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

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

FROM: **Honorable Fern M. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **December 1, 1997**

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

I. Introduction

The Advisory Committee on Evidence Rules met on October 20th and 21st in Charleston, S.C. At the meeting, the Committee approved three items for action by the Standing Committee--proposed amendments to Evidence Rules, with the recommendation that they be published for public comment. The Advisory Committee is submitting these proposed amendments to the Standing Committee at this time, but there is no intent to accelerate or otherwise change the regular schedule for public comment.

The Evidence Rules Committee also discussed several proposals for amending other Evidence Rules. Specifically, the Committee has begun to consider whether the rules on expert testimony should be amended in light of the Supreme Court's *Daubert* decision, and also whether the Evidence Rules should be revised to accommodate technological advancements in the presentation of evidence. The discussion of these and other matters is summarized in Part III of this Report, and is more fully set forth in the draft minutes of the October meeting, which are attached to this Report.

II. Action Items

A. Rule 103(a).

The proposed amendment to Rule 103 would add a new paragraph to subdivision (a). The goals of the proposal are: 1) to specify when and whether a party must renew an objection or offer of proof after losing an initial ruling on admissibility; and 2) to codify the principles of *Luce v. United States,* concerning the preservation of a claim of error when admission of evidence is dependent on an event occurring at trial.

The Evidence Rules Committee previously proposed an amendment to Evidence Rule 103 that would have added a new subdivision (e) to the Rule. At its June, 1997 meeting, the Standing Committee sent this proposal back for reconsideration on a number of grounds. Among the suggestions were: 1) that the *Luce* principle set forth in the Evidence Rules Committee's proposal was inappropriately limited to civil cases; and 2) that it would make more sense to amend subdivision (a), which already deals with objections and offers of proof, than it would be to add a new subdivision to the Rule. After considering these suggestions, the Evidence Rules Committee unanimously agreed upon a new proposal. This new proposal incorporates all of the suggestions for improvement made at the Standing Committee meeting, and sets forth clear-cut standards for determining when an objection or offer of proof must be renewed after an initial determination by the trial court. Both the proposed amendment and Advisory Committee Note to the amendment are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the amendment to Evidence Rule 103 be published for public comment, at the regularly scheduled time for publication.

B. Rule 404(a)

Congress is currently considering a proposal to amend Evidence Rule 404(a) to provide that evidence of a criminal defendant's pertinent character trait is admissible if the defendant attacks the character of the victim. The Evidence Rules Committee reviewed this proposal and agreed, in principle, that an attack on the victim's character should open the door to permit a corresponding attack on the defendant's character. The Evidence Rules Committee was concerned, however, with the breadth of the language in the Congressional proposal, which might be read to permit an attack on the defendant's *credibility* whenever the defendant attacks the character of the victim. The Evidence Rules Committee agreed upon more limited language, and proposes an amendment to Rule 404(a) that would address Congressional

concerns, and provide a more balanced use of character evidence when the defendant chooses to prove a negative character trait of the victim. Both the proposed amendment and the Advisory Committee Note to the amendment are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the amendment to Evidence Rule 404(a) be published for public comment, at the regularly scheduled time for publication.

C. Rules 803(6) and 902.

Under current law, a foreign record of regularly conducted activity can be admitted in a criminal case without the necessity of calling a foundation witness. 18 U.S.C. § 3505 provides that foreign business records may be admitted if they are certified by a qualified witness, under circumstances in which the law of the foreign country would punish a false certification. In contrast, the foundation for all other records admissible under Evidence Rule 803(6) must be established by a testifying witness. The Evidence Rules Committee unanimously agreed that an amendment to Evidence Rule 803(6) was necessary to provide for uniform treatment of business records. The Committee also recognized that if certification of business records is to be permitted, Evidence Rule 902 must be amended to provide a procedure for self-authentication of such records. In that sense, the proposed amendments to Rules 803(6) and 902 are part of a single package--the amendment to Rule 902 is only necessary if the amendment to Rule 803(6) is adopted, and conversely the amendment to Rule 803(6) would be a nullity if the amendment to Rule 902 were rejected.

The Evidence Rules Committee notes that the proposed modification of Rules 803(6) and 902 to permit certification of business records is in accord with a trend in the states. The Evidence Rules Committee's proposed amendments are adapted from state versions of the Federal Rules of Evidence in Indiana, Maryland and Texas. The proposed amendments to Rules 803(6) and 902, and the Advisory Committee Notes to these amendments, are attached to this Report.

Recommendation: The Evidence Rules Committee recommends that the amendments to vidence Rules 803(6) and 902 be published for public comment, at the regularly scheduled time for publication.

III. Information Items

A. Rules on Experts and *Daubert*.

The Supreme Court's *Daubert* decision has spawned a large body of case law, as well as initiatives in Congress to amend Evidence Rule 702. In 1995, the Advisory Committee decided to delay considering any amendment to the Evidence Rules on experts, until the courts had had enough time to digest and interpret the *Daubert* opinion. At its October, 1997 meeting, the Evidence Rules Committee agreed unanimously that there is now enough case law--and conflicts among the courts--to justify consideration of an amendment to Evidence Rule 702 to explicate the standards of reliability to be applied to expert testimony, in light of *Daubert*. Moreover, the Committee is aware of, and has commented upon, two pieces of proposed legislation in Congress that purport to codify *Daubert*, but that in fact create serious problems of interpretation, and impose evidentiary standards so rigorous as to render much traditionally accepted expert testimony inadmissible. In light of these Congressional proposals, the Evidence Rules Committee agreed that it was especially appropriate to consider whether Rule 702 should be amended through the rulemaking process.

