

TENTATIVE DRAFT #2  
ARTICLE VIII-IX

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FOR DISCUSSION ONLY

**REVISION OF UNIFORM RULES OF  
EVIDENCE ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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**FEBRUARY 20-22, 1998**

**REVISION OF UNIFORM RULES OF  
EVIDENCE ACT**

With Comments

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1 Article VIII

2  
3 HEARSAY

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

The Comment to the 1986 Amendment reads:

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

The Amendments read:

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

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

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 Deutch 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 (MO. 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).  
41

1       **Rule 802. [Hearsay Rule].**

2  
3               Hearsay is not admissible except as provided by law or by these rules.

4                               **Reporter's Note**

5               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).

**(2) Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

## Reporter's Note

There are no proposals at the present time for amending Rule 803(2).

The Evidence Project proposes revising Rule 803(2) of the Federal Rules of Evidence as follows:

**(2) Excited utterance.** A statement relating to a startling event or condition made while the declarant was ~~under~~ overwhelmed by the stress of excitement caused by the event or condition.

See Rice, Paul R., *The Evidence Project, Proposed Revisions to the Federal Rules of Evidence*, 171 F.R.D. 330, 628 (1997).

**(3) Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

## Reporter's Note

There are no proposals at the present time for amending Rule 803(3).

The Evidence Project proposes substantial revisions in Rule 803(3) of the Federal Rules of Evidence. See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of Evidence, 171 F.R.D. 330, 62O (1997) and the **Reporter's Note** to Rule 803(1) for the text of the proposed revision of the exception dealing with statements of present mental state.

The Evidence Project also proposes the following revision of Rule 803(3) of the Federal Rules of Evidence by incorporating the provisions of Rule 801(a)(2) in Rule 803(3) as follows:

**(3) — ~~Then existing mental, emotional, or physical condition.~~**  
 [Moved to Revised Rule 803(1) and 804(3)] **Admission by party-opponent.** [Moved from Current Rule 801(d)(2)] The A statement that is offered against a party and is a(n)

~~(A)~~ **(a) Personal admission.** The party's own statement, in either an individual or a representative capacity. ~~or~~

~~(B)~~ **(b) Adoptive admission.** A statement of which the party has manifested an adoption or belief in its truth, ~~or~~

~~(C) (c) Vicarious admission by present agent.~~ ~~(C)~~ a statement by a person authorized by the party to make a statement concerning the subject, or ~~(D)~~ A a statement by the party's present agent concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

~~(D)~~ **(d) Vicarious admission by former agent.** A statement by the party's former agent concerning a matter which was within the scope of the agency or employment,



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)

**(4) Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

## Reporter's Note

There are no proposals at the present time for amending Rule 803(4).

The Evidence Project proposes revising Rule 803(4) of the Federal Rules of Evidence as follows:

**(4) Statements for purposes of medical diagnosis or treatment.**  
Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. Statements made for the purpose of counseling are not admissible under this rule.

See Rice, Paul R., *The Evidence Project, Proposed Revisions to the Federal Rules of Evidence*, 171 F.R.D. 330, 638 (1997).

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

## Reporter's Note

It is proposed that Rule 803(5) be amended to delete the words "memorandum or" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" be defined by amending Rule 1001 of the Uniform Rules of Evidence, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, *supra*.

There are no other proposals at the present time for amending Rule 803(5).

The Evidence Project proposes a substantial revision in Rule 803(5) of the Federal Rules of Evidence and moving and renumbering the rule as Rule 805(3) as follows:

**(3) Recorded recollection.** [Moved from Current Rule 803(5)] A memorandum or record concerning a matter which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been reflecting a witness' knowledge of an event, made or adopted by the witness ~~when the matter was fresh in the witness' memory~~ and to reflect that knowledge correctly soon after the event's occurrence under conditions of apparent sincerity. If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.

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

(6) **Records of regularly conducted business activity.** A memorandum, ~~report, record, or data compilation,~~ in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the ~~memorandum, report, record, or data compilation,~~ all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or with a statute providing for certification, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness. As used in this paragraph, "business@ includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

## Reporter's Note

First, it is proposed that Rule 803(6) be amended to delete the words "memorandum," "report" and "data compilation" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the Uniform Rules of Evidence, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, *supra*.

