record containing such an expression;

(2) A "cleric" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the cleric

(3) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person is seeking spiritual counsel, solace or absolution from a cleric and reasonably believes that no one except the cleric and others present in furtherance of the purpose of the communication will learn its contents.

**(b) General Rule of Privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a communication made in confidence by that person to a cleric in the cleric's professional capacity as a spiritual adviser.

**(c) Who May Claim the Privilege.** The privilege under this rule may be claimed

(i) by the person who made the protected communication to a cleric;

(ii) by that person's guardian or conservator;

(iii) by that person's personal representative if that person is deceased; or

(iv) by the cleric to whom the communication was made, but only on behalf of the person who made the communication. A person who makes a communication in confidence under this Rule may, implicitly or explicitly, authorize a cleric to invoke the privilege on behalf of the communicating person.

## Sources

The draft is derived from proposed Rule 506, as modified slightly by the Uniform Rules Committee. But it is adapted in form to comport with the structure in our drafts of the Lawyer-Client privilege and Physician-Patient privilege.

## Notes and Issues for the Committee

1. As with all other privileges, the Committee must consider the *a priori* question of whether a privilege for communications to clerics merits codification. This privilege was one of those proposed by the original Advisory Committee, and it has been recognized under Federal Common Law.

2. A specific reference to Christian Science practitioners is added. This is also done in the Uniform Rules and in several states such as New York. The specific reference appears to be a recognition that the relationship between Christian Science practitioners and their religious organization is somewhat different from that of clerics and other organizations.

3. Mississippi adds a subdivision providing as follows:

> "A cleric's secretary, stenographer, or clerk shall not be examined without the consent of the cleric concerning any fact, the knowledge of which was acquired in such capacity."

This paragraph seems overbroad. It would appear to protect against disclosure of a cleric's records of personal criminal activity, child sexual abuse, etc. But perhaps there should be some specific protection that would shield secretaries and the like who have information of confidential communications made by a "penitent".

4. Consideration might be given to exceptions to this privilege that parallel other privileges, specifically:

a. An exception for declarations of imminent bodily harm, analogous to the psychotherapist-patient privilege.

b. A crime-fraud exception, analogous to the attorney-client privilege.

c. An exception for statements concerning child and domestic abuse, analogous to the interspousal privilege.

My instinct is that these exceptions are not necessarily fully applicable to the clergy-communicant relationship. For example, the future harms exception is based on substantive law duties that psychotherapists have to protect third parties from imminent harm from patients. I am unaware of any substantive law that extends the *Tarasoff* duty to members of the clergy. If such an exception were adopted, however, it could read something like this:

**There is no privilege under this rule for any communication in which a person has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to any person and the disclosure of the communication is necessary to prevent that death or injury.**

Beyond any substantive duty owed by the cleric to prevent imminent harms, the Committee may decide that such an exception is appropriate anyway as a matter of public policy.

As to the crime-fraud exception: it arises from a concern that a client may be using the attorney's legal services to violate the law. This concern is often well-founded. In contrast, it seems rather unlikely that a "penitent" would be using the cleric's services to further a plan of crime or fraud (as opposed to confessing past crimes, which should be protected by the privilege). However, if a crime-fraud exception were added to the clergy-communicant privilege, it could read something like this.

**There is no privilege under this rule if a person consults a cleric to obtain assistance in engaging in a crime or fraud or aiding a third person to do so.**

As to confessions of child abuse, some states are proposing to add such an exception to the clergy-communicant privilege, with an exception if the cleric's religion would not permit disclosure. This is basically a policy question for the committee. If the exception were adopted, it could read something like this:

> **There is no privilege under this rule for a communication that is relevant to prove conduct related to physical or sexual abuse of a child.**

Alternatively, language might be lifted from the draft of the physician-patient privilege, which raises similar issues of disclosure of child abuse, but frames the exception more broadly to cover any statutory reporting obligation:

> **There is no privilege under this rule for a communication that is subject to a duty to disclose under the laws of the United States [or of any State or political subdivision thereof].**

As with the psychotherapist-patient privilege, it is for the Committee to decide whether there should be an exception for state-mandated (as opposed to federal-mandated) disclosure. The argument against permitting state mandated disclosure is that the federal privilege would then be controlled by state law.

5. The Committee Note should emphasize that the privilege is not limited to one-on-one sessions, but can protect communications where a number of people with a common problem confer with a cleric in order to obtain religious advice. The language in the Rule, declaring that a communication is confidential if made with "others present in furtherance of the purpose of the communication" is intended to cover multi-party exchanges. See *In re Grand Jury Investigation*, 918 F.2d 374 (3d Cir. 1990) (Becker, J ) ("As is the case with the attorney-client privilege, the presence of third parties, if essential to and in furtherance of the communication, should not void the privilege.").

6. The last line of the Rule parallels the implicit authorization language of the lawyer-client privilege. The original Advisory Committee proposal used a different approach, one that has been adopted in the Uniform Rule. Those rules treat the "who may claim?" question as follows:

**(c) Who May Claim the Privilege.** The privilege under this rule may be claimed

(i) by the person who made the protected communication to a cleric;

(ii) by that person's guardian or conservator;

(iii) by that person's personal representative if that person is deceased; or

(iv) by the cleric to whom the communication was made, but only on behalf of the person who made the communication. **The cleric's authority to invoke the privilege is presumed in the absence of evidence to the contrary.**

The presumption-based language in the original Advisory Committee proposal is probably based on the unique nature of a cleric's dilemma when ordered to disclose information received during spiritual counseling. The Privileges Subcommittee agreed that the language of implicit authorization should be used instead, to provide parallelism with the other proposed privileges. But if the Committee as a whole wishes to track the original Advisory Committee proposal, the presumption-based language can be substituted.

# Privilege for Confidential Interspousal Communications and Supporting Material

# MARITAL COMMUNICATIONS PRIVILEGE

**Draft Date: March 21, 2002**

**(a) Definitions.** As used in this rule:

(1) A "communication" is any expression through which one spouse intends to convey information to another spouse or any record containing such an expression;

(2) A "spouse" is either partner to a marriage recognized as such under the law of the place of the origination of their marriage.

(3) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating spouse reasonably believes that no one except the other spouse will learn the contents of the communication.

**(b) General Rule of Privilege**

A spouse has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between spouses during the existence of their marriage.

**(c) Who may claim the privilege.**

Either spouse may claim the privilege. However, notwithstanding any other provision of these rules, a waiver of the privilege by the communicating spouse is binding on both spouses.

**(d) Exceptions.** There is no privilege under this rule:

(1) in any civil proceeding in which the spouses are adverse parties;

**alternative 1**

**[(2) in any criminal proceeding if the court finds by a preponderance of the evidence that the spouses acted jointly in the commission of the crime charged;]**

**alternative 2**

**[(2) in any criminal proceeding if the court finds by a preponderance of the evidence that the spouses acted jointly in the commission of the crime charged and the communication was in furtherance of that crime;]**

**alternative 3**

**[(2) if the court finds by a preponderance of the evidence that the spouses acted jointly in the commission of patently illegal activity;]**

(3) in proceedings in which one spouse is charged with a crime or tort against the person or property of the other or of a child of either **[or of a child related to either spouse][or of a child living in the household of either]**, or with a crime or tort against the person or property of a third person committed in the course of committing a crime or tort against the other or a child of either **[or of a child related to either spouse][or of a child living in the household of either]** ; or

(4) if the interests of a minor child of either spouse **[or of a child related to either spouse][or of a child living in the household of either]** would be adversely affected by invocation of the privilege.

**alternative 1**

**[(5) if the spouses were separated at the time of the communication in question and the marriage was irreconcilable.]**

**alternative 2**

**[(5) if the spouses were permanently separated at the time of the communication.]**

## Derivation of Marital Communications Privilege and Issues to be Discussed

*Section (a)(1)*

This is an adaptation of the communications definition in the lawyer-client draft. By adopting this definition, we would be limiting the privilege to expressions intended by one spouse to convey a meaning or message to the other. Many state courts go beyond this to include acts done privately in the presence of the spouse. The rule would have to be amended to include such acts. As expressed in 1 Strong et al, McCormick on Evidence, § 79 (5th Ed. 1999), an extension beyond intended expressions does not seem to be wise policy. For federal cases limiting the exception to communications, see *United States v. Lofton*, 957 F.2d 476 (7th Cir. 1992); *United States v. Estes*, 793 F.2d 465 (2d Cir. 1986). As in the case of the amendment made by the subcommittee to the lawyer-client privilege, this draft changes the phrase "attempts to convey" to "intends to convey."

*Section (a)(2)*

This definition was revised by the subcommittee to reflect the policy determination that the law of the place of origination of the marriage should govern. The parties have a reasonable expectation that the law governing their marriage will continue to be that place. The original draft of this subsection read as follows: *A "spouse" is either partner to a marriage recognized as such under the law of the place where the couple lived at the time of the communication in question or, if the couple was not living together at the time of the communication, the place of the origination of their marriage.* The first part of this definition, dealing with the place where the couple lived at the time of the communication, was based on case law. See particularly *People v. Schmidt*, 579 N.W. 2d 431 (Mich. App. 1998) (recognizing a common law marriage valid under the law of the place where the couple resided at the time of the communication); *Compare United States v. Acker*, 52 F.3d 509 (4th Cir. 1995) (no privilege where neither of the states in which couple had lived recognized common law marriages). The clause dealing with origination of the marriage was added in the original draft to deal with the unlikely, but possible, situation where the couple had temporarily separated and the partners were living in different states. There is little case law one way or the other to support the origination language, either in the original draft or in the subcommittee's version. However, at least one court has referred to the need to give full faith and credit to common law marriages "originating in other states." *State v. Williams*, 688 So.2d 1277 (La.App. 1997). In addition, the definition does not deal specifically with the question of a bigamous marriage. However, the word "marriage" is intended to mean a valid marriage. If the committee thinks it useful, the word "valid" can be added. However, a comment in the note should be sufficient to deal with the question. The issue that occurs when one spouse is not aware of the invalidity of the marriage can be dealt with by the courts without trying to anticipate the question in the rule.

The Committee Note to this subsection should make it clear that the place of origination of the marriage is the place where the marriage began to have legal effect. For example, assume that a couple had lived in a state that did not recognize common law marriages, but then moved to a state

that did recognize such unions. The applicable law would be the law of the state that recognized the marriage.

*Section (a)(3)*

The definition of "in confidence" is adapted from the draft of the lawyer-client privilege.

*Section (b)*

The general rule is adapted from the draft of the lawyer-client privilege. It was amended after the subcommittee meeting to conform to the suggested changes in the changes in the lawyer-client privilege. The new draft clearly states that a spouse may prevent "any other person from disclosing a communication." Obviously, this includes an eavesdropper, provided the communication was in confidence within the meaning of (a)(3). There are cases, especially older cases, that do not protect a spouse from the testimony of eavesdroppers. See cases collected in 1 Strong et al, McCormick on Evidence § 82 (5th Ed. 1999). However, the better policy would seem to be to protect confidential statements from disclosure from any source. See California Evidence Code § 980.

*Section (c)*

This statement varies from Uniform Rule 504, which states the privilege: "An individual has a privilege to refuse to testify and to prevent the individual's spouse or former spouse from testifying as to any confidential communication made by the individual to the spouse during their marriage." The Uniform Rule thus limits the privilege to the communicating spouse and we could certainly justify a similar statement. Such a limitation would be consistent with the policy of encouraging freedom of expression between spouses. However, there would seem to be no good policy reason to deny the listening spouse the right to assert the privilege. The privilege works both ways in conversations between lawyer and client. Similarly, in the case of marital communications, there may be situations in which one spouse's silence is itself a communication or an entire conversation is offered to show the collective expressions of both spouses. See discussion in Mueller & Kirkpatrick, Evidence §5.32, p. 457 (Aspen 1999). See also Calif. Evid. Code § 980. However, there would seem to be no reason to continue the existence of the privilege once it is waived by the communicating spouse. For example, the communicating spouse may want the statement in evidence because it is exculpatory. There is not a good policy reason to enable the listening spouse to prevent such a disclosure.

*Section (d)(1)*

Derived from Uniform Rule 504(1).

*Section (d)(2)*

There are three alternatives set out. The first alternative is taken from the draft of the Spousal Testimony Privilege. That draft is in turn borrowed from the Uniform Rule, although the burden is changed from "unrefuted" to a "preponderance."

The second alternative is based upon the discussion in 2 Saltzburg, Martin & Capra, Federal Rules of Evidence Manual, 742-43 (Lexis 1998) where the authors argue that a "joint participants" privilege may be applicable to the adverse testimony privilege, but is not well-suited to the marital communications privilege. The exception should rather go to the intent behind the communication rather than to the status of the communicant Although the point made is a good one, there does not seem to be much federal case law support for it. Most cases, like *United States v. Hill,* 967 F.2d 902 (3d Cir. 1992), articulate a pure joint participant privilege without regard to whether the communications in question were in furtherance of the crime.

The third alternative is based upon the language of decisions in some circuits that limit the exception to "patently illegal activity." See *United States v. Evans,* 966 F.2d 398 (8th Cir. 1992); *United States v. Sims,* 755 F.2d 1237 (6th Cir. 1985). If the "patently illegal activity" test is used, there would seem to be little reason for limiting the exception to criminal cases or to communications dealing only with a crime charged in an indictment.

*Section (d)(3)*

Derived from the draft of the Spousal Testimony Privilege, which was borrowed from the Uniform Rule. This exception and exception (4) have been amended since the committee first saw a draft of this privilege to add optional language concerning the children covered by the exception. The first bracketed phrase would be used in lieu of the phrase "child of either." The second could be used either in lieu of that phrase, in addition to it or in addition to the first bracketed phrase. The bracketed language was added for the committee's consideration at the meeting of the subcommittee on privileges.

*Section (d)(4)*

Derived from the draft of the Spousal Testimony Privilege, which was borrowed from the Uniform rule. See above note with regard to the bracketed phrases.

*Section (d)(5)*

Many states consistently apply the marital communications privilege regardless of whether the spouses are living together at the time of the communication. See 1 Strong, et al, McCormick on Evidence, § 81 (5th Ed. 1999). However, all of the federal circuits which have dealt with the question have considered the continuing viability of the marriage in determining whether the privilege is applicable. The two alternatives reflect the two different tests used to determine viability *Compare United States v. Murphy*, 65 F.3d 758 (9th Cir. 1995) (no privilege where the couple has separated and the marriage is irreconcilable) with *United States v. Porter,* 986 F.2d 1014 (6th Cir. 1993) (no privilege if the couple has permanently separated).

# Rule 501 and Memorandum on Choice of Privilege Law

# In Mixed Claims Cases

## Rule 501

**Draft dated March 21, 2002**

**Rule 501. General Rule; State Law; Other Privileges.**

**(a) General rule.** Except as otherwise provided by the Constitution of the United States, Act of Congress, these rules, or other rules prescribed by the Supreme Court pursuant to statutory authority, there is no privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object, writing, recording or other information, whether in tangible, electronic, or other form; or

(4) prevent another from being a witness, disclosing any matter or producing any object, writing, recording or other information, whether in tangible, electronic or other form.

**(b) State law.** In a civil action or proceeding with respect to an element of a claim or defense as to which state law supplies the rule of decision, and in which there is no federal claim **[to which the challenged evidence is relevant]**, privileges shall be determined in accordance with state law. The word "state" as used in this rule includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

**(c) Other privileges.** A privilege not recognized by Act of Congress, these rules, other rules prescribed by the Supreme Court pursuant to statutory authority, or existing federal common law, may be recognized only if the court finds in the light of reason and experience that the benefits of the privilege outweigh the cost in the loss of probative evidence that would result from application of the privilege.

# Notes on Rule 501

1. The definition of "state" in subdivision (b) tracks the language of the diversity statute, 28 U.S.C. 1332(d). The minutes of the April 2001 meeting reflect the reason for this modification of the draft:

> After discussion at the meeting, it was determined that the reason that the District, Commonwealth and Territories should be treated on a par with the States is that Congress has provided for diversity jurisdiction for cases between citizens of different States, and the term "States" includes "the Territories, the District of Columbia, and the Commonwealth of Puerto Rico." See 28 U S.C. § 1332(d). Because Congress has decided to treat those jurisdictions on a par with the States for purposes of diversity, it follows that the same considerations supporting the application of the State law of privilege in a diversity case apply to the District of Columbia, the Commonwealth of Puerto Rico and the Territories. Those considerations are grounded in the policy judgment of current Rule 501 that the choice of privilege law should be tied to the applicable substantive law. The Committee therefore agreed that the catchall provision should include language defining a "State" as any jurisdiction whose residents can qualify for diversity jurisdiction under 28 U.S.C. § 1332(d)

2. Subdivision (b) codifies the general rule that in cases where there are both federal and state claims, the federal rule of privilege applies. The Subcommittee decided to include the bracketed language to codify an exception, permitting the state rule of privilege to apply where the challenged evidence is relevant only to the state claim. In such a situation, the conflict would be between admitting the evidence under federal law and excluding it under state law. Where the evidence is only relevant to the state claim, there seems no basis to ignore the state privilege law–any cost in the loss of relevant evidence is borne by a state policy. Whether this language should be retained or modified is a question discussed in detail in a separate memo included in this agenda book.

3. The Committee resolved at the April 2001 meeting to include a statement in the Committee Note that the reference to "existing" common law privileges refers to privileges existing on the date of enactment of the rule. This will clarify that a court may not adopt a new common law privilege unless it is consistent with the balancing test required by this Rule 501.

4. The balancing test for new privileges in subdivision (c) was approved by the Committee at the April 2001 meeting; this is a change from an earlier draft which permitted new privileges only if "the benefits of the privilege substantially outweigh the loss of probative evidence that the privilege would entail."

# Matters for Committee Note To Rule 501

1. If the rule of decision is supplied by foreign law, the court must determine whether to apply the federal or the foreign law of privilege. Cite cases discussing this issue.

2. There are some provisions in CFR that might be thought to have an effect on privileges. See, e.g., 27 C.F.R.§ 70.803 (disclosure of ATF records in criminal cases, privilege controlled by Director); 32 C.F.R. § 725.8 (national defense, release of information and testimony by Navy personnel). To the extent administrative rules impact on privileges, it is almost always by determining the application of privileges in administrative proceedings. These regulations have no effect on the Evidence Rules, which apply to court proceedings. Other administrative rules appear to affect discovery (e.g., rules exempting certain governmental officials from pretrial discovery in criminal cases). But these rules are not grounded in an evidentiary privilege. To the extent there are administrative rules that purport to exclude evidence on grounds of privilege in a federal court proceeding, it could be argued that such a privilege is not recognized under Rule 501 because the source of law language does not mention administrative rules. But administrative rules, to be valid, must proceed from a delegation in an Act of Congress. Therefore, the reference to Act of Congress in the rule is broad enough to cover valid administrative regulations.

3. Specify that some new privileges might serve public and private interests whereas others might serve only public interests.

4. Specify that the reference to privileges existing under common law refers only to those privileges not specifically recognized or abrogated by Congress in a codification. Pre-existing federal common law should not affect privileges that are part of the enactment (e.g., the attorney-client privilege)–if it did, there would be little reason for codification New privileges not existing on the date of enactment can only be established by the balancing test in subdivision (c).

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Rule 501–applicability of state privileges in mixed federal-state cases.
Date: March 1, 2002

As you know, the privileges subcommittee is engaged in a long-term project to prepare rules that would codify the federal law of privileges. The subcommittee has drafted a proposed Rule 501 that has been twice considered by the full Committee. At its April 2001 meeting, the Committee approved most aspects of the subcommittee's draft of Rule 501, but directed the Reporter to research the case law on whether the state law of privilege is ever applied in cases where both federal and state claims are presented–called herein "mixed claims cases".

The minutes to the April 2001 meeting set forth the issue to be addressed in this memo:

> The Committee then considered how and whether the draft rule should treat "mixed" claims: specifically, which privilege law should apply in a case in which federal and state claims are joined? The Subcommittee's current draft provides that if there is a federal claim in the case, then federal privilege law applies to *all* of the claims. The Reporter stated that the circuit court cases considering this matter have held that federal privilege law applies to all claims in a mixed claims case. Those cases have found it untenable to apply different privilege laws to the different claims, because it would be impossible to regulate the evidence and properly instruct the jury. The question is therefore whether federal or state law should apply to all the claims. The circuit courts have reasoned that the need for uniformity and consistency in federal privilege law requires that federal law of privilege must apply in mixed claims cases. However, the Reporter noted that a few cases can be found applying the state law of privilege to all claims in mixed cases. One Committee member argued that applying federal law of privilege to state claims in mixed cases undermines the *Erie* concerns that are embodied in the current Rule 501. Another member stated that the crucial question is whether the courts have been consistent in applying federal privilege law in mixed claims cases. If some courts would apply the state law of privilege in mixed claims cases, then Congress might be legitimately concerned about an amendment that would limit the application of state privileges more than

is the case under current law.