The Evidence Rules Committee has agreed on the following general principles: 1) Any attempt to amend Evidence Rule 702 must encompass both scientific and non-scientific testimony; 2) The amendment should not attempt to delineate an all-encompassing set of specific standards that courts must employ in regulating expert testimony; 3) The amendment must cover not only the theories employed by the expert, but also the application of those theories to the specific facts of the case; 4) Any amendment to Evidence Rule 703, concerning the use of inadmissible information by an expert, would be related to and should be considered together with any amendment to Rule 702; and 5) Consideration should be given to the treatment of lay witnesses who are proffered to testify about technical subjects that require some expertise.

A subcommittee has been appointed to consider these points of agreement and to prepare a proposal to amend the Evidence Rules accordingly. The subcommittee's report will be considered at the April, 1998 meeting of the Evidence Rules Committee.

B. Technological Advances in Presenting Evidence

The Evidence Rules Committee discussed, and will consider at its next meeting, whether an amendment is necessary to accommodate technological innovations in the presentation of evidence. One possible solution that is being considered is to use the definition of "writings" and "recordings" that is currently found in Evidence Rule 1001, and to

apply that definition more broadly throughout the Rules. This presents a conceptual problem, because the Federal Rules of Evidence contain no all-encompassing definitions section. The alternative, assuming an amendment is necessary, would be to directly amend each rule in which the terms "writing" or "recording" are found. These matters will be considered by the Evidence Rules Committee at its next meeting in April, 1998.

C. Correcting Advisory Committee Notes.

The Advisory Committee Notes provide comment on the Advisory Committee draft of the Evidence Rules; however, several of the Rules ultimately adopted by Congress differ markedly from the Advisory Committee's version. For example, the Advisory Committee Note to Evidence Rule 804(b)(1) states that the Rule allows "substitution of one with the right and opportunity to develop the testimony with similar motive and interest." Yet Congress rejected the Advisory Committee's position, and added a "predecessor in interest" requirement to the Rule. Another example is the Advisory Committee's Note on Evidence Rule 301. Congress rejected the Advisory Committee's "burden-shifting" approach to presumptions in favor of the "bursting bubble" approach. The Committee Note, however, states that the Rule provides for burden-shifting, and is critical of the "bursting bubble" approach ultimately adopted by Congress.

The Reporter to the Evidence Rules Committee prepared a list of statements contained in the original Advisory Committee Notes that are either wrong as written, or that comment on a draft that was materially changed by Congress. A copy of this memorandum is attached to this Report. The Evidence Rules Committee reviewed the draft and agreed that the Federal Judicial Center should consider whether the memorandum might be distributed under FJC auspices to publishers and other interested persons. The memorandum would not be published as the work product of the Evidence Rules Committee, but rather as a work of the Reporter in his individual capacity.

D. Congressional Proposal to Amend Evidence Rule 615

The Kennedy-Leahy Bill on victims rights, currently in the Senate, would directly amend Evidence Rule 615 to expand the right of victim-witnesses to attend a criminal trial. The proposal gives the Judicial Conference a time period after the date of passage in which to provide comments on the legislation. The Reporter to the Evidence Rules Committee has drafted some suggestions for improvement in the proposed statutory language. It appears that there will be no action on the Kennedy-Leahy proposal during this term of Congress. The Evidence Rules Committee will take up the matter of possible suggestions for improvement in the statutory language at its April, 1998 meeting.

E. Issues the Committee Has Decided Not to Pursue

After discussion at the October meeting, the Evidence Rules Committee has decided not to pursue the following issues at this time:

1. *Rule 404(b)*--The Committee considered whether Evidence Rule 404(b) should be amended along the lines of a proposal contained in the Omnibus Crime Bill. That proposal would add "disposition toward a particular individual" to the list of permissible purposes for evidence of uncharged misconduct. After consideration, the Evidence Rules Committee determined that such an amendment was unnecessary, because the list of purposes set forth in Rule 404(b) is illustrative only; it is not intended to be exclusive.

2. *Rule 501*--The Evidence Rules Committee considered a proposal to provide that the attorney-client privilege for in-house counsel should be contiguous with the attorney-client privilege for outside counsel. After discussion, the Committee decided not to propose any change to the rule on privilege at this time.

IV. Minutes of the October, 1997 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's October, 1997 meeting are attached to this report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Rules and Committee Notes
Reporter's Memorandum concerning incorrect Advisory Committee Notes
Draft Minutes

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 103(a)

Rule 103. Rulings on Evidence*

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof.— In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

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

Once the court, at or before trial, makes a definitive ruling on the record admitting or excluding evidence, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. But if under the court's ruling there is a condition precedent to admission or exclusion, such as the introduction of certain testimony or the pursuit of a certain claim or defense, no claim of error may be predicated upon the ruling unless the condition precedent is satisfied.

* * * * *

COMMITTEE NOTE

The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "*in limine*" rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, e.g., Collins v. Wayne*

Corp., 621 F.2d 777 (5th Cir. 1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat,* 78 F.3d 84 (2d Cir. 1996) (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g., Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993). Other courts have held that an objection or offer of proof once made is sufficient to preserve a claim of error because the trial court's ruling thereon constitutes "law of the case." *See, e.g., Cook v. Hoppin,* 783 F.2d 684 (7th Cir. 1986). These differing approaches create uncertainty for litigants and unnecessary work for the appellate courts.

The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). Where the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. See Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same); *Favala v. Cumberland Engineering Co.,* 17 F.3d 987, 991 (7th Cir. 1994) ("once a motion *in limine* has been granted, there is no reason for the party losing the motion to try to present the evidence in order to preserve the issue for appeal"). On the other hand, where the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. *See, e.g., United States v.*

Vest, 116 F.3d 1179, 1188 (7th Cir. 1997) (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial, meant that it was "too late to reopen the issue now on appeal"); *United States v. Valenti,* 60 F.3d 941 (2d Cir. 1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence). While formal exceptions are unnecessary, the amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point.

Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error if any in such a situation occurs only when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.,* 896 F.2d 949, 956 (5th Cir. 1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); *United States v. Roenigk,* 810 F.2d 809 (8th Cir. 1987) (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

The amendment codifies the principles of *Luce v. United States,* 469 U.S. 38 (1984), and its progeny. In *Luce*, the Supreme Court held that a criminal defendant must testify at trial in order to

preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other comparable situations, and logically applies whenever the occurrence of a trial event is a condition precedent to the admission or exclusion of evidence. *See United States v. DiMatteo,* 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman,* 41 F.3d 785, 788 (1st Cir. 1994), *cert.denied,* 514 U.S. 1007 (1995) ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria,* 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz,* 857 F.2d 900 (2d Cir.), *cert. denied,* 489 U.S. 1070 (1989) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error for appeal); *United States v. Bond,* 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. *See, e.g., United States v. Fisher,* 106 F.3d 622 (5th Cir. 1997), *as corrected* 1997 U.S. App. LEXIS

12671 (1997) (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); *Judd v. Rodman,* 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *Gill v. Thomas,* 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); United States v. Williams, 939 F.2d 721 (9th Cir. 1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 404(a)

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes*

(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 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 victim of the crime is admitted under subdivision (a)(2), evidence of a pertinent trait of character of the accused offered by the prosecution;

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

(2) Character of victim. — Evidence of a pertinent trait of character of the 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 victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness.— Evidence of the character of a witness, as provided in rules 607, 608, and 609.

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Advisory Committee on Evidence Rules
Proposed Amendment: Rule 404(a)

COMMITTEE NOTE

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of a victim under subdivision (a)(2) of this Rule, the door is opened to an attack on a corresponding character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain,* 768 F.2d 790 (7th Cir. 1985) (when the defendant offers proof of self-defense, this permits proof of the victim's character trait for peacefulness, but it does not permit proof of the defendant's character trait for violence).

The amendment makes clear that the accused cannot attack the victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the accused's own corresponding character trait. For example, in a murder case where the defendant claims self-defense, the defendant, to bolster this defense, might offer evidence of the victim's allegedly violent disposition. If the government has evidence that the defendant has a violent character, but is not allowed to offer this evidence as part of its rebuttal, then the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the defendant's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the defendant's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when the accused chooses to attack the character of the victim.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 404(a)

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion. Finally, the amendment does not permit proof of the defendant's character when the defendant attacks the victim's character as a witness under Rules 608 or 609.

105TH CONGRESS
1ST SESSION

S. 3

IN THE SENATE OF THE UNITED STATES

Mr. HATCH (for himself _____
_____
_____) introduced the following bill; which was read twice and referred to the Committee on _____

Mr. LOTT
Mr. ABRAHAM
Mr. ALLARD
Mr. ASHCROFT
Mr. CRAIG
Mr. D'AMATO
Mr. DeWINE
Mr. DOMENICI
Mr. ENZI
Mr. FAIRCLOTH
Mr. GORTON
Mr. GRAMS
Mr. GRASSLEY
Mr. HAGEL
Mr. HELMS
Mr. HUTCHINSON
Mr. KYL
Mr. MURKOWSKI
Mr. NICKLES
Mr. ROBERTS
Mr. SMITH
Mr. THOMAS
Mr. THURMOND
Mr. WARNER
Mr. COVERDELL

A BILL

To provide for fair and accurate criminal trials, reduce violent juvenile crime, promote accountability by juvenile criminals, punish and deter violent gang crime, reduce the fiscal burden imposed by criminal alien prisoners, promote safe citizen self-defense, combat the importation, production, sale, and use of illegal drugs, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Omnibus Crime Control Act of 1997".

shall be made of 12, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.".

SEC. 503. REBUTTAL OF ATTACKS ON THE CHARACTER OF THE VICTIM.

Rule 404(a)(1) of the Federal Rules of Evidence is amended by inserting before the semicolon the following: ", or, if an accused offers evidence of a pertinent trait of character of the victim of the crime, evidence of a pertinent trait of character of the accused offered by the prosecution".

SEC. 504. USE OF NOTICE CONCERNING RELEASE OF OFFENDER.

Section 4042(b) of title 18, United States Code, is amended by striking paragraph (4).

SEC. 505. BALANCE IN THE COMPOSITION OF RULES COMMITTEES.

Section 2073 of title 28, United States Code, is amended—

(1) in subsection (a)(2), by adding at the end the following: "On each such committee that makes recommendations concerning rules that affect criminal cases, including the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Federal Rules of Appellate Procedure, the Rules Govern-

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(6)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * * *

(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 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

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

"business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

* * * * *

COMMITTEE NOTE

The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. See, e.g., *Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.*, 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and 18 U.S.C. § 3505 for foreign records in criminal cases.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 902

Rule 902. Self-authentication*

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * * * *

(11) *Certified domestic records of regularly conducted activity.* The original or a duplicate of a domestic record of regularly conducted activity, which would be admissible under Rule 803(6), and which the custodian thereof or another qualified person certifies under oath—

(A) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

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

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record in evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it.

(12) *Certified foreign records of regularly conducted activity.* In a civil case, the original or a duplicate of a foreign record of regularly conducted activity, which would be admissible under Rule 803(6), and which is accompanied by a written declaration by the custodian thereof or another qualified person that the record—

(A) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The record must be signed in a manner which, if falsely made, would subject the maker to criminal penalty under the laws of the country where the record is signed. A party intending to offer a record in evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record available for inspection sufficiently in advance of its offer in evidence to provide an adverse party with a fair opportunity to challenge it.

