

TENTATIVE DRAFT #2
ARTICLE VIII-IX

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FOR DISCUSSION ONLY

REVISION OF UNIFORM RULES OF EVIDENCE ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

FEBRUARY 20-22, 1998

REVISION OF UNIFORM RULES OF EVIDENCE ACT

With Comments

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EVIDENCE ACT

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1 **Article VIII**

2 **HEARSAY**

3
4
5
6 **Rule 801. [Definitions].**

7 As used in this Article:

8
9
10 **(a) Statement.** "Statement" means ~~(i)~~ (1) an oral ~~or written~~ assertion, or (2)
11 an assertion in a record, or ~~(ii)~~ (3) nonverbal conduct of an individual who intends it as an
12 assertion.

13 **(b) Declarant.** "Declarant" means an individual who makes a statement.

14 **(c) Hearsay.** "Hearsay" means a statement, other than one made by the
15 declarant while testifying at the trial or hearing, offered in evidence to prove the truth of
16 the matter asserted.

17 **(d) Statements that are not hearsay.** A statement is not hearsay if:

18 **(1) Previous statement by witness.** The declarant testifies at the trial or
19 hearing and is subject to cross-examination concerning the statement, and the statement is
20 ~~(i)~~ (A) inconsistent with the declarant's testimony and, if offered in a criminal proceeding,
21 was given under oath and subject to the penalty of perjury at a trial, hearing, or other
22 proceeding, or in a deposition, ~~(ii)~~ (B) consistent with the declarant's testimony, and is
23 offered to rebut an express or implied charge against the declarant of recent fabrication or
24 improper influence or motive; and was made prior to the time the supposed motive to
25 falsify arose, or ~~(iii)~~ (C) one of identification made shortly after perceiving the individual
26 identified.

27 **(2) Admission by party-opponent.** The statement is offered against a party

1 and is ~~(i)~~ (A) the party's own statement, in either an individual or a representative
2 capacity, ~~(ii)~~ (B) a statement of which the party has manifested adoption or belief in its
3 truth, ~~(iii)~~ (C) a statement by an individual authorized by the party to make a statement
4 concerning the subject, ~~(iv)~~ (D) a statement by the party's agent or servant concerning a
5 matter within the scope of the agency or employment, made during the existence of the
6 relationship, or ~~(v)~~ (E) a statement by a co-conspirator of a party during the course and in
7 furtherance of the conspiracy. The contents of the statement shall be considered but are
8 not alone sufficient to establish the declarant's authority under subdivision (C), the
9 agency or employment relationship and scope thereof under subdivision (D), or the
10 existence of the conspiracy and the participation therein of the declarant and the party
11 against whom the statement is offered under subdivision (E).

Reporter's Note

12
13
14
15 The Comment to the 1986 Amendment reads:

16
17 The change conforms Uniform Rule 801(d)(1)(iii) to that found in
18 Federal Rule 801(d)(c), with the addition of the modifier "shortly."

19 The Amendments read:

20
21 1986 amendments to text are shown by underlines [added material]
22 and strikeouts [deleted material].

23
24 Uniform Rule 801 is included in this Tentative Draft #2 as amended in 1986 with
25 only the current proposals for revisions in the format shown to make the rule consistent
26 with the format employed in Tentative Draft #2 of Articles I through VI and with three
27 proposed substantive changes, one, in Rule 801(a) to accommodate the use of electronic
28 evidence, one in Rule 801(d)(1)(B) to codify the holding in *Tome v. United States*, 513
29 U.S. 150, 115 S.Ct. 696 (1995) and, one, in Rule 801(d)(2) to adopt the blackletter of
30 Rule 801(d)(2) of the Federal Rules of Evidence which took effect on December 1, 1997,
31 to deal with issues raised in *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97
32 L.Ed.2d 144 (1987).
33

1 The first substantive change proposed is that Rule 801(a) be amended to delete the
2 words "or written" and insert the words "(2) an assertion in a record" to conform the rule
3 to the recommendation of the Task Force on Electronic Evidence, Subcommittee on
4 Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on
5 Business Law of the American Bar Association. It is proposed that "record" in the
6 amended rule be defined by amending Rule 1001 of the Uniform Rules of Evidence, to
7 embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform
8 Commercial Code and thereby carry forward the established policy of the Conference to
9 accommodate the use of electronic evidence in business transactions. See, in this
10 connection, the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, supra.

11
12 The second substantive change as proposed in Rule 801(d)(1)(B) codifies the
13 holding of the Supreme Court in Tome v. United States, 513 U.S. 150, 115 S.Ct. 696
14 (1995), that "[t]he Rule permits the introduction of a declarant's consistent out-of-court
15 statements to rebut a charge of recent fabrication or improper influence or motive only
16 when those statements were made before the charged recent fabrication or improper
17 influence or motive." The majority reasoned that the language as well as the use of
18 wording in Rule 801(d)(1)(B) following the language of common-law cases "suggests
19 that it was intended to carry over the common-law pre-motive rule," that there was
20 "[n]othing in the Advisory Committee's Notes . . . [suggesting] that it intended to alter the
21 common-law premotive requirement and that relevancy alone was "not the sole criterion"
22 in determining the admissibility of hearsay evidence.

23
24 In contrast, the four dissenting justices rejected the premotive requirement of the
25 majority and reasoned as follows:

26
27 Accordingly, I would hold that that the Federal Rules authorize a
28 district court to allow (where probative in respect to rehabilitation) the use
29 of postmotive prior consistent statements to rebut a charge of recent
30 fabrication, improper influence or motive (subject of course to, for
31 example, Rule 403). Where such statements are admissible for this
32 rehabilitative purpose, Rule 801(d)(1)(B), as stated above, makes them
33 admissible as substantive evidence as well (provided, of course, that the
34 Rule's other requirements, such as the witness' availability for cross-
35 examination, are satisfied). In most cases, this approach will not yield a
36 different result from a strict adherence to the premotive rule for, in most
37 cases, postmotive statements will not be significantly probative. And,
38 even in cases where the statement is admitted as significantly probative (in
39 respect to rehabilitation), the effect of admission on the trial will be
40 minimal because the prior consistent statements will (by their nature) do
41 no more than repeat in-court testimony.

42
43 The third substantive change as proposed in subdivision (2)(d) is drawn from
44 Federal Rule 801(d)(2) which took effect on December 1, 1997 to respond to the three

1 issues raised by *Bourjaily v. United States*, 483 U.S. 171 (1987). The rationale for the
2 amendment is set forth in the Advisory Committee's Note to Rule 801(2)(d) as follows:
3

4 First, the amendment codifies the holding in *Bourjaily* by stating
5 expressly that a court may consider the contents of a coconspirator's
6 statement in determining "the existence of the conspiracy and the
7 participation therein of the declarant and the party against whom the
8 statement is offered." According to *Bourjaily*, Rule 104 requires these
9 preliminary questions to be established by a preponderance of the
10 evidence.
11

12 Second, the amendment resolves an issue on which the Court had
13 reserved decision. It provides that the contents of the declarant's statement
14 do not alone suffice to establish a conspiracy in which the declarant and
15 the defendant participated. The court must consider in addition the
16 circumstances surrounding the statement, such as the identity of the
17 speaker, the context in which the statement was made, or evidence
18 corroborating the contents of the statement in making its determination as
19 to each preliminary question. This amendment is in accordance with
20 existing practice. Every court of appeals that has resolved this issue
21 requires some evidence in addition to the contents of the statement. See, e
22 g. *United States v. Beckham*, 968 F.2d 47 51 D.C.Cir. 1992); *United States*
23 *v. Sepulveda*, 15 F.3d 1161, 1181-82 (1st Cir. 1993), cert. denied, 114
24 S.Ct. 2714 1994); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir.,
25 cert. denied, 448 U.S. 821 (1988)); *United States v. Clark*, 18 F.3d 1337,
26 1341-42 (6th Cir.), cert. denied, 115 S.Ct. 152 (1994); *United States v.*
27 *Zambrana*, 841 F.2d 1320, 1344-45 (7th Cir. 1988); *United States v.*
28 *Silverman*, 861 F.2d 571, 577 (9th Cir. 1988); *United States v. Gordon*,
29 844 F.2d 1397, 1402 (9th Cir. 1988); *United States v. Hernandez*, 829
30 F.2d 988, 933)10th Cir. 1987), cert. denied, 485 U.S. 1013 (1988); *United*
31 *States v. Byrom*, 910 F.2d 725, 736 (11th Cir. 1990).
32

33 Third, the amendment extends the reasoning of *Bourjaily* to
34 statements offered under subdivisions (C) and (D) of Rule 801(d)(2). In
35 *Bourjaily*, the Court rejected treating foundation facts pursuant to the law
36 of agency in favor of an evidentiary approach governed by Rule 104(a).
37 The Advisory Committee believes it appropriate to treat analogously
38 preliminary questions relating to the declarant's authority under
39 subparagraph (C), and the agency or employment relationship and scope
40 thereof under subparagraph (D).
41

42 There are a number of states that appear to adhere to that part of the amendment
43 permitting the court to consider the contents of a coconspirator's statement in determining

1 "the existence of the conspiracy and the participation therein of the declarant and the
2 party against whom the statement is offered." These are: **Colorado**, People v. Mayfield-
3 Ulloa , 817 P.2d 603 (Colo. App. 1991); **Delaware**, Lloyd v. State, 534 A.2d 1262 (Del.
4 1987); **State v, McGriff**, 76 Hawaii 148, 871 P.2d 782 (1994); **Louisiana**, State v.
5 Matthews, 26,550 (La. App. 2 Cir. 1/19/95, 649 So.2d 1022 (La. App. 2 Cir., 1994); State
6 v. Lobato, 603 So.2d 739 (La. 1992); **Maryland**, Ezenwa v. State, 82 Md.App. 489, 572
7 A.2d 1101 (Md. App. 1990); **Michigan**, People v. Slattery, 448 Mich. 935, 531 N.W.2d
8 713 (1995); **New Mexico**, State v. Zim, 106 N.M. 544, 746 P.2d 650 (1987); **New Jersey**,
9 State v. Phelps, 96 N.J. 500, 476 A.2d 1199 (1984); **North Carolina**, State v. Mahaley,
10 332 N.C. 583, 423 S.E.2d 58 (1992); **Oklahoma**, Harjo v. State, 797 P.2d 338 (Okl. Cr.
11 1990); **Oregon**, State v. Cornell, 109 Or. App. 396, 820 P.2d 11 (1992); **Texas**,
12 Rodriquez v. State, 896 S.W.2d 203 (Tex. App. 1994); and **Wisconsin**, State v. Whitaker,
13 167 Wis.2d 247, 481 N.W.2d 649 (Wis. App. 1992).