After further discussion, the Committee directed the Reporter to do further research on the case law concerning privilege applicability in mixed claims cases. If there is a fair body of case law on either side of the matter, then the draft rule should simply leave the treatment of mixed claims cases to a discussion of that case law in the Committee Note. However, if the vast body of authority mandates the application of the federal law of privilege in mixed claims cases, then the draft should codify this case law.

This memo discusses the case law on applicability of state privilege law in "mixed" federal - state cases. It is divided into five parts. Part one discusses the predominant rule in the cases, which is that federal and not state privilege law applies to all claims. Part two discusses the cases using state privilege law as a reference point if the federal law of privilege is unclear. Part three discusses cases applying state law when the challenged evidence is relevant only to the state law claim and not to the federal law claim. Part four discusses cases leaving open the possibility that the state law of privilege will apply to both federal and state claims, at least under certain circumstances. Part five sets forth the draft rule as it exists now, and how it might be changed if the issue of privilege applicability in "mixed" cases is either not addressed or addressed differently.

## I. General Rule–Federal Law of Privilege Applies In Mixed Claims Cases

It is fair to state that the vast majority of federal courts have held that the federal law of privilege controls in cases presenting both federal and state claims. These cases generally involve an underlying federal question issue with pendent state law claims. *See, e.g., Hancock v. Hobbs,* 967 F.2d 462, 466 (11th Cir. 1992) (where jurisdiction is based on a federal question and pendent state claims give rise to conflicting federal and state privilege laws, federal privilege law controls; this is the case even where the evidence sought is relevant to a pendent state claim); *Hancock v. Dodson,* 958 F.2d 1367 (6th Cir. 1992) (existence of pendent state claim did not relieve the court of its obligation to apply the federal law of privilege in a section 1983 case); *von Bulow v. von Bulow,* 811 F 2d 136 (2d Cir. 1987) (federal law controlled question of the existence of a journalist's privilege, in a case where state claims were joined with civil RICO claims); *Memorial Hosp. for McHenry County v. Shadur,* 664 F.2d 1058, 1061 n.3 (7th Cir. 1981) (yes, that Shadur) (finding federal privilege law applied in federal antitrust action with pendent state law claim); *Robinson v. Magovern,* 83 F.R.D.79, 84 (W.D.Pa.1979) (federal law controlled on the question of privilege in a federal antitrust action, notwithstanding the presence of a pendent state claim); *Manzi v. DiCarlo,* 982 F. Supp. 125, 127 (E.D.N.Y. 1997) (where main claim in case arose under federal law, federal privilege law applied to both federal and state claims); *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.,* 174

F.R.D. 609, 632 (M.D. Pa. 1997) ("In a federal question case with supplemental state law claims, the federal law of privileges governs the entire case."); *Damiano v. Sony Music Entm't, Inc.*, 168 F R.D. 485, 494 (D.N.J. 1996) (applying federal privilege law where all pendent state law claims were "intimately connected" to the initial federal claim); *Robertson v. Neuromedical Ctr.*, 169 F.R.D. 80, 82-3 (M.S. La. 1996) (finding federal privilege law applied despite pendent state law claims in "primarily a federal question case"); *In Re Combustion, Inc.*, 161 F.R.D. 51, 54 (W.D. La. 1995) ("I further hold that the federal law of privilege provides the rule of decision with respect to privilege issues affecting the discoverability of evidence in this federal question case involving pendent state law claims."); *Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 527-28 (N.D. Fla. 1994) (finding federal privilege law governs the entire case with mixed federal and state law claims); *Smith v. Alice Peck Day Mem'l Hosp.*, 148 F.R.D. 51, 53 (D.N.H. 1993) ("In federal question cases where pendent state law claims are raised, the asserted privileges are governed by federal common law."); *PPM America, Inv. V. Marriott Corp.*, 152 F.R.D.32, 34 (S.D.N.Y. 1993) (federal privilege law applies in cases involving both federal and state claims); *Hansen v. Allen Mem'l Hosp.*, 141 F.R.D. 115, 120-21 (S.D. Iowa 1992) (finding, "at least where the issue is the discoverability of evidence," federal privilege law is controlling in federal question cases with pendent state law claims); *Fittanto v. Children's Advocacy Cent.*, No. 91C6934, 1992 WL 350710, at *1 (N.D. Ill. Nov. 23, 1992) ("Federal question cases with pendent state law claims are controlled by federal law."); *Bayges v. Southeastern Pa. Transp. Auth.*, 144 F.R.D. 269, 271 (E.D. Pa. 1992) ("In cases where there are federal claims coupled with pendent state claims, the question of privilege is resolved by the federal law on privileges."); *Puricelli v. Borough of Morrisville*, 136 F.R.D. 393, 397 (E.D. Pa. 1991) (same); *Wei v. Bodner*, 127 F.R.D. 91, 95 (D.N.J. 1989) (where case contained both federal and state claims, the court found federal privilege law applied to the issue of whether a state peer review privilege should be recognized); *First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim*, 110 F.R.D. 557, 560 (S.D.N.Y. 1986) ("When evidence that is the subject of an asserted privilege is relevant to both federal and state law claims, the courts have held consistently that federal law governs the privilege"); *Sneirson v. Chemical Bank*, 108 F.R.D 159, 161 (D.C. Del. 1985) (federal law in favor of admissibility applies to cases containing both federal and state law claims).

Similarly, courts have held that federal privilege law applies to all privilege claims where jurisdiction is based on *both* diversity of citizenship and the presence of federal claims. *See, e.g., Alice Peck Day Mem'l Hosp., supra,* 148 F.R.D. at 53; *Auersperg v. Bulow*, 811 F.2d 136, 141 (2d Cir. 1987).

It is notable that the general rule–federal law applies to both state and federal claims in mixed claims cases–is consistent with the legislative history of Rule 501. The Senate Report states that it is "intended that the Federal law of privileges should be applied with respect to pendant [sic] State law claims when they arise in a Federal question case." S.Rep. No. 1277, 93rd Cong , 2d Session, reprinted in 1974 U.S.Code Cong. & Ad.News 7051, 7059 n. 16.

## II. Where Federal Privilege Law Is Unclear

A few courts in mixed claims cases have looked to the state law of privilege when the relevant federal privilege law is *unsettled.* These courts have found that when federal law is unsettled courts "may resort to state law analogies for the development of a federal common law of privileges." *Brunt v. Hunterdon County,* 183 F.R.D. 181, 185-86 (D.N.J. 1998) (because "federal law in this District on the existence of the self-critical analysis privilege is unsettled, the Court should resort to state law analogies for guidance on the appropriate law to be applied in this case"). See also *Wm. T. Thompson Co. v. General Nutrition Corp., Inc.,* 671 F.2d 100, 104 (3d Cir 1982) (although holding federal privilege law is controlling in cases presenting both federal and state claims, "Our holding does not, of course, preclude resort to state law analogies for the development of a federal common law of privileges in instances where the federal rule is unsettled"); *Ziemann v. Burlington County Bridge Comm'n,* 155 F.R.D. 497, 504 (D.N.J. 1994) ("Under Rule 501 . . . the court may look to state law as a guide if the federal law of privileges is unsettled on a particular issue."); *Roberts v. Heim,* 123 F.R.D. 614, 622 (N.D. Cal. 1988) (where no federal law existed on specific issues of the scope of attorney/client and work product privileges, the court would be guided by state privilege law).

While these cases *refer* to the state law of privilege in "mixed" cases, they are not inconsistent with the basic premise that the federal law of privilege controls in such cases. These cases are using state law as guidance for determining what the federal privilege is. This analysis–referring to state laws of privilege when the federal common law is unclear–is well-accepted, and is often applied even when there is no state claim in the case For example, the Supreme Court in *Jaffee v. Redmond* looked to state law to determine whether to adopt a federal common law privilege for statements to psychotherapists. Thus, these cases are not an exception to the rule that the federal law of privilege is controlling in "mixed" federal-state cases.

## III. Where the Privilege Is Relevant Only to the State Claim

A few cases can be found where the disputed evidence is relevant *only* to the state law claim. The choice is typically between excluding the evidence due to a state rule of privilege, or admitting the evidence because it is relevant under Federal Rules 401 and 402. Where the evidence is relevant only to the state claim, the courts appear to apply the state law of privilege, on the ground that to do so does not conflict with federal law, and indeed is mandated by Federal Rule 501. *See, e.g., Platypus Wear, Inc. v. K.D. Co., Inc.,* 905 F. Supp. 808 809-13 (S.D. Cal. 1995) (in a case primarily in diversity jurisdiction, where there was only one federal law counterclaim among several state law diversity claims, and where the disputed evidence went to the state claims *only,* the court found state law governed the privilege claims; the Court notes that "this Court would not be forced to apply two different privilege rules to the same evidence."); *Waterloov Gutter Prot. Sys. Co., Inc. v. Absolute Gutter Prot., LLC,* 64 F. Supp. 2d 398, 411-13 (D.N.J. 1999) (applying a state law litigation privilege to a pendent state law counterclaim in a federal question case, in large part because the evidence was inapplicable to the underlying federal claims and therefore the state privilege did not "undermine any

federal interest"); *Freeman v. Fairman,* 917 F. Supp. 586, 588 (N.D. Ill. 1996) (applying state privilege law where alleged privileged report was relevant only to the pendent state claims); *In re Carmean,* 153 B.R. 985, 990-91 (Bankr. S.D. Ohio 1993) ("[W]here the federal court tries a pendent state law claim and the evidence for which a state law privilege is invoked is relevant only to the state claim, federal courts have applied the state law of privilege. . . ."); *Shaklee Corp. v. Gunnell,* 110 F.R.D. 190, 192 (N.D. Cal. 1986) (in case containing both federal and state claims, the court found state privilege law applied where the disputed evidence affected only the state law claims).

At least one case takes the opposite view, applying the federal law of privilege whenever there is a federal claim in the case. See *Doe v. Special Investigations Agency, Inc.,* 779 F. Supp. 21, 23 (E.D. Pa. 1991) (rejecting state privilege and admitting the evidence even though it was relevant only to pendent state claims, noting that "there are sound policy reasons for maintaining a bright line rule even where the material claimed to be privileged is relevant only to the state claim").

Those cases applying the state law of privilege where it is relevant only to a state law claim seem consistent with and indeed mandated by the language of the current Rule 501. That Rule states that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law provides the rule of decision, the privilege . . . shall be determined in accordance with State law." There is a problem applying this language in mixed cases where the challenged evidence is relevant to both state and federal claims and the state and federal privilege law is in conflict. The problem is that it is unworkable to apply the state law to the state claim and the federal law to the federal claim. But where the challenged evidence is applicable to the state claim only, there is every reason to apply the language of the Rule mandating the application of state privilege law. What this will ordinarily mean is that the evidence will be excluded when offered as proof on the state claim, and there is no risk of jury confusion because the evidence could not be admitted as proof on the federal claim.

## IV. Courts Holding That the State Law of Privilege Is Potentially Applicable in Mixed Claims Cases.

Several courts, although reaffirming the general rule that federal privilege law applies to mixed federal and state law claims, have also declared that federal courts might nonetheless apply state privilege law to all the claims in the interest of federal-state comity. Applying a case-by-case approach, these courts have considered factors such as the need for full disclosure, the State's interest in truth-seeking, a particular state's policy interest behind a privilege, whether state courts recognize the privilege and whether the privilege is "intrinsically meritorious" in the federal court's own judgment. *See, e.g., Shadur, supra,* 664 F.2d at 1061-062 (factors used included State's truth-seeking interest, need for full disclosure and the state's policy interest in invoking the privilege); *Alice Peck Mem'l Hosp., supra,* 148 F.R.D. at 54 (using two-pronged test: whether state courts recognize

privilege and whether privilege is "intrinsically meritorious"); *Van Emrik v. Chemung Dep't of Soc. Servs.*, 121 F.R.D. 22, 24 (W.D N.Y. 1988) (although finding that federal privilege law controlled in a mixed claims case, the court opined that courts should also consider "principles of federalism and comity" when determining what privilege law to apply).

Other courts have rejected the concept of comity and have simply applied federal law to all claims. *See, e.g., Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1170 (C.D. Cal. 1998) (disapproving courts' application of state privilege law "as a matter of comity" in mixed federal/state claims).

It should be noted that the cases leaving open the possibility that comity principles may justify the application of state law have generally applied the federal law of privilege to all claims in the end. Thus, these cases really do not stand for the proposition that the state law of privilege controls in mixed federal-state cases. *See, e.g., Shadur*, 664 F.2d at 1061 (finding state privilege against discovery of hospital review records did not apply where the plaintiff could not bring the action without access to the allegedly privileged documents); *Alice Peck Mem'l Hosp.*, 148 F.R.D. at 55-6 (refusing to apply state quality assurance privilege mainly because its application would not be "intrinsically meritorious"); *Manzi v. DiCarlo*, 982 F. Supp. 125, 131 (E.D.N.Y. 1997) ("[I]n the interest of comity, courts should attempt to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy;" the court nonetheless granted the plaintiff's motion, with restrictions, to remove confidential designation of documents); *Fittanto, supra*, 1992 WL 350710, at *1-2 (finding state privilege should *not* be recognized under FRE 501, in large part, because the "need for the truth" outweighed the state policy behind the privilege in the case); *Hansen, supra*, 141 F.R.D. at 121-24 (in the interest of comity the court balanced the need for truth against the public policy behind the state confidentiality privilege and concluded the need for truth prevailed).

I have not found a case that relied on comity principles and actually held that the state law of privilege applied to federal claims in a mixed case.

A few courts have applied a balancing test in cases containing mixed federal and state claims to determine whether federal or state privilege law applies–as opposed to a *per se* application of federal privilege law in mixed federal and state law claims. This balancing test is not stated in terms of comity but in fact it is not much different from the cases relying on comity. See *United States v. Cartledge*, 928 F.2d 93, 96-7 (4th Cir. 1991) (reversing lower court decision because of court's failure to use a balancing test to determine whether a state law privilege prohibiting the use of evidence of seat belt violations other than in traffic violation proceedings should be applied; court held federal interest in enforcement of criminal statute outweighed state interests behind the privilege). At least one court, applying such a balancing analysis, has held that the state law of privilege controlled even the federal claims in a mixed case. *Hartsell v. Duplex Prods, Inc.*, 895 F. Supp. 100, 101-03 (W.D.N.C. 1995) (finding federal courts "must balance the interests underlying conflicting state and federal privilege law to determine which law controls the federal claim" and concluding that the state interest in protecting the confidentiality of Employment Security

Commission hearings outweighed the federal interest in relevant evidence in a Title VII action).

A few other cases can be found applying a balancing test to determine which privilege law to apply in mixed federal-state law cases. But in each of these cases, the court ultimately opted for the federal law of privilege. *See, e.g., United States v. Wilson,* 88 F.R.D. 583, 586 (7th Cir. 1992) (applying a balancing test in a mixed federal/state case, the court found federal interests in discovery and access to peer review reports outweighed state interests in favor of privilege where plaintiff would not be able to argue and prove its case without access to reports); *Doe v. St. Joseph's Hosp. of Ft. Wayne,* 113 F.R.D. 677, 679-80 (N.D. Ind. 1987) (applying a flexible multi-factor balancing test to determine whether a state peer review privilege could be applied in light of "the limited recognition of privileges in federal courts under Rule 501" and finding that the state privilege could be overcome on a showing of need); *Robinson v. Magovern,* 83 F.R.D. 79, 84-9 (W.D. Pa. 1979) (in federal question case with pendent state claims, the court applied a balancing test and determined the "need for relevant evidence" outweighed the confidentiality interests behind a state peer review privilege).

***Conclusion on Case Law***

The vast majority of cases apply the federal law of privilege to all claims in mixed claim cases. This includes cases that properly look to state law as a referent for developing the federal common law of privileges. There is a small body of well-reasoned cases that apply the state law of privilege if the challenged evidence is relevant only to the state law claims A few cases admit of the possibility that the state law of privilege could apply to both federal and state claims, either due to comity or pursuant to a balance of state and federal interests. But the cases that actually apply the state law of privilege to federal claims under these analyses can be counted on one hand, and maybe one finger.

# V. Privilege Law in Mixed Claims Cases Under the Current Draft of Rule 501

The current draft of Rule 501 provides as follows:

**Rule 501. General Rule; State Law; Other Privileges.**

**(a) General rule.** Except as otherwise provided by the Constitution of the United States, Act of Congress, these rules, or other rules prescribed by the Supreme Court pursuant to statutory authority, there is no privilege to:

(1) refuse to be a witness,

(2) refuse to disclose any matter;

(3) refuse to produce any object, writing, recording or other information, whether in tangible, electronic, or other form; or

(4) prevent another from being a witness, disclosing any matter or producing any object, writing, recording or other information, whether in tangible, electronic or other form.

**(b) State law.** In a civil action or proceeding with respect to an element of a claim or defense as to which state law supplies the rule of decision, *and in which there is no federal claim*, privileges shall be determined in accordance with state law. The word "state" as used in this rule includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

**(c) Other privileges.** A privilege not recognized by Act of Congress, these rules, other rules prescribed by the Supreme Court pursuant to statutory authority, or existing federal common law, may be recognized only if the court finds in the light of reason and experience that the benefits of the privilege outweigh the cost in the loss of probative evidence that would result from application of the privilege.

* * *

The italicized language is intended to codify the predominant case law holding that federal law applies to all privilege questions in mixed federal-state cases. As stated above, the rule is in some tension with the analysis in a handful of cases that look to comity or balancing of interests and consider the possibility that the state law of privileges might apply even to federal claims. And it is directly contrary to the even smaller number of cases that actually do apply state privilege law to federal claims.

The question for the Committee is whether it is worth the effort to codify the predominant case law, thus rejecting some contrary holdings and terminating a line of authority that permitted

balancing of interests under the circumstances. The alternative is simply to delete the italicized language and leave the matter to the Committee Note, which would emphasize the approach taken by the vast majority of cases but also mention the minority view.

One problem with the current language of the draft, however, is that it would appear to require an application of federal law in a mixed claims case even where the challenged evidence is relevant only to the state claims. The italicized language provides that the state law of privilege applies only in cases in which "there is no federal claim." Thus, the federal rule of privilege would apply in mixed claim cases even if the challenged evidence is relevant to the state claim but not to the federal claim.

If the Committee decides that the state rule of privilege should apply in those infrequent mixed claim cases in which the challenged evidence is relevant only to the state claim, there are two alternatives:

1. The draft could simply be amended to delete the italicized language, as discussed above, and the matter could be left to a Committee Note; or

2. The draft language could be changed to specify that the federal law of privilege generally applies in mixed claims cases, but not where the challenged evidence is relevant only to the state claims. For example, the subdivision could read as follows:

> **(b) State law.** In a civil action or proceeding with respect to an element of a claim or defense as to which state law supplies the rule of decision, *and in which there is no federal claim* ***to which the challenged evidence is relevant,*** privileges shall be determined in accordance with state law. The word "state" as used in this rule includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

The above option should be chosen if the Committee decides that the applicability of federal law in mixed claim cases should be codified, but that an exception should be left for cases where the challenged evidence is relevant only to the state claims.

The Subcommittee on privileges agreed that the above option should be added to the working draft of Rule 501. It is included in bracketed language in the working draft submitted to the Committee as a whole in this Agenda Book.

# Attorney-Client Privilege and Supporting Material

# ATTORNEY-CLIENT PRIVILEGE

(Draft, March 21, 2002)

**(a) Definitions.** As used in this rule:

(1) A "communication" is any expression through which a privileged person intends to convey information to another privileged person or any record containing such an expression;

(2) A "client" is a person who or an organization that consults a lawyer to obtain professional legal services.

(3) An "organization" is a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, governmental entity, or other for-profit or not-for-profit association.

(4) An "attorney" is a person who is authorized to practice law in any domestic or foreign jurisdiction or whom a client reasonably believes to be an attorney;

(5) A "privileged person" is a client, that client's attorney, or an agent of either who is reasonably necessary to facilitate communications between the client and the attorney.