COMMITTEE NOTE

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. § 3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases. The notice requirements in Rules 902(11) and (12) are intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the certification.

Advisory Committee Notes That May Require Editorial Comment

By Daniel J. Capra, Reporter, Judicial Conference Advisory Committee on Evidence Rules

1. Advisory Committee Note to Rule 104(b)

Problem--Incorrect word that might change the meaning.

Advisory Committee's Note

* * *

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not **[sic]** established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration

2. Advisory Committee Note to Rule 201(g)

Problem--The Rule as enacted distinguishes between civil and criminal cases.

Advisory Committee's Note

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Authority upon the propriety of taking judicial notice against an accused in a criminal case with respect to matters other than venue is relatively meager. Proceeding upon the theory that the right of jury trial does not extend

to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases. People v. Mayes, 113 Cal. 618, 45 P. 860 (1896); Ross v. United States, 374 F.2d 97 (8th Cir. 1967). Cf. State v. Main, 94 R.I. 338, 180 A.2d 814 (1962); State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951). **[Editor's Note: This treatment was rejected by the Congress, which provided that judicial notice is not conclusive in criminal cases.]**

3. Advisory Committee Note to Rule 301

Problem--Internal reference to Rule 303, which was never adopted.

Advisory Committee's Note

* * *

This rule governs presumptions generally. See Rule 302 for presumptions controlled by state law and Rule 303 for those against an accused in a criminal case. **[Editor's Note: The latter rule was deleted by Congress.]**

Problem: The Rule as enacted adopts the "bursting bubble" view of presumptions rather than the burden-shifting approach,

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv. L. Rev. 909, 913 (1937); Morgan, Instructing the Jury upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 82 (1933); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5 (1959). **[Editor's Note: This approach was rejected by the Congress.]**

The so-called ``bursting bubble'' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too ``slight and evanescent'' an effect. Morgan and Maguire, *supra*, at p. 913. **[Editor's Note: This approach was adopted by the Congress.]**

4. Advisory Committee Note to Rule 402

Problem--Internal reference to privilege rules that were not enacted.

Advisory Committee's Note

* * *

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, Article V recognizes a number of privileges **[Editor's Note: The Advisory Committee proposals on Article V were subsequently rejected by Congress]**; Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

5. Advisory Committee note to Rule 403

Problem--Internal reference to a Rule that was renumbered.

Advisory Committee's Note

* * *

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 **[Editor's Note: This is now Rule 105]** and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor. * * *

6. Advisory Committee Note to Rule 404(a)

Problem--Incorrect reference to another rule.

Advisory Committee's Note

* * *

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 **[Editor's Note: The correct reference is to Rules 608 and 609]** for methods of proof. * * *

7. Advisory Committee Note to Rule 406

Problem--Proposed Rule 406(b), dealing with the permissible forms of proof of habit, was deleted by Congress.

Advisory Committee's Note

* * *

Subdivision (a). [Editor's Note: As proposed by the Advisory Committee, Rule 406 contained two subdivisions; subdivision (b) was deleted by Congress.] An oft-quoted paragraph, McCormick § 162, p. 340, describes habit in terms effectively contrasting it with character. * * *

Subdivision (b). [Editor's Note: This subdivision was deleted by Congress.] Permissible methods of proving habit or routine conduct include opinion and specific instances sufficient in number to warrant a finding that the habit or routine practice in fact existed. * * *

8. Advisory Committee Note to Rule 410

Problem--The initial Advisory Committee proposal was rejected, because Congress was concerned with its broad exceptions. Then there was an amendment in 1980. Therefore, the Advisory Committee Note to the 1980 amendment is the most appropriate.

Advisory Committee's Note

[Editor's Note: The following material is the Note accompanying the Advisory Committee's draft of the latest versions of the Rule, promulgated in 1980, which sets forth the relevant legislative history. The Rule was changed slightly after the Note was written.]

The major objective of the amendment to rule **[Fed. R. Crim. P.]** 11(e)(6) **[virtually identical to Rule 410]** is to describe more precisely, consistent with the original purpose of the provision, what evidence relating to pleas or plea discussions is inadmissible. The present language is susceptible to interpretation which would make it applicable to a wide variety of statements made under various

circumstances other than within the context of those plea discussions authorized by rule 11(e) and intended to be protected by subdivision (e)(6) of the rule. See United States v. Herman, 544 F.2d 791 (5th Cir. 1977), discussed herein.

Fed. R. Ev. 410, as originally adopted by Pub. L. 93-595, provided in part that `evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere* or an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer.' (This rule was adopted with the proviso that it `shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule.') As the Advisory Committee Note explained: `Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise.' The amendment of Fed. R. Crim. P. 11, transmitted to Congress by the Supreme Court in April 1974, contained a subdivision (e)(6) essentially identical to the rule 410 language quoted above, as a part of a substantial revision of rule 11. The most significant feature of this revision was the express recognition given to the fact that the `attorney for the government and the attorney for the defendant or the defendant when acting *pro se* may engage in discussions with a view toward reaching' a plea agreement. Subdivision (e)(6) was intended to encourage such discussions. As noted in H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 7 (1975), the purpose of subdivision (e)(6) is to not `discourage defendants from being completely candid and open during plea negotiations.' Similarly, H.R. Rep. No. 94-414, 94th Cong., 1st Sess. 10 (1975), states that `Rule 11(e)(6) deals with the use of statements made in connection with plea agreements.' (Rule 11(e)(6) was thereafter enacted, with the addition of the proviso allowing use of statements for purposes of impeachment and in a prosecution for perjury, and with the qualification that the inadmissible statements must also be `relevant to' the inadmissible pleas or offers. Pub. L. 94-64; Fed. R. Ev. 410 was then amended to conform. Pub. L. 94-149.)

