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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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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: May 1, 2001

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules met on April 19th in Washington, D.C.. The Committee approved two proposed amendments to the Evidence Rules, with the recommendation that the Standing Committee approve them for release for public comment.

The Evidence Rules Committee also discussed a proposal for amending Evidence Rule 1101. That proposal would have amended Rule 1101(d) to add a number of proceedings that have been held by the courts to be exempt from the Evidence Rules, and it would also have deleted the now outdated Rule 1101(e). After extensive discussion, the Committee decided not to propose such amendments to Rule 1101 at this time.

Finally, the Committee reviewed some long-term projects that are summarized in Part III of this Report. The draft minutes of the April meeting set forth a more detailed discussion of all the matters considered by the Committee. Those minutes are attached to this Report.

II. Action Items

A. Rule 608(b).

The proposed amendment to Evidence Rule 608(b) is intended to bring the text of the Rule into line with the original intent of the drafters. The Rule was intended to prohibit the admission of extrinsic evidence when offered to attack or support a witness' character for truthfulness. Unfortunately, the text of the Rule is phrased as prohibiting extrinsic evidence when offered to attack or support a witness' "credibility"– a less precise locution. The term "credibility" can be read to prohibit extrinsic evidence when offered for non-character forms of impeachment, such as to prove bias, contradiction or prior inconsistent statement. The Supreme Court in *United States v. Abel,* 469 U.S. 45 (1984) held that the Rule 608(b) extrinsic evidence prohibition does not apply when it is offered for a purpose other than proving the witness' character for veracity. However, a number of cases continue to misapply the Rule to preclude extrinsic evidence offered to impeach a witness on grounds other than character. *See, e.g., Becker v. ARCO Chem. Co.,* 207 F.3d 176 (3rd Cir. 2000) (stating that evidence offered for contradiction is barred by Rule 608(b)); *United States v. Bussey,* 942 F.2d 1241 (8th Cir. 1991) (stating that the "plain language" of the Rule bars the use of extrinsic evidence to impeach a witness by way of contradiction); *United States v. Graham,* 856 F.2d 756 (6th Cir. 1988) (Rule 608(b) bars extrinsic evidence when offered to prove that the witness is biased).

The proposed amendment substitutes the term "character for truthfulness" for the overbroad term "credibility", thus limiting the extrinsic evidence ban to cases in which the proponent's sole purpose is to impeach the witness' character for veracity. This change is consistent with the Court's construction of the Rule in *Abel.* The Committee Note to the proposed Rule clarifies that the admissibility of extrinsic evidence offered to impeach a witness on grounds other than character is governed by Rules 402 and Rule 403, not by Rule 608(b).

The Evidence Rules Committee unanimously approved the proposed amendment to Rule 608(b) and the proposed Committee Note. The proposed amendment and Committee Note are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 608(b) be approved for release for public comment.

B. Rule 804(b)(3)

The proposal to amend Evidence Rule 804(b)(3) would provide uniform treatment of hearsay statements offered as declarations against interest. The text of the existing Rule requires an accused to provide corroborating circumstances clearly indicating trustworthiness before an against-penal-interest statement can be admitted. This important requirement is intended to assure that the declaration against penal interest is in fact reliable. But the text of the Rule does

not impose the same reliability-based obligation on the government; all the government needs to show is that the statement tended to disserve the declarant's penal interest. Moreover, the corroborating circumstances requirement does not by its terms apply when a declaration against penal interest is offered in a civil case.

Despite the text of the Rule, many courts have applied the corroborating circumstances requirement to government-proffered declarations against interest, reasoning that simple fairness requires this result; and at least one court requires corroborating circumstances for declarations against interest offered in civil cases. But other courts have been more literal, reading the Rule as it is written. The proposed amendment to Rule 804(b)(3) will resolve this conflict in the case law by establishing a unitary approach for declarations against penal interest. More importantly, the amendment will provide assurance to all litigants that only reliable hearsay statements will be admitted under the exception.

The Committee Note to the proposed amendment provides guidance to courts and litigants on the factors that are relevant to the "corroborating circumstances" inquiry. The Note clarifies that Rule 804(b)(3) mandates two separate inquiries: 1) the statement must inculpate the declarant, and 2) corroborating circumstances must clearly indicate that the statement is trustworthy. The Note emphasizes that in analyzing whether corroborating circumstances exist, the court cannot consider the fact that the statement inculpates the declarant; to do so would improperly merge the corroborating circumstances requirement with the against-penal-interest requirement of the Rule.