(6) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one except a privileged person will learn the contents of the communication.

**(b) General Rule of Privilege.**

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purpose of obtaining or providing legal assistance for the client. **[The client's identity and the fee paid to the attorney are privileged only if the disclosure of this information would thereby disclose a confidential communication, such as the client's motive for seeking representation.]**

**(c) Who May Claim the Privilege.**

A client, a personal representative of an incompetent or deceased client, or a person succeeding to the interest of a client may invoke the privilege. A client may, implicitly or explicitly, authorize an attorney, agent of the attorney, or an agent of a client to invoke the privilege on behalf of the client.

**(d) Standards for Organizational Clients**

With respect to an organizational client, the attorney-client privilege extends to a communication that

(1) is otherwise privileged;

(2) is between an organization's agent and a privileged person where the communication concerns a legal matter of interest to the organization within the scope of the agent's agency or employment; and

(3) is disclosed only to privileged persons and other agents of the organization who reasonably need to know of the communication in order to act for the organization.

**(e) Privilege of Co-Clients and Common-Interest Arrangements.**

If two or more clients are jointly represented by the same attorney in a matter or if two or more clients with a common interest in a matter are represented by separate attorneys and they agree to pursue a common interest and to exchange information concerning the matter, a communication of any such client that is otherwise privileged and relates to matters of common interest is privileged as against third persons. Any such client may invoke the privilege unless the client making the communication has waived the privilege. Unless the clients agree otherwise, such a communication is not privileged as between the clients. Communications between clients or agents of clients outside the presence of an attorney or agent of an attorney representing at least one of the clients are not privileged.

**(f) Exceptions.** The attorney-client privilege does not apply to a communication

(1) from or to a deceased client if the communication is relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction;

(2) that occurs when a client consults an attorney to obtain assistance to engage in a crime or fraud or aiding a third person to do so. Regardless of the client's purpose at the time of consultation, the communication is not privileged if the client uses the attorney's advice or other services to engage in or assist in committing a crime or fraud.

(3) that is relevant and reasonably necessary for an attorney to reveal in a proceeding to resolve a dispute with a client **[regarding the attorney's employment or the compensation or reimbursement that the attorney reasonably claims the client owes the attorney];**

(4) that is relevant and reasonably necessary for an attorney to reveal in order to defend against an allegation by anyone that the attorney, the attorney's agent, or any person for whose conduct the attorney is responsible acted wrongfully or negligently during the course of representing a client;

(5) between a trustee of an express trust or a similar fiduciary and anattorney or other privileged person retained to advise the trustee concerning the administration of the trust that is relevant to a beneficiary's claim of breach of fiduciary duties;

(6) between an organizational client and an attorney or other privileged person, if offered in a proceeding that involves a dispute between the client and shareholders, members, or other constituents of the organization toward whom the directors, officers, or similar persons managing the organization bear fiduciary responsibilities, provided the court finds

(A) those managing the organization are charged with breach of their obligations toward the shareholders, members, or other constituents or toward the organization itself;

(B) the communication occurred prior to the assertion of the charges and relates directly to those charges; and

(C) the need of the requesting party to discover or introduce the communication is sufficiently compelling and the threat to confidentiality sufficiently confined to justify setting the privilege aside.

## Changes from Last Year's Draft, In Response to Committee's Instructions

**1. All references to "lawyer-client" privilege changed to "attorney-client" privilege.**

**2. Subdivision (b)–General rule of privilege now specifically covers, in bracketed language, the question of client identity and fees.**

**3. Language in the second sentence of subdivision (c) was altered slightly to clarify that the client has the power to explicitly or implicitly authorize the lawyer or agent to invoke the privilege on the client's behalf.**

**4. Subdivision (e) (common interest rule)–previously bracketed language limiting the privilege to situations in which an attorney is present is now part of the rule.**

**5. Crime-fraud exception–bracketing language that would have expanded the exception to cover intentional torts is deleted.**

**6. Subdivision (f)(4)–bracketed language permitting disclosure where necessary to protect the lawyer from allegations of wrongful or negligent conduct is now made part of the rule.**

## Notes On Attorney-Client Privilege For Consideration By Full Committee:

1. The bracketed language in subdivision (b) was added at the request of the Committee to address the cases that hold that the name of the client and the fees paid to the lawyer are generally not privileged. At the Subcommittee's request, the Reporter has excerpted a section from the Federal Rules of Evidence Manual discussing this case law. That excerpt can be found at the end of the materials on the attorney-client privilege, infra.

2. The bracketed language in subdivision (f)(3) represents an unresolved issue from the April 2001 meeting–the question is whether the self-defense exception might be too broadly applied to cases of retaliatory dismissal. A memorandum from Ken Broun concerning the proposed language to add to the subdivision is included in these materials.

3. The Committee Note to the Rule should make clear that a mere declaration of an intent to commit a crime or fraud, although not within the crime/fraud exception because not made for the purpose of obtaining legal assistance, would not be covered by the privilege. It would simply not come within the language of the General Rule of Privilege, section (b). Under that section, the only communications within the privilege are those made "for the purpose of obtaining or providing legal assistance for the client."

## Memorandum by Ken Broun on Privilege Exception for Disputes Between Client and Attorney

Date: March 21, 2002

Following are some thoughts on exception (3) to the attorney-client privilege. The exception is now drafted to read:

(3) that is relevant and reasonably necessary for an attorney to reveal in a proceeding to resolve a dispute with a client **[regarding compensation or reimbursement that the attorney reasonably claims the client owes the attorney];**

Does this exception apply in disputes between the lawyer and client that go beyond fees? As far as I can tell or think about, the only kind of dispute, other than one involving fees, in which an issue of client confidentiality has arisen is where an in-house lawyer has sued for retaliatory discharge or for employment discrimination. In these cases, the issue has involved confidentiality rather than privilege. See, *e.g., Karchmar v. Sungard Data Systems, Inc.*, 109 F.3d 173 (1997). In *Karchmar*, the court indicated that the lawyer, because she was involved in a dispute with her client, might be able to reveal confidences under Pennsylvania rule of Professional Conduct 1.6 (adopted from Model Rule of Professional Conduct 1.6) which provides that the lawyer may reveal confidences to the extent the lawyer reasonably believes necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." As the court indicated in *Karchmar*, although the examples given in the commentary to the rule involve fees or disputes over misconduct, there is no statement that disputes are limited to those kinds of things. Thus, retaliatory discharge claims may be included and the court in *Karchmar* permitted the law suit to go forward despite the risk of disclosure of otherwise confidential information.

A similar case is *Breckinridge v. Bristol-Myers Co.*, 624 f. Supp. 79 (S.D.Ind. 1985) where the court refused to disqualify counsel for a lawyer bringing an age discrimination even though the lawyer had received client confidences. The court indicated that there would be some exoneration from the requirements of confidentiality where the lawyer is involved in a dispute with his client.

On the other side of the coin, courts have disqualified lawyers who have literally switched sides and brought actions against their former employer, including shareholder derivative suits. The dismissal is based on the likelihood that confidential information received by the lawyer would be used against the client. *See Cannon v. U.S. Acoustics*, 398 F.Supp. 209 (N.D. Ill. 1975), *affd,* 532 F.2d 1118 (7th Cir. 1978); *Doe v. A. Corp.*, 330 F.Supp. 1352 (S.D.N.Y. 1971) *affd. per curiam sub nom.*, 453 F.2d 375 (2nd Cir. 1972). *See also,* Wolfram, Modern Legal Ethics, § 7.1.7 at 330, n 90.

Although the claims in these cases involved confidentiality under the rules governing professional conduct rather than privilege, the same kinds of issues may have to resolved in a privilege context. What if the employer in a retaliatory discharge or discrimination case claims privilege in

order to protect their confidences? Unless it is going to draft a rule that leaves the issue up to the courts, the committee must make a policy determination as to whether the privilege applies. The language without the brackets would govern all disputes, the bracketed language would limit those disputes to those involving compensation or reimbursement and probably exclude cases of retaliatory discharge or employment discrimination.

Restatement § 133 excepts from the privilege communications relevant and reasonably necessary for a lawyer to employ in a proceeding "to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer; or to defend the lawyer against an allegation by any person that the lawyer . . . acted wrongfully during the course of representing a client." A suit for retaliatory discharge or other comparable disputes are not expressly included within the exception. However, the comments to the section state: "But a lawyer formerly employed as inside legal counsel by a corporation may invoke the exception in a good-faith suit against the corporation for compensation allegedly due."

Uniform Rule 502, excepts communications "relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer." Retaliatory discharge claims would seem clearly included.

A good argument can be made for the elimination of privilege in the case where the lawyer-employee sues for retaliatory discharge or discrimination. Arguably the lawyer should have the ability to make his or her case under those circumstances just as he or she could in a case involving fees. It seems unfair to let the client hide behind the privilege – although the court may intervene to make sure that the disclosures are not broader in either scope or dissemination than is necessary for the lawyer to make a case. However, where, as in the case where the lawyer decides to bring a derivative action against his or her former employer, there seems to be good reason to provide the client with the ordinary protections of the attorney-client privilege.

One way to seek to insure that the privilege would not apply in an employment case but would apply where the lawyer has changed sides would be to amend the language to read:

> (3) that is relevant and reasonably necessary for an attorney to reveal in a proceeding to resolve a dispute with a client **[regarding the attorney's employment or the compensation or reimbursement that the attorney reasonably claims the client owes the attorney];**

The Privileges Subcommittee agreed that this language should be included in brackets in the working draft of the Rule.

## Excerpt From Federal Rules of Evidence Manual on Attorney-Client Privilege As It Relates To Client Identity and Fees

### [11] Attorney-client Privilege — Confidences — Incidents of Representation

For obvious reasons, the privilege protects preliminary communications with an attorney about the subject of the representation, even if an attorney-client relationship has not been formalized at that point. This is because confidentiality may be necessary in order to determine whether the attorney can take on the representation.[1]

On the other hand, the privilege ordinarily does not protect the preliminary aspects of the attorney-client relationship itself. These matters, which have been referred to as the "incidents of representation," include the client's name, the amount and payment of a fee, and the fact of consultation. The incidents of representation are not generally considered privileged because they are independent of the confidential communications necessary for the representation The identity of the client, the fee, and the fact and extent of representation are generally incidental to the formation and maintenance of the relationship, and have nothing to do with the free flow of information once that relationship has been established.[2] Thus, the focus of the privilege in most Courts is on those communications that the attorney can influence by informing the client that a free flow of information will not prejudice the client. Communications and information respecting the incidents of representation do not meet this standard.[3] As Judge Winter stated in the leading case of *In re Shargel*, 742 F.2d 61 (2d Cir. 1984):

> Absent special circumstances, disclosure of the identity of the client and fee information stand on a footing different from communications intended by the client to explain a problem to a lawyer in order to obtain legal advice. * * * A general rule requiring

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[1]. See, e.g., In re Auclair, 961 F.2d 65 (5th Cir. 1992) (where three people go to an attorney on a matter that concerns them all, in order to determine whether the attorney can represent them all, the preliminary discussions with the attorney are presumptively protected under the common interest doctrine).

[2]. See, e.g., In re Grand Jury Proceedings, 33 F.3d 1060 (9th Cir. 1994) (upholding a judgment of contempt resulting from an attorney's refusal to produce records pertaining to fee information and fee arrangements with a client; while that information might have indicated that the client retained the attorney to represent him in a grand jury investigation, this fact did not "in and of itself reveal any confidential information"); United States v. Olano, 62 F.3d 1180 (9th Cir. 1995) (no privilege where the testimony provided "only general descriptions of the work" that the lawyer performed; the lawyer did not disclose the defendant's "motives, strategies or goals").

[3]. For more on this topic, see Capra, *Deterring the Formation of the Attorney-Client Relationship: Disclosure of Client Identity, Payment of Fees, and Communications by Fiduciaries*, 4 GEO. J. LEGAL ETHICS 235 (1990).

disclosure of the fact of consultation does not place attorneys in the professional dilemma of cautioning against disclosure and rendering perhaps ill-informed advice or learning all the details and perhaps increasing the perils to the client of disclosure.[4]

A limited exception to the above rule exists, however: If information concerning the incidents of representation would, directly or indirectly, disclose a confidential communication, then this preliminary information is privileged. One example is where the disclosure of the fee payment or the fact of representation would reveal a confidential motive for seeking representation.[5] Another example is where communications have been disclosed, and yet they remain confidential as a practical matter because they have not been attributed to an identifiable person. If disclosure of the client's identity would tie the client to the previously disclosed communications, then the client's identity is

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[4]. See also United States v. Leventhal, 961 F.2d 936 (11th Cir. 1992) (information concerning payment of more than $10,000 cash from a client to an attorney is not privileged, and can be obtained through enforcement of an IRS summons; fee arrangements and disclosure of the identity of the client are part of the preliminaries and incidents of the representation, and in the absence of extraordinary circumstances, they do not satisfy the requirement of the privilege that a communication must be made in the course of seeking legal advice). See also In re Grand Jury Matter No. 91-01386, 969 F.2d 995 (11th Cir. 1992) (identity of a client who paid the attorney with counterfeit bills held not privileged, where disclosure of identity "will not provide the government with a necessary link to, or revelation of, any confidential matters which fall within the attorney-client privilege"; disclosure of identity will only link the client with a payment by counterfeit money, "which is not a communication at all"); Tornay v. United States, 840 F.2d 1424 (9th Cir. 1988) (fee information not privileged since it is not a communication necessary to further legal advice); United States v. Ricks, 776 F.2d 455 (4th Cir. 1985) (fee information not privileged).

[5]. See, e.g., In re Subpoenaed Grand Jury Witness, 171 F.3d 511 (7th Cir. 1999) (fee payment and client identity privileged where "disclosure of this information would identify a client of Hagen's who is potentially involved in a targeted criminal activity which, on this record, would lead to revealing that client's motive to pay the legal bills for some of Hagen's other clients"). Compare Clarke v. American Commerce Nat'l Bank, 974 F.2d 127 (9th Cir. 1992) (billing statements containing information on the identity of the client, the case name for which the fee was paid, and the general nature of the services performed, are not protected by the attorney-client privilege; nothing in the statements reveals research or litigation strategy, or otherwise discloses the motive of the client in seeking representation); Vingelli v. DEA, 992 F.2d 449 (2d Cir. 1993) (benefactor payment made by an attorney on behalf of a client is not privileged; the fact that the attorney made a benefactor payment does not indicate why the client may have sought the attorney's advice); In re Grand Jury Subpoena, 204 F.3d 516 (4th Cir. 2000) (privilege inapplicable where disclosure of identity would reveal client's motive for seeking legal advice, but client had previously authorized his attorney to disclose the motive for representation).

privileged.[6] It is apparent from the mere delineation of this exception that it is very limited; in the vast majority of cases, disclosure of fee, identity, etc., says nothing about the motive for seeking representation, nor does it tie the client to a previously disclosed yet unattributed communication.[7] As the Court stated in *Lefcourt v. United States,* 125 F.3d 79 (2d Cir. 1997):

> Although the contours of the special circumstance exception [to the rule that identity of the client is unprotected by privilege] have not been exhaustively developed, no doubt due to the fact special circumstances are seldom found to exist, it is clear that there is no special circumstance in this circuit simply because the provision of client-identifying information could prejudice the client in the case for which legal fees are paid.

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[6]. See, e.g., United States v. Liebman, 742 F.2d 807 (3d Cir. 1984) (where the substance of a communication was already known, but not the identity of the communicator, then disclosure of identity would be tantamount to disclosure of a privileged communication).

[7]. See, e.g., United States v. Blackman, 72 F.3d 1418 (9th Cir. 1995) (upholding an order enforcing an IRS summons requiring an attorney to identify a client paying more than $10,000 in cash and the nature of the services rendered in exchange for the cash: "We have repeatedly held that the attorney-client privilege does *not* apply where disclosure might incriminate the client or fee-payer, but *only* where it would convey information tantamount to a confidential communication."). The *Blackman* Court declared itself "hard pressed" to imagine a case in which the receipt of fees could be so intertwined with the subject of the representation as to obviate compliance with Treasury Department reporting requirements. See also In re Subpoena to Testify Before Grand Jury, 39 F.3d 973 (9th Cir. 1994) (affirming the denial of a motion to quash a subpoena served on an attorney, demanding disclosure of the name of a client who paid the attorney with counterfeit money; communication of the client's name and counterfeit payment "were entirely distinct" from the traffic and assault matters on which the attorney represented the client; therefore, disclosure of the identity and payment of the client would not be "in substance a disclosure of the confidential communication in the professional relationship between the client and the attorney").

# Waiver Rule

## (Already Tentatively Approved By the Committee)

# Rule 5–: Waiver

**Draft dated March 1, 2002**

**(a) General rule.** A privilege conferred by these rules is waived as to any communication if the holder of the privilege, or the holder's authorized representative:

(1) voluntarily discloses or consents to disclosure of the otherwise privileged information in a non-privileged communication;
(2) uses the privileged information, directly or indirectly, as part of a claim or defense; or
(3) fails to make a proper objection to an attempt by another person to give or obtain testimony or other evidence of a privileged communication.

**(b) Inadvertent disclosure.** An inadvertent disclosure of privileged information does not result in the loss of the privilege if the person responsible for the disclosure

(1) exercised due care under the circumstances;
(2) discovered the disclosure with due diligence; and
(3) took all reasonable efforts to protect and retrieve the information once the disclosure was discovered.

If the court finds that an inadvertent disclosure does not result in the loss of the privilege, the party who received the privileged information is prohibited from proffering that information at trial. The receiving party is also prohibited from proffering any evidence that is derived directly or indirectly from the privileged information. The party who disclosed the privileged information has the burden of showing, by a preponderance of the evidence, that information proffered by the receiving party is derived from the privileged information.

## Derivation of Waiver Rule

Subdivision (a) is taken from the Restatement's provision concerning waiver of attorney-client privilege.

Subdivision (b) is an attempt to codify the case law concerning inadvertent disclosures. This case law is not uniform, the language attempts to codify the majority rule. The last two sentence of the final paragraph, concerning "fruits", deals with a matter on which there is not much case law. It attempts to stake out a position that would be fair to a party who innocently receives privileged information from an adversary. The Committee previously agreed that shifting the burden of showing taint to the party who made the mistaken disclosure would be a fair result.

## Matters for the Advisory Committee Note to the Waiver Rule–

1. Note that some courts are upholding agreements between the parties that inadvertently disclosed information will not constitute a waiver, especially in cases with a large amount of electronic information.

2. Discuss the advice of counsel defense.

3. Discuss the *Westinghouse* case and the rejection of the concept of selective waiver.

4. The note should include a discussion about the distinction between waiver and forfeiture. The Note might state that the committee decided against making such a distinction in the text of the rule given the extensive case law treating both waivers and forfeitures under the umbrella term, "waiver."

# Privilege Protecting Against Adverse Spousal Testimony

## (Tentatively Rejected By the Committee)

# Draft of Spousal Privilege Against Providing Adverse Testimony

**Rule 5__. Spousal Testimony In a Criminal Proceeding.**

**(a) General rule of privilege.** In a criminal proceeding the spouse of an accused has a privilege to refuse to testify against the accused spouse.

**(b) Exceptions.** There is no privilege under this rule·

(1) if the court finds by a preponderance of the evidence that the spouses acted jointly in the commission of the crime charged;

(2) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other or a child of either; or

(3) if the interests of a minor child of either spouse would be adversely affected by invocation of the privilege.

**Derivation–**

Subsection (a) is derived from Rule 504 of the Uniform Rules. The original Advisory Committee proposal is not a proper model because it provides that the accused has a privilege to prevent his spouse from testifying. This is no longer the law after *Trammel v. United States*.

Subsection (b)(1) is the joint participants exception, derived from the Uniform Rules. Federal courts are split on the exception–for example, the Second Circuit rejects it and the Tenth Circuit accepts it. So the Committee must decide whether such an exception is good policy. The problem with the exception is that it tends to swallow the privilege since most spouses who invoke the privilege are probably involved in one way or another in their spouse's criminal activity. Casting the language in terms of "acting jointly in the commission" of the crime tends to limit the exception somewhat (e.g., it probably would not cover accessories after the fact), and that is probably a good thing.

Subsection (b)(2) is derived from Rule 505 as initially proposed by the Advisory Committee. There is similar language in the Uniform Rule.