* * *

[Editor's Note: What follows next is the Advisory Committee's Note on the original version of Rule 410, which was rejected by Congress.]

Withdrawn pleas of guilty were held inadmissible in federal prosecutions in Kercheval v. United States, 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 1009 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in People v. Spitaleri, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961), reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in *Kercheval*, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326.

Pleas of *nolo contendere* are recognized by Rule 11 of the Rules of Criminal Procedure, although the law of numerous States is to the contrary. The present rule gives effect to the principal traditional characteristic of the *nolo* plea, i.e., avoiding the admission of guilt which is inherent in pleas of guilty. This position is consistent with the construction of Section 5 of the Clayton Act, 15 U.S.C. § 16(a), recognizing the inconclusive and compromise nature of judgments based on *nolo* pleas. General Electric Co. v. City of San Antonio, 334 F.2d 480 (5th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963), *cert. denied*, 376 U.S. 939, 84 S. Ct. 794, 11 L. Ed. 2d 659; Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967); City of Burbank v. General Electric Co., 329 F.2d 825 (9th Cir. 1964). See also state court decisions in Annot., 18 A.L.R.2d 1287, 1314.

Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise. As pointed out in McCormick § 251, p. 543, ``Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises.'' See also People v. Hamilton, 60 Cal. 2d 105, 32 Cal. Rptr. 4, 383 P.2d 412 (1963), discussing legislation designed to achieve this result. As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.

Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use for or against other persons will not

impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster. See A.B.A. Standards Relating to Pleas of Guilty § 2.2 (1968). See also the narrower provisions of New Jersey Evidence Rule 52(2) and the unlimited exclusion provided in California Evidence Code § 1153.

9. Advisory Committee Note to Rule 412

Problem--Congress adopted the Advisory Committee's version rather than the Supreme Court's version; the Supreme Court had rejected the Advisory Committee's version.

[Editor's Note: There is no legislative history to the original Rule 412. Nor is there legislative history to the amended Rule 412, which was passed as part of the Violent Crime Control and Law Enforcement Act of 1994. Congress did in that Act, however, adopt verbatim the version of Rule 412 recommended by the Advisory Committee. The Advisory Committee proposal had been rejected by the Supreme Court in favor of a slightly different version, but Congress chose the Advisory Committee's version over that adopted by the Supreme Court. Accordingly, we include the Advisory Committee's Note on amended Rule 412, as at least some indication of the legislative intent behind amended Rule 412.]

Advisory Committee's Note

Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

* * *

10. Advisory Committee Note to Rule 501

Problem--All of the proposed rules on privilege were rejected by Congress, in favor of the common law approach.

Advisory Committee's Note

Deleted. **Editor's Note: Congress rejected the Advisory Committee's proposals on privileges. The reasons given in support of the Congressional action are stated in the report of the House Committee on the Judiciary, the Report of the Senate Committee on the Judiciary, and the Report of the House/Senate Conference Committee, set forth below. [Insert those Reports]**

11. Advisory Committee Note to Rule 601

Problems--Congress added language concerning deference to state law, and the Note makes reference to a Rule that was not adopted by Congress.

Advisory Committee's Note

This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds thus abolished are religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds.

The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind. For the reasoning underlying the decision not to give effect to state statutes in diversity cases, see the Advisory Committee's Note to Rule 501. **[Editor's Note: This proposal by the Advisory Committee, providing that federal**

rules of competency applied even where state law provided the rule of decision, was rejected by Congress.]

* * *

Admissibility of religious belief as a ground of impeachment is treated in Rule 610. Conviction of crime as a ground of impeachment is the subject of Rule 609. Marital relationship is the basis for privilege under Rule 505 **[Editor's Note: Rule 505 was deleted by Congress.].** Interest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses.

12. Advisory Committee Note to Rule 607

Problem--The Note refers to the Advisory Committee's proposed Rule 801(d)(1), while the version of that Rule enacted is narrower.

Advisory Committee's Note

The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under Rule 801(d)(1). **[Editor's Note: This categorical statement is not correct. Congress changed the Advisory Committee's version of Rule 801(d)(1). As enacted, Rule 801(d)(1)(A) exempts prior inconsistent statements from the hearsay rule only if the statements are made under oath at a formal proceeding.]**

* * *

13. Advisory Committee Note to Rule 608

Problem--Congress deleted the Advisory Committee's "remote in time" limitation on admissibility.

Advisory Committee's Note

* * *

(2) Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. **[Editor's note: The Advisory Committee's proposal precluded reference to bad acts that were remote in time. This provision was deleted by Congress in favor of a case-by-case balancing of probative value and prejudicial effect.].** Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

* * *

14. Advisory Committee Note to Rule 609--

Problem--Congress amended Rule 609(a)(1) to provide for balancing of probative value and prejudicial effect.

Advisory Committee's Note

As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick § 43; 2 Wright,

Federal Practice and Procedure: Criminal § 416 (1969). The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of crimen falsi, without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of § 14-305 of the District of Columbia Code, P.L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving ``dishonesty or false statement.'' Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. Whatever may be the merits of those views, this rule is drafted to accord with the congressional policy manifested in the 1970 legislation. **[Editor's Note: The Rule ultimately adopted by Congress, and as amended in 1990, provides for Trial Court balancing of probative value and prejudicial effect as to convictions not involving dishonesty or false statement.]**

* * *

Problem--Rule 609(b) was amended to provide for admissibility in exceptional cases, rather than total preclusion of old crimes.