14
15 Other states adhere to the rule that the court must determine the existence of the
16 conspiracy independent of the hearsay statements themselves. These are: **Alabama**,
17 Deutchsh v. State, 610 So.2d 1212 (Ala.Cr. App. 1992); **California**, People v. Longines,
18 34 Cal.App.4th 621, 40 Cal. Rptr.2d 356 (Cal.App. 1 Dist. 1995); **Connecticut**, State v.
19 Headley, 26 Conn.App.94, 598 A.2d 655 (Conn. App. 1991); **District of Columbia**,
20 Butler v. United States, 481 A.2d 431 (D.C.App. 1984); **Florida**, Foster v. State, 1996 WL
21 399853 (Fla.). Romani v. State, 542 So.2d 984 (Fla 1989), expressly refusing to follow
22 the Bourjaily case; **Illinois**, People v. Jackson, 666 N.E.2d 854, 217 Ill.Dec. 185 (Ill. App.
23 1 Dist. 1996); **Indiana**, Simpson v. State, 628 N.E.2d 1215 (Ind. App. 1 Dist. 1994);
24 **Missouri**, State v. Frederickson, 739 S.W.2d 708 (M0. 1987); **Montana**, State v. Stever,
25 225 Mont. 336, 732 P.2d 853 (1987); **New Hampshire**, State v. Gibney, 133 N.H. 890,
26 587 A.2d 607 (1991); **Nebraska**, State v. Copple, 224 Neb. 672, 401 N.W.2d 141 (1987);
27 **New York**, People v. Tai, 145 Misc.2d 599, 547 N.Y.S.2d 989 (1989); **Ohio**, State v.
28 Carter, 72 Ohio St.3d 545, 651 N.E.2d 965 (1995); **Tennessee**, State v. Gaylor, 862
29 S.W.2d 546 (Tenn. Cr. App 1992); **Utah**, State v. Johnson, 774 P.2d 1141 (Utah 1989);
30 **Virginia**, Rabeira v. Com., 10 Va. App. 61, 389 S.E.2d 731 (1990); **Washington**, State v.
31 Atkinson, 75 Wash.App. 515, 878 P.2d 505 (Wash. App. Div. 1 1994); and **Wyoming**,
32 Jandro v. State, 781 P.2d 512 (Wyo. 1989).

33
34 Second, that part of the amendment providing that the contents of the declarant's
35 statement do not alone suffice to establish a conspiracy in which the declarant and the
36 defendant participated has also received judicial recognition. See, for example,
37 **Oklahoma**, and the decision of the Court of Criminal Appeals in Harjo v. State, 797 P.2d
38 338 (Okl. Cr. 1990), as follows:

39
40 The Bourjaily Court specifically declined to decide whether a court
41 could rely solely on hearsay to determine that a conspiracy has been
42 established by a preponderance of the evidence. Bourjaily, 483 U.S. at
43 176, 107 S.Ct. at 1781-82. While we adopt the new standard announced

1 therein, it is the opinion of this Court that the need for some quantum of
2 independent evidence has not been eliminated. Simply stated we hold that
3 hearsay evidence alone cannot provide the sole basis for establishing the
4 foundational requirements of ' 2801(4)(b)(5).

5
6 The eight reported public comments on the amendment of Rule 801(d)(2) of the
7 Federal Rules of Evidence were varied, but with a majority expressing concerns as to
8 whether the amendment provides any meaningful assurance of reliability by abandoning
9 the pre-Bourjaily requirement of evidence other than the hearsay statement of the
10 coconspirator to determine the existence of the conspiracy. See, in this connection,
11 Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) and United
12 States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). In Glasser the
13 Supreme Court concluded:

14
15 "[S]uch declarations are admissible over the objection of an alleged
16 coconspirator, who was not present when they were made, only if there is
17 proof aliunde that he is connected with the conspiracy Otherwise,
18 hearsay would lift itself by its own bootstraps to the level of competent
19 evidence."

20
21 This view was later reaffirmed in the Nixon case, but, of course, rejected by the Supreme
22 Court in Bourjaily on the ground that "[t]o the extent that Glasser meant that courts could
23 not look to the hearsay statements themselves for any purpose, it has clearly been
24 superseded by Rule 104(a)" which "on its face allows the trial judge to consider any
25 evidence whatsoever, bound only by the rules of privilege" in determining the existence
26 of a conspiracy.

27
28 As to the standard of proof required to establish the existence of a conspiracy, a
29 number of jurisdictions apply the preponderance of evidence standard. See **Alaska,**
30 **Connecticut, Delaware, Florida, Hawaii, Illinois, Montana, New Hampshire,**
31 **Missouri, North Dakota, New Jersey, Oregon, Pennsylvania, Texas, Utah and**
32 **Wisconsin.**

33
34 Other states apply a prima facie standard, that is, evidence which is sufficient to
35 permit the trial court to conclude that a conspiracy existed. See **Alabama, Arkansas,**
36 **California, Georgia, Illinois, Louisiana, Maryland, Michigan, Minnesota,**
37 **Mississippi, Nebraska, new Mexico, New Hampshire, New York, North Carolina,**
38 **Ohio, South Carolina, Tennessee, Virginia, Washington, Wisconsin, West Virginia**
39 **and Wyoming.** Still other states appear to apply their own unique standards, for example,
40 "more probably true than not," "evidence need not be strong for admission," "substantial
41 factual basis," "evidence showing adequate probability," "slight evidence," "substantial
42 proof," or "sufficient indicia of reliability." See **Arizona, District of Columbia, Idaho,**
43 **Indiana, Kansas, Massachusetts, Nevada, Pennsylvania, South Dakota and Vermont.**

1 Neither Uniform Rule 104(a), nor the proposed amendment of Uniform Rule 801(d)(2)
2 addresses the question of the standard of proof to be applied in determining the existence
3 of a conspiracy.

4
5 There are no other proposals at the present time for amending Rule 801.

6
7 The Evidence Project proposes substantial revisions in Rule 801 of the Federal
8 Rules of Evidence as follows:

1 **Rule 801. Definitions.**

2
3 The following definitions apply under this article:

4
5 **(a) Statement.** A "statement" ~~(1) is an oral or written assertion or any (2)~~
6 ~~nonverbal conduct or expression of a person if it is intended by that person~~
7 ~~as an assertion~~ is all speech or writing, as well as any action that
8 communicates a message.

9
10 **(b) Declarant.** A declarant is a person who makes a statement.

11
12 **(c) Hearsay.** "Hearsay" is a statement, ~~other than one made by the~~
13 ~~declarant while testifying at trial or hearing,~~ made outside of the
14 proceeding, repeated by someone other than the declarant, and offered in
15 evidence to prove the truth of the matter ~~asserted~~ communicated.

16
17 **(d) Statements which are not hearsay.** A statement is not hearsay if
18 [Moved to Revised Rules 613, 801(c), 803(3), and 805(1) & (2)]

19 **Unavailability.**

20 [Moved from Current Rule 804(a)] "Unavailability as a witness" includes
21 situations in which the declarant--

22
23 (1) is exempted by ruling of the court on the ground of privilege from
24 testifying concerning the subject matter of the declarant's statement; or

25
26 (2) ~~persists in refusing~~ refuses to testify concerning the subject matter of
27 ~~the declarant's~~ about the statement despite an order ~~of~~ by the court to do
28 so; or

29
30 (3) testifies to a lack of memory of the subject matter of the declarant's
31 statement; or

32
33 (4) is unable to be present or to testify at the hearing because of death or
34 then existing physical or mental illness or infirmity; or

35
36 (5) is absent from the hearing and the proponent of the statement has been
37 unable to procure the declarant's attendance (or in the case of a hearsay
38 exception under 804(b)(2), (3), or (4), the declarant's attendance or
39 testimony) by process or other reasonable means.

40
41 ~~— A declarant is not unavailable as a witness if exemption, refusal, claim of~~
42 ~~lack of memory, inability, or absence is due to the procurement or~~
43 ~~wrongdoing of the proponent of a statement for the purpose of preventing~~
44 ~~the witness from attending or testifying.~~

1 If the proponent of the statement caused the unavailability of the declarant, then
2 the proponent may not offer the statement under the exceptions provided in Rule 804.

3
4 (e) Present. "Present" means the declarant is physically before the court,
5 but cannot or will not presently testify to the substance of a previous
6 statement.

7
8 See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of
9 Evidence, 171 F.R.D. 330, 596-597 (1997).

10
11 The Evidence Project would then treat prior inconsistent statements of a witness
12 and statements of prior identification as exceptions (1) and (2) of a newly established
13 Rule 805 of the Federal Rules of Evidence as follows:

14
15 **Revised Rule 805. Hearsay Within Hearsay. Hearsay Exception;**
16 **Presence of Declarant Material**

17
18 The following are not excluded by the hearsay rule if the declarant
19 is present:

20
21 **(1) Prior inconsistent statement by witness.** [Moved from
22 Current Rule 801(d)(10)(A)] A statement that is inconsistent with the
23 declarant's testimony, and was given under oath subject to the penalty of
24 perjury at a trial, hearing, or other proceeding, or in a deposition; provided
25 the proponent as extrinsic evidence of the prior statement, and the
26 declarant is confronted with the statement while testifying and afforded an
27 opportunity to explain or deny the same and the opposite party afforded an
28 opportunity to examine the witness thereon; or

29
30 **(2) Prior identification.** [Moved from Current Rule 801(d)(1)(C)]
31 A statement of identification of a person made after perceiving the person;
32 or

33
34 [See **Reporter's Note** to Uniform Rule 803(5) for the
35 incorporation of a revised recorded recollection exception
36 of Rule 803(5) in the Revised Rule 805(3) of the Federal
37 Rules of Evidence]

38
39 See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of
40 Evidence, 171 F.R.D. 330, 666-673 (1997).

1
2
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5

Rule 802. [Hearsay Rule].

Hearsay is not admissible except as provided by law or by these rules.

Reporter's Note

There are no proposals at the present time for amending Rule 802.

1 **Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.**

2
3 The following are not excluded by the hearsay rule, even though the declarant is
4 available as a witness:

5 **(1) Present sense impression.** A statement describing or explaining an event
6 or condition made while the declarant was perceiving the event or condition, or
7 immediately thereafter.