**Derivation (cont.)**

Note that Advisory Committee Rule 505 also provided the privilege did not apply as to testimony concerning matters occurring prior to the marriage. Only one federal court (the Seventh Circuit) has adopted this exception, meaning that in this Circuit the spouse must testify to adverse facts about the accused if the facts arose before their marriage. This rule makes little sense assuming that one believes that the adverse testimonial privilege is needed to preserve marital harmony at the time of the testimony. Since the focus is on the relationship at the time of the testimony, it shouldn't matter that the act testified to occurred before the marriage. Therefore, the "pre-marital acts" exception to the privilege is not included in the draft.

Subsection (b)(3) is derived from the Uniform Rule. Whether to establish a "harm to minors" exception–and whether to provide for an exception more limited than that set forth in the draft–are policy questions for the Committee.

**Note: There is an a priori question of whether the adverse testimonial privilege should even be promulgated. Many states do not have such a privilege, and federal courts have not given the privilege a generous reading.**

## Matters for Advisory Committee Note on Adverse Testimonial Privilege–

1. The privilege does not apply to civil cases because the threat to marital harmony, and the emotional pressure on the witness, is not as severe as in criminal cases. Federal courts using a common law approach have refused to apply the privilege to civil cases.

2. The rule does not prohibit the government from seeking cooperation from a witness-spouse, e g., by a plea agreement.

3. The rule does not prohibit the use of a spouse's out-of-court statement that is otherwise admissible under the hearsay rule.

4. Who is a spouse is defined by state law.

5. Where the privilege exists, it covers activity occurring before the marriage. The sham marriage exception entertained by some common law courts makes no sense after *Trammel*, which held that the privilege is held by the witness-spouse, not by the litigant. Thus, an accused would not likely engage in a sham marriage to invoke the privilege, because the invocation of the privilege is not within his control.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Future Amendments to the Evidence Rules
Date: March 21, 2002

At its April 2001 meeting the Advisory Committee directed the Reporter to review scholarship, case law, and other bodies of Evidence law to determine whether there are any Evidence Rules that might be in need of amendment. This memorandum sets forth those Evidence Rules that have been highlighted either by scholarship, case law, or the Uniform Rules project as good candidates for a possible amendment.

This memorandum carries several provisos:

1. Nothing herein should be taken as a recommendation that any Rule should actually be amended. The Rules cited are those in which either scholarship, case law, or the Uniform Rules project has indicated some possible problem in the existing text of a Federal Rule. It is for the Committee to determine whether the substantial costs of amending a Rule are outweighed by the benefits of clarification or reformulation.

2. This memo does not contain a full-scale discussion of each, or any, of the Rules cited. It provides a concise explanation of the possible problem in the text of the particular Rule. If the Committee decides that the problem is one for which an amendment might be useful, then an in-depth memo on the particular Rule will be prepared for the Committee's consideration at the Fall 2002 meeting. To the extent that language for a possible amendment is set forth, it is only to give the Committee some perspective on what a change might look like. The language is not intended to be definitive, and it could undoubtedly be substantially improved.

3. Suggestions in the scholarship, case law, and Uniform Rules with respect to privileges are not discussed in this memo. The Privileges Subcommittee is considering these suggestions as part of its long-term project.

4. This memo is intended to be comprehensive, but undoubtedly some colorable suggestions for rule amendments have been overlooked.

## Rule 104(b)

Professor Allen, in *The Myth of Conditional Relevancy,* 25 Loy. L.A. L.Rev. 871 (1992), argues that Rule 104(b) is misguided because there is no such thing as conditional relevancy. Put another way, he contends that there is no distinction between relevance and conditional relevance He explains as follows:

> No evidence is simply relevant in its own right. Evidence is relevant only because there is an intermediate premise or set of premises that connects the evidence to some proposition involved in the litigation. But if determining the relevance of evidence always requires relying on some intermediate premise, no distinction can be drawn between relevancy and conditional relevancy.

Professor Allen also argues that there is no standard of proof for relevancy that is clearly stated in the Rules–i.e., how much must the proponent show to prove that the evidence is relevant under Rule 401? If relevancy (as opposed to conditional relevancy) is governed by Rule 104(a), then there is the anomaly of applying a preponderance of the evidence standard to "pure" relevancy questions, while using a prima facie standard for the more tenuous "conditional" relevancy under Rule 104(b).

Because of all these conundrums, Professor Allen suggests that Rule 104(b) should be replaced with the following provision.

> *(b) Relevancy. – The court shall admit evidence over a relevancy objection upon, or subject to, a finding that the evidence could rationally influence a reasonable person's assessment of any fact that is of consequence to the determination of the action.*

## Rule 104, New Subpart

The Uniform Rules add a new subpart to Rule 104 to govern preliminary proof of privileges. It is a new subpart (b)–with former subpart (b) moved down to (c) and so forth. The subpart reads as follows:

> (b) Determination of privilege. – A person claiming a privilege must prove that the conditions prerequisite to the existence of the privilege are more probably true than not. A person claiming an exception to a privilege must prove that the conditions prerequisite to the applicability of the exception are more probably true than not. If there is a factual basis to support a good faith belief that a review of the allegedly privileged material is necessary, the court, in making its determination, may review the material outside the presence of any other person.

# Rule 106

Rule 106 sets forth a rule of completeness, providing that when a party introduces a writing or recorded statement, the adversary may "require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106 by its terms permits the adversary to introduce completing statements only where the proponent introduces a *written or recorded* statement. The language of the Rule does not on its face permit completing evidence when the proponent introduces an oral statement, such as a criminal defendant's oral confession. Some courts have found, however, that Rule 106, or at least the principle of completeness embodied therein, applies to require admission of omitted portions of an oral statement when necessary to correct a misimpression. See *United States v Tarantino,* 846 F.2d 1384 (D.C. Cir. 1988) (prior oral statements of a government witness were properly offered on redirect examination since the defendant had used portions of the statements in cross-examination and the omitted portions placed the statements in context). See also the discussion in *United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (noting the case law permitting criminal defendants to offer omitted parts of statements they make to law enforcement officers that provide exculpatory information). Compare *United States v. Harvey,* 914 F.2d 966 (7th Cir. 1990) (Rule 106 does not apply to oral statements).

Moreover, some courts have held that Rule 106 can operate as a de facto hearsay exception when the opponent opens the door by creating a misimpression by offering only part of a statement. In other words, completing evidence is found admissible under Rule 106 even if it would otherwise be hearsay. See *United States v. Sutton,* 801 F.2d 1346, 1369 (D.C.Cir. 1986) ("Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that that proffered evidence should be considered contemporaneously"). See also C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5078, at 376 (supporting this approach). Such a reading is not apparent from the text or Committee Note. See *United States v. Wilkerson,* 84 F.3d 692 (4th Cir. 1996) (interpreting Rule 106 as purely a timing device, not as a rule permitting the admission of otherwise inadmissible evidence).

Assuming that the Rule should cover oral statements, and also should permit the use of hearsay for completeness purposes, the Rule could be amended as follows:

> When a ~~writing or recorded~~ statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other ~~writing or recorded~~ statement which ought in fairness to be considered contemporaneously with it, <u>whether or not that statement is hearsay</u>.

## Rule 402

Professor Leonard, in *Minimal Value and the Failure of Good Sense,* 34 Houston L.Rev. 89 (1997), argues that Rules 402 and 403 lean too heavily in favor of admissibility and fail to provide adequate and consistent guidance to trial judges. Leonard proposes amending Rule 402 to preclude the admission of marginally probative evidence. Under this proposal a trial judge, before admitting evidence, must determine if it could rationally assist the jury in deciding an issue in the case. Leonard's amended Rule 402 would read as follows.

> All relevant evidence is admissible~~, except~~ . Except as otherwise provided in the Constitution of the United State, any Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority~~:~~ , the court shall admit evidence over a relevancy objection upon, or subject to, a finding that the evidence could rationally assist a reasonable person in deciding any fact that is of consequence to the determination of the action. Evidence which is not relevant is not admissible.

Leonard believes this amended rule will allow a trial judge to exclude "logically relevant but essentially useless evidence", i.e., marginally relevant evidence, without having to meet Rule 403's high standard of a "substantially" outweighing risk of prejudice, confusion and delay.

## Rule 403

Rule 403 provides that a trial judge may exclude proffered evidence if its probative value is substantially outweighed "by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Of the negative factors listed that would support exclusion, only one refers to the jury directly--the danger of "misleading the jury". This would seem to indicate that other negative factors mentioned in the Rule, specifically the danger of unfair prejudice and confusion of the issues, must be taken into account in a bench trial. Yet courts have held to the contrary, reasoning that unfair prejudice and confusing evidence will not have the same negative impact on the judge as it would have on the jury. See, e.g., *Schultz v. Butcher,* 24 F.3d 626 (4th Cir. 1994) (trial court erred in excluding evidence in a bench trial on the ground of its prejudicial effect); *Gulf States Utils. v. Ecodyne Corp.*, 635 F.2d 517 (5th Cir. 1981) (the portion of Rule 403 referring to prejudicial effect "has no logical application in bench trials").

The Rule could be brought into line with the case law by the following change:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of the jury being misled, confused, or unfairly prejudiced against the opponent, ~~unfair prejudice, confusion of the issues, or misleading the jury,~~ or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

* * *

A different change to Rule 403 has been suggested by Professor Crump, *On the Uses of Irrelevant Evidence,* 34 Houston L.Rev. 1 (1997). Crump argues that although the language of Rule 403 effectively excludes evidence that is both of low probative value *and* is highly prejudicial, it fails to provide a basis for excluding evidence of *only* slight probative value that is not necessarily prejudicial. Evidence lacking even minimal probative value often sneaks by because of the liberal definition of relevant evidence in Rule 401 coupled with the fact that the Rule 403 balancing test is tilted toward admissibility. Crump argues the current language of Rule 403 provides an inadequate filter of minimally relevant evidence: Evidence that has little relevance is probably not prejudicial (or only indirectly prejudicial) and a judge is probably unable to determine before the evidence is introduced whether it is a waste of time. Attorneys are thus encouraged to introduce marginally relevant evidence for tactical purposes, especially on cross-examination where they "artfully" use such evidence to confuse the jury

Crump proposes an amendment to Rule 403 under which evidence of low probative value would be excluded, even if the counterweights were low:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by, or, if the probative value is not appreciable, if it is counter-balanced by, the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. In considering whether there is undue delay, waste of time, or needless presentation of cumulative evidence, the judge shall consider the cumulative effect of the entire line of inquiry and shall evaluate whether the questions make it unnecessarily lengthy, rather than considering only the individual interrogatory and response.

**Reporter's Note:**

One should think long and hard before proposing an amendment to Rule 403 anywhere outside the scholarly literature. As we all know, Rule 403 is the most important Rule of evidence, invoked thousands of times a year and the subject of thousands of opinions. There is a risk that any change to Rule 403 will upset substantial, ingrained expectations, and could result in the inadvertent overruling of a large number of opinions.

## Rule 404(a)

Rule 404(a) states that no party is permitted in the first instance to introduce character evidence to prove action in accordance with character, except for the "accused"--i.e., only the "accused" can open the door to circumstantial use of character evidence. Thus, the Rule seems explicit in prohibiting the circumstantial use of character evidence in civil cases. And the Advisory Committee Note confirms this exclusionary principle. Yet some courts have permitted civil defendants to use character evidence circumstantially "when the central issue in a civil case is by its nature criminal." *Palmquist v. Selvik,* 111 F.3d 1332, 1342 (7th Cir. 1997) (assuming that character evidence could be admissible in certain civil cases); *Perrin v. Anderson,* 784 F.2d 1040 (10th Cir. 1986) (police officers charged with excessive force are permitted to prove the decedent's character for violence).

The Rule can be made more explicit by the following change:

(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused — ~~Evidence~~ In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim.— ~~Evidence~~ In a criminal case, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

* * *

## Rule 404(b)

The Uniform Rules now include substantial procedural protections limiting the admission of evidence of uncharged misconduct under Rule 404(b). A new subsection (c) provides as follows:

(c) Determination of admissibility. Evidence is not admissible under subdivision (b) unless:

(1) the proponent gives to all adverse parties reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the nature of the evidence the proponent intends to introduce at trial;

(2) if offered against an accused in a criminal case, the court conducts a hearing to determine the admissibility of the evidence and finds:

(A) by clear and convincing evidence, that the other crime, wrong, or act was committed;

(B) that the evidence is relevant to a purpose for which the evidence is admissible under subdivision (b);

(C) that the probative value of the evidence outweighs the danger of unfair prejudice; and

(3) upon the request of a party, the court gives an instruction on the limited admissibility of the evidence pursuant to Rule 105.

# Rule 405

A proposal to amend Rule 405 is made by Mary Kay Kleiss, *A New Understanding of Specific Act Evidence in Homicide Cases Where the Accused Claims Self-Defense: Striking the Balance Between Competing Policy Goals,* 32 Ind. L Rev. 1437 (1999). Kleiss would amend Rule 405 to permit a homicide defendant to introduce evidence of *specific bad acts* of the victim when the accused claims self-defense. Currently, an accused can only introduce character evidence in the form of reputation or opinion evidence to prove that a decedent was the initial aggressor; an accused cannot use specific bad act evidence to prove a decedent's character (though the acts can be admitted to prove the defendant's state of mind if he heard about them beforehand). Kleiss argues that the limitation on specific act evidence impedes the truth-seeking function of the criminal justice system and results in unfairness to the accused. She contends that there are sufficient safeguards to prevent unfairness to the prosecution, specifically the balancing test of Rule 403.

Kleiss would amend the Rule as follows:

> (a) Reputation or opinion.—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific instances of conduct.—In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, <u>or is in issue under Rule 404(a)(2)</u>, proof may also be made of specific instances of that person's conduct.

Kleiss notes that this added language can be found in the Wyoming version of Rule 405.

## Rule 408

A number of cases have held that compromise evidence, such as a civil settlement, can be admitted in related criminal litigation. For example, in *United States v. Prewitt*, 34 F.3d 436 (7th Cir. 1994), the defendant's securities activity subjected him to a civil investigation by a state securities office and to a criminal investigation for mail fraud. In an attempt to settle the civil suit, the defendant admitted certain conduct; these statements were used against him in the subsequent criminal trial. The Court found no error, holding that Rule 408 does not prevent admissions and statements made in a civil settlement conference from being used in a criminal case.

Some commentators have argued against such a result on the ground that it is bad policy–it will deter civil settlements if there is a risk of later criminal prosecution. If the Committee were to agree that it is bad policy, Rule 408 could be amended as follows:

**Rule 408. Compromise and Offers to Compromise**

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible <u>in civil or criminal cases</u> to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

## Rule 412

Roger Pauley points up an anomaly in the language of Rule 412. The Rule states that evidence of the victim's sexual behavior or predisposition is generally inadmissible, then provides some exceptions:

> (b) Exceptions.
>
> (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
>
> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
>
> (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
>
> (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

The language "if otherwise admissible under these rules" is added to clarify that other rules such as the hearsay rule may exclude the proffered evidence even though it fits into one of the exceptions to the rape shield protection. But that language creates an anomaly when applied to subpart (C). It seems to say that evidence, if *not* admissible under other rules, must be excluded *even if* its exclusion would violate the constitutional rights of the defendant.

This anomaly could be solved by placing the qualifier "if otherwise admissible under these rules" directly into subparts (A) and (B) only. So that it would read as follows:

> (b) Exceptions.
>
> (1) In a criminal case, the following evidence is admissible~~, if otherwise admissible under these rules~~:
>
> (A) <u>if otherwise admissible under these rules,</u> evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
>
> (B) <u>if otherwise admissible under these rules,</u> evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
>
> (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

* * *

Another possible need for clarifying Rule 412 arises when the defendant wants to show that the victim has made false claims of rape in the past. The following is an excerpt on the subject from the *Federal Rules of Evidence Manual:*

> Suppose the victim has made previous allegations of rape that turned out to be false. It is conceivable that the Constitution would require that such evidence be admitted in some cases — e.g., where the victim's credibility is critical and the defendant has no alternative evidence with which to contest the victim's account. Assuming that the Constitution does not require its admission, does the rape shield law exclude evidence of prior false allegations of rape?
>
> This depends on whether a false allegation of rape is "sexual behavior" within the meaning of the Rule. The Advisory Committee Note to the amended Rule states flatly that "[e]vidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412," though it might be barred by Rules 404 and 403. Yet the Advisory Committee Note also describes the sexual behavior excluded by the Rule quite broadly. It states that the word "behavior" "should be construed to include activities of the mind, such as fantasies or dreams." It could certainly be argued that false allegations are related to activities of the mind of a sexual nature, and so are covered by the exclusionary language of Rule 412. There is something to the government's argument in *United States v. Cournoyer,* 118 F.3d 1279 (8th Cir. 1997), that evidence of prior false rape allegations is "inseparable from evidence of the victim's past sexual behavior, which Rule 412 was designed to exclude."
>
> In the end, however, we believe that prior false rape allegations are sufficiently distinguishable from sexual activity that they should not be covered by Rule 412. Evidence of a false rape allegation does not intrude into the zone of private and personal activity that the Rule is trying to protect. Moreover, such evidence clearly goes to an important matter of credibility, independent of its sexual content. It is one thing to argue that a rape complainant is not credible because she has engaged in sexual activity--this is clearly and properly prohibited by the Rule. But it is another thing to argue that she is not credible because she has falsely accused someone of a crime.
>
> The *Cournoyer* Court ultimately found it unnecessary to decide whether prior false rape allegations "must survive the rigors of Rule 412 scrutiny." It reasoned that even if Rule 412 did not apply, the evidence of false allegations would have to pass muster under Rules 404 and 403. In *Cournoyer*, the evidence of false allegations was to be brought in through an opinion witness, but the defense made no effort to establish a foundation for the witness' testimony Given "defense counsel's failure to follow up, for example, with foundation testimony to support an opinion as to reputation, or with an offer of proof to show relevant, specific prior conduct," the evidence was properly excluded. Other Courts, without mentioning the Advisory Committee Note to Rule 412, have held that the Rule excludes false accusations of rape.

---

If Rule 412 were amended to specifically exempt false allegations from the strict exclusionary rule, that could be accomplished either by a specific exception added to Rule 412(b), or by adding language after the term "sexual behavior", as follows:

(a) Evidence Generally Inadmissible.—The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior, but not including false allegations or rape or other sexual misconduct.

## Rules 413-415

The major ambiguity in these Rules is whether evidence of a defendant's prior acts of sexual misconduct are subject to exclusion under Rule 403. Every case construing these Rules has held that Rule 403 is applicable, so arguably there is no need to amend the Rule in light of this judicial unanimity. On the other hand, at least with Rules 413-414 the Rule 403 balancing has been construed into the Rules as a savings clause–the courts reasoning that if Rule 403 were unavailable, the Rules would violate the right of the accused to due process. See *Federal Rules of Evidence Manual*, §413.02 ("Some Courts have held that Rules 413 and 414 might be unconstitutional if the Trial Court had no power to exclude evidence of an accused's prior sexual misconduct. Thus, these Courts read Rule 403 into the Rules as a kind of saving clause."). See also *United States v. Enjady*, 134 F.3d 1427 (10th Cir. 1998) (recognizing that "Rule 413 raises a serious constitutional due process issue" because it creates a danger that the defendant will be convicted because he is a bad person, not because he committed the crime charged: "without the safeguards embodied in Rule 403, we would hold [Rule 413] to be unconstitutional.").

If the Committee wishes to specify that Rule 403 still applies to a defendant's prior sexual misconduct, it might add the following to the Rules 413-415 (using Rule 413 as an example):

**Rule 413. Evidence of Similar Crimes in Sexual Assault Cases**

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible subject to Rule 403, and may be considered for its bearing on any matter to which it is relevant.

* * *

## Rule 606(b)

There has been some question in the courts about whether juror affidavit or testimony is admissible if it is offered to prove a clerical error, such as a mathematical miscalculation or checking the wrong box on the verdict form. See, e.g., *Attridge v. Cencorp Div.*, 836 F.2d 113 (2d Cir. 1987) (inquiry of jurors is permissible where the goal was to determine whether the verdict rendered was different from the judgment announced); *United States v. Dotson*, 817 F.2d 1127 (5th Cir.), *modified*, 821 F.2d 1034 (1987) (Trial Judge properly corrected a jury verdict after the jury was discharged, to acquit the defendants on one count; there is an exception from the general prohibition of Rule 606(b) for situations in which a clerical error in a verdict is corrected to reflect the intent of the jury); *McCullough v. Consolidated Rail Corp.*, 937 F.2d 1167 (6th Cir. 1991) (no error in amending a verdict sheet after the Trial Judge determined that the jury unanimously intended the award on the verdict sheet to be a net rather than a gross award; amending the award in no way threatened the jury's freedom of deliberation, as the Judge was careful to limit the inquiry into the jury's intent and did not go into its thought processes). Compare *Karl v. Burlington N. R.R.*, 880 F.2d 68 (8th Cir. 1989) (the "clerical error" exception to Rule 606(b) applies only when the verdict is misreported due to some oversight or mistake, such as mistakenly stating that a defendant was guilty when the jury had actually agreed that he was not guilty; but the clerical error exception does not apply where the verdict "truly stated what the jury agreed to," even though the jury may have misinterpreted the Judge's instructions).