Subdivision (b). Few statutes recognize a time limit on impeachment by evidence of conviction. However, practical considerations of fairness and relevancy demand that some boundary be recognized. See Ladd, Credibility Tests ▩ Current Trends, 89 U. Pa. L. Rev. 166, 176-177 (1940). This portion of the rule is derived from the proposal advanced in Recommendation Proposing an Evidence Code, § 788(5), p. 142, Cal. Law Rev. Comm'n (1965), though not adopted. See California Evidence Code § 788. **[Editor's Note: The Rule ultimately adopted by Congress provides for admissibility of convictions more than ten years old when the probative value substantially outweighs the prejudicial effect.]**

15. Advisory Committee Note to Rule 611:

Problem--Incorrect internal reference.

Advisory Committee's Note

Subdivision (a). Spelling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain.

* * *

Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403(b). **[Editor's Note: The correct reference is to Rule 403; there is no subdivision (b).]**

* * *

Problem--The Advisory Committee recommended the English view as to the permissible scope of cross-examination. Congress opted for the American view.

Subdivision (b). [Editor's Note: The Advisory Committee version of Rule 611(b) called for wide open cross-examination on any relevant issue. Congress rejected this proposal and adopted a rule limiting the scope of cross-examination to the subject matter of the direct, with the Trial Court having discretion to broaden the scope. The Advisory Committee Note makes the case for the Committee's proposal and criticizes the view that was ultimately adopted by Congress.] The tradition in the federal courts and in numerous state courts has been to limit the scope of cross-examination to matters testified to on direct, plus matters bearing upon the credibility of the witness. Various reasons have been advanced to justify the rule of limited cross-examination. (1) A party vouches for his own witness but only to the extent of matters elicited on direct. Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 F. 668, 675 (8th Cir. 1904), quoted in Maguire, Weinstein, et al., Cases on Evidence 277, n. 38 (5th ed. 1965). But the concept of vouching is discredited, and Rule 607 rejects it. (2) A party cannot ask his own witness leading questions.

This is a problem properly solved in terms of what is necessary for a proper development of the testimony rather than by a mechanistic formula similar to the vouching concept. See discussion under subdivision (c). (3) A practice of limited cross-examination promotes orderly presentation of the case. Finch v. Weiner, 109 Conn. 616, 145 A. 31 (1929). While this latter reason has merit, the matter is essentially one of the order of presentation and not one in which involvement at the appellate level is likely to prove fruitful. See, for example, Moyer v. Aetna Life Ins. Co., 126 F.2d 141 (3d Cir. 1942); Butler v. New York Cent. R. R., 253 F.2d 281 (7th Cir. 1958); United States v. Johnson, 285 F.2d 35 (9th Cir. 1960); Union Automobile Indem. Ass'n v. Capitol Indem. Ins. Co., 310 F.2d 318 (7th Cir. 1962). In evaluating these considerations, McCormick says:

> The foregoing considerations favoring the wide-open or restrictive rules may well be thought to be fairly evenly balanced. There is another factor, however, which seems to swing the balance overwhelmingly in favor of the wide-open rule. This is the consideration of economy of time and energy. Obviously, the wide-open rule presents little or no opportunity for dispute in its application. The restrictive practice in all its forms, on the other hand, is productive in many courtrooms, of continual bickering over the choice of the numerous variations of the ``scope of the direct'' criterion, and of their application to particular cross-questions. These controversies are often reventilated on appeal, and reversals for error in their determination are frequent. Observance of these vague and ambiguous restrictions is a matter of constant and hampering concern to the cross-examiner. If these efforts, delays and misprisons were the necessary incidents to the guarding of substantive rights or the fundamentals of fair trial, they might be worth the cost. As the price of the choice of an obviously debatable regulation of the order of evidence, the sacrifice seems misguided. The American Bar Association's Committee for the Improvement of the Law of Evidence for the year 1937-38 said this:
>
> ``The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the Opinion rule) leading in the trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only. Some of the instances in which Supreme Courts have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding.

``We recommend that the rule allowing questions upon any part of the issue known to the witness ... be adopted....''

McCormick, § 27, p. 51. See also 5 Moore's Federal Practice ¶43.10 (2nd ed. 1964).

The provision of the second sentence, that the judge may in the interests of justice limit inquiry into new matters on cross-examination, is designed for those situations in which the result otherwise would be confusion, complication, or protraction of the case, not as a matter of rule but as demonstrable in the actual development of the particular case.

Problem--Congress changed the Advisory Committee's proposed Rule 611(c), expanding the definition of hostile witnesses, and applying the Rule to criminal as well as civil cases.

Subdivision (c).

* * *

The final sentence deals with categories of witnesses automatically regarded and treated as hostile. Rule 43(b) of the Federal Rules of Civil Procedure has included only ``an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party.'' This limitation virtually to persons whose statements would stand as admissions is believed to be an unduly narrow concept of those who may safely be regarded as hostile without further demonstration. See, for example, Maryland Cas. Co. v. Kador, 225 F.2d 120 (5th Cir. 1955), and Degelos v. Fidelity & Cas. Co., 313 F.2d 809 (5th Cir. 1963), holding despite the language of Rule 43(b) that an insured fell within it, though not a party in an action under the Louisiana direct action statute. The phrase of the rule, ``witness identified with'' an adverse party, is designed to enlarge the category of persons thus callable. **[Editor's Note: Congress revised the last sentence of Rule 611(c) by expanding it to apply to criminal cases (allowing the defendant, for example, to use leading questions on the direct examination of a witness associated with the government), and by permitting the use of leading questions in the direct examination of any hostile witness.]**

16. Advisory Committee Note to Rule 612

Problem--Congress provided for less extensive disclosure of documents relied on by witnesses before trial.