8
9 **Reporter's Note**

10
11 There are no proposals at the present time for amending Rule 803(1).

12
13 The Evidence Project proposes substantial revisions in Rule 803(1) of the Federal
14 Rules of Evidence, as follows:

15
16 **(1) Contemporaneous statements. ~~Present sense impression.~~** A
17 statement ~~describing or explaining an event made while the declarant was~~
18 ~~perceiving the an~~ event or condition, or immediately thereafter: under
19 circumstances of apparent sincerity, limited to:

20
21 **(a) ~~(1)~~ Present sense impression.** An oral statement describing or
22 explaining an external event or condition ~~made while the declarant was~~
23 ~~perceiving the event or condition, or immediately thereafter.~~

24
25 **(b) Present state of mind.** [Moved from Current Rule 803(3)] ~~Then~~
26 ~~existing mental, emotional, or physical condition.~~ A statement of the
27 declarant's then existing state of mind, ~~emotion, sensation, or physical~~
28 ~~condition (such as intent, plan, motive, design, mental feeling, pain, and~~
29 ~~bodily health), but not including a statement of memory or belief to prove~~
30 ~~the fact remembered or believed~~ having independent relevance because
31 such mental state is an element of a claim or defense, or used to
32 circumstantially prove the declarant's past or future conduct. If offered as
33 circumstantial evidence of the conduct of a third party, there must be
34 independent evidence that the third party acted consistently with the
35 declarant's stated intent. unless it relates to the execution, revocation,
36 identification, or terms of declarant's will.

37
38 **(c) Present physical condition.** [Moved from Current Rule 803(3)] A
39 statement of the declarant's then existing ~~state of mind, emotion, sensation,~~
40 ~~or physical condition (such as intent, plan, motive, design, mental feeling,~~
41 ~~pain, and bodily health).~~

1 See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of
2 Evidence, 171 F.R.D. 330, 620 (1997).

1 and which was made during the existence of the
2 relationship. The proponent must employ process or other
3 reasonable means to obtain the attendance of the declarant,
4 and provide the opposing party with reasonable notice of
5 the intended use of the statement. , or
6

7 **(E) (e) Vicarious admission by coconspirators. A a**
8 statement by a coconspirator of a party during the course
9 and in furtherance of the conspiracy. A statement by a
10 coconspirator may be used to prove the existence of the
11 conspiracy and the opponent's participation in the
12 conspiracy, only after prima facie evidence of those
13 elements, independent of the alleged coconspirator
14 admission has been offered. The proponent of a
15 coconspirator admission must employ process or other
16 reasonable means to obtain the attendance of the declarant,
17 and provide the opposing party with reasonable notice of
18 the intended use of the statement.
19

20 See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of
21 Evidence, 171 F.R.D. 330, 601 (1997)

1 See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of
2 Evidence, 171 F.R.D. 330, 667 (1997).

1 provide for the self-authentication of domestic and foreign records to provide adequate
2 protection for the admissibility of business records under the certification procedure
3 provided for in Uniform Rule 803(6). See the proposed amendments to Uniform Rules
4 902(11) and 902(12), *infra*.

1 There are at least three states which, although differing in approach from the
2 proposed amendment of Uniform Rule 803(6), embrace the use of certification as an
3 alternative to satisfying the foundational requirements for admissibility through
4 testimonial evidence. See **Indiana**, Ind. R. Ev., Rules 803(6), 902(9) and 902(10);
5 **Maryland**, Md. R. Rev. Rules 5-803(6) and 5-902(11); and **Texas**, Tx. R. Civ. Ev., Rules
6 803(6) and 902(10) and Tx. R. Cr. Ev., Rules 803(6) and 902(10).

7
8 The Evidence Project proposes a substantial revision in Rule 803(6) of the
9 Federal Rules of Evidence as follows:

10
11 **(6) Business records**

12
13 ~~_____~~ **(a) Records of regularly conducted business activity.** A memorandum,
14 ~~report, record, or data compilation,~~ in any form, ~~of acts, events, conditions,~~
15 ~~opinions, or diagnoses,~~ provided the record is relied upon, made at or near
16 the time of an activity by, or from information transmitted by, a person
17 with knowledge and a business duty to the entity maintaining the record, if
18 kept in the course of a regularly conducted activity, and if it was the
19 regular practice of that business activity to make the ~~memorandum, report,~~
20 ~~record, or data compilation,~~ all as shown by the testimony of the
21 custodian or other qualified witness, unless the source of information or
22 method or circumstances of preparation indicate lack of trustworthiness. It
23 is presumed that opinions within business records satisfy the requirements
24 of Rules 702 and 703. This presumption shifts only the burden of
25 production to the opposing party. The term "business" as used in this
26 paragraph includes ~~business, institution, association, profession,~~
27 ~~occupation, and~~ callings of every kind, whether or not conducted for
28 profit.

29
30 See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of
31 Evidence, 171 F.R.D. 330, 643 (1997).

1 Evidence not here material since the Conference elected to adopt a more restrictive rule
2 governing the admissibility of public records and reports under this exception to the
3 hearsay rule. The Evidence Project would amend Rule 803(8) of the Federal Rules of
4 Evidence by including the substance of Rule 803(10), dealing with the absence of a
5 public record or entry, as a subparagraph (b) to Rule 803(8). See Rice, Paul R., The
6 Evidence Project, Proposed Revisions to the Federal Rules of Evidence, 171 F.R.D. 330,
7 650 (1997).

1 **(14) Reports of records.~~Records of documents~~ affecting an interest in**
2 **property.** ~~The~~ (A) A public record, as defined in subdivision (B), of a document
3 purporting to establish or affect an interest in property, as proof of the content of the
4 original ~~another or duplicate record~~ ~~recorded document~~ and its execution and delivery
5 by each person by whom it purports to have been executed and delivered. , if the
6 record is a record of a public office and an applicable statute authorizes the recording
7 of documents of that kind in that office.

8 (B) A "public record" is a record of a public office in which office an
9 applicable statute authorizes the filing or recording of documents of that kind.

Reporter's Note

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13
14 It is proposed that Rule 803(14) be amended as indicated to conform the rule to the
15 recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic
16 Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of
17 the American Bar Association. It is proposed that "record" in the amended rule be defined
18 by amending Rule 1001 of the Uniform Rules of Evidence, to embrace the definition of
19 "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby
20 carry forward the established policy of the Conference to accommodate the admissibility
21 of certificates where they are preserved in a form other than a writing. See, in this
22 connection, the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, supra.

23
24 The recommendation of the Task Force that the definition of a "public record," now
25 contained in the last three lines of Rule 803(14), be defined in a separate section is also
26 incorporated in the proposed amendments of Rule 803(14).

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(23) Judgment as to personal, family or general history, or boundaries.

Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the matter would be provable by evidence of reputation.

Reporter's Note

There are no proposals at the present time for amending Rule 803(23).

1 ~~—— (24) Other exceptions. A statement not specifically covered by any of the~~
2 ~~foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if~~
3 ~~the court determines that (i) the statement is offered as evidence of a material fact, (ii) the~~
4 ~~statement is more probative on the point for which it is offered than any other evidence~~
5 ~~which the proponent can procure through reasonable efforts, and (iii) the general purposes~~
6 ~~of these rules and the interests of justice will best be served by admission of the statement~~
7 ~~into evidence. A statement may not be admitted under this exception unless the proponent~~
8 ~~of it makes known to the adverse party sufficiently in advance to provide the adverse party~~
9 ~~with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement~~
10 ~~and the particulars of it, including the name and address of the declarant.~~

11 ~~As amended 1986.~~

12 **Reporter's Note**

13 It is proposed that Uniform Rule 803(24) be eliminated to combine the rule with the
14 identical Uniform Rule 804(b)(5) in a single new Uniform Rule 808 governing the
15 admissibility of evidence under a residual exception to the hearsay rule. This would make
16 the Uniform Rules of Evidence consistent with the combining of Rules 803(24) and 804(b)(5)
17 into one Rule 807 of the Federal Rules of Evidence which took effect on December 1, 1997.
18 All of the public comments, with one exception, approved the combining of the two residual
19 exceptions into a new Rule 807. Comments addressed to the substance of a residual
20 exception are discussed in the **Reporter's Note** to proposed Uniform Rule 808.

21
22 The Evidence Project would also delete Rule 803(24) but retain, with substantial
23 revisions, Rule 804(b)(5) of the Federal Rules of Evidence reasoning that the residual
24 exception is only appropriate where the declarant is unavailable as a witness. See Rice, Paul
25 R., The Evidence Project, Proposed Revisions to the Federal Rules of Evidence, 171 F.R.D.
26 330, 665 (1997) and the **Reporter's Note** to Uniform Rule 804(b)(5), *infra*.

1 **Rule 804. [Hearsay Exceptions: Declarant Unavailable].**

2 (a) **Definition of unavailability.** "Unavailability as a witness" includes
3 situations in which the declarant:

4 (1) is exempted by ruling of the court on the ground of privilege from testifying
5 concerning the subject matter of ~~his~~ the declarant's statement;

6 (2) persists in refusing to testify concerning the subject matter of ~~his~~ the
7 declarant's statement despite an order of the court to do so;

8 (3) testifies to a lack of memory of the subject matter of ~~his~~ the declarant's
9 statement;

10 (4) is unable to be present or to testify at the hearing because of death or then
11 existing physical or mental illness or infirmity; or

12 (5) is absent from the hearing and the proponent of ~~his~~ the declarant's statement
13 has been unable to procure ~~his~~ the declarant's attendance (or in the case of a hearsay
14 exception under subdivision (b)(2), (3), or (4), ~~his~~ the declarant's attendance or testimony)
15 by process or other reasonable means.

16 A declarant is not unavailable as a witness if ~~his~~ the declarant's exemption, refusal,
17 claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of
18 the proponent of ~~his~~ the declarant's statement for the purpose of preventing the witness from
19 attending or testifying.

20
21 **Reporter's Note**

22 The proposed amendments eliminate the gender-specific language in the existing rule
23 without any change in substance.

24 There are no other proposals at the present time for amending Rule 804(a).
25
26
27

1 The Evidence Project would delete all of Rule 804(a) of the Federal Rules of
2 Evidence and incorporate the substance of Rule 804(a) in a Revised Rule 801(d). See Rice,
3 Paul R., *The Evidence Project, Proposed Revisions to the Federal Rules of Evidence*, 171
4 F.R.D. 330, 617-618 (1997). See further, the **Reporter's Note** to Uniform Rule 801.