If the Committee thinks it worthwhile to codify an exception for clerical errors, it might look like this:

> (b) Inquiry into validity of verdict or indictment.—Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the ~~question~~ following questions: (1) whether extraneous prejudicial information was improperly brought to the jury's attention ~~or~~; (2)whether any outside influence was improperly brought to bear upon any juror; or (3) whether the verdict was inaccurate due to a mathematical, ministerial or other clerical error. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

## Rule 607

Rule 607 states categorically that a party can impeach any witness it calls. On its face, the Rule permits a party to call a witness solely for the purpose of "impeaching" them with evidence that would not otherwise be admissible, such as hearsay. Yet despite the affirmative and permissive language of the Rule, the courts have held that a party cannot call a witness solely to impeach that witness, because to allow this practice would undermine the hearsay rule. See, e.g., *United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985) ("The prosecution, however, may not call a witness it knows to be hostile for the primary purpose of eliciting otherwise inadmissible impeachment testimony, for such a scheme merely serves as a subterfuge to avoid the hearsay rule. The danger in this procedure is obvious."); *United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975) (conviction reversed on the ground that the government should not have been permitted to call a witness for no other purpose than to impeach him). See generally Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 Tex. L. Rev. 745 (1990) (noting this and other situations where courts have felt compelled to diverge from the text of an Evidence Rule in order to reach a just result).

If the Committee wishes to codify an exception to Rule 607 that the courts have developed to prevent abuse, it might look something like this:

**Rule 607. Who May Impeach**

The credibility of a witness may be attacked by any party, including the party calling the witness. However, a party may not call a witness for the sole purpose of impeaching that witness with evidence that is otherwise inadmissible.

## Rule 609

The memorandum on Rule 608(b) in this agenda book discusses a suggestion by Professor Duane that the term "credibility" in Rule 609(a) should be changed to "character for truthfulness". The rationale is the same as for the amendment to Rule 608(b). Rule 609(a) uses the broad term "credibility" when it really means to use the more narrow term "character for truthfulness." The broad term is problematic because it covers all forms of impeachment, e.g., prior inconsistent statement, bias, contradiction. Thus, the Rule could be misconstrued as limiting the use of convictions even though offered for a purpose other than an attack on the witness' character. If the Committee decides that a change analogous to that in Rule 608 should also be made in Rule 609, that change would look like this:

> (a) General rule.—For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,
>
> > (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
> > (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Note that Rule 609(d) also uses the term "credibility", but there it is used properly. Rule 609(d) provides that juvenile adjudications are generally inadmissible, but they can be admissible under certain circumstances if the same offense could be used to attack the "credibility" of an adult-witness. The exception is properly phrased because the adjudication should be admissible if it is offered for a purpose other than to prove character for truthfulness.

* * *

The Uniform Rules contain a different suggested change to Rule 609(a)–one that would clarify what crimes are automatically admitted under Rule 609(a)(2). Currently there is dispute in the courts about two matters: 1. Whether drug crimes and theft crimes involve "dishonesty or false statement" and thus are automatically admitted to impeach the witness; and 2. Whether the proponent can go behind the crime to the underlying facts, and have the conviction admitted automatically because the crime was committed in a deceitful manner (e g., murder by tricking the victim to come to a certain place). The Uniform Rules propose that only those crimes that contain an *element* of

untruthfulness should be automatically admitted. This means that drug crimes and theft crimes would not be automatically admitted, because those crimes can be committed without having to lie. This also means that the proponent could not go behind the crime to the underlying facts, because the test would focus on the elements of the crime. This "elements of the crime" approach makes a good deal of sense because it limits the applicability of the automatic admission provision of Rule 609(a)(2). That Rule should be limited because it is contrary to the general goal of the Federal Rules, which is to give the trial judge discretion to exclude severely prejudicial evidence.

The Uniform Rules provision, as applied to Federal Rule 609(a)(2) would read something like this:

> (a) General rule.—For the purpose of attacking the credibility of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted ~~if it involved dishonesty or false statement,~~ regardless of the punishment <u>if the statutory elements of the crime necessarily involve untruthfulness or falsification</u>.

## Rule 610

As with Rule 609, Professor Duane suggests that the overbroad term "credibility" should be replaced by "character for truthfulness." But as discussed in the memorandum on Rule 608, the term "character for truthfulness" might be too narrow as applied to impeachment. A policy question is raised on whether a person's mental stability should be subject to attack on the basis of their religious beliefs. If the Committee decides that Rule 610 should be amended, that policy decision would have to be addressed. If the Committee decides that the exclusion of evidence of religious belief should apply only if the attack goes to the witness' character for truthfulness, the proposed amendment would be simple:

**Rule 610. Religious Beliefs or Opinions**

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' ~~credibility~~ character for truthfulness is impaired or enhanced.

If mental stability were found to be similarly off limits, then the proposal might look like this:

**Rule 610. Religious Beliefs or Opinions**

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' ~~credibility~~ mental stability or character for truthfulness is impaired or enhanced.

## Rule 611

Professor Crump, *On the Uses of Irrelevant Evidence*, 34 Houston L.Rev. 1 (1997), argues that a good deal of evidence that is only marginally relevant to the case is brought out on cross-examination of witnesses. He proposes that imposing a duty on judges to limit the *length* of cross-examinations will also help prevent the admission of this marginally relevant evidence. In this respect, he proposes amending Rule 611 to include new subdivisions as follows::

1. Requiring a judge to "limit examinations so that they are not unduly lengthy in relation to the target trial length in the court's Civil Justice Reform Act plan."

2. A judge should have a duty to prevent attorneys from "unduly exhausting the witnesses physical or mental stamina" (add to Rule 611(a)).

3. Imposing specific time limitations on cross-examinations and leading questions.

4. Imposing specific time limitations on direct examinations by, for example, videotaping very long examinations for editing purposes.

* * *

The final two sentences of Rule 611(c) leave the state of the law confused with respect to whether the party who cross-examines a witness that the Judge has identified as hostile or adverse to the adversary can ask leading questions It says that the party *calling* the witness has the right to ask leading questions on direct if the witness is adverse, and that leading questions are ordinarily permissible on cross-examination. If the direct examination is favorable to the cross-examiner, courts have justifiably treated the cross-examination as delayed direct examination and have denied the cross-examiner a chance to lead an already favorable witness. See, e.g., *Woods v. Lecureux*, 110 F.3d 1215, 1221 (6th Cir. 1997) ("a district court should be hesitant to authorize the use of leading questions when it is cross-examination in form only"). This result could be codified as follows:

(c) Leading questions.—Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions, and cross-examination should proceed without leading questions.

## Rule 613(b)

The Rule provides that it is not necessary to give a witness an opportunity to examine a prior inconsistent statement before that statement is admissible to impeach the witness. All that is necessary is that the witness be given an opportunity at some point in the trial to explain or deny the statement. The Rule thus rejects the common-law rule from Queen Caroline's case, under which the proponent was required to lay a foundation for the prior inconsistent statement at the time the witness testified. Despite the language of the Rule and Note, however, some courts have reverted to the common-law rule. See, e.g., *United States v. Sutton,* 41 F.3d 1257 (8th Cir. 1994) (trial judge properly excluded testimony as to inconsistent statements by a prosecution witness on the ground that the witness had not been given an opportunity to explain or deny the prior statement while cross-examined by defense counsel); *United States v. Marks,* 816 F.2d 1207, 1211 (7th Cir. 1987) (trial judge is entitled despite the language of Rule 613(b) "to conclude that in particular circumstances the older approach should be used in order to avoid confusing witnesses and juries").

Some courts have returned to the common-law rule on the ground that it is more efficient. Allowing the adversary to admit extrinsic evidence without confronting the witness leads to a waste of time in cases where the witness would have admitted that he made the statement. The Rule also burdens witnesses who wish to minimize the time they must take from work or other activities. Under the Federal Rule a witness who apparently has nothing more to add must remain available for recall until the other party's case-in-chief or case-in-rebuttal has concluded.

The change from the common-law rule was deemed necessary for a number of reasons First, the common-law rule was sometimes a trap for the unwary; statements were sometimes lost due to an inadvertent failure to lay a foundation. Second, problems were presented when inconsistent statements were discovered after the witness testified. Third and most importantly, there was the danger under the common-law rule of prematurely alerting collusive witnesses to the evidence available for impeachment.

Those who argue against the current Rule maintain that a reversion to the common-law rule could be coupled with language granting discretion to the trial judge to dispense with the traditional foundation requirement where the interests of justice require. Judge Selya, concurring in *United States v. Hudson*, 970 F.2d 948, 959 (1st Cir. 1992), has expressed this view:

> [The common law rule] works to avoid unfair surprise, gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency, facilitates judges' efforts to conduct trials in an orderly manner, and conserves scarce judicial resources. At the same time, insistence upon a prior foundational requirement, subject, of course, to relaxation in the presider's discretion if the interests of justice otherwise require, does not impose an undue burden on the proponent of the evidence.

If the Committee were to propose a return to the common-law foundation requirement, while providing judicial discretion to dispense with such a requirement in the interests of justice, the amendment might look like this:

(b) Extrinsic evidence of prior inconsistent statement of witness. — Extrinsic evidence of a prior inconsistent statement by a witness is not admissible ~~unless~~ before the witness is afforded an opportunity to explain or deny the same ~~and the opposite party is afforded an opportunity to interrogate the witness thereon, or~~ unless the interests of justice otherwise require This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

## Rule 704(b)

Rule 704(b) would seem to prohibit all expert witnesses from testifying that a criminal defendant either did or did not have the requisite mental state to commit the crime charged. It states that "[n]o expert witness . . . may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." But some courts have held (and others have implied) that the rule is applicable only to mental health experts, and therefore does not prohibit intent-based testimony from such witnesses as law enforcement testifying about the narcotics trade. See, e.g., *United States v. Gastiaburo,* 16 F.3d 582 (4th Cir. 1994) (stating that Rule 704(b) does not apply to the testimony of an expert law enforcement agent); *United States v. Lipscomb,* 14 F.3d 1236 (7th Cir. 1994) (expressing sympathy with such a position, but finding it unnecessary to decide the matter). Other courts, while technically applying the Rule 704(b) limitation to all expert witnesses, have applied it in such a way as to nullify its impact--permitting, for example, an expert to opine on the mental state of a hypothetical person whose fact situation mirrors the fact situation in issue. See, e.g., *United States v. Williams,* 980 F.2d 1463 (D.C.Cir 1992) (permitting a law enforcement agent to testify that a hypothetical person carrying ziplock bags each containing small amounts of drugs was intending to distribute them; the hypothetical matched the facts of the case).

The Committee might consider whether the Rule should be amended to restore its original focus, which was to limit the conclusory testimony of psychological experts in criminal cases. If such an amendment were considered, it might look like this:

**Rule 704. Opinion on Ultimate Issue**

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No mental health expert ~~witness~~ testifying ~~with respect to the mental state or condition of a defendant~~ in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Alternatively, the Committee could consider the possibility of deleting Rule 704(b) entirely. If the Rule is designed to exclude expert testimony that is conclusory and unhelpful, then it is superfluous–Rule 702 already excludes expert testimony that is not helpful. Indeed, if Rule 704(b) is to be used at all independently of Rule 702, it is by definition being used to exclude *helpful* evidence about the defendant's mental state. It makes little sense to continue with a Rule that is either superfluous or else designed to exclude evidence that would assist the jury.

## Rule 706

Judge Gettleman has proposed an amendment to the appointment clause of Rule 706 that would read as follows:

**Rule 706. Court Appointed Experts**

(a) Appointment.— ~~The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection.~~ (1) The court may, on its own motion or the motion of any party, enter an order appointing an expert to act as the court's witness. Prior to any such appointment, the court shall notify and allow the parties a reasonable time to:

(A) object to the appointment;

(B) submit nominations by each party or by all parties jointly; and

(C) address the qualifications of any such expert.

(2) The court may appoint expert witnesses of its own choosing or may appoint an expert nominated by any party.

(3) An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

Judge Gettleman explains the proposed change as follows:

The proposal breaks up the run-on in the first sentence, and eliminates the "show cause" language that is rarely observed in practice. Especially where a court-appointed expert is suggested by a party, the notice of motion serves as a "show cause" order. Where the court suggests the appointment, subsection (a) requires adequate advance notice.

* * *

Various suggestions have been made in the literature for other possible amendments to Rule 706. These include:

1. Regulating ex parte communications between the court and the expert and between a party and the expert, for example by requiring that all such communications be recorded and made available to all parties.

2. Granting the trial court discretion to limit depositions or cross-examination of court-appointed experts where the circumstances warrant.

3. Regulating whether the jury should be told that the expert is court-appointed–either prohibiting such a practice or requiring cautionary instructions.

4. Clarifying that the Rule does not affect the court's inherent authority to appoint a technical adviser, when that appointee will not be a witness at trial.

Most of these issues are addressed in the ABA Civil Practice Standards, and these Standards might serve as a guideline to any amendment to the Rule.

The Advisory Committee previously considered whether an amendment to Rule 706 should be proposed to deal with some of the possible problems set forth above. The Committee decided to defer consideration of any amendment because the Civil Rules Committee was considering an amendment to Civil Rule 53, governing special masters. The Evidence Rules Committee recognized that there is an overlap between the roles of special master and court-appointed expert, and found it appropriate to wait until Civil Rules completed its project. Civil Rules has now proposed an amendment to Rule 53 that makes no attempt to regulate the use of court-appointed experts. So if the Committee were to decide to proceed with an amendment to Rule 706, it would not conflict with any proposal from the Civil Rules Committee.

## Rule 801(c)

Rule 801(c) defines hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." The Committee Note states that "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted" is excluded from the definition of hearsay "by the language of subdivision (c)". This would mean that a statement would be hearsay only if it were offered for the truth of the express assertion in the statement--offering it for any implied assertion would escape hearsay proscription. So for example, a statement "It is raining cats and dogs" would be admissible to prove it is raining--the statement would not be offered to prove the express assertion that cats and dogs were falling from the sky.

This highly constricted definition of hearsay generally has been rejected by the courts. The cases generally state that statements are hearsay if 1) they are offered for the truth of a matter *implied* in the statement and 2) the speaker *intended* to communicate that implication. See, e.g., *United States v. Reynolds,* 715 F.2d 99 (3rd Cir. 1983) (rejecting the government's suggestion that only a statement's express assertion should be considered in deciding whether it constitutes hearsay); *Lyle v. Koehler,* 720 F.2d 426, 433 (6th Cir. 1983) (concluding that letters were hearsay because "the inferences they necessarily invite form an integral part of the letters"; the reference to "matters asserted" in Rule 801(c) covers both express and implied assertions); *United States v. Jackson,* 88 F.3d 845, 848 (10th Cir. 1996) (stating that the important question under Rule 801(c) is whether the assertion, express or implied, "is intended"). See also Milich, *Re-examining Hearsay Under the Federal Rules: Some Method for the Madness,* 39 Kan. L.Rev. 893 (1991) (arguing for an intent-based test in determining whether implied assertions are hearsay)

An intent-based test for implied assertions, in accordance with the case law, could be added to Rule 801(c) as follows:

> (c) Hearsay.—''Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of ~~the matter asserted~~ what the declarant expressly or impliedly intended to assert.

## Rule 801(d)

Rule 801(d) provides that certain prior statements of testifying witnesses, and admissions by party-opponents, are "not hearsay" even though these statements clearly fit the definition of hearsay in Rule 801(c). Simply put, it is confusing to define a statement as "hearsay" in one subdivision and then declare that it is "not hearsay" in the next subdivision.

It would be more analytically correct to label the statements in Rule 801(d) as falling within hearsay "exceptions." But these statements received special categorization because the basis for admitting them is different from that supporting the other standard hearsay exceptions, such as excited utterances and dying declarations, which are found in Rules 803, 804, and 807. Statements falling within these latter exceptions are admitted because they are made pursuant to circumstantial guarantees of reliability that substitute for the in-court guarantees of oath, cross-examination, etc. In contrast, prior statements of testifying witnesses are admitted not because they were reliable when made, but because the person who made them is testifying at the trial or hearing under oath and subject to cross-examination. And admissions are permitted not because they are reliable, but because admitting the party's own statements against him is a consequence of the adversary system

The original Advisory Committee thought that it would be confusing to lump prior statements of testifying witnesses and admissions together with reliability-based exceptions under a single label of "hearsay exceptions." In fact, however, the Federal Rules regime is more confusing in the end because statements that clearly fit the definition of hearsay are labeled, *ipse dixit*, "not hearsay."

Perhaps the better solution is to treat prior statements of testifying witnesses and admissions as *exemptions* from the hearsay rule, rather than as "not hearsay" or as hearsay exceptions. An amendment creating an exemption for such statements might look like this.

**Rule 801. Definitions**

The following definitions apply under this article:

(a) Statement.—A ''statement'' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.—A ''declarant'' is a person who makes a statement.

(c) Hearsay.—''Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) ~~Statements which are not hearsay~~ Exemptions.—A statement is ~~not hearsay~~ exempt from exclusion under this rule if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing

and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent.—The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

**Reporter's Note: If this change were made, a corresponding change would have to be made to Rule 805. See the discussion of Rule 805, infra.**

## Rule 801(d)(1)(B)

Judge Bullock has proposed that Rule 801(d)(1)(B) be amended in two respects: 1. to reject the limitation on the Rule set forth in the Supreme Court's decision in *Tome v. United States*, which stated that a prior consistent statement is not admissible unless it is made before the witness' motive to falsify arose; and 2. to provide that prior consistent statements are admissible under the hearsay exception whenever they would be admissible to rehabilitate the witness' credibility. The justification for the former proposal is that post-motive statements can be relevant to rebut a charge of recent fabrication, and therefore there should be no rigid rule of exclusion. The justification for the latter proposal is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

If Judge Bullock's arguments are accepted by the Committee, an amendment to Rule 801(d)(1)(B) might look like this:

(d) Statements which are not hearsay. — A statement is not hearsay if —

(1) Prior statement by witness. — The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is ~~offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive~~ admissible, subject to Rule 403, to rehabilitate the declarant's credibility as a witness, or (C) one of identification of a person made after perceiving the person;

* * *

The Committee Note to the amendment might explain the change as follows:

### Draft Committee Note to Possible Amendment to Rule 801(d)(1)(B)

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not provide admissibility, for example, for consistent statements that are probative to explain what appears to be an inconsistency in the witness' testimony. Nor did it include consistent statements that would be probative to rebut a charge of bad memory. Thus, the Rule left many prior consistent statements potentially admissible for the limited purpose of rehabilitating a witness' credibility, but not admissible for their truth. See, e.g., *Tome v. United States,* 513 U.S 150 (1995) (noting that prior consistent statements that are probative to rebut a charge of bad memory might be admissible to rehabilitate the witness, but not for their truth). The original Rule also led to conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others refused to permit admission of such statements even for rehabilitation when they were not admissible for their truth under the Rule. *Compare United States v. Brennan,* 798 F.2d 581 (2d Cir. 1986) (prior consistent statement was not admissible to rebut a charge of improper motive, but it was admissible to clarify what appeared to be an inconsistency: "prior consistent statements may be admissible for rehabilitation even if not admissible under Rule 801(d)(1)(B)"), *with United States v. Miller,* 874 F.2d 1255, 1273 (9th Cir. 1989) ("a prior consistent statement offered for rehabilitation is admissible under Rule 801(d)(1)(B) or it is not admissible at all."). This latter approach resulted in unnecessarily restricted use of prior consistent statements that are probative to rehabilitate a witness.

The amendment provides that prior consistent statements are exempt from the hearsay rule whenever they are admissible, subject to Rule 403, to rehabilitate the witness. It extends the argument made in the original Advisory Committee Note to its logical conclusion. As commentators have stated, "[d]istinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning," because "[j]uries have a very difficult time understanding an instruction about the difference between substantive and nonsubstantive use." Hon. Frank W. Bullock, Jr. and Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 Fla.St. L.Rev. 509, 540 (1997).