Second, it is proposed that Rule 803(6) be amended to provide for satisfying through certification the foundational requirements for the admissibility of a business record as an alternative to the expense and inconvenience of producing a time-consuming foundation witness. The language of the amendment is drawn from a proposed amendment to Rule 803(6) of the Federal Rules of Evidence which was adopted by the Advisory Committee at its meeting on October 20-21, 1997 and recently approved by the Standing Committee of the Judicial Conference of the United States for publication for official comment. A uniform rule of evidence providing for satisfying the foundational requirements for admissibility of business records would appear to be compatible with a federal rule on the subject. It is also recommended that Uniform Rule 902 be amended to

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).

**(7) Absence of entry in records kept in accordance with paragraph (6).**

Evidence that a matter is not included in the ~~memoranda, reports, records, or data compilations~~, in any form, kept in accordance with paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a ~~memorandum, report, record, or data compilation~~ was regularly made and preserved, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

## Reporter's Note

It is proposed that Rule 803(7) be amended to delete the words "memoranda," "reports," "data compilations," and "data compilation" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the Uniform Rules of Evidence, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, *supra*.

There are no other proposals at the present time for amending Rule 803(6).

The Evidence Project proposes including Rule 803(7), dealing with the absence of business records and entries, as a subdivision (b) of Rule 803(6) of the Federal Rules of Evidence, and revised as follows:

**(7) (b) Absence of entry in records kept in accordance with the provisions of paragraph (6) (a).** [Moved from Current Rule 803(7)]  
Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6)(a), to prove the nonoccurrence or nonexistence of the a matter, if the matter was of a kind which an an memorandum, report, record or data compilation entry was regularly made and preserved, unless the sources of the information or other circumstances indicate lack of trustworthiness.

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



(8) **Public records and reports.** Unless the sources of information or other circumstances indicate lack of trustworthiness, records, ~~reports, statements, or data compilations~~ in any form, of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (i) (A) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (ii) (B) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (iii) (C) factual findings offered by the government in criminal cases; and (iv) (D) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

## Reporter's Note

First, it is proposed that Rule 803(8) be revised to make the format of the rule consistent with the format employed in Tentative Draft #2 of Articles I through VI.

Second, it is proposed that Rule 803(8) be amended to delete the words "reports," "statements" and "data compilations" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the Uniform Rules of Evidence, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, *supra*.

There are no other proposals at the present time for amending Rule 803(8).

The Evidence Project proposes revisions in Rule 803(8) of the Federal Rules of

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).

**(9) Records of vital statistics.** ~~Records or data compilations, in any form, of~~  
births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office  
pursuant to requirements of law.

## Reporter's Note

It is proposed that Rule 803(9) be amended to delete the words "or data compilations, in any form" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the Uniform Rules of Evidence, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, *supra*.

There are no other proposals at the present time for amending Rule 803(9).

**(10) Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, or statement, ~~or data compilation, in any form,~~ was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, ~~or data compilation,~~ or entry.

## Reporter's Note

It is proposed that Rule 803(10) be amended to delete the words "report," "statement," or "data compilation, in any form" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the Uniform Rules of Evidence, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, *supra*.

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

See the **Reporter's Note** to Rule 803(8) for the discussion of The Evidence Project's proposal to locate Rule 803(10) as a subparagraph to Rule 803(8) of the Federal Rules of Evidence.

1                   **(11) Records of religious organizations.** Statements of births, marriages,  
2 divorces, death, legitimacy, ancestry, relationship by blood or marriage, or other similar  
3 facts of personal or family history, contained in a regularly kept record of a religious  
4 organization.

5                   **Reporter's Note**

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

1           **(12) Marriage, baptismal, and similar records.**~~certificates.~~ Statements of  
2 fact contained in a certificate, or record thereof, that the maker performed a marriage or  
3 other ceremony or administered a sacrament, made by a clergyman, public official, or  
4 other person authorized by the rules or practices of a religious organization or by law to  
5 perform the act certified, and purporting to have been issued at the time of the act or  
6 within a reasonable time thereafter.