1 See 2 Whinery, Oklahoma Evidence, Commentary on the Law of Evidence ' 31.18 (1997
2 Pocket Part).

3
4 The Evidence Project recommends including that portion of the current Rule 803(3)
5 of the Federal Rules of Evidence which admits statements of a testator relating to the
6 execution, revocation, identification, or terms of a testator's will as a Rule 804(3) which is
7 left open by placing the statements against interest exception in the Federal Rules of
8 Evidence as Rule as Rule 803(7). Revised Rule 804(3) would then provide as follows:
9

10 ~~(3) Statement Against Interest.~~ [Moved to Revised Rule 803(7)]
11 Testamentary statements. [Moved from Current Rule 803(3)] In a probate
12 action, statements by the testator relating to the execution, revocation,
13 identification, or terms of testator's will.
14

15 See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of
16 Evidence, 171 F.R.D. 330, 664 (1997).
17

18 The Evidence Project then recommends that the renumbered statement against
19 interest exception be revised as follows:
20

21 (7) **Statement against interest.** [Moved from Current Rule 804(b)(3)]
22

23 (a) **Subjective test.** A statement which at the time of its making the
24 declarant believed to be so far contrary to the declarant's interest that the
25 declarant would not have made the statement unless believing it to be true.
26

27 (b) **Objective test.** If the declarant's belief is unascertainable, A a
28 statement which was at the time of its making so far contrary to the
29 declarant's pecuniary or proprietary interest, or so far tended to subject the
30 declarant to criminal or civil liability, or to invalidate render invalid a claim
31 by the declarant against another, that a reasonable person in the declarant's
32 position would not have made the statement unless believing it to be true. A
33 statement tending to expose the declarant to criminal liability and offered to
34 exculpate the accused is not admissible unless corroborating circumstances
35 clearly indicate the trustworthiness of the statement.
36

37 See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of
38 Evidence, 171 F.R.D. 330, 646-649 (1997). See further, the **Reporter' Note** to Rule 803(7),
39 supra.

1 ~~—— (5) Other exceptions. A statement not specifically covered by any of the~~
2 ~~foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if~~
3 ~~the court determines that (i) the statement is offered as evidence of a material fact, (ii) the~~
4 ~~statement is more probative on the point for which it is offered than any other evidence~~
5 ~~which the proponent can procure through reasonable efforts, and (iii) the general purposes~~
6 ~~of these rules and the interests of justice will best be served by admission of the statement~~
7 ~~into evidence. A statement may not be admitted under this exception unless the proponent~~
8 ~~of it makes known to the adverse party sufficiently in advance to provide the adverse party~~
9 ~~with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement~~
10 ~~and the particulars of it, including the name and address of the declarant.~~

11 ~~As amended 1986.~~

12 **Reporter's Note**

13 It is proposed that Uniform Rule 804(b)(5) be eliminated to combine the rule with
14 the identical Uniform Rule 803(24) in a single new Uniform Rule 808 governing the
15 admissibility of evidence under a residual exception to the hearsay rule. This would make
16 the Uniform Rules of Evidence consistent with the combining of Rules 803(24) and 804(b)(5)
17 into one Rule 807 of the Federal Rules of Evidence which took effect on December 1, 1997.
18 All of the public comments, with one exception, approved the combining of the two residual
19 exceptions into a new Rule 807. Comments addressed to the substance of a residual
20 exception are discussed in the **Reporter's Note** to proposed Uniform Rule 808.

21
22
23
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25
26 The Evidence Project recommends, with revisions, that only Rule 804(b)(5) be
27 retained as a residual exception to the Federal Rules of Evidence as follows:

28
29 **(5) Other exceptions.** A statement not specifically covered by any of the
30 foregoing exceptions, but having equivalent circumstantial guarantees of
31 trustworthiness, if (a) the proponent gives notice to the opposing party of the
32 intention to use the evidence, with details of the statement, including the identity of
33 the declarant; and (b) the court determines that (A) that statement is offered as
34 evidence of a material fact (B) the statement is more probative on the point for which

1 ~~it is offered than any other evidence which the proponent can procure through~~
2 ~~reasonable efforts more reliable evidence is not reasonably available.; and (C) the~~
3 ~~general purposes of these rules and the interests of justice will be best served by~~
4 ~~admission of the statement into evidence. However, a statement may not be admitted~~
5 ~~under this exception unless the proponent of it makes known to the adverse party~~
6 ~~sufficiently in advance of the trial or hearing to provide the adverse party with a fair~~
7 ~~opportunity to prepare to meet it, the proponent's intention to offer the statement and~~
8 ~~the particulars of it, including the name and address of the declarant.~~

9
10 See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of
11 Evidence, 171 F.R.D. 330, 665-666 (1997). See further, the **Reporter' Note** to Uniform Rule
12 803(24), *supra*.

1 States which have a comparable rule are: [To Be Supplied, If Any}

1 **Rule 805. [Hearsay Within Hearsay].**

2
3 Hearsay included within hearsay is not excluded under the hearsay rule if each part
4 of the combined statements conforms with an exception to the hearsay rule provided in these
5 rules.

6
7 **Reporter's Note**

8
9 There are no proposals at the present time for amending Rule 805.

10
11 The Evidence Project recommends a substantial revision in Rule 805 of the Federal
12 Rules of Evidence by moving the substance of Rule 805 into a new Rule 806, without
13 revisions, and substituting a new Rule 805 with three subdivisions containing prior
14 inconsistent statements, statements of prior identification and recorded recollection, as
15 follows:

16
17 **Revised Rule 805. ~~Hearsay Within Hearsay.~~ Hearsay Exception;**
18 **Presence of Declarant Material**

19
20 The following are not excluded by the hearsay rule if the declarant is
21 present:

22
23 **(1) Prior inconsistent statement by witness.** [Moved from Current
24 Rule 801(d)(10)(A)] A statement that is inconsistent with the declarant's
25 testimony, and was given under oath subject to the penalty of perjury at a
26 trial, hearing, or other proceeding, or in a deposition; provided the proponent
27 as extrinsic evidence of the prior statement, and the declarant is confronted
28 with the statement while testifying and afforded an opportunity to explain or
29 deny the same and the opposite party afforded an opportunity to examine the
30 witness thereon; or

31
32 **(2) Prior identification.** [Moved from Current Rule 801(d)(1)(C)]
33 A statement of identification of a person made after perceiving the person; or

34
35 **(3) Recorded recollection.** [Moved from Current Rule 803(5)] A
36 memorandum or record concerning a matter which a witness once had
37 knowledge but now has insufficient recollection to enable the witness to
38 testify fully and accurately, shown to have been reflecting a witness'
39 knowledge of an event, made or adopted by the witness when the matter was
40 fresh in the witness' memory and to reflect that knowledge correctly soon
41 after the event's occurrence under conditions of apparent sincerity. If

1 ~~admitted, the memorandum or record may be read into evidence but may not~~
2 ~~be received as an exhibit unless offered by an adverse party.~~

3

4 See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of
5 Evidence, 171 F.R.D. 330, 666-673 (1997).

1 **Rule 806. Attacking and Supporting Credibility of Declarant.**

2
3 If a hearsay statement, or a statement defined in Rule 801(d)(2)(iii) (C), ~~(iv)~~ (D), or
4 ~~(v)~~ (E), has been admitted in evidence, the credibility of the declarant may be attacked, and
5 if attacked may be supported, by any evidence which would be admissible for those purposes
6 if the declarant had testified as a witness. Evidence of a statement or conduct by the
7 declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to
8 any requirement that the declarant may have been afforded an opportunity to deny or explain.
9 If the party against whom a hearsay statement has been admitted calls the declarant as a
10 witness, the party is entitled to examine the declarant on the statement as if under cross-
11 examination.

12
13 **Reporter's Note**

14
15 The Amendments to the 1986 Amendments reads:

16
17 1986 amendments to text are shown by underlines [added material]
18 and strikeouts [deleted material].

19
20 The amendments have now been changed to conform to the stylistic format of
21 Uniform Rule 801(d)(2) and to make certain technical amendments to conform the rule to
22 amendments to Rule 806 of the Federal Rules of Evidence which took effect on December
23 1, 1997.

24
25 There are no proposals at the present time for any other amendments to Uniform Rule
26 806.

27
28 The Evidence Project would include the substance of this rule without revision in a
29 new Rule 807 of the Federal Rules of Evidence. See Rice, Paul R., The Evidence Project,
30 Proposed Revisions to the Federal Rules of Evidence, 349 (October, 1996), appended as
31 Exhibit #4.

1 **Rule 807. Child Victims or Witnesses.**

2
3 (a) A hearsay statement made by a minor who is under the age of [12] years at
4 the time of trial describing an act of sexual conduct or physical violence performed by or
5 with another on or with that minor or any [other individual] [parent, sibling or member of
6 the familial household of the minor] is not excluded by the hearsay rule if, on motion of a
7 party, the minor, or the court and following a hearing [in camera], the court finds that:

8 _____(i) (1) there is a substantial likelihood that the minor will suffer severe
9 emotional or psychological harm if required to testify in open court;

10 _____(ii) (2) the time, content, and circumstances of the statement provide
11 sufficient circumstantial guarantees of trustworthiness;

12 _____(iii) (3) the statement was accurately recorded by audio-visual means
13 as may be provided by statute;

14 _____(iv) (4) the audio-visual record discloses the identity and at all times
15 includes the images and voices of all individuals present during the interview
16 of the minor;

17 _____(v) (5) the statement was not made in response to questioning
18 calculated to lead the minor to make a particular statement or is clearly
19 shown to be the minor's statement and not the product of improper
20 suggestion;

21 _____(vi) (6) the individual conducting the interview of the minor is
22 available at trial for examination or cross-examination by any party; and ~~(vii)~~
23 before the recording is offered into evidence, all parties are afforded an

1 opportunity to view it and are furnished a copy of a written transcript of it.

2 (b) Before a statement may be admitted in evidence pursuant to subsection (a) in
3 a criminal case, the court shall, at the request of the defendant, provide for further
4 questioning of the minor in such manner as the court may direct. If the minor refuses to
5 respond to further questioning or is otherwise unavailable, the statement made pursuant to
6 subsection (a) is not admissible under this rule.

7 (c) The admission in evidence of a statement of a minor pursuant to subsection
8 (a) does not preclude the court from permitting any party to call the minor as a witness if the
9 interests of justice so require.