Prior consistent statements were not admissible under the original Rule 801(d)(1)(B) when they were made after the declarant's alleged motive to falsify arose. *Tome v. United States,* 513 U.S. 150 (1995). The Court in *Tome,* in finding a "premotive" requirement in the original Rule, relied heavily on the language of that Rule and on the fact that it appeared to track the common law, which had imposed a premotive requirement on prior consistent statements. The amendment changes the focus of the Rule by equating rehabilitative and substantive use, and as such it rejects any rigid adherence to a premotive requirement. This is not to say, however, that a prior consistent statement offered to rebut a charge of improper motive is always admissible regardless of when it is made. The fact remains that a consistent statement postdating the witness's motive to falsify is rarely rehabilitative of the witness's credibility, because it is usually made under the same cloud of improper motive as the witness's testimony. Moreover, under Rule 403, the trial judge has the discretion to exclude prior consistent statements when their rehabilitative value is substantially outweighed by the

risk that the jury will use the statements improperly. For example, where the charge of improper motive or influence is weak, a trial judge might well exclude a prior consistent statement, lest "the whole emphasis of the trial * * * shift to the out-of-court statements, not the in-court ones." *Tome v. United States*, 513 U.S 150, 163 (1995).

## Rule 803(3)

Rule 803(3) incorporates the famous *Hillmon* doctrine, providing that a statement reflecting the declarant's state of mind can be offered as probative of the declarant's subsequent conduct in accordance with that state of mind. The Rule is silent, however, on whether a declarant's statement of intent can be used to prove the subsequent conduct of someone other than the declarant. When the victim says, "I am going to meet Frank tonight", is the statement admissible to prove that Frank and the victim actually met? Or is the statement admissible only to prove the future conduct of the declarant? The Advisory Committee Note refers to the Rule as allowing only "evidence of intention as tending to prove the act intended"– implying that the statement can be offered to prove how the declarant acted, but cannot be offered to prove the conduct of a third party. The legislative history is ambiguous. The case law is conflicted. Some courts have refused to admit a statement that the declarant intended to meet with a third party as proof that they actually did meet. See, e.g., *Gual Morales v. Hernandez Vega*, 579 F.2d 677 (1st Cir. 1978); *United States v. Jenkins*, 579 F.2d 840 (4th Cir. 1978) (statements of intent can prove only the declarant's subsequent conduct). Other courts hold such statements admissible if the proponent provides corroborating evidence that the meeting took place. See, e.g., *United States v. Delvecchio*, 816 F.2d 59 (2nd Cir. 1987). See C. Mueller and L. Kirkpatrick, *Evidence* at 938 (1st ed. 1995) ("Some modern cases take the clearly correct position that the exception in its present form cannot justify use of statements of intent by themselves as proof of what others did. And yet a growing number of cases approve use of a statement to prove what the speaker and another did together if other evidence confirms what the statement suggests the other did.").

If the Committee decides that Rule 803(3) should not provide admissibility of state of mind statements when offered to prove the conduct of someone other than the declarant, then the Rule could be amended as follows (with the bracketed language to be added if the Committee agrees with the courts that hold such statements admissible if corroborating evidence is provided:

> (3) Then existing mental, emotional, or physical condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including:
>
> > (A) a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will; or
> >
> > (B) a statement offered to prove the conduct of someone other than the declarant [unless it is supported by corroborating evidence indicating that the statement is true].

## Rule 803(4)

Rule 803(4) exempts statements made to medical personnel from the hearsay rule when the statements are pertinent to diagnosis or treatment. Statements made to doctors for purposes of litigation fall within the exception. The original Advisory Committee recognized that such statements might not be reliable due to a litigation motive, but relied on practical reasons for including statements to litigation doctors within the exception. One reason was that under Rule 703, the doctor would be able to rely on the patient's statements in forming an expert opinion, even though they were hearsay; because the hearsay statements would get before the jury anyway, to illustrate the basis for the expert's opinion, the Advisory Committee figured it would not make much difference if they were also admitted substantively.

Ken Broun observes that the original Advisory Committee's reliance on Rule 703 is no longer justified now that Rule 703 was amended in 2000. Under the amendment, hearsay relied upon by an expert cannot be disclosed to the jury unless its probative value in illustrating the expert's basis substantially outweighs the risk that the jury will use the hearsay for its truth. Therefore, it is far less likely than it once was that a litigation doctor would be able to disclose the plaintiff's hearsay statement to the jury in the guise of illustrating the basis for the expert's opinion. (This point is further developed by Professor Mosteller in an article at 65 Law and Contemporary Problems 47 (2002)).

Professor Broun proposes deleting the provision allowing statements made in anticipation of litigation to be admitted under Rule 803(4). An amendment deleting that provision might look like this:

> (4) Statements for purposes of medical diagnosis or treatment.—Statements made for purposes of medical ~~diagnosis or~~ treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to ~~diagnosis or~~ treatment.

**Reporter's Note:** It should be recognized that this amendment would require courts to distinguish between statements made for treatment purposes and those made for litigation purposes. After an accident occurs, it may be difficult to determine the victim's intent in seeking medical assistance. Was the victim trying to get treated, or trying to line up an expert witness, or both?

## Rule 803(5)

The Rule provides a hearsay exception for past recollection recorded: a record "containing a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately" where the record is "shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly." What happens, however, when a person makes a statement to another person, and that other person is the one who writes it down? The exception by its terms does not seem to permit a "two-party voucher" system of proving past recollection recorded, becausee it states that the record must be shown to have been "made or adopted by the witness " Thus, the Rule does not envision that a person with personal knowledge might make a statement recorded by another, with the record being made admissible by calling both the reporter and the recorder. Despite the language of the Rule, however, cases can be found that permit two-party vouching under Rule 803(5). See, e.g., *United States v. Williams*, 951 F.2d 853 (7th Cir. 1993).

If the Rule were amended to provide for two-party vouching, it might read as follows:

(5) Recorded recollection.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness, or made to another who testifies that the statement of the witness was accurately recorded, when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

## Rule 803(6)

The Rule defines a business record as one "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted activity." This language could be read as abrogating the common-law requirement that the person transmitting the information to the recorder must have a business duty to do so. It states only that the transmitting person must have "knowledge", not that the person must be reporting within the business structure. Yet despite the text, the courts have held that all those who report information included in a business record must be under a business duty to do so--or else the hearsay problem created from the report by an outsider must be satisfied in some other way. See *United States v. Turner,* 189 F.3d 712, 719-20 (8th Cir. 1999) ("[W]hen the source of information and the recorder of that information are not the same person, the business record contains hearsay upon hearsay. If both the source and recorder of the information were acting in the regular course of the organization's business, however, the hearsay upon hearsay problem may be excused by the business records exception to the rule against hearsay."); *Bemis v. Edwards,* 45 F.3d 1369 (9th Cir. 1995) (911 call was not admissible as a business record because the caller was not under any business duty to report, and the report did not independently satisfy any hearsay exception); *Cameron v. Otto Bock Orthopedic Indus. Inc.*, 43 F.3d 14 (1st Cir. 1994) (product failure reports submitted to the manufacturer after the plaintiff's accident were inadmissible; the reports were submitted by parties who had no business duty to report accurately to the manufacturer).

If the Committee thinks it appropriate to codify the business duty requirement, the amendment might look like the Louisiana version of Rule 803(6):

> (6) Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. <u>This exception is inapplicable unless the recorded information was furnished to the business by a person who was routinely acting for the business in reporting the information or in circumstances under which the statement would not be excluded by the hearsay rule.</u> The term ''business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Another possibility is provided by the Tennessee version of Rule 803(6):

> (6) Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge and a business duty to record or transmit the information, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ''business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

**Reporter's Note:** The Louisiana version is more comprehensive and descriptive. It does not rely on the undefined term "business duty"; and it properly notes that a statement from an outsider to the business can be admitted even if not made pursuant to a business duty, so long as it complies with some other hearsay exception (e.g., an admission or an excited utterance in a business record).

## Rule 803(8)

Rule 803(8) contains at least three textual anomalies. It currently reads as follows:

> (8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The anomalies are as follows:

1. *Trustworthiness clause:* It is unclear whether the trustworthiness clause at the end of the Rule applies only to reports offered under subpart (C), or whether it applies to all reports offered under the exception. The better reading is that it should apply to all reports, just like the trustworthiness clause of Rule 803(6) applies to all business records.

2. *Rule 803(8)(B) and exculpatory reports:* Subpart (B) excludes from its coverage public reports setting forth "matters observed by police officers and other law enforcement personnel" if such reports are offered "in criminal cases." Read literally, the Rule would not provide a hearsay exception for a forensic report prepared by the police that concluded that the defendant was innocent. Such a report would be offered by the defendant, but the exclusionary language of Rule 803(8)(B) covers all police reports offered in criminal cases. Yet some lower courts have refused to be bound by the plain meaning of the rule, reasoning that Congress intended to regulate only police reports that unfairly *inculpate* a criminal defendant, and that the exception should therefore apply to public reports offered by the accused. See, e.g., *United States v. Smith*, 521 F 2d 957 (D.C.Cir. 1975) (despite its exclusionary language, Rule 803(8)(B) should be read in light of Congress' intent to exclude police reports only when offered *against* a criminal defendant). Other courts have read the Rule literally. *United States v. Sharpe*, 193 F.3d 852, 868 (5th Cir. 1999) (the defendant's reliance on Rule 803(8)(B) to admit an exculpatory police report was "misplaced" because the Rule does not grant admissibility for any such reports offered in criminal cases).

3. *Rule 803(8)(B) and (C) and law enforcement reports:* Rule 803(8)(B) and (C) both contain language appearing to exclude from the hearsay exception all records prepared by law enforcement personnel, when such records are offered against a criminal defendant. Read literally, these provisions would prevent the government from introducing simple tabulations of non-adversarial information. For example, these subdivisions appear not to grant a hearsay exception for a routine printout from the Customs Service recording license plates of cars that crossed the border

on a certain day, when offered in a criminal case. Courts have refused to apply the plain exclusionary language of these subdivisions literally, however. They reason that the language could not have been intended to cover reports that are ministerial in nature and prepared under non-adversarial circumstances; it is only adversarial, evaluative reports (such as crime scene reports) that carry the risk of fabrication that the exclusionary language was designed to regulate. See, e.g., *United States v. Orozco*, 590 F.2d 789 (9th Cir. 1979) (customs records of border crossings are admissible under Rule 803(8) because they are ministerial and not prepared under adversarial circumstances); *United States v. Grady*, 544 F.2d 598 (2d Cir. 1976) (reports concerning firearms' serial numbers were admissible because they were records of routine factual matters prepared in non-adversarial circumstances).

If these three textual anomalies were all addressed in an amendment to Rule 803(8), the amendment might look like this:

> (8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel made under adversarial circumstances and offered against the accused, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made under adversarial circumstances pursuant to authority granted by law~~, unless~~. This exception is inapplicable if the sources of information or other circumstances indicate lack of trustworthiness in the preparation of the record, report, statement or data compilation.

There are other drafting alternatives that might make the Rule less elaborate:

1. Provide that all reports prepared by public offices or agencies are admissible, subject to a list of specific exceptions, e.g.:

a. Official reports prepared under adversarial circumstances offered against the accused in criminal cases.

b. Reports offered in a civil case when prepared for purposes of litigation.

This approach is taken by the Uniform Rule, although it is arguable that the exceptions included in the Uniform Rule are too broad, i.e., that they exclude a good number of reliable public reports.

2. Provide that all public reports are admissible unless the court finds them untrustworthy, as follows:

> (8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies made pursuant to a duty imposed by law , ~~setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law,~~ unless the sources of information or other circumstances indicate lack of trustworthiness.

This is the Nebraska version. It makes a good deal of sense, because all of the exclusionary language in the existing Rule is designed to exclude untrustworthy reports, such as police reports of a crime scene that might be written to frame the accused. It would seem that a simple inclusion of the trustworthiness clause would be sufficient to regulate untrustworthy public reports–and the change would bring the Rule in line with the case law in both civil and criminal cases.

## Rule 803(18)

Rule 803(18) provides a hearsay exception for "statements contained in published treatises, periodicals, or pamphlets" if they are "established as a reliable authority" by the testimony or admission of an expert witness or by judicial notice. The Rule does not on its face permit evidence in electronic form, such as a film or video. But the Second Circuit has rejected a literal reading of the Rule and upheld the admission of an authoritative videotape under the learned treatise exception. See *Costantino v. Herzog,* 203 F.3d 164, 171 (2d Cir.2000) (reasoning that it is "overly artificial to say that information that is sufficiently trustworthy to overcome the hearsay bar when presented in a printed learned treatise loses the badge of trustworthiness when presented in a videotape").

If the Committee wishes to provide for admissibility of information in electronic form in the text of Rule 803(18), the amendment might look like this:

> (18) ~~Learned treatises~~ Information recognized as authoritative.—To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, information collected in printed or electronic form ~~statements contained in published treatises, periodicals, or pamphlets~~ on a subject of history, medicine, or other science or art, from a source established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

## Rule 804(a)(5)

Rule 804(a)(5) contains a deposition preference for statements that are offered under the declaration against interest exception when the asserted ground of unavailability is that the declarant is absent. It provides that a declarant is unavailable due to absence if the declarant:

> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

The following discussion from the *Federal Rules of Evidence Manual* sets out the problem with the drafting of the Rule:

> A declarant is not absent under the terms of Rule 804(a)(5) simply because he is out of the jurisdiction or cannot be located. The party relying on absence to support an offer of hearsay evidence, in the case of any of the basic exceptions covered by subdivision (b) of Rule 804 aside from former testimony, must demonstrate that it has not been possible to take a deposition. The Senate objected to the requirement that an attempt to depose be required. But the Rule follows the House provision in requiring a showing of inability to obtain *testimony* of a declarant before a dying declaration, statement against interest, or statement of pedigree can be admitted on the ground that the declarant is absent. As a practical matter, the issue does not arise for statements offered as dying declarations or statements of pedigree. The ground of unavailability for dying declarations is ordinarily death, not absence; and statements of pedigree are rarely offered. So the deposition requirement with respect to the absence ground of unavailability is really limited to situations in which the proponent has a statement that would otherwise be admissible as a declaration against interest, and the asserted ground of unavailability is absence.
>
> Rule 804(a)(5) requires an attempt to depose. The rationale is that if a deposition can be taken, the deposition testimony will be admissible as prior testimony; and prior testimony is preferred to the declaration against interest, for the very reason that prior testimony has been subject to cross-examination Consequently, if the attempt to depose is successful, the hearsay declarant is no longer considered unavailable and statements falling within 804(b)(3), (or technically (2) or (4)) are no longer admissible for their truth.
>
> The problems created by the deposition preference in Rule 804(a)(5) are well-illustrated by *Campbell v. Coleman Co.*, 786 F.2d 892 (8th Cir. 1986). The minor plaintiffs alleged that they were severely burned by a defective gasoline lantern that exploded. Coleman had a different theory: that Johnnie Hayes, who was babysitting the children, overfilled the

lighted lantern with gasoline, then panicked and threw the burning lantern out of the house where it accidentally hit the children. Coleman had deposed Hayes, but at the deposition, Hayes flatly denied having anything to do with the accident. The deposition was not introduced at trial. However, Hayes had made several statements to various people implicating himself in the accident, and these were introduced at trial as declarations against interest. Coleman contended that Hayes was unavailable on the ground of absence because it had made good faith attempts to locate him before trial, and he could not be found. The Trial Court admitted the statements, but the Court of Appeals found that this was reversible error, because Hayes was not absent within the meaning of Rule 804(a)(5). As the Court put it, the "subsection is concerned with the absence of testimony, rather than the physical absence of the declarant." Thus, while Hayes was absent from the trial, his testimony was available (i.e., the deposition), and his hearsay statements were therefore not admissible under Rule 804(b)(3).

The result in *Coleman* shows that the deposition preference can create anomalous results. Hayes' deposition was undoubtedly a *less* reliable indicator of what happened than were his informal statements against interest. The congressional assumption that a declaration against interest is not necessary where a deposition can be or has been taken assumes that the proponent will get the same information, only better, from the deposition as from the declaration against interest. But *Coleman* shows that this is not always the case. The anomaly of the Rule is even more striking when it is considered that if Hayes were dead or declaring the privilege at the time of trial, the declarations against interest would have been admissible. The deposition preference is applied only when absence is the asserted ground of unavailability. Clearly, this makes no sense. If nothing else it is inconsistent with the general goal of Rule 804(a), which was to provide a unitary test of unavailability for all hearsay exceptions. Finally, the deposition preference is problematic because it ends up penalizing parties who depose witnesses in a timely fashion. If Coleman had not bothered to depose Hayes before he disappeared, the declarations against interest would have been admissible. It seems odd to penalize Coleman for engaging in diligent efforts to prepare for litigation.

Because there is a deposition preference in Rule 804(a)(5), however misguided it might be, it follows that a declarant will not be considered absent for purposes of Rules 804(b)(2)-(4) simply because he is outside the jurisdiction and beyond the subpoena power. The Federal Rules of Civil and Criminal Procedure make provision for deposing witnesses who are beyond the territorial jurisdiction of the Court. If the witness is deposeable, he is not absent under Rule 804(a)(5).

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The anomaly of the deposition preference could be remedied by simply deleting it, thereby providing that the declarant is unavailable due to absence when the declarant:

> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance ~~(or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony)~~ by process or other reasonable means.

## Rule 804(b)(1)

The Rule provides a hearsay exception for prior testimony when offered against a party who either 1) had a similar motive and opportunity to develop the testimony at the time it was given, or 2) in civil cases, had a predecessor in interest with such a similar motive and opportunity at the time the testimony was given. Some courts have defined a "predecessor in interest" as *anyone* who had a similar motive and opportunity to develop the testimony, at the time it was given, as the opponent would have at the instant trial; these courts do not require some legal relationship between the prior party and the party against whom the evidence is now offered. This construction collapses the term "predecessor in interest" with the term "similar motive". See, e.g., *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3rd Cir. 1978) (prior testimony properly admitted against plaintiff, where prior party had a similar motive to develop the testimony as the plaintiff in the instant case would have were the declarant to testify at trial; Judge Stern, concurring, states that such an expansive definition of "predecessor in interest" effectively reads that term out of the Rule); *Horne v. Owens-Corning Fiberglass Corp.*, 4 F.3d 276 (4th Cir. 1993) (prior testimony from a different case properly admitted against the plaintiff, where the previous plaintiff, though not affiliated in any way with the plaintiff, had a similar motive to develop the testimony). Other courts have admitted such evidence not as prior testimony (for want of a predecessor in interest) but as residual hearsay. See *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985).

If the Committee were to decide to codify the cases that read the predecessor in interest requirement out of the Rule, the amendment might look like this:

> (1) Former testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, ~~a predecessor in interest~~ any other party, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

## Rule 805

A possible amendment to categorize statements falling under Rule 801(d) as "exempt" from the hearsay rule, rather than "not hearsay" has been previously discussed. If that change is made, a corresponding change would have to be made to Rule 805.

Rule 805 currently provides:

> Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Currently this Rule does not present a problem with respect Rule 801(d) statements because they are not defined as hearsay and so the Rule does not cover these statements. But if Rule 801(d) statements are defined as hearsay that is "exempt" from the Rule, then Rule 805 would implicitly exclude them if they were part of a multiple hearsay transmission–they would not conform with an "exception" to the hearsay rule. This technical problem would be alleviated by a minor change to Rule 805:

> Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to <u>or an exemption from</u> the hearsay rule provided in these rules.

## Rule 806

Rule 806 provides as follows:

> When a hearsay statement, or a statement defined in rule 801(d)(2) (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

The Rule states that a hearsay declarant's credibility may be attacked "by any evidence which would be admissible" if the declarant had testified as a witness. The language raises a problem when the proponent wishes to attack the declarant by proffering specific bad acts to prove the witness' character for untruthfulness. Rule 608(b) prohibits extrinsic proof of bad acts when offered to show the witness' character for untruthfulness. Rule 806 could therefore be read literally as imposing a substantial limitation on bad acts impeachment of a hearsay declarant–because extrinsic evidence will often be the only way to introduce such acts without the witness being there to admit them. Some courts have refused to read the Rule literally, holding that extrinsic evidence of a bad act offered to prove a hearsay declarant's character for veracity is admissible (subject to Rule 403). The reasoning is that since the declarant is not available for cross-examination, extrinsic evidence is "the only means of presenting such evidence to the jury." *United States v. Friedman,* 854 F.2d 535, n.8 (2d Cir. 1988).