7  
8                                   **Reporter's Note**  
9

10           It is proposed that the word "records" be substituted for the word "certificates" in  
11 the heading of Rule 803(12) and that the language, "or record thereof" be added in the  
12 body of the rule to conform the rule to the recommendation of the Task Force on  
13 Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of  
14 Commerce in Cyberspace, Section on Business Law of the American Bar Association. It  
15 is proposed that "record" in the amended rule be defined by amending Rule 1001 of the  
16 Uniform Rules of Evidence, to embrace the definition of "record" as derived from ' 5-  
17 102(a)(14) of the Uniform Commercial Code and thereby carry forward the established  
18 policy of the Conference to accommodate the admissibility of certificates where they are  
19 preserved in a form other than a writing. See, in this connection, the Reporter's Note to  
20 Rule 106 of the Uniform Rules of Evidence, *supra*.  
21

22           There are no other proposals at the present time for amending Rule 803(12).

1                   **(13) Family records.** Statements of fact concerning personal or family history  
2 contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on  
3 family portraits, engravings on urns, crypts, or tombstones, or the like.

4  
5                   **Reporter's Note**

6  
7                   There are no proposals at the present time for amending Rule 803(13).

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

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

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



1           **(15) Statements in ~~documents~~ records affecting an interest in property.** A  
2 statement contained in a ~~document~~ record purporting to establish or affect an interest in  
3 property if the matter stated was relevant to the purpose of the ~~document~~ record, unless  
4 dealing with the property since the ~~document~~ record was made have been inconsistent  
5 with the truth of the statement or the purport of the ~~document~~ record.

6  
7                                   **Reporter's Note**  
8

9           It is proposed that Rule 803(15) be amended to delete the words "documents," and  
10 "document" and, in lieu thereof substitute the word "record" to conform the rule to the  
11 recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic  
12 Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of  
13 the American Bar Association. It is proposed that "record" in the amended rule be defined  
14 by amending Rule 1001 of the Uniform Rules of Evidence, to embrace the definition of  
15 "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry  
16 forward the established policy of the Conference to accommodate the use of electronic  
17 evidence in business transactions. See, in this connection, the Reporter's Note to Rule 106  
18 of the Uniform Rules of Evidence, *supra*.

19  
20           There are no other proposals at the present time for amending Rule 803(15).

1           **(16) Statements in ancient ~~documents~~ records.** Statements in a ~~document~~ record  
2 in existence twenty years or more the authenticity of which is established.

3  
4                           **Reporter's Note**

5  
6           It is proposed that Rule 803(16) be amended to delete the words "documents," and  
7 "document" and add the word "record" to conform the rule to the recommendation of the  
8 Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on  
9 Law of Commerce in Cyberspace, Section on Business Law of the American Bar  
10 Association. It is proposed that "record" in the amended rule be defined by amending Rule  
11 1001 of the Uniform Rules of Evidence, to embrace the definition of "record" as derived from  
12 ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established  
13 policy of the Conference to accommodate the use of electronic evidence in business  
14 transactions. See, in this connection, the Reporter's Note to Rule 106 of the Uniform Rules  
15 of Evidence, *supra*.

16  
17           There are no other proposals at the present time for amending Rule 803(16).

**(17) Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published or publicly recorded compilations, generally used and relied upon by the public or by persons in particular occupations.

## Reporter's Note

It is proposed that Rule 803(17) be amended to add the words "or publicly recorded" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the Uniform Rules of Evidence, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, *supra*.

There are no other proposals at the present time for amending Rule 803(17).

**(18) Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

## Reporter's Note

There are no proposals at the present time for amending Rule 803(18).

1           **(19) Reputation concerning personal or family history.** Reputation among  
2 members of an individual's family by blood, adoption, or marriage, or among the individual's  
3 associates, or in the community, concerning the individual's birth, adoption, marriage,  
4 divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other  
5 similar fact of the individual's personal or family history.