10 ~~————(d)———— In any proceeding in which a minor under the age of [12] years may be called~~
11 ~~as a witness to testify concerning an act of sexual conduct or physical violence performed~~
12 ~~by or with another on or with that minor or any [other individual] [parent, sibling or member~~
13 ~~of the familial household of the minor]; if the court finds that there is a substantial likelihood~~
14 ~~that the minor will suffer severe emotional or psychological harm if required to testify in~~
15 ~~open court, the court may, on motion of a party, the minor or the court, order that the~~
16 ~~testimony of the minor be taken by deposition recorded by audio-visual means or by~~
17 ~~contemporaneous examination and cross-examination in another place under the supervision~~
18 ~~of the trial judge and communicated to the courtroom by closed-circuit television. Only the~~
19 ~~judge, the attorneys for the parties, the parties, individuals necessary to operate the~~
20 ~~equipment and any individual the court finds would contribute to the welfare and well-being~~
21 ~~of the minor may be present during the minor's testimony. If the court finds that placing the~~
22 ~~minor and one or more of the parties in the same room during the testimony of the minor~~

1 ~~would contribute to the likelihood that the minor will suffer severe emotional or~~
2 ~~psychological harm, the court shall order that the parties be situated so that they may observe~~
3 ~~and hear the testimony of the minor and may consult with their attorneys, but the court shall~~
4 ~~ensure that the minor cannot see or hear them, except, within the discretion of the court, for~~
5 ~~purposes of identification.~~

6 ~~——(e) (d)~~ The requirements for admissibility of a statement under this rule do not
7 preclude admissibility of the statement under any other exception to the hearsay rule.

8 As added 1986.

9
10 **Reporter's Note**

11
12 The Comment to the 1986 amendment of the Uniform Rules of Evidence reads, in
13 part, as follows:

14
15 This new rule creates a limited hearsay exception permitting the
16 introduction of extrajudicial statements and prerecorded and closed-circuit
17 televised testimony of children who have been the victims of, or witnesses to,
18 acts of sexual conduct or physical violence. It is not intended that this new
19 hearsay exception should preclude resort to any other hearsay exception,
20 when applicable, or, that any other hearsay exception should preclude resort
21 to this new hearsay exception, when applicable.

22
23 * * *

24
25 **Judicial Determination of Minor's Emotional/Psychological Harm.**
26 The rule requires that the court make an antecedent finding of a substantial
27 likelihood that the minor will suffer severe emotional or psychological harm
28 if required to testify in open court before an extrajudicial statement made be
29 admitted or alternative means of testifying employed. This standard is
30 intended to require more than a showing of mere distress on the part of a
31 child who is faced with the prospect of testifying. It is a strict standard,
32 which is imposed in recognition of the fact that life testimony and cross
33 examination is the preferred mode of proof. It is not contemplated that the
34 court will necessarily receive expert testimony concerning the minor's
35 emotional state in making this determination. The court is in an adequate
36 position to assess the surrounding circumstances and to form a judgment

1 concerning the likely effect of live testimony in open court on the minor
2 without expert assistance. See *Washington v. State*, 452 So.2d 82, 82 (Fla.
3 App. 1984); *Chappell v. State*, 710 S.W.2d 214, 217 (Ark. App. 1986).

4
5 This determination is to be made in accordance with Rule 104(a). In
6 making this determination, the court should consider such factors as the age
7 of the minor, the minor's physical and mental condition, the relationship
8 between the minor and the parties, the nature of the acts about which the
9 minor is to testify, the nature of the proceeding, the presence of any threats
10 to the minor or a family member relating to the minor's testimony, and the
11 conduct of the parties or their counsel during the proceeding at which the
12 minor is called to testify.

13
14 The Age of the Minor. The age of twelve years suggested in the rule
15 is a strict standard (many of the existing rules and statutes supply a fourteen-
16 or sixteen-year age limit). This reflects the judgment that the balance
17 between protecting the minor from the trauma of live testimony in open court
18 on the one hand, and affording the defendant the protections of the law's
19 preference for live testimony on the other, begins to tilt in favor of the
20 defendant as the minor reaches an age at which he or she can more
21 adequately cope with the pressures of trial.

22
23 Breadth of Application. This rule takes the broad approach of
24 extending the hearsay exception and alternative means of testifying (1) to
25 minors who are witnesses as well as those who are victims of sexual conduct
26 or physical violence, and (2) to those who are called to testify in civil as well
27 as criminal proceedings. The breadth of this approach is premised on the
28 recognition that, if the court finds the prerequisite "substantial likelihood of
29 severe emotional or psychological harm," the same considerations apply to
30 child witnesses as to child victims and are equally applicable in civil as in
31 criminal proceedings.

32
33 Cautionary Instructions. When a hearsay statement or prerecorded
34 or closed-circuit testimony is admitted under this rule, it is appropriate for the
35 trial judge to consider instructing the members of the jury that they are to
36 draw no inference from the fact that any of these procedures have been used.
37 The court should also consider instructing counsel outside the presence of the
38 jury that they are not to comment during the course of the trial on the fact that
39 any of these procedures have been used.

40
41 Subdivision (a)

42
43 Audio-visual Recording. The hearsay exception for a minor's
44 extrajudicial statement requires that the statement be audio-visually recorded

1 (e.g., videotaped or filmed). The purpose of this requirement is to permit the
2 court and jury to observe the demeanor of the minor witness and to assess the
3 surrounding circumstances. It reflects concern about the susceptibility of
4 minors to suggestion and outside influence. The same concern underlies the
5 rule's requirement that the audio-visual recording include the images and
6 voices of all those who are present when the minor's statement is made.
7

8 Person's Present. Because of the requirement that the audio-visual
9 record of any hearsay statement include the images and voices of all persons
10 present when the statement is made, it is advisable to limit the number of
11 persons in the room during the interview of the minor. It should be noted in
12 this regard that more than one camera may be used to record the interview
13 and that split imaging or other technology may be used to meet the
14 requirements of the rule.
15

16 Sufficient Circumstantial Guarantees of Trustworthiness. Among the
17 factors that the court should consider in determining whether sufficient
18 circumstantial guarantees of trustworthiness exist to warrant admission of the
19 recorded statement are: the age of the minor; his or her physical and mental
20 condition; the circumstances of the alleged event; the language used by the
21 minor; the existence of corroborate evidence; the existence of any apparent
22 motive to falsify; whether any attorneys for the parties were present when the
23 minor's statement was recorded and, if so, what role the attorneys played in
24 eliciting information from the minor and the manner in which they did so;
25 whether every voice and individual on the recording has been identified and,
26 if not, the significance of the role played by the unidentified speaker; whether
27 the audio-visual means by which the statement was recorded have been
28 shown to be accurate; the time when the statement was made; the number of
29 interviews of the minor prior to the statement; and whether there exists any
30 evidence of undue influence or pressure on the minor at or before the time of
31 the recording.
32

33 Subdivision (b)

34

35 The rule generally endows the trial judge with discretion to determine
36 whether to permit additional testimony to be elicited from the minor and, if
37 so, whether that testimony should be taken live in open court or by means of
38 videotaped deposition or closed-circuit television If, however, in a
39 criminal case, the court admits an extrajudicial statement under subdivision
40 (a), the defendant is entitled to put further questions to the minor in such
41 fashion as the court may direct. This further questioning may, in the court's
42 discretion, take the form of videotaped or closed-circuit testimony . . . ,
43 written questions submitted to the court for the court either to put orally to
44 the minor or to transmit to the minor for written response, or any other form

1 of questioning ordered by the court. The court may take other precautionary
2 measures too, such as appointing a guardian ad litem for the minor. It is
3 contemplated that the issues of admissibility of the statement and of any
4 further questioning of the minor will be resolved in pretrial proceedings.
5

6 Subdivision (c)
7

8 Although a number of the existing enactments preclude the parties
9 from compelling the minor's testimony at trial, this rule reflects the judgment
10 that the arguments to the contrary are more persuasive. Constitutionally,
11 potential confrontation clause concerns are ameliorated by permitting any
12 party, within the court's discretion, to call the child as a witness. Further, to
13 the extent that cross-examination at trial has historically been considered an
14 integral part of the truth-testing process, the availability of the minor to be
15 called to the stand, within the judge's discretion, enhances the stature of the
16 proceedings. Finally, it may be in the interest of the prosecution as well as
17 the defendant in a criminal case, or of any party in a civil case, to be able to
18 called the minor as witness at trial. And, it should be understood that the
19 admission in evidence of a statement taken pursuant to subdivision (a) does
20 not preclude the calling of the minor as a witness pursuant to subdivision (c)
21 or vice versa.
22

23 * * *
24

25 In this Tentative Draft #2, it is proposed that Rule 807 be amended to conform the
26 rule to the format adopted in drafting amendments to the Uniform Rules of Evidence
27 generally. Second, Subdivision (d) has been deleted pending a decision of the Drafting
28 Committee to separate the hearsay issue relating to the admissibility of statements of children
29 and the forms in which the testimony of children can be preserved for introduction in court.
30 Consistent with this proposed amendment, the portions of the Comment to 1986 Amendment
31 relating to the taking of the testimony by audio-visual deposition or closed-circuit television
32 are omitted. If appropriate, the Reporter can draft separately a rule governing the forms in
33 which the testimony of children may be taken and preserved for introduction in court for
34 submission to the Committee on Scope and Program for consideration and adoption as a
35 model act.
36

37 The substance of Uniform Rule 807 creating an exception to the hearsay rule to
38 permit the introduction of extrajudicial statements of children in various types of proceedings
39 has received overwhelming approval in the several states. To date, a hearsay exception for
40 statements of children has been adopted in 40 states. These are: **Alabama**, Ala. Code ' 15-
41 25-31 & 32 (West 1996)(statement of child under 12 years of age involving physical or
42 sexual abuse and exploitation admissible in criminal proceedings); **Alaska**, Alaska Stat. '
43 12.40.110 (West 1996)(statement of child under 10 years of age involving sexual assault or
44 sexual abuse of minor); **Arizona**, Ariz. Rev. Stat. Ann. ' 13-1416 (West 1996)(statement of