Advisory Committee's Note

The treatment of writings used to refresh recollection while on the stand is in accord with settled doctrine. McCormick § 9, p. 15. The bulk of the case law has, however, denied the existence of any right to access by the opponent when the writing is used prior to taking the stand, though the judge may have discretion in the matter. Goldman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322 (1942); Needelman v. United States, 261 F.2d 802 (5th Cir. 1958), cert. dismissed, 362 U.S. 600, 80 S. Ct. 960, 4 L. Ed. 2d 980, reh. denied, 363 U.S. 858, 80 S. Ct. 1606, 4 L. Ed. 2d 1739, Annot., 82 A.L.R.2d 473, 562 and 7 A.L.R.3d 181, 247. An increasing group of cases has repudiated the distinction, People v. Scott, 29 Ill. 2d 97, 193 N.E.2d 814 (1963); State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957); State v. Hunt, 25 N.J. 514, 138 A.2d 1 (1958); State v. Deslovers, 40 R.I. 89, 100 A. 64 (1917), and this position is believed to be correct. As Wigmore put it, ``the risk of imposition and the need of safeguard is just as great'' in both situations. 3 Wigmore § 762, p. 111. To the same effect is McCormick § 9, p. 17. **[Editor's Note: The Advisory Committee proposal to require disclosure of documents relied on by witnesses before trial was rejected, in favor of a provision allowing disclosure only if the court, in its discretion, finds that it is necessary in the interests of justice.]**

* * *

17. Advisory Committee Note to Rule 704

Problem--The application of Rule 704 was limited by Congress' later addition of Rule 704(b).

Advisory Committee's Note

The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called `ultimate

issue' rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from ``usurping the province of the jury,'' is aptly characterized as ``empty rhetoric.'' 7 Wigmore § 1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of ``might or could,'' rather than ``did,'' though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. People v. Wilson, 25 Cal. 2d 341, 153 P.2d 720 (1944), whether abortion necessary to save life of patient; Clifford-Jacobs Forging Co. v. Industrial Comm'n, 19 Ill. 2d 236, 166 N.E.2d 582 (1960), medical causation; Dowling v. L. H. Shattuck, Inc., 91 N.H. 234, 17 A.2d 529 (1941), proper method of shoring ditch; Schweiger v. Solbeck, 191 Or. 454, 230 P.2d 195 (1951), cause of landslide. In each instance the opinion was allowed.

[Editor's Note: The inference in this Note, that Rule 704 imposes no limitations on ultimate issue testimony, must be qualified in light of the later addition of Rule 704(b) by Congress. Rule 704(b) prevents an expert from drawing a conclusion that a criminal defendant had or did not have the requisite mental state to commit the crime charged.]

18. Advisory Committee Note to Rule 801

Problem--The reference to the residual exceptions is no longer accurate, because these exceptions have been combined into a new Rule 807.

Advisory Committee's Note

* * *

(3) The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified exceptions ``but having comparable circumstantial guarantees of trustworthiness.'' Rules 803(24) and 804(b)(6) **[Editor's Note: The latter exception was enacted as (b)(5), and both exceptions have been transferred to a single Rule 807 by a 1997 amendment.].** This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.

Problem--Congress modified Rule 801(d)(1)(A) to include an under oath requirement.

(A) Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. **[Editor's Note: The Advisory Committee proposal was modified by the Congress to provide for substantive admissibility only if the prior statement was made under oath at a formal proceeding.]** As has been said by the California Law Revision Commission with respect to a similar provision:

> Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in

time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the ``turncoat'' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

Comment, California Evidence Code § 1235. See also McCormick § 39. The Advisory Committee finds these views more convincing than those expressed in People v. Johnson, 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968). The constitutionality of the Advisory Committee's view was upheld in California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.

19. Advisory Committee Note to Rule 803

Problem--The Note on Rule 803(6) refers to a broader standard of covered activity than the "business" activity ultimately set forth by Congress.

Advisory Committee's Note

* * *

Exception (6) * * * The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. McCormick §§ 281, 286, 287; Laughlin, Business Entries and the Like, 46 Iowa L. Rev. 276 (1961). The model statutes and rules have sought to capture these factors and to extend their impact by employing the phrase ``regular course of business,'' in conjunction with a definition of ``business'' far broader than its ordinarily accepted meaning. The result

is a tendency unduly to emphasize a requirement of routineness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The rule therefore adopts the phrase ``the course of a regularly conducted activity'' as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a ``business.'' **[Editor's Note: This terminology was rejected by the Congress.]**

Problem--Congress changed Rule 803(6) in a way that could arguably affect the business duty requirement that was traditionally part of the Rule.

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short ``in the regular course of business.'' If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander; the officer qualifies as acting in the regular course but the informant does not. The leading case, Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. Gencarella v. Fyfe, 171 F.2d 419 (1st Cir. 1948); Gordon v. Robinson, 210 F.2d 192 (3d Cir. 1954); Standard Oil Co. of California v. Moore, 251 F.2d 188, 214 (9th Cir. 1957), cert. denied, 356 U.S. 975, 78 S. Ct. 1139, 2 L. Ed. 2d 1148; Yates v. Bair Transport, Inc., 249 F. Supp. 681 (S.D.N.Y. 1965); Annot., 69 A.L.R.2d 1148. Cf. Hawkins v. Gorea Motor Express, Inc., 360 F.2d 933 (2d Cir. 1966). Contra, 5 Wigmore § 1530a, n. 1, pp. 391-92. The point is not dealt with specifically in the Commonwealth Fund Act, the Uniform Act, or Uniform Rule 63(13). However, Model Code Rule 514 contains the requirement ``that it was the regular course of that business for one with personal knowledge ... to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record....'' The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity. **[Editor's Note: Congress' amendment to the Rule makes it unclear whether the informant**

must be acting in the course of business activity; but Congress does not appear to have intended to reject the business duty requirement].

Problem--Rule 803 (24) has been transferred to Rule 807

Exception (24). Editor's Note: Rule 803(24) has been transferred to Rule 807. The Advisory Committee Note on Rule 803(24) has accordingly been transferred to that Rule as well.