6  
7                           **Reporter's Note**

8           There are no proposals at the present time for amending Rule 803(19).  
9

**(20) Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

## Reporter's Note

There are no proposals at the present time for amending Rule 803(20).

1           **(21) Reputation as to character.** Reputation of an individual's character among  
2 the individual's associates or in the community.

3  
4                           **Reporter's Note**

5           There are no other proposals at the present time for amending Rule 803(21).  
6

7  
8           The Evidence Project would delete Rule 803(21) of the Federal Rules of Evidence  
9 due to its eliminating reeputation as a method of proof of the character of a party or witness  
10 in its Revised Rules 404 and 608. See Rice, Paul R., The Evidence Project, Proposed  
11 Revisions to the Federal Rules of Evidence, 171 F.R.D. 330, 656 (1997).

**(22) Judgment of previous conviction.** Evidence of a final judgment, [entered after a trial or upon a plea of guilty,] adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

## Reporter's Note

There are no proposals at the present time for amending Rule 803(22).

The Evidence Project proposes substantial revisions in Rule 803(22) of the Federal Rules of Evidence as follows:

~~(22) (20) Judgment of previous conviction: Final judgment.~~ Evidence of a final judgment entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, offered to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of Evidence, 171 F.R.D. 330, 656 (1997).



(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).

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

~~As amended 1986.~~

### **Reporter's Note**

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

The Evidence Project would also delete Rule 803(24) but retain, with substantial revisions, Rule 804(b)(5) of the Federal Rules of Evidence reasoning that the residual exception is only appropriate where the declarant is unavailable as a witness. See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of Evidence, 171 F.R.D. 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  
23  
24 The proposed amendments eliminate the gender-specific language in the existing rule  
25 without any change in substance.

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

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.

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

**(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

## Reporter's Note

There are no proposals at the present time for amending Rule 804(b)(1).

The Evidence Project recommends revising Rule 804(b)(1) of the Federal Rules of Evidence, as follows:

**(1) Former testimony.** Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest was previously offered, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of Evidence, 171 F.R.D. 330, 659-662 (1997).

**(2) Statement under belief of impending death.** A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

## Reporter's Note

There are no proposals at the present time for amending Rule 804(b)(1).

The Evidence Project recommends revising Rule 804(b)(2) of the Federal Rules of Evidence, as follows:

**(2) Statement under belief of impending death.** ~~In a prosecution for homicide or in a civil action or proceeding, a~~ A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

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

(3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject ~~him~~~~[or her]~~ the declarant to civil or criminal liability or to render invalid a claim by ~~him~~~~[or her]~~ the declarant against another or to make ~~him~~ the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in ~~his~~~~[or her]~~ the declarant's position would not have made the statement unless ~~he~~~~[or she]~~ the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both ~~himself~~~~[or herself]~~ the codefendant or other person and the accused, is not within this exception.

## Reporter's Note

The proposed amendments to Rule 804(b)(3) eliminate the gender-specific language in the existing rule without any change in substance.

There are no other proposals at the present time for amending Rule 804(b)(3). However, the Drafting Committee may wish to consider the impact of the Supreme Court's interpretation of Rule 804(b)(3) of the Federal Rules of Evidence in *Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994), the impact it may have on the blackletter of the last sentence of the current Uniform Rule 804(b)(3) and whether further revision of Rule 803(b)(3) is indicated as a result of this decision. As observed elsewhere,

In *Williamson v. United States*, the Court held that "the most faithful reading of Rule 803(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." It may be assumed, the Court reasoned, "that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else." Accordingly, the Court concluded that a determination of whether the statements in the declarant's confession are "truly self-inculpatory" requires a fact intensive inquiry of all the circumstances surrounding the criminal activity and the making of the statement. (Footnotes Omitted)

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*.



**(4) Statement of personal or family history.** (i) (a) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (ii) (b) a statement concerning the foregoing matters and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

## Reporter's Note

The Comment to the 1986 Amendment, in its relevant part, reads as follows:

In the jurisdictions that have adopted the Uniform Parentage Act, the word "parentage" should be substituted for the word "legitimacy" in [Rule] . . . 804(b)(4)(i).