1 child under 10 years of age involving sexual or physical abuse); **Arkansas**, Ark. Code ' 16-
2 41-101 (West 1995), Ark Code Rule 803(25) (West 1993)(statement of child under 10 years
3 of age involving sexual or physical abuse); **California**, Cal. Evid. Code ' 1360 (West 1995-
4 96)(statement of child under 12 years of age involving child abuse or neglect); **Colorado**,
5 Colo. Rev. Stat. ' 13-25-129(statement of child who is victim of unlawful sexual offense or
6 child abuse); **Connecticut**, Conn. Gen. Stat. Ann. ' 54-86(g) (West 1997)(statement of child
7 under 12 years of age involving sexual abuse); **Delaware**, Del. Code Ann. tit. 11 ' 3513
8 (West 1996)(statement of child under 11 years of age involving sexual or physical abuse);
9 **Florida**, Fla. Stat. Ann. ' 90.803 (West 1996)(statement of child under 11 years of age
10 involving sexual abuse, child abuse, or neglect); **Georgia**, Ga. Code Ann. ' 24-3-16 (West
11 1997)(statement of child under 14 years of age involving sexual contact or physical abuse);
12 **Hawaii**, Haw. Rev. Stat. Rule 804 (West 1997)(statement of child under 16 years of age
13 involving sexual abuse or physical violence); **Idaho**, Idaho Code ' 19-3024 (West
14 1997)(statement of child under 10 years of age involving sexual or physical abuse or other
15 criminal conduct); **Illinois**, Ill. Ann. Stat. ch. 725, & 5/115-10 & ch. 735, & 5/8-2601 (Smith-
16 Hurd 1997)(statement of child under 13 years of age involving child abuse or unlawful
17 sexual act); **Indiana**, Ind. Code Ann. ' ' 35-37-4-6, 35-37-4-8, 31-6-15-2, 31-6-15-3 (West
18 1996)(statement of child under 14 years involving closed circuit television or videotapes);
19 **Iowa**, Iowa Code ' 239.96 (West 1997)(statement of child in proceeding to support a finding
20 that the child is in need of assistance); **Kansas**, Kan. Stat. Ann. ' 60-460 (West
21 1996)(statement of child in criminal actions involving children); **Louisiana**, La. Children's
22 Code Ann. art. 322 (West 1996)(statement of child involving physical or sexual abuse);
23 **Maine**, Me. Rev. Stat. Ann. tit. 14, ' 1205 (West 1996)(statement of child under 16 years of
24 age involving sexual act or sexual conduct); **Maryland**, Md. Ann. Code of 1957 ' 775 (West
25 1996)(statement of child under 12 years of age involving child abuse, rape or sexual offense);
26 **Massachusetts**, Mass. Gen. Laws Ann. ch. 233, ' ' 81-83 (West 1996)(statement of child
27 under 10 years of age involving sexual contact); **Michigan**, Mich. Rules of Court Rule 5.972
28 (West 1997)(statement of child under 10 years of age involving child abuse); **Minnesota**,
29 Minn. Stat. Ann. ' 260.156 (West 1996)(statement of child under 10 years of age involving
30 physical abuse or neglect); **Missouri**, Mo. Ann. Stat. ' 491.075 (Vernon 1996)(statement of
31 child under 12 years of age involving offense under chapter 565, 566, or 568, RSMo);
32 **Nevada**, Nev. Rev. Stat. ' 51.385 (West 1996)(statement of child under 10 years of age
33 involving any act of sexual conduct); **New Hampshire**, N.H. Rev. Stat. ' 516:24-a, Rule 803
34 (West 1995)(statement of child involving sexual abuse or assault); **New Jersey**, N.J. Stat.
35 Rev. Rule 63(33) and Rule 803 (West 1997)(statement of child under 12 years of age
36 involving sexual abuse); **New Mexico**, N.M. Stat. Child Ct. Rule 10-217 & N.M. Stat. Dist.
37 Ct. Rule of Crim. Proc. Rule 5-504 (West 1996)(statement of child under 13 years of age
38 involving sexual abuse and the use of videotaped deposition); **North Dakota**, N.D. Rules of
39 Evid. Rule 803 (West 1992)(statement of child under 12 years of age involving sexual abuse);
40 **Ohio**, Ohio Rev. Rules of Evid. Rule 807 (Baldwin 1997)(statement of child under 12 years
41 of age involving sexual abuse); **Oklahoma**, Okla. Stat. Ann. tit. 12, ' 2803.1 (West
42 1996)(statement of child under 12 years of age involving physical abuse or sexual contact);
43 **Oregon**, Or. Rev. Stat. ' 44.460 (West 1995)(statement of child under 12 years of age

1 involving abuse or sexual conduct); **Pennsylvania**, 42 Pa. Cons. Stat. ' 5984 (West
2 1996)(statement of child involving videotaped deposition); **South Carolina**, S.C. Code Ann.
3 ' 19-1-180 (Law. Co-op. 1996)(statement of child under 12 years of age involving abuse or
4 neglect); **South Dakota**, S.D. Codified Laws Ann. ' 19-16-38 (West 1997)(statement of
5 child under 10 years of age involving sex crime, physical abuse, or neglect); **Tennessee**,
6 Tenn. Rules of Evid. Rule 803 (Michie 1996)(statement of child under 13 years of age
7 involving physical, sexual, or psychological abuse or neglect); **Texas**, Tex. Fam. Code Ann.
8 ' 54.031 & Tex. Crim. Proc. Code Ann. Art. 38.072 (West 1995)(statement of child under
9 12 years of age involving sexual and assaultive offenses); **Utah**, Utah Code Ann. ' 76-5-411
10 (West 1997)(statement of child under 14 years of age involving sexual abuse); **Vermont**, Vt.
11 Rules of Evid. Rule 804(a) (West 1996)(statement of child under 10 years of age involving
12 sexual assault, lewd or lascivious conduct, incest, abuse, neglect, or exploitation); **Virginia**,
13 Va. Code Ann. ' 63.1-248.13:2 (West 1997)(statement of child under 12 years of age
14 involving sexual abuse); **Washington**, Wash. Rev. Code Ann. ' 9A.44.120 (West
15 1996)(statement of child under 10 years of age involving sexual or physical abuse); and
16 **Wisconsin**, Wis. Stat. Ann. ' 908.08 (West 1997)(statement of child involving videotaped
17 statements).

18
19 The following states do not have a specific hearsay exception for statements of
20 children in sexual or physical abuse cases: **Kentucky, Mississippi, Montana, Nebraska,**
21 **New York, North Carolina, Rhode Island, West Virginia and Wyoming.**

1 **Rule 808. [Residual exception]**

2
3 (1) A statement not specifically covered by ~~and of the foregoing exceptions~~ Rule
4 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not
5 excluded by the hearsay rule, if the court determines that:

6 (A) the statement is offered as evidence of a material fact;

7 (B) the statement is more probative on the point for which it is offered
8 than any other evidence ~~which~~ that the proponent can procure through reasonable efforts; and

9 (C) the general purposes of these rules and the interests of justice will best
10 be served by admission of the statement into evidence.

11 (2) But a statement may not be admitted under this exception unless the
12 proponent gives to the adverse party reasonable notice in advance of trial, or during trial if
13 the court excuses pretrial notice on good cause shown, of the nature of any such evidence the
14 proponent intends to introduce at trial.

15
16 **Reporter's Note**

17
18 This Rule 808 combines the recommended abrogated Rules 803(24) and 804(b)(5)
19 named "Other exceptions" and renames the rule "Residual exception." Only minor format
20 and non-substantive changes in the blackletter are recommended and subdivision (2) contains
21 the notice provision adopted for Rule 404(b) and thereby provides the consistency desired
22 by the Drafting Committee in the giving of notice under the Uniform Rules of Evidence.
23 Except for the notice provision, Rule 808 is identical to Rule 807 of the Federal Rules of
24 Evidence which took effect on December 1, 1997 except for the following notice provision:

25
26 But a statement may not be admitted under this exception unless its
27 proponent makes known to the adverse party sufficiently in advance of the
28 trial or hearing to provide the adverse party with a fair opportunity to prepare
29 to meet it, the proponent's intention to offer the statement and the particulars
30 of it, including the name and address of the declarant.

31
32 The following states presently recognize a residual exception as provided in Rules
33 803(24) and 804(b)(5) of the Uniform Rules of Evidence: **Alaska**, Alaska R. Evid. 803(23)

1 and 804(b)(5); **Arizona**, Ariz. R. Evid. 803(24) and 804(b)(5); **Arkansas**, Ark. R. Evid.
2 803(24) and 804(b)(5); **Colorado**, Colo. R. Evid. 803(24) and 804(b)(5); **Hawaii**, Haw. Code
3 Ann. tit.33, " 803(b)(24) and 804(b)(7); **Idaho**, Idaho R. Evid. 803(24) and 804(b)(5); **Iowa**,
4 Iowa R. Evid. 803(24) and 804(b)(5); **Maryland**, Md. R. Evid. 5-803(24) and 5-
5 804(b)(5)(rule expressly applicable only "Under exceptional circumstances"),
6 **Michigan**, Mich. R. Evid. 803(24) and 804(b)(5); **Minnesota**, Minn. R. Evid. 803(24) and
7 804(b)(5); **Mississippi**, Miss. R. Evid. 803(24) and 804(b)(5); **Montana**, Mont. Code Ann.
8 tit. 26, c. 10, Rules 803(24) and 804(b)(5)(authorizing the admission of "[a] statement not
9 specifically covered by any of the foregoing exceptions but having comparable
10 circumstantial guarantees of trustworthiness."); **Nebraska**, Neb. Rev. Stat. Ann. " 27-803(22)
11 and 27-804(2)(e); **New Hampshire**, N.H. R. Evid. 803(24)(omitting notice requirement) and
12 804(b)(6)(including notice requirement); **Nevada**, Nev. Rev. Stat. ' 51-315(authorizing the
13 admission of a statement if it possesses "strong assurances of accuracy" and the declarant is
14 unavailable as a witness); **New Mexico**, N.M. R. Evid. 11-803(X) and 11-804(B)(5); **North**
15 **Carolina**, N.C. Gen. Stat. ' 8C-1, 803(24) and 804(b)(5); **North Dakota**, N.D. R. Evid.
16 803(25) and 804(b)(5); **Oklahoma**, Okla. Stat. tit. 12, " 2803(24) and 2804(B)(5); **Oregon**,
17 Or. Rev. Stat. " 40.460, Rule 803(26) and
18 40.465, Rule 804(3)(f); **Rhode Island**, R.I. R. Evid. 803(24) and 804(b)(5); **South Dakota**,
19 S.D. Codified Laws " 19-16-28, Rule 803(24) and 19-16-35, Rule 804(b)(6); **Utah**, Utah R.
20 Evid. 803(24) and 804(b)(5); **West Virginia**, W. Va. R. Evid. 803(24) and 804(b)(5);
21 **Wisconsin**, Wis. Stat. ' 908.03(24) and 908.04(5); and **Wyoming**, Wyo. R. Evid. 803(24) and
22 804(b)(6).