The Evidence Rules Committee approved the proposed amendment to Rule 804(b)(3) and the proposed Committee Note by a vote of six to one. The proposed amendment and Committee Note are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 804(b)(3) be approved for release for public comment.

III. Information Items

A. 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 prepared three draft rules for consideration by the Committee at the April meeting. Those drafts set forth: 1) a catch-all provision similar to current Rule 501 that would permit development of new privileges, and that would apply the state law of privilege in cases where state law provides the rule of decision; 2) an attorney-client privilege; and 3) a privilege for a witness to refuse to give adverse testimony against a spouse in a criminal case. At the April meeting the Committee provided extensive guidance and commentary on these drafts.

The Subcommittee has also prepared a draft of a privilege for confidential interspousal communications, and a draft rule on waiver of privileges. The Subcommittee will conduct further research and will revise all of these drafts for further consideration at the October, 2001 meeting of the Evidence Rules Committee.

B. Rule 1101

At its April meeting the Evidence Rules Committee considered a proposal to amend Evidence Rule 1101(d) and (e). Rule 1101(d) sets forth a list of proceedings in which the Evidence Rules (except those with respect to privilege) do not apply. 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 to revoke or to modify the conditions of supervised release and psychiatric release and commitment proceedings. The proposal to amend Rule 1101(d) purported to codify this case law. Rule 1101(e) sets forth a laundry list of statutory proceedings in which the Evidence Rules are declared to be applicable only insofar as evidence rules are not provided for by the listed statutes. The proposal would have deleted Subdivision (e). Two reasons were given for the suggested deletion: 1) the detailed listing of statutes in Rule 1101(e) has become outdated, and 2) given the time required for the adoption of any Rule amendment and the consequent general inadvisability of citing specific statutory provisions in an Evidence Rule unless necessary for other reasons, elimination of the listing appeared to be a desirable step.

After extensive discussion, the Committee resolved not to propose an amendment to Rule 1101(d) or the deletion of Rule 1101(e). As to the former, the Committee determined that it is difficult, if not impossible, to mention specifically all of the proceedings in which the Evidence Rules are not or should not be applicable. The Committee saw a danger in providing a list of excluded proceedings that is not comprehensive. A court might incorrectly infer that the Evidence Rules do apply to all proceedings not specifically mentioned. The Committee reviewed the case law and determined that 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). As for Rule 1101(e), it did not seem prudent to consider its deletion as an independent amendment – that could lead to improper inferences as to the proper way to read an unchanged Rule 1101(d). The Committee therefore concluded that the cost of any amendment to Rule 1101 would outweigh the benefit.

C. Long-Range Planning

At its April meeting the Committee resolved to continue its practice of monitoring the cases and the legal scholarship for suggestions as to necessary amendments to the Evidence Rules.

At its next meeting the Committee will consider a possible amendment to Evidence Rule 803(4). Rule 803(4) provides an exception from the hearsay rule for statements made to medical personnel for purposes of "medical treatment or diagnosis." The exception covers statements to a doctor even if the sole reason for the consultation is to enable the doctor to testify as an expert witness. The Committee will consider whether the Rule should be amended to preclude statements to medical personnel made solely for purposes of litigation. 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. This rationale might now be in question under 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.

IV. Minutes of the April, 2001 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April, 2001 meeting are attached to this Report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Proposed Amendment to Evidence Rule 608(b) and Committee Note
Proposed Amendment to Evidence Rule 804(b)(3) and Committee Note
Draft Minutes

9A

Attachment 1 to Report of Advisory Committee on Evidence Rules

Proposed Amendment to Evidence Rule 608(b) and Proposed Committee Note

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 608

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE[1]

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

[1] New matter is underlined and matter to be omitted is lined through.

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.

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.").

Attachment 2 to Report of Advisory Committee on Evidence Rules

Proposed Amendment to Evidence Rule 804(b)(3)

and Proposed Committee Note

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE[1]

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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[1] New matter is underlined and matter to be omitted is lined through.

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 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.