Professor Cordray, in *Evidence Rule 806 and the Problem of the Nontestifying Declarant,* 56 OHIO STATE L.J. 495, 526 (1995), discusses the problems arising from a literal interpretation of Rule 806 that would prohibit extrinsic evidence of bad acts offered to prove the untruthful character of the declarant:

> If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if her opponent had called the declarant to testify. * * *
>
> In addition, if Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a nontestifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed. * * *

These considerations militate strongly in favor of modifying Rule 608(b)'s ban on extrinsic evidence when the attacking party seeks to impeach a nontestifying declarant with specific instances of conduct showing untruthfulness.

But at least one Court has held that extrinsic evidence may never be admitted to prove a bad act offered to impeach a hearsay declarant's character for truthfulness. The Court in *United States v. Saada*, 212 F.3d 210 (3d Cir. 2000), relied on the "plain language" of Rule 806, which it read as creating exactly the same impeachment rules for in-court witnesses and hearsay declarants, with one exception–impeachment with inconsistent statements (as to which the requirement at trial of confronting the witness with the statement is specifically excused under Rule 806). The *Saada* Court found that the Rule's express exception for different treatment of inconsistent statements cut against any judicially-created exception for bad acts impeachment of a declarant. The Court recognized that the ban on extrinsic proof, as applied to impeachment of hearsay declarants, "prevents using evidence of prior misconduct as a form of impeachment, unless the witness testifying to the hearsay has knowledge of the declarant's misconduct." Nevertheless, this drawback "may not override the language of Rules 806 and 608(b)."

The problem with the reasoning in *Saada* is that it is inconsistent with the *intent* of Rule 806, which is to give the opponent of the hearsay the same leeway for impeachment as it would have if the declarant testified at trial. Under *Saada*, the opponent of the hearsay is put in a worse position with respect to bad acts of the hearsay declarant. The bad acts could at least be referred to if the declarant were to testify, whereas if the statement is introduced as hearsay it is unlikely that the jury will hear about the hearsay declarant's bad acts (unless by chance there is a witness bringing in the hearsay statement who has personal knowledge about the declarant's bad acts).

Another problem with the language of the Rule is that the first sentence treats agent and coconspirator admissions (admitted under Rule 801(d)(2)) the same as the hearsay statements of any other declarant admitted under the "exceptions." This is the proper result, because there is no analytical distinction, for purposes of impeaching a hearsay declarant, between statements offered under the exceptions and statements offered under the "not hearsay" category of agency admissions. The problem is that the last two sentences of the rule refer to "hearsay" statements–as such these sentences would not seem to cover impeachment of declarants whose statements are admitted under the exceptions for agency admissions. This would mean that a party could not admit the inconsistent statement of an agent for impeachment purposes without confronting the declarant with the statement, and could not examine such a declarant as if on cross-examination if the party decided to call the agent. There seems to be no reason to treat agents of a party the same as other hearsay declarants for one purpose (the first sentence of Rule 806), but to differentiate them for other purposes (the second and third sentences of Rule 806). Thus, an argument can be made that the Rule should be amended so that agent-declarants are subject to the same treatment as hearsay declarants for all purposes of the Rule.

If Rule 806 were to be amended to solve both anomalies discussed above, it might read like this:

When a hearsay statement, or a statement defined in rule 801(d)(2) (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's ~~hearsay~~ statement that is admitted in evidence, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. Extrinsic evidence offered to show the declarant's character for untruthfulness is admissible subject to Rule 403. If the party against whom ~~a hearsay~~ the declarant's statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

If the Committee does decide to have a go at this Rule, it might be advised to scrap its rambling structure and use subdivisions to make the various points.

## Rule 807

Rule 807 permits the admission of residual hearsay only if that hearsay is "not specifically covered" by another exception. This might seem to indicate that hearsay that "nearly misses" one of the established exceptions should not be admissible as residual hearsay--because it is specifically covered by, and yet not admissible under, another exception. In fact, however, most courts have construed the term "not specifically covered" by another hearsay exception to mean "not admissible under" another hearsay exception. See, e.g., *United States v. Fernandez*, 892 F.2d 976 (11th Cir. 1989) (grand jury statement is "not specifically covered" by another hearsay exception because it is not admissible under any such exception). Compare *United States v. Dent*, 984 F.2d 1453 (7th Cir. 1993) (Easterbrook, J., concurring) (arguing that grand jury testimony can never be admissible as residual hearsay, since such testimony is specifically covered by, though not admissible under, the hearsay exception for prior testimony).

The predominant construction of the term "not specifically covered" indicates a much more liberal use of the residual exception than was contemplated by Congress. It is fair to state that Congress intended the residual exception to be used in only exceptional circumstances. But the courts have used the residual exception to create whole new categories of hearsay exceptions, e.g., a hearsay exception for grand jury statements and another for statements by children in sex abuse prosecutions. It is notable that the Uniform Rules Committee has added language to its version of Rule 807 to limit its scope to "exceptional circumstances".

Another possible problem with the residual exception involves the notice requirement. The Rule states that "a statement may not be admitted" under this exception unless the proponent gives notice "sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it." Most courts have read the notice requirement far more flexibly than its language would seem to indicate. For example, most courts have held that the notice requirement can be satisfied by providing notice at trial, so long as the adversary is given sufficient time to prepare. See, e.g., *United States v. Baker*, 985 F.2d 1248 (4th Cir. 1993). Other courts have read a good cause exception into the notice requirement. See, e.g., *United States v. Lyon*, 567 F.2d 777 (8th Cir. 1977). But see *United States v. Ruffin*, 575 F 2d 346 (2d Cir. 1978) (rejecting a good cause exception as not permitted by the text of the Rule).

If the Committee wishes to retain the rigid notice requirement in Rule 807, there is not much it can do to amend the Rule that could make the courts comply. The Rule already says that a statement may not be admitted if the notice provision is not met. An amendment such as "and we really mean it" would not seem workable. On the other hand, the Committee might wish to amend the notice requirement to codify the predominant case law, which essentially reads a "good cause" requirement into the Rule.

Assuming that the Committee wishes to amend Rule 807 to limit its scope to its original intent, and also wishes to codify the case law on notice, the Rule might look like this:

**Rule 807. Residual Exception**

In exceptional circumstances a ~~A~~ statement not specifically covered by Rule 801(d), 803 or 804 but having equivalent, though not any of the same, circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent ~~of it makes known to the~~ gives all adverse ~~party~~ parties ~~sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it,~~ reasonable notice in advance of trial of the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant, unless the court excuses pretrial notice for good cause shown.

**Reporter's Note: The amendment to the first sentence is not related to the amendment to the notice provision, so the Committee could choose to pursue one or the other, both, or neither. If the Committee decides to pursue an amendment to both sentences to the Rule, it might consider restructuring the Rule so that it flows better stylistically.**

## Tender Years Exception

The Uniform Rules contain a special hearsay exception for children who are victims of physical or sexual abuse. It is similar to exceptions that are found in most states. Under Federal Practice, such statements are usually offered under Rules 803(2), 803(4) or 807. A good argument can be made that each of these exceptions is an inadequate tool for regulating and admitting child hearsay in abuse cases. If the Committee believes that a special exception should be added to the Federal Rules to cover child-victim hearsay in abuse cases, an exception like that in the Uniform Rules could be added as a new Rule 808. The Uniform Rules Tender Years exception provides as follows:

Statement of Child Victim

(a) Statement of child not excluded. – A statement made by a child under [seven] years of age describing an alleged act of neglect, physical or sexual abuse, or sexual contact performed against, with, or on the child by another individual is not excluded by the hearsay rule if:

(1) subject to subdivision (b), the court conducts a hearing outside the presence of the jury and finds that the statement concerns an event within the child's personal knowledge and is inherently trustworthy; and

(2) the child testifies at the proceeding, or the child is unavailable to testify at the proceeding, as defined in Rule 804(a), and, in the latter case, there is evidence corroborative of the alleged act of neglect, physical or sexual abuse, or sexual contact.

(b) Determining trustworthiness. – In determining the trustworthiness of a child's statement, the court shall consider the circumstances surrounding the making of the statement, including:

(1) the child's ability to observe, remember and relate the details of the event;

(2) the child's age and mental and physical maturity;

(3) whether the child used terminology not reasonably expected of a child of similar age, mental and physical maturity, and socioeconomic circumstances;

(4) the child's relationship to the alleged offender;

(5) the nature and duration of the alleged neglect, physical or sexual abuse, or sexual contact;

(6) whether any other descriptions of the event by the child have been consistent with the statement;

(7) whether the child had a motive to fabricate the statement;

(8) the identity, knowledge and experience of the person taking the statement;

(9) whether there is a video or audio recording of the statement and, if so, the circumstances surrounding the taking of the statement; and

(10) whether the child made the statement spontaneously or in response to suggestive or leading questions.

(c) Making a record. – The court shall state on the record the circumstances that support its determination of the admissibility of the statement offered pursuant to subdivision (a).

(d) Notice. – Evidence is not admissible under this rule unless the proponent gives to all adverse parties reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the nature of any such evidence the proponent intends to introduce at trial.

## Rule 901(b)

Judge Victor E. Bianchini & Harvey Bass, in *A Paradigm for the Authentication of Photographic Evidence in the Digital Age*, 20 T. Jefferson L. Rev. 303 (1998), argue that the traditional authentication methods under the Evidence Rules may be inadequate to deal with the special risks of alteration and forgery presented by digitally produced photographic evidence. The authors contend, with some justification, that the chances of detecting a digital manipulation of a photograph are substantially less than the chances of detecting manipulation of a traditional photo. The authors propose an amendment that would add a new subdivision to Rule 901(b), to create a special category for digitally created evidence. The amendment to Rule 901(b) would read as follows:

(b) Illustrations.—By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(11) In the case of photographic evidence generated digitally from computer sources, the proponent of such evidence shall make the original computer data files available for examination upon request. Computer generated negatives, prints or other images created by emulsion-based "film recorders" or other such devices capable of masking the digital nature of the source, shall not be admissible unless such prints are digitally imprinted with a "fingerprint" identifying such print as having been so generated.

**Reporter's Note:** This proposal might have some merit, but it probably should not be placed in Rule 901(b). That Rule simply provides illustrations of ways to authenticate evidence. It does not impose limitations. Perhaps this proposal is better placed at the end of Rule 901(a), which sets forth the standard for authenticity, or as a separate rule at the end of Article IX.

## Rule 902(1)

The Rule provides for self-authentication of domestic documents under seal, as follows:

(1) Domestic public documents under seal.—A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

There is no longer a Canal Zone, so that reference has become outmoded. An amendment might be proposed to delete that reference as part of general housekeeping.

## Rule 902(2)

The Advisory Committee has previously considered, and tabled, a proposal that would provide an alternative to the requirement of a seal for self-authenticating public documents. The proposed amendment and draft Committee Note follows:

**Rule 902. Self-Authentication**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. – A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. – A document not bearing a seal but purporting to bear a signature of an officer or employee of any entity listed in paragraph (1) of this rule, affixed in the officer's or employee's official capacity. ~~A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.~~

* * *

**Committee Note for this Alternative**

The Rule has been amended to provide for a means of self-authentication of public documents other than through the use of a seal. A number of states have established a presumption of authenticity for certain public documents that purport to bear a signature of a public official in his or her official capacity. See, e.g., Cal. Evid. Code § 1453; Fla. Stat. Ann. § 90.902; La. Code Evid. Art. 902(2); Nev. Stat. Ann. § 52.125; N.J. R Evid. 902(b); R.I. R.Evid. 902(2), Vt. R.Evid. 902(2). Litigants in federal court have not surprisingly found it difficult to obtain a public document with a seal from these states. A relaxation of the requirements for self-authentication of public documents is justified by the diminished importance of the seal and improved methods of detecting forgeries.

**Reporter's Note: This proposal was deferred so that the Justice Department could make a showing that the existing sealing requirement was imposing hardships for government**

**attorneys in practice. While no such showing has been made, it may be appropriate to consider the proposal on its merits. The proposal is consistent with the law in many states. Those states seem to be finding a sealing requirement to be an unnecessary formality.**

## Rule 902(6)

Greg Joseph, a former member of the Advisory Committee member, has suggested that if the Committee would ever consider amending Rule 902 again, that it might consider as part of the amendment a change to Rule 902(6). Rule 902(6) provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to:

> (6) Newspapers and periodicals. – Printed materials purporting to be newspapers or periodicals.

Greg notes that it is difficult to use paragraph (6) to authenticate electronic or hardcopy of material made available over the internet. This would include everything from Slate magazine to wire service reports like Reuters. Under the text of the Rule, there is no presumption of authenticity for these electronic materials. However, under Rule 901, the proponent can still show on the facts that the electronic material is what the proponent claims it to be.

If the Committee wishes to provide that online materials in the nature of newspapers or periodicals are self-authenticating, then the following change can be made to the Rule:

**Rule 902. Self-Authentication**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(6) Newspapers, ~~and~~ Periodicals, and Other Regularly Published Information. – ~~Printed materials~~ Materials purporting to be newspapers, ~~or~~ periodicals, or other regularly published information, whether in printed or electronic form.

* * *

The Committee Note might read as follows:

## COMMITTEE NOTE

The Rule has been amended to extend the presumption of authenticity from printed newspapers and periodicals to similar electronic and online sources. The importance and prevalence of these sources, together with improved methods of detecting forgery, justify a presumption of authenticity.

# Rule 1006

Rule 1006 allows admission of summaries in lieu of having the voluminous originals presented at trial. This use of summaries in this manner should be distinguished from charts and summaries used only for demonstrative purposes to clarify or amplify argument based on evidence that has already been admitted. *See, e.g., Air Disaster at Lockerbie Scot. on Dec. 21, 1988*, 37 F.3d 804 (2d Cir. 1994) (finding no error where experts gave their opinions on the adequacy of PanAm security measures, relying from time to time on trial transcripts displayed on a projection screen; Rule 1006 objection was misplaced because the trial transcripts were records of testimony at the trial itself). Some courts have considered the "admissibility" of charts and summaries of trial evidence under Rule 1006, but this is a mistake; the Rule is really not applicable because pedagogical summaries are not evidence. See, e.g., *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996) (applying Rule 1006 to approve the use of summaries based on evidence that had already been admitted at trial); *United States v. Stephens*, 779 F.2d 232 (5th Cir. 1985) (same).

It might be possible to alleviate some confusion by clarifying that Rule 1006 does not regulate the presentation of summaries of trial evidence. An amendment might look like this:

**Rule 1006. Summaries**

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court. <u>This rule does not govern the presentation of summaries of evidence that has been admitted at trial</u>.

## "Global" Amendments

Two proposals have previously been floated, and previously rejected, for amendments to a number of Evidence Rules in an attempt to solve a perceived problem that goes beyond any particular rule. Those proposals are:

1. A proposal to amend the Rules of Evidence to accommodate technological changes in the presentation of evidence. This would include amending those rules that refer in some way to "paper" evidence–there are more than 20 of these Rules. It would also include amending Rules like the hearsay rule and Rule 403 to specifically mention and regulate electronic evidence. In 1999, the Reporter prepared a memorandum on whether the Federal Rules needed to be amended to accommodate electronic evidence. The Advisory Committee at that time concluded that courts and litigators were not having substantial problems in adapting the already flexible and discretion-based Federal Rules (especially Rule 403) to meet the challenges of electronic evidence. Practice in the last three years does not seem to indicate that the Rules have become unworkable in relation to electronic evidence. If the Committee decides that the problem of technology should be revisited, the Reporter can prepare a memorandum on the subject for the next meeting.

2. There are a number of Evidence Rules that impose a notice requirement–Rules 404(b), 412, 413-415, 609(b), 807 and 902(11)and (12). The notice requirements are not consistently written. Some have imposed specific time limits (e.g., 15 days before trial), some employ "reasonableness." Some allow good cause excuse, some do not. It is for the Committee to decide whether it would be useful to craft a standard notice provision that would be used for all of the Evidence Rules that require notice.