23
24 The following state recognizes only the residual exception of Uniform Rule 803(24)
25 since 804(b)(5) is the same as Rule 803(24): **Delaware**, Del. R. Evid. 803(24);

26
27 The following states do not recognize a residual exception: **Alabama, California,**
28 **Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana,** (initially
29 recognized the residual exception, in La. Code Evid. art. 804(B)(5), but the statute was
30 repealed by Acts 1995, No. 1300, ' 2); **Maine, Massachusetts, Missouri, New Jersey, New**
31 **York, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia,**
32 **Virgin Islands, and Washington.**

33
34 There are two difficult and recurring issues that arise in both the federal and state
35 jurisdictions in determining the admissibility of statements under the residual exception and
36 which the Drafting Committee may want to address in either proposing the retention or
37 amendment of the residual exception in the proposed Uniform Rule 808. The first arises out
38 of the language of the proposed amended rule "[a] statement not specifically covered by Rule
39 803 or 804" and the second out of the language "having equivalent circumstantial guarantees
40 of trustworthiness."

41
42 As to the first, may a statement which almost, but fails, to meet the requisite
43 foundational requirements of one of the specific exceptions in Uniform Rules 803 or 804(b)
44 be admitted under the residual exception? At the time of the enactment of the Federal Rules

1 of Evidence, congressional concerns were expressed that hearsay statements which failed to
2 meet the foundational requirements for admissibility under a potentially applicable specific
3 exception would nevertheless be admitted under the then two residual exceptions of Rules
4 803(24) and 804(b)(5). See 120 Cong. Rec. H12255-57 (Dec. 18, 1974). At the federal
5 level, congressional concerns have not been found to be unwarranted. See, for example,
6 United States v. Furst, 886 F.2d 558 (3d Cir. 1989), in which the court concluded that "[r]ule
7 803(24) is not limited in availability as to types of evidence not addressed in the other
8 exceptions; . . . [it] is also available when the proponent fails to meet the standards set forth
9 in the other exceptions." More recently, this "near miss" doctrine has been applied by the
10 Ninth Circuit to admit under Rule 803(24) a prior inconsistent statement not under oath
11 which was inadmissible for its substance under Rule 801(d)(1)(A). See United States v.
12 Valdez-Soto, 31 F.3d 1467, 1471 (9th Cir. 1994), in which the court, rejecting the defendants
13 reliance on legislative history, easily dismissed expressed Congressional concern as follows:
14

15 Relying on Rule 803(24)'s legislative history, defendants claim this hearsay
16 exception must be interpreted narrowly. We decline the defendants'
17 invitation to go skipping down the yellowbrick road of legislative history.
18 Rule 803(24) exists to provide courts with flexibility in admitting statements
19 traditionally regarded as hearsay but not falling within any of the
20 conventional exceptions. (Footnotes Omitted)
21

22 See, for a further analysis of federal authorities, Capra, Daniel, Memorandum to Members
23 of the Advisory Committee on the Federal Rules of Evidence, Expanded Use of the Residual
24 Exception 1, 9-12 (November 7, 1996).

25 At the state level, both a restrictive and liberal interpretation has been given to the
26 expanded use of the residual exception. For example, in **Alaska**, in holding that a statement
27 determined to be inadmissible as a statement against interest under Alaska R. Evid.
28 804(b)(3), was not admissible under the residual exception of Rule 804(b)(5). The Court
29 reasoned as follows:
30

31 This residual exception, however, is one of rare application and is not meant
32 to be used as a catch-all for the admission of statements falling just outside
33 the borders of recognized exceptions. Under A.R.E. 804(b)(5) an
34 independent analysis must be undertaken to see if the case involves
35 "exceptional circumstances where the court finds guarantees of
36 trustworthiness equivalent to or exceeding the guarantees reflected in the
37 present exceptions to the hearsay rule."
38

39 See Shakespeare v. State, 827 P.2d 454, 460 (Alaska App. 1992), relying on Brandon v.
40 State, 778 P.2d 221, 227 (Alaska App. 1989). See also, Matter of A.S.W., 834 P.2d 801, 803
41 (Alaska 1992). See further, Schoch's Estate v. Kail, 209 Neb. 812, 311 N.W.2d 903 (1981),
42 stating that "[t]he residual hearsay exceptions are to be used very rarely, and only in
43 exceptional circumstances."
44

45 In contrast, in **Wisconsin** the issue involved the admissibility of police reports which

1 did not meet the foundational requirements for admissibility under the business records
2 exception to the hearsay rule. However, the Supreme Court rejected the defendant's
3 argument "that to admit these reports under the residual exception is to circumvent the
4 requirements of the business records exception." It reasoned, as in two previous cases, "that
5 the drafters did not intend to restrict the use of the residual exception to situations which are
6 completely different from those covered by the specifically enumerated exceptions." All that
7 is required, the Court reasoned, is that the statements have circumstantial guarantees of
8 trustworthiness comparable to the enumerated exceptions. See *Mitchell v. State*, 84 Wis.2d
9 325, 267 N.W.2d 349 (1978).

10
11 Second, whether the statement has "equivalent circumstantial guarantees of
12 trustworthiness" involves a fact-intensive inquiry. Accordingly, it is correspondingly
13 difficult to determine whether a stricter or more liberal standard would facilitate the "growth
14 and development of the law of evidence in the hearsay area, consistently with the broad
15 purposes expressed in Rule 102." See Advisory Committee's Note, 56 F.R.D. 303, 315.

16
17 At the federal level, Professor Capra has identified fifteen "non-dispositive
18 generalizations" which the federal courts have employed in evaluating the trustworthiness
19 of a declarant's statement. These are: (1) the relationship between the declarant and the
20 person to whom the statement was made; (2) the capacity of the declarant at the time of the
21 statement; (3) the personal truthfulness of the declarant;
22 (4) the declarant's careful consideration of the statement;
23 (5) the declarant's recantation or repudiation of the statement after it was made; (6) other
24 statements made by the declarant that are either consistent or inconsistent with the proffered
25 statement; (7) avowal of the declarant through conduct of the declarant's own belief in the
26 truth of the statement; (8) the declarant's personal knowledge of the event or condition
27 described in the statement; (9) impairment of the declarant's memory due to the lapse of time
28 between the event and the statement; (10) the clarity and factual nature of the statement, as
29 opposed to its being vague and ambiguous; (11) the making of the statement under formal,
30 as opposed to informal, circumstances in which the declarant would be more likely to
31 consider the accuracy of the statement; (12) the making of the statement in anticipation of
32 litigation; (13) the cross-examination of the declarant by a person with similar interests to
33 those of the party against whom the statement is offered; (14) the making of the statement
34 voluntarily as opposed to being made under a grant of immunity; and (15) the declarant
35 being a disinterested bystander as opposed to an interested party. See Capra, Daniel,
36 Memorandum to Members of the Advisory Committee on the Federal Rules of Evidence,
37 Expanded Use of the Residual Exception 1, 3-9 (November 7, 1996).

38
39 Among the state jurisdictions, generally speaking, whether the statement has
40 "equivalent circumstantial guarantees of trustworthiness" is also a fact-intensive inquiry. See
41 *People v. Bowers*, 773 P.2d 1093, 1096 (Colo. App. 1988), affirmed, 801 P.2d 511 (1990).
42 In **Nebraska**, the following factors have been identified for determining the trustworthiness
43 of the statement: (1) the personal knowledge of the declarant regarding the subject matter of
44 the statement; (2) the oral or written nature of the statement; (3) the partiality of the declarant
45 and the relationship between the declarant and the witness; (4) the declarant's motive to

1 speak truthfully or untruthfully; (5) the spontaneity of the statement, as opposed to its being
2 made in response to a leading question or questions; (6) the making of the statement under
3 oath; (7) the declarant being subject to cross-examination at the time the statement was
4 made; and (8) the declarant's recantation or repudiation of the statement after it was made.
5 See *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544, 550-551 (1993).

6
7
8 In **South Dakota**, in addition to the foundational requirements set out in the
9 blackletter of the residual exception, the following are deemed important in determining the
10 trustworthiness of the statement: (1) the written or oral nature of the evidence; (2) the
11 character of the statement; (3) the declarant's relationship to the witness; (4) the declarant's
12 motivation in making the statement; and (5) the circumstances under which the declarant
13 made the statement. See *State v. Davi*, 504 N.W.2d 844, 849 (S.D. 1993) and *State v. Luna*,
14 378 N.W.2d 229 (S.D. 1985).

15
16 In the case of the admissibility of a child's out-of-court statement, other factors may
17 be deemed important in evaluating the trustworthiness of the statement. In **Wisconsin**, for
18 example, the attributes of the child making the statement are also deemed important. This
19 would include age, the ability to communicate verbally, to comprehend the statements or
20 questions of others, to know the difference between truth and falsehood, and any fear of
21 punishment, retribution, or other personal interest which might affect the child's motivation
22 to tell the truth. See *State v. Sorenson*, 143 Wis.2d 226, 421 N.W.2d 77, 84-85 (1988) and
23 *State v. Gerald L.C.*, 194 Wis.2d 548, 535 N.W.2d 777, 781 (1995).

24
25 Does the Drafting Committee wish to consider any further restrictions on the
26 admissibility of hearsay statements under Uniform Rule 808 than those that are currently
27 embodied in the rule? Public Comments on the parallel Rule 807 of the Federal Rules of
28 Evidence which took effect on December 1, 1997, applauded the combining of the two
29 residual exceptions into one. At the same time, the Comments called for redrafting the
30 notice requirement "to unify the circuits and promote more flexibility"; criticized the
31 standard in the current federal rule requiring "equivalent guarantees of trustworthiness" to
32 the aggregate of the exceptions of Rules 803 and 804 on the ground that it "is a meaningless
33 standard"; suggested that the wording in the rule should be narrowed to prevent the rule from
34 affording a safe haven for "'near miss' hearsay evidence that does not satisfy traditional
35 hearsay exceptions"; and urged a tightening of the rule in criminal cases due to different
36 standards of admissibility that arguably should prevail in civil and criminal cases and avoid
37 the confusion concerning the standards of trustworthiness for evidentiary and confrontation
38 clause purposes, particularly in view of flexibility now accorded prosecutors in admitting
39 hearsay under the new forfeiture exception of Rule 804(b)(6).