20. Advisory Committee Note to Rule 804

Problem--Congress added a deposition preference to Rule 804(a)(5).

Advisory Committee's Note

* * *

Subdivision (a). * * * If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant. **[Editor's Note: A deposition preference was included by Congress when unavailability is asserted on grounds of absence. See the text of Rule 804(a)(5).].** * * *

Problem--Congress added a predecessor in interest requirement to Rule 804(b)(1).

Exception (1). * * * As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. Falknor, *supra*, at 652; McCormick § 232, pp. 487-88. The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against

whom offered. The rule departs to the extent of allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest. The position is supported by modern decisions. McCormick § 232, pp. 489-90; 5 Wigmore § 1388. **[Editor's Note: This approach was rejected by the Congress, which provided that prior testimony cannot be used against a party unless that party or a predecessor in interest had a similar motive and opportunity to develop the testimony.]**

Problem--The dying declaration exception was renumbered (because the exception for statements of recent perception was deleted), and the Rule was limited to civil cases and homicide cases.

[Editor's Note: The exception for dying declarations, described in the Note as Exception (3), became Rule 804(b)(2) as enacted. The change in numbering was due to the deletion by Congress of the Advisory Committee's proposal for an exception for statements of recent perception. Also, the dying declaration exception was amended by Congress so as to be available only in civil cases and prosecutions for homicide].

Exception (3). The exception is the familiar dying declaration of the common law, expanded somewhat beyond its traditionally narrow limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. See 5 Wigmore § 1443 and the classic statement of Chief Baron Eyre in Rex v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789).

The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecutions for other crimes, e.g., a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions, as in Colo.R.S. § 52-1-20, or has expanded the area of offenses to include abortions, 5 Wigmore § 1432, p. 223, n. 4. Kansas by decision extended the exception to civil cases. Thurston v. Fritz, 91 Kan. 468, 138 P. 625 (1914). While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases and in prosecutions for crimes other than homicide. The same considerations suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters

other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. Unavailability is not limited to death. See subdivision (a) of this rule. Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of firsthand knowledge is assured by Rule 602.

* * *

Problem--The exception for declarations against penal interest was renumbered, and statements against social interest were rejected as a basis for admissibility. Also, there is an incorrect internal reference.

[Editor's Note: The exception for statements against interest, described below as Exception (4), became Rule 804(b)(3) as enacted. The change in numbering was due to the deletion by Congress of the Advisory Committee's proposal for an exception for statements of recent perception. Also, the statement against interest exception was amended by Congress so as not to cover statements against the declarant's "social" interest.]

Exception (4). The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. Hileman v. Northwest Engineering Co., 346 F.2d 668 (6th Cir. 1965). If the statement is that of a party, offered by his opponent, it comes in as an admission, Rule 803(d)(2) **[Editor's Note: Now Rule 801(d)(2)]**, and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against-interest aspect. Highman v. Ridgway, 10 East 109, 103 Eng. Rep. 717 (K.B. 1808); Reg. v. Overseers of Birmingham, 1 B. & S. 763, 121 Eng. Rep. 897 (Q.B. 1861); McCormick § 256, p. 551, nn.2 and 3.

The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCormick § 254, pp. 548-49. Another is to allow statements tending to expose declarant to hatred, ridicule, or disgrace, the

motivation here being considered to be as strong as when financial interests are at stake. McCormick § 255, p. 551. * * *

Problem--the exception for statements of pedigree was renumbered.

[Editor's Note: The exception for statements against interest, described below as Exception (4), became Rule 804(b)(3) as enacted. The change in numbering was due to the deletion by Congress of the Advisory Committee's proposal for an exception for statements of recent perception].

Exception (5). The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility. See 5 Wigmore § 1483. Item (i) specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. In some instances it is self-evident (marriage) and in others impossible and traditionally not required (date of birth). Item (ii) deals with declarations concerning the history of another person.

Problem--Rule 804(b)(5) has been transferred to Rule 807.

Exception (5). [Editor's Note: Rule 804(b)(5) has been transferred to Rule 807. The Advisory Committee Note on Rule 804(b)(5) simply referred to the commentary under the identical Rule 803(24), which in 1997 was combined with Rule 804(b)(5) into a single Rule 807.]

21. Advisory Committee Note to Rule 807

Problems--This Rule is a combination of two old Rules, so the Advisory Committee Notes to the old Rules should be transferred. Also, the Advisory Committee's proposal on residual exceptions was changed by Congress: Congress added a notice requirement, and also the requirement that the hearsay be probative of a material fact and more probative than any other evidence reasonably available. Also, there are incorrect internal references.

Editor's Note: Below is the Advisory Committee's original Note to what was then Rule 803(24). In 1997, Rule 803(24) was combined with Rule 804(b)(5) and transferred to a new Rule 807.

Advisory Committee Note to Rule 803(24)

The preceding 23 exceptions of Rule 803 and the first five **[Editor's Note: Only four were actually enacted.]** exceptions of Rule 804(b) *infra*, are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exception (24) and its companion provision in Rule 804(b)(6) **[Editor's Note: The Rule 804 residual exception was originally enacted as 804(b)(5).]** are accordingly included. They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102. See Dallas County v. Commercial Union Assur. Co., Ltd., 286 F.2d 388 (5th Cir. 1961). **[Editor's Note: Congress added several limitations to the residual exception proposed by the Advisory Committee: 1) the hearsay must be more probative than other evidence reasonably available; 2) the statement must be offered as evidence of a "material fact"; and 3) the proponent must give pretrial notice.].**

[The original Advisory Committee Note to Rule 804(b)(5) stated as follows: "In language and in purpose, this exception is identical with Rule 803(24). See the Advisory Committee's Note to that provision."]