# AGENDA DOCKETING

## ADVISORY COMMITTEE ON EVIDENCE RULES

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 101]** — Scope | | 6/92 — Approved by ST Cmte.<br>9/92 — Approved by Jud. Conf.<br>4/93 — Approved by Sup. Ct.<br>12/93 — Effective<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 102** — Purpose and Construction | | 5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 103]** — Ruling on EV | | 9/93 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 103(a)]** — When an *in limine* motion must be renewed at trial (earlier proposed amendment would have added a new Rule 103(e)) | | 9/93 — Considered<br>5/94 — Considered<br>10/94 — Considered<br>1/95 — Approved for publication by ST Cmte.<br>5/95 — Considered Note revised.<br>9/95 — Published for public comment<br>4/96 — Considered<br>11/96 — Considered. Subcommittee appointed to draft alternative.<br>4/97 — Draft requested for publication<br>6/97 — ST Cmte. recommitted to advisory cmte for further study<br>10/97 — Request to publish revised version<br>1/98 — Approved for publication by ST Cmte.<br>8/98 — Published for comment<br>10/98 — Cmte considered comments and statements from witnesses<br>4/99 — Cmte approved with revisions<br>6/99 — Stg Comte approved<br>9/99 — Judicial Conference Approved<br>4/00 — Approved by Supreme Court<br>12/00 — Effective<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV104]** — Preliminary Questions | | 9/93 — Considered<br>1/95 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 105]** — Limited Admissibility | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 106]** — Remainder of or Related Writings or Recorded Statements | | 5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 106]** — Admissibility of "hearsay" statement to correct a misimpression arising from admission of part of a record | Prof. Daniel Capra (4/97) | 4/97 — Reporter to determine whether any amendment is appropriate<br>10/97 — No action necessary<br>**COMPLETED** |
| **[EV 201]** — Judicial Notice of Adjudicative Facts | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>11/96 — Decided not to amend<br>**COMPLETED** |
| **[EV 201(g)]** — Judicial Notice of Adjudicative Facts | | 5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>11/96 — Decided to take no action<br>**DEFERRED INDEFINITELY** |
| **[EV 301]** — Presumptions in General Civil Actions and Proceedings. (Applies to evidentiary presumptions but not substantive presumptions.) | | 5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>11/96 — Deferred until completion of project by Uniform Rules Committee<br>**PENDING FURTHER ACTION** |
| **[EV 302]** — Applicability of State Law in Civil Actions and Proceedings | | 5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 401]** — Definition of "Relevant Evidence" | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 402]** — Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 403]** — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 404]** — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes | Sen. Hatch S.3, § 503 (1/97)(dealing with 404(a) | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>10/94 — Considered with EV 405 as alternative to EV 413-415<br>4/97 — Considered<br>6/97 — Stotler letter to Hatch on S.3<br>10/97 — Recommend publication<br>1/98 — Approved for publication by the ST Cmte.<br>8/98 — Published for comment<br>10/98 — Cmte considered comments and statements from witnesses<br>4/99 — Cmte approved with revisions<br>6/99 — Stg Comte approved<br>9/99 — Judicial Conference Approved<br>4/00 — Approved by the Supreme Court<br>12/00 — Effective<br>**COMPLETED** |
| **[EV 404(b)]** — Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes: Other crimes, wrongs, or acts. (Uncharged misconduct could only be admitted if the probative value of the evidence substantially outweighs the prejudicial effect.) | Sen. Hatch S.3, § 713 (1/97) | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>10/94 — Discussed<br>11/96 — Considered and rejected any amendment<br>4/97 — Considered<br>6/97 — Stotler letter to Hatch on S.3<br>10/97 — Proposed amendment in the Omnibus Crime Bill rejected<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 405]** — Methods of Proving Character. (Proof in sexual misconduct cases.) | | 9/93 — Considered<br>5/94 — Considered<br>10/94 — Considered with EV 404 as alternative to EV 413-415<br>**COMPLETED** |
| **[EV 406]** — Habit; Routine Practice | | 10/94 — Decided not to amend (Comprehensive Review)<br>1/95 — Approved for publication by ST Cmte.<br>**COMPLETED** |
| **[EV 407]** — Subsequent Remedial Measures (Extend exclusionary principle to product liability actions, and clarify that the rule applies only to measures taken after injury or harm caused by a routine event.) | Subcmte. reviewed possibility of amending (Fall 1991) | 4/92 — Considered and rejected by CR Rules Cmte<br>9/93 — Considered<br>5/94 — Considered<br>10/94 — Considered<br>5/95 — Considered<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Approved & submitted to ST Cmte. for transmittal to Jud. Conf.<br>6/96 — Approved by ST Cmte.<br>9/96 — Approved by Jud. Conf.<br>4/97 — Approved by Sup. Ct.<br>12/97 — Enacted<br>**COMPLETED** |
| **[EV 408]** — Compromise and Offers to Compromise | | 9/93 — Considered<br>5/94 — Considered<br>1/95 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 409]** — Payment of Medical and Similar Expenses | | 5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 410]** — Inadmissibility of Pleas, Plea Discussions, and Related Statements | | 9/93 — Considered and recommended for CR Rules Cmte.<br>**COMPLETED** |
| **[EV 411]** — Liability Insurance | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 412]** — Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition | Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92) | 4/92 — Considered by CR Rules Cmte.<br>10/92 — Considered by CR Rules Cmte.<br>10/92 — Considered by CV Rules Cmte.<br>12/92 — Published<br>5/93 — Public Hearing, Considered by EV Cmte.<br>7/93 — Approved by ST Cmte.<br>9/93 — Approved by Jud. Conf.<br>4/94 — Recommitted by Sup. Ct. with a change<br>9/94 — Sec. 40140 of the Violent Crime Control and Law Enforcement Act of 1994 (superseding Sup. Ct. action)<br>12/94 — Effective<br>**COMPLETED** |
| **[EV 413]** — Evidence of Similar Crimes in Sexual Assault Cases | | 5/94 — Considered<br>7/94 — Considered by ST Cmte.<br>9/94 — Added by legislation<br>1/95 — Considered<br>1/95 — Reported to but disregarded by Congress<br>7/95 — Effective<br>**COMPLETED** |
| **[EV 414]** — Evidence of Similar Crimes in Child Molestation Cases | | 5/94 — Considered<br>7/94 — Considered by ST Cmte.<br>9/94 — Added by legislation<br>1/95 — Considered<br>1/95 — Reported to but disregarded by Congress<br>7/95 — Effective<br>**COMPLETED** |
| **[EV 415]** — Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation | | 5/94 — Considered<br>7/94 — Considered by ST Cmte.<br>9/94 — Added by legislation<br>1/95 — Considered<br>1/95 — Reported to but disregarded by Congress<br>7/95 — Effective<br>**COMPLETED** |
| **[EV 501]** — General Rule. (Guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors be adequately protected in Federal court proceedings.) | 42 U.S.C., § 13942(c) (1996) | 10/94 — Considered<br>1/95 — Considered<br>11/96 — Considered<br>1/97 — Considered by ST Cmte.<br>3/97 — Considered by Jud. Conf.<br>4/97 — Reported to Congress<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 501]** — Privileges, extending the same attorney-client privilege to in-house counsel as to outside counsel | | 11/96 — Decided not to take action<br>10/97 — Rejected proposed amendment to extend the same privilege to in-house counsel as to outside counsel<br>10/98 — Subcmte appointed to study the issue<br>**COMPLETED** |
| **[Privileges]** — To codify the federal law of privileges | EV Rules Committee (11/96) | 11/96 — Denied<br>10/98 — Cmte. reconsidered and appointed a subcmte to further study the issue<br>4/99 — Considered pending further study<br>10/99 — Subcomte established to study<br>4/00 — Cmte considered subc's drafts<br>4/01 — Cmte considered<br>**PENDING FURTHER ACTION** |
| **[EV 501]** Parent/Child Privilege | Proposed Legislation | 4/98 — Considered; draft statement in opposition prepared<br>**COMPLETED** |
| **[EV 601]** — General Rule of Competency | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 602]** — Lack of Personal Knowledge | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 603]** — Oath or Affirmation | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 604]** — Interpreters | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 605]** — Competency of Judge as Witness | | 9/93 — Considered<br>10/94 — Decided not to amend (Comprehensive Review)<br>1/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 606]** — Competency of Juror as Witness | | 9/93 — Considered<br>10/94 — Decided not to amend (Comprehensive Review)<br>1/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 607]** —Who May Impeach | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 608]** — Evidence of Character and Conduct of Witness | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 608(b)]** — Inconsistent rulings on exclusion of extrinsic evidence | | 10/99 — Considered<br>4/00 — Cmte directed reporter to prepare draft amendment<br>4/01 — Cmte recommended publication<br>6/01 — Approved for publication by ST Cmte<br>8/01 — Published for public comment<br>**PENDING FURTHER ACTION** |
| **[EV 609]** — Impeachment by EV of Conviction of Crime. See 404(b) | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>11/96 — Considered<br>4/97 — Declined to act<br>**COMPLETED** |
| **[EV 609(a)** — Amend to include the conjunction "or" in place of "and" to avoid confusion. | Victor Mroczka 4/98 (98-EV-A) | 5/98 — Referred to chair and reporter for consideration<br>10/98 — Cmte declined to act<br>**COMPLETED** |
| **[EV 610]** — Religious Beliefs or Opinions | | 5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 611]** — Mode and Order of Interrogation and Presentation | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 611(b)]** — Provide scope of cross-examination not be limited by subject matter of the direct | | 4/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>11/96 — Decided not to proceed<br>**COMPLETED** |
| **[EV 612]** — Writing Used to Refresh Memory | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 613]** — Prior Statements of Witnesses | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 614]** — Calling and Interrogation of Witnesses by Court | | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>**COMPLETED** |
| **[EV 615]** — Exclusion of Witnesses. (Statute guarantees victims the right to be present at trial under certain circumstances and places some limits on rule, which requires sequestration of witnesses. Explore relationship between rule and the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997 passed in 1996.) | 42 U.S.C., § 10606 (1990) | 9/93 — Considered<br>5/94 — Decided not to amend (Comprehensive Review)<br>6/94 — Approved for publication by ST Cmte.<br>9/94 — Published for public comment<br>11/96 — Considered<br>4/97 — Submitted for approval without publication<br>6/97 — Approved by ST Cmte.<br>9/97 — Approved by Jud. Conf.<br>4/98 — Sup Ct approved<br>12/98 — Effective<br>**COMPLETED** |
| **[EV 615]** — Exclusion of Witnesses | Kennedy-Leahy Bill (S. 1081) | 10/97 — Response to legislative proposal considered; members asked for any additional comments<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 701]** — Opinion testimony by lay witnesses | | 10/97 — Subcmte. formed to study need for amendment<br>4/98 — Recommend publication<br>6/98 — Stg. Cmte approves request to publish<br>8/98 — Published for comment<br>10/98 — Cmte considered comments and statements from witnesses<br>4/99 — Cmte approved with revisions<br>6/99 — Stg Comte approved<br>9/99 — Judicial Conference Approved<br>4/00 — Sup Ct approved<br>12/00 — Effective<br>**COMPLETED** |
| **[EV 702]** — Testimony by Experts | H.R. 903 and S. 79 (1997) | 2/91 — Considered by CV Rules Cmte.<br>5/91 — Considered by CV Rules Cmte<br>6/91 — Approved for publication by ST Cmte.<br>8/91 — Published for public comment by CV Rules Cmte.<br>4/92 — Considered and revised by CV and CR Rules Cmtes.<br>6/92 — Considered by ST Cmte.<br>4/93 — Considered<br>5/94 — Considered<br>10/94 — Considered<br>1/95 — Considered (Contract with America)<br>4/97 — Considered. Reporter tasked with drafting proposal.<br>4/97 — Stotler letters to Hatch and Hyde<br>10/97 — Subcmte. formed to study issue further<br>4/98 — Recommend publication<br>6/98 — Stg. Cmte approves request to publish<br>8/98 — Published for comment<br>10/98 — Cmte considered comments and statements from witnesses<br>4/99 — Cmte approved with revisions<br>6/99 — Stg Comte approved<br>9/99 — Judicial Conference Approved<br>4/00 — Sup Ct approved<br>12/00 — Effective<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 703]** — Bases of Opinion Testimony by Experts (Whether rule, which permits an expert to rely on inadmissible evidence, is being used as means of improperly evading hearsay rule ) | | 4/92 — Considered by CR Rules Cmte.<br>6/92 — Considered by ST Cmte.<br>5/94 — Considered<br>10/94 — Considered<br>11/96 — Considered<br>4/97 — Draft proposal considered.<br>10/97 — Subcmte. formed to study issue further<br>4/98 — Recommend publication<br>6/98 — Stg. Cmte approves request to publish<br>8/98 — Published for comment<br>10/98 — Cmte considered comments and statements from witnesses<br>4/99 — Cmte approved with revisions<br>6/99 — Stg Comte approved<br>9/99 — Judicial Conference Approved<br>4/00 — Sup Ct approved<br>12/00 — Effective<br>**COMPLETED** |
| **[EV 705]** — Disclosure of Facts or Data Underlying Expert Opinion | | 5/91 — Considered by CV Rules Cmte.<br>6/91 — Approved for publication by ST Cmte.<br>8/91 — Published for public comment by CV Rules Cmte.<br>4/92 — Considered by CV and CR Rules Cmtes<br>6/92 — Approved by ST Cmte<br>9/92 — Approved by Jud. Conf.<br>4/93 — Approved by Sup. Ct.<br>12/93 — Effective<br>**COMPLETED** |
| **[EV 706]** — Court Appointed Experts. (To accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases.) | Carnegie (2/91) | 2/91 — Tabled by CV Rules Cmte.<br>11/96 — Considered<br>4/97 — Considered. Deferred until CACM completes their study.<br>**PENDING FURTHER ACTION** |
| **[EV 801(a-c)]** — Definitions: Statement; Declarant; Hearsay | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 801(d)(1)]** — Definitions: Statements which are not hearsay. Prior statement by witness. | | 1/95 — Considered and approved for publication<br>5/95 — Decided not to amend (Comprehensive Review)<br>9/95 — Published for public comment<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 801(d)(1)]** Hearsay exception for prior consistent statements that would otherwise be admissible to rehabilitate a witness's credibility | Judge Bullock | 4/98 — Considered; tabled<br>**PENDING FURTHER ACTION** |
| **[EV 801(d)(2)]** — Definitions: Statements which are not hearsay. Admission by party-opponent. (*Bourjaily*) | Drafted by Prof. David Schlueter, Reporter, 4/92 | 4/92 — Considered and tabled by CR Rules Cmte<br>1/95 — Considered by ST Cmte.<br>5/95 — Considered draft proposed<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf.<br>6/96 — Approved by St. Cmte.<br>9/96 — Approved by Jud. Conf.<br>4/97 — Approved by Sup. Ct.<br>12/97 — Effective<br>**COMPLETED** |
| **[EV 802]** — Hearsay Rule | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 803(1)-(5)]** — Hearsay Exceptions; Availability of Declarant Immaterial | | 1/95 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 803(6)]** — Hearsay Exceptions; Authentication by Certification (See Rule 902 for parallel change) | Roger Pauley, DOJ 6/93 | 9/93 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>11/96 — Considered<br>4/97 — Draft prepared and considered. Subcommittee appointed for further drafting.<br>10/97 — Draft approved for publication<br>1/98 — Approved for publication by the ST Cmte.<br>8/98 — Published for comment<br>10/98 — Cmte considered comments and statements from witnesses<br>4/99 — Cmte approved<br>6/99 — Stg Comte approved<br>9/99 — Judicial Conference Approved<br>4/00 — Sup Ct approved<br>12/00 — Effective<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 803(7)-(23)]** — Hearsay Exceptions; Availability of Declarant Immaterial | | 1/95 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 803(8)]** — Hearsay Exceptions; Availability of Declarant Immaterial: Public records and reports. | | 9/93 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Considered regarding trustworthiness of record<br>11/96 — Declined to take action regarding admission on behalf of defendant<br>**COMPLETED** |
| **[EV 803(18)]** — Should "learned treatises" be received as exhibits | Judge Grady | 4/00— Considered; comte decides not to act<br>**COMPLETED** |
| **[EV 803(24)]** — Hearsay Exceptions; Residual Exception | EV Rules Committee (5/95) | 5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807.<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf.<br>6/96 — Approved by St. Cmte.<br>9/96 — Approved by Jud. Conf.<br><br>4/97 — Approved by Sup. Ct.<br>12/97 — Effective<br>**COMPLETED** |
| **[EV 803(24)]** — Hearsay Exceptions; Residual Exception (Clarify notice requirements and determine whether it is used too broadly to admit dubious evidence) | | 10/96 — Considered and referred to reporter for study<br>10/97 — Declined to act<br>**COMPLETED** |
| **[EV 804(a)]** — Hearsay Exceptions; Declarant Unavailable: Definition of unavailability | Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92) | 4/92 — Considered by CR Rules Cmte.<br>6/92 — Considered by ST Cmte. for publication<br>1/95 — Considered and approved for publication<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 804(b)(1)-(4)]** — Hearsay Exceptions | | 10/94 — Considered<br>1/95 — Considered and approved for publication by ST Cmte.<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 804(b)(3)]** — Degree of corroboration regarding declaration against penal interest | | 10/99 — Considered by cmte<br>4/00 — Cmte directed reporter to prepare draft amendment<br>4/01 — Cmte recommended publication<br>6/01 — Approved for publication by ST Cmte<br>8/01 — Published for public comment<br>**PENDING FURTHER ACTION** |
| **[EV 804(b)(5)]** — Hearsay Exceptions; Other exceptions | | 5/95 — Combined with EV804(b)(5) and transferred to a new Rule 807.<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf.<br>6/96 — Approved by St. Cmte.<br>9/96 — Approved by Jud Conf.<br>4/97 — Approved by Sup. Ct.<br>12/97 — Effective<br>**COMPLETED** |
| **[EV 804(b)(6)]** — Hearsay Exceptions; Declarant Unavailable. (To provide that a party forfeits the right to object on hearsay grounds to the admission of a statement made by a declarant whose unavailability as a witness was procured by the party's wrongdoing or acquiescence.) | Prof. David Schlueter (4/92); Prof. Stephen Saltzburg (4/92) | 4/92 — Considered by CR Rules Cmte.<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf.<br>6/96 — Approved by ST Cmte.<br>9/96 — Approved by Jud. Conf.<br>4/97 — Approved by Sup. Ct.<br>12/97 — Effective<br>**COMPLETED** |
| **[EV 805]** — Hearsay Within Hearsay | | 1/95 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 806]** — Attacking and Supporting Credibility of Declarant. (To eliminate a comma that mistakenly appears in the current rule. Technical amendment.) | EV Rules Committee 5/95 | 5/95 — Decided not to amend<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf.<br>6/96 — Approved by St. Cmte.<br>9/96 — Approved by Jud. Conf.<br>4/97 — Approved by Sup. Ct.<br>12/97 — Effective<br>**COMPLETED** |
| **[EV 806]** — To admit extrinsic evidence to impeach the character for veracity of a hearsay declarant | | 11/96 — Declined to act<br>**COMPLETED** |
| **[EV 807]** — Other Exceptions. Residual exception. The contents of Rule 803(24) and Rule 804(b)(5) have been combined to form this new rule. | EV Rules Committee 5/95 | 5/95 — This new rule is a combination of Rules 803(24) and 804(b)(5).<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/96 — Considered and submitted to ST Cmte. for transmittal to Jud. Conf.<br>6/96 — Approved by St. Cmte.<br>9/96 — Approved by Jud. Conf.<br>10/96 — Expansion considered and rejected<br>4/97 — Approved by Sup. Ct.<br>12/97 — Effective<br>**COMPLETED** |
| **[EV 807]** — Notice of using the provisions | Judge Edward Becker | 4/96 — Considered<br>11/96 — Reported. Declined to act.<br>**COMPLETED** |
| **[EV 901]** — Requirement of Authentication or Identification | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 902]** — Self-Authentication | | 5/95 —Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte<br>9/95 — Published for public comment<br>10/98 — Cmte considered comments and statements from witnesses<br>4/99 — Cmte approved with revisions<br>6/99 — ST Comte approved<br>**COMPLETED** |
| **[EV 902]** — Use of seals | DOJ Committee member | 10/99 — Cmte considered<br>4/00 — Cmte considered and rejected<br>**COMPLETED** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[EV 902(6)]** — Extending applicability to news wire reports | Committee member (10/98) | 10/98 — to be considered when and if other changes to the rule are being considered<br>4/00 — Considered<br>**PENDING FURTHER ACTION** |
| **[EV 902 (11) and (12)]** — Self-Authentication of domestic and foreign records (See Rule 803(6) for consistent change) | | 4/96 — Considered<br>10/97 — Approved for publication<br>1/98 — Approved for publication by the ST Cmte.<br>8/98 — Published for comment<br>10/98 — Cmte considered comments and statements from witnesses<br>4/99 — Cmte approved with revisions<br>6/99 — ST Cmte Approved<br>9/99 — Judicial Conference Approved<br>4/00 — Approved by Supreme Court<br>12/00 — Effective<br>**COMPLETED** |
| **[EV 903]** — Subscribing Witness' Testimony Unnecessary | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1001]** — Definitions | | 9/93 — Considered<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1001]** — Definitions (Cross references to automation changes) | | 10/97 — Considered<br>**PENDING FURTHER ACTION** |
| **[EV 1002]** — Requirement of Original. Technical and conforming amendments. | | 9/93 — Considered<br>10/93 — Published for public comment<br>4/94 — Recommends Jud. Conf. make technical or conforming amendments<br>5/95 — Decided not to amend<br>7/95 — Approved for publication by ST Cmte<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1003]** — Admissibility of Duplicates | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1004]** — Admissibility of Other Evidence of Contents | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |

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|---|---|---|
| **[EV 1005]** — Public Records | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1006]** — Summaries | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1007]** — Testimony or Written Admission of Party | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1008]** — Functions of Court and Jury | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1101]** — Applicability of Rules | | 6/92 — Approved by ST Cmte.<br>9/92 — Approved by Jud. Conf.<br>4/93 — Approved by Sup. Ct.<br>12/93 — Effective<br>5/95 — Decided not to amend<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>4/98 — Considered<br>10/98 — Reporter submits report; cmte declined to act<br>**COMPLETED** |
| **[EV 1102]** — Amendments to permit Jud. Conf. to make technical changes | CR Rules Committee (4/92) | 4/92 — Considered by CR Rules Cmte.<br>6/92 — Considered by ST Cmte.<br>9/93 — Considered<br>6/94 — ST Cmte. did not approve<br>5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[EV 1103]** — Title | | 5/95 — Decided not to amend (Comprehensive Review)<br>7/95 — Approved for publication by ST Cmte.<br>9/95 — Published for public comment<br>**COMPLETED** |
| **[Admissibility of Videotaped Expert Testimony]** | EV Rules Committee (11/96) | 11/96 — Denied but will continue to monitor<br>1/97 — Considered by ST Cmte.<br>**PENDING FURTHER ACTION** |

| Proposal | Source, Date, and Doc # | Status |
|---|---|---|
| **[Attorney-client privilege for in-house counsel]** | ABA resolution (8/97) | 10/97 — Referred to chair<br>10/97 — Denied<br>**COMPLETED** |
| **[Automation]** — To investigate whether the EV Rules should be amended to accommodate changes in automation and technology | EV Rules Committee (11/96) | 11/96 — Considered<br>4/97 — Considered<br>4/98 — Considered<br>**PENDING FURTHER ACTION** |
| **[Circuit Splits]** — To determine whether the circuit splits warrant amending the EV Rules | | 11/96 — Considered<br>4/97 — Considered<br>**COMPLETED** |
| **[Obsolete or Inaccurate Rules and Notes]** — To identify where the Rules and/or notes are obsolete or inaccurate. | EV Rules Committee (11/96) | 5/93 — Considered<br>9/93 — Considered. Cmte. did not favor updating absent rule change<br>11/96 — Considered<br>1/97 — Considered by the ST Cmte.<br>4/97 — Considered and forwarded to ST Cmte.<br>10/97 — Referred to FJC<br>1/98 — ST Cmte. Informed of reference to FJC<br>6/98 — Reporter's Notes published<br>**COMPLETED** |
| **[Statutes Bearing on Admissibility of EV]** — To amend the EV Rules to incorporate by reference all of the statutes identified, outside the EV Rules, which regulate the admissibility of EV proffered in federal court | | 11/96 — Considered<br>4/97 — Considered and denied<br>**COMPLETED** |
| **[Sentencing Guidelines]** — Applicability of EV Rules | | 9/93 — Considered<br>11/96 — Decided to take no action<br>**COMPLETED** |