40
41 Earlier, Professor Myrna S. Raeder, suggested the following alternative limitations
42 to narrow the scope of the residual exceptions:

43
44 The most radical revision would be to prohibit the catch-alls from being used
45 against a criminal defendant, a result that offers no flexibility in truly

1 exceptional cases. A less dramatic revision would prohibit the catch-alls
2 from being used against a criminal defendant when the declarant does not
3 testify. This would eliminate confrontation conflicts, but would not offer any
4 relief to prosecutors in exceptional circumstances.
5

6 A more realistic proposal that would both narrow the use of catch-alls
7 and provide flexibility is to require courts to make specific findings that the
8 circumstances justifying the introduction of the hearsay are exceptional and
9 that the type of hearsay that is being admitted is also exceptional. This would
10 carry out Congress' original intent to permit expansion in the evidentiary field
11 without making the hearsay rules purely discretionary. See Raeder, Myrna
12 S., *Confronting the Catch-Alls*, *Criminal Justice* 31 (Summer, 1991).
13

14 See also, Raeder, Myrna S., *The Effect of Catchalls on Criminal Defendants: Little Red*
15 *Riding Hood Meets the Hearsay Wolf and Is Devoured*, *25 Loyola of Los Angeles Law*
16 *Review* 925 (1992), for drafting alternatives to the Other Exceptions.
17
18
19

1 **Article IX**

2
3 **AUTHENTICATION AND IDENTIFICATION**

4
5
6
7 **Rule 901. [Requirement of Authentication or Identification].**

8 (a) **General provision.** The requirement of authentication or identification as
9 a condition precedent to admissibility is satisfied by evidence sufficient to support a finding
10 that the matter in question is what its proponent claims.
11

12 **Reporter's Note**

13 There are no proposals at the present time for amending Rule 901(a).

14
15 The Evidence Project does not recommend any amendments to Article IX of the
16 Federal Rules of Evidence with the following explanation:
17

18
19
20 No revisions were proposed for Article IX. While it was suggested
21 that the common law reply doctrine be incorporated in the means of
22 authentication explicitly delineated in Current Rule 901(b), that proposal was
23 rejected. Subsection (b) delineates only "illustrations" of acceptable means
24 of authentication, and subsection (b)(4) permits to [sic] consideration of
25 "appearance, contents, substance, internal patterns, or other distinctive
26 characteristics, taken in conjunction with the circumstances"--the general
27 equivalent of the common law reply doctrine.
28

29 See Rice, Paul R., *The Evidence Project, Proposed Revisions to the Federal Rules of*
30 *Evidence*, 171 F.R.D. 330, 370 (1997).

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(3) Comparison by trier or expert witness. Comparison by the trier of fact or
by expert witnesses with specimens which have been authenticated.

Reporter's Notes

There are no proposals at the present time for amending Rule 901(b)(3).

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6

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

Reporter's Note

There are no proposals at the present time for amending Rule 901(b)(9).

1 **Rule 902. [Self-authentication].**
2

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

5 **(1) Domestic public documents under seal.** A document bearing a seal
6 purporting to be that of the United States, or of any state, district, commonwealth, territory,
7 or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific
8 Islands, or of a political subdivision, department, officer, or agency thereof, and a signature
9 purporting to be an attestation or execution.

10 **Reporter's Notes**
11

12 There are no proposals at the present time for amending Rule 902(1).
13

1 **(11) Certified domestic records of regularly conducted activity.**

2 (a) The original or a duplicate of a domestic record of regularly conducted activity,
3 ~~within the scope of which would be admissible under Rule 803(6), and~~ which the custodian
4 thereof or another qualified individual person certifies under oath:

5 ~~—— (i) (1) was made, at or near the time of the occurrence of the matters set forth, by, (or~~
6 ~~from information transmitted by), a person with knowledge of those matters;~~

7 ~~—— (ii) (2) is~~ was kept in the course of the regularly conducted activity; and

8 ~~—— (iii) (3) was made by the regularly conducted activity as a regular practice, unless the~~
9 ~~sources of information or the method or circumstances of preparation indicate lack of~~
10 ~~trustworthiness, but a record so certified is not self-authenticating under this subsection~~
11 ~~unless the proponent makes an intention to offer it known to the adverse party and makes~~
12 ~~it available for inspection sufficiently in advance of its offer in evidence to provide the~~
13 ~~adverse party with a fair opportunity to to challenge it.~~

14 (b) A party intending to offer a record in evidence under this paragraph must provide
15 written notice of that intention to all adverse parties, and must make the record available for
16 inspection sufficiently in advance of its offer in evidence to provide an adverse party with
17 a fair opportunity to challenge the record. As used in this subsection, "certifies" means, with
18 respect to a domestic record, a written declaration under oath subject to the penalty of perjury
19 and, with respect to a foreign record, a written declaration signed in a foreign country which,
20 if falsely made, would subject the maker to criminal penalty under the laws of that country.
21 ~~The certificate relating to a foreign record must be accompanied by a final certification as~~
22 ~~to the genuineness of the signature and official position (i) of the individual executing the~~

1 ~~certificate or (ii) of any foreign official who certifies the genuineness of signature and official~~
2 ~~position of the executing individual or is the last in a chain of certificates that collectively~~
3 ~~certify the genuineness of signature and official position of the executing official. A final~~
4 ~~certification must be made by a secretary of embassy or legation, consul general, consul, vice~~
5 ~~consul, or consular agent of the United States, or a diplomatic or consular official of the~~
6 ~~foreign country who is assigned or accredited to the United States.~~

7 8 9 **Reporter's Note**

10
11 The substance of Uniform Rule 902(11) was added to the Uniform Rules of Evidence
12 in 1986. The **Comment to 1986 Amendment** reads as follows:

13
14 Subsection 11 is new and embodies a revised version of the recently
15 enacted federal statute dealing with foreign records of regularly conducted
16 activity. 18 U.S.C. ' 3505. Under the federal statute, authentication by
17 certification is limited to foreign business records and to use in criminal
18 proceedings. This subsection broadens the federal provision so that it
19 includes domestic as well as foreign records and is applicable in civil as well
20 as criminal cases. Domestic records are presumably no less trustworthy and
21 the certification of such records can more easily be challenged if the
22 opponent of the evidence chooses to do so. As to the federal statute's
23 limitation to criminal matters, ordinarily the rules are more strictly applied
24 in such cases, and the rationale of trustworthiness is equally applicable in
25 civil matters. Moreover, the absence of confrontation concerns in civil
26 actions militates in favor of extending the rule of the civil side as well.

27
28 The rule requires that the certified record be made available for
29 inspection by the adverse party sufficiently in advance of the offer to permit
30 the opponent a fair opportunity to challenge it. A fair opportunity to
31 challenge the offer may require that the proponent furnish the opponent with
32 a copy of the record in advance of its introduction and that the opponent have
33 an opportunity to examine, not only the record offered, but any other records
34 or documents from which the offered record was procured or to which the
35 offered record relates. That is a matter not addressed by the rule but left to
36 the discretion of the trial judge.

37
38 Except for changes in the formatting of existing Uniform Rule 902(11), the proposed

1 amendments to the rule are based upon the Proposed Rule 902(11) of the Federal Rules of
2 Evidence which was approved by the Advisory Committee at its meeting on October 20-21,
3 1997 and recently approved by the Standing Committee of the Judicial Conference of the
4 United States for publication for official comment. A uniform rule of evidence providing
5 for satisfying the foundational requirements for self-authentication of business records
6 through certification would appear to be compatible with a federal rule on the subject. The
7 Proposed Advisory Committee Note to Rule 902(11) reads as follows:
8

9 The Rule provides a means for parties to authenticate domestic
10 records of regularly conducted activity other than through the testimony of
11 a foundation witness. See the proposed amendment to Rule 803(6). The
12 notice requirement is intended to provide the opponent of the evidence with
13 a full opportunity to test the adequacy of the foundation set forth in the
14 certification. Testimony from a foundation witness is required if a genuine
15 question is raised as to either the trustworthiness or the authenticity of the
16 record. Cf. Rule 1003 [providing that "[a] duplicate is admissible to the same
17 extent as the original unless (1) a genuine question is raised as to the
18 authenticity of the original or (2) in the circumstances it would be unfair to
19 admit the duplicate in lieu of the original"].
20

21 Uniform Rule 902(11), as in the case of federal Rule 902(11), has been amended to
22 apply only to domestic records of regularly conducted activity in both civil and criminal
23 cases. A separate provision for the authentication of foreign records of regularly conducted
24 activity through certification is set forth in Uniform Rules 902(12), *infra*, to provide for
25 uniformity with the Federal Rules of Evidence.
26

27 Finally, it should be noted that the notice requirement in Uniform Rule 902(11)(b)
28 differs from the other notice requirements set forth in the Uniform Rules of Evidence. See,
29 for example, Uniform Rule 404(b) and the **Reporter's Note** to the effect that the Drafting
30 Committee recommends that the notice requirements throughout the Uniform Rules of
31 Evidence be uniform. Should Uniform Rule 902(11)(b) be redrafted to conform to the form
32 of notice provisions previously approved by the Drafting Committee? Or, does the Drafting
33 Committee want to revisit the earlier approved form of notice provisions to make them
34 stricter as in the case of Uniform Rule 902(11)(b)?

1 a full opportunity to test the adequacy of the foundation set forth in the
2 certification. Testimony from a foundation witness is required if a genuine
3 question is raised as to either the trustworthiness or the authenticity of the
4 record. Cf. Rule 1003 [providing that "[a] duplicate is admissible to the same
5 extent as the original unless (1) a genuine question is raised as to the
6 authenticity of the original or (2) in the circumstances it would be unfair to
7 admit the duplicate in lieu of the original"].

8
9 The Rule applies only to civil cases. Certification of foreign records
10 of regularly conducted activity in criminal cases os currently provided for by
11 statute. See 18 U.S.C. ' 3505.

12
13 However, unlike Federal Rule 902(12), this Uniform Rule applies to both civil and
14 criminal cases since 18 U.S.C. ' 3505 is inapplicable in the several state jurisdictions.

15
16 As to the provision for notice in Uniform Rule 902(12), see the **Reporter's Note** to
17 Uniform Rule 902(11).

1 **Rule 903. [Subscribing Witness= Testimony Unnecessary].**

2
3 The testimony of a subscribing witness is not necessary to authenticate a ~~writing~~
4 record unless required by the laws of the jurisdiction whose laws govern the validity of the
5 ~~writing~~ record.

6 **Reporter=s Note**

7
8 There are no proposals at the present time for amending Rule 903.