It is recommended that Rule 804(b)(4) be amended to conform the rule to the format followed throughout in the amendments to the Uniform Rules of Evidence.

There are no other proposals at the present time for amending Rule 804(b)(4).

**(5) Statement of recent perception.** In a civil action or proceeding, a statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.

## Reporter's Note

This exception dealing with statements of recent perception was added to the Uniform Rules of Evidence in 1986 and was based upon a comparable Federal Rule of Evidence which the United States Supreme Court had recommended for adoption, but which was rejected by Congress. The Comment to Rule 804(b)(5) reads as follows:

Paragraph (b)(5) may be included by states that approve the recommendations of the U.S. Supreme Court Advisory Committee. See Advisory Committee notes.

There are no proposals at the present time for amending renumbered Rule 804(b)(5).

Does the Drafting Committee wish to amend or retain this exception in the current revision of the Uniform Rules of Evidence? It appears that to date only three states have adopted this exception. **Wyoming** has adopted the black letter of Uniform Rule 803(5). **Oregon** and **Wisconsin**, with modifications, have also adopted this exception.

Oregon's exception provides as follows:

(e) A statement made at or near the time of the transaction by a person in a position to know the facts stated therein, acting in the person's professional capacity and in the ordinary course of professional conduct.

See Or. Rev. Stat. ' 40.465, Rule 804(3)(e). In Wisconsin, the introductory language "In a civil action or proceeding . . . ." is omitted. See Wis. Stat. ' 908.04(b)(5).

What is the relationship between this exception and the present sense impression exception of Uniform Rule 803(1)?

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  
24  
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*.

**(5) Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

## Reporter's Note

The rationale for this proposed rule, which is identical to Rule 804(b)(6) of the Federal Rules of Evidence, which became effective December 1, 1997, is set forth in the Advisory Committee's Note to the rule as follows:

Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), on remand, 561 F. Supp. 1114 (E.D. N.Y.), *aff'd*, 722 F.2d 13 (2d Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

Every circuit that has resolved the question has recognized the principle of waiver by misconduct, although the tests for determining whether there is a waiver have varied. See, e.g., *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992); *United States v. Potamitis*, 739 F.2d 784, 789 (2d Cir.), cert. denied, 469 U.S. 918 (1984); *Steele v. Taylor*, 684 F.2d 1193, 1199 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980). *United States v. Carlson*, 547 F.2d 1346, 1358-59 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977). The foregoing cases apply a preponderance of the evidence standard. *Contra*, *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir.)(clear and convincing standard), cert. denied, 459 U.S. 825 (1982). The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.

Public Comments on Rule 804(b)(6) of the Federal Rules of Evidence ranged from outright opposition to the adoption of the rule, to concerns relating to vagueness in the wording of the exception, to applying a "preponderance of evidence" standard in lieu of the more stringent "clear and convincing evidence" standard, and to the absence of an advance notice requirement for invoking the exception. See West Group, Federal Rules of Evidence 179-180 (1997-98 Edition). In response, the title of the rule was changed from "Waiver by misconduct" to "Forfeiture by wrongdoing" as in line 1 and the word "who" was changed to "that" as in line 2 to indicate that the rule is potentially applicable against the government. No other changes were made in the rule as enacted.

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.

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

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

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

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

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

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

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

—————(vi) (6) the individual conducting the interview of the minor is available at trial for examination or cross-examination by any party; and ~~(vii)~~ 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. ' 12.40.110 (West 1996)(statement of child under 10 years of age involving sexual assault or  
43 sexual abuse of minor); **Arizona**, Ariz. Rev. Stat. Ann. ' 13-1416 (West 1996)(statement of  
44

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

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## AUTHENTICATION AND IDENTIFICATION

**Rule 901. [Requirement of Authentication or Identification].**

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

## Reporter's Note

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

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

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

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



1           **(b) Illustrations.** By way of illustration only, and not by way of limitation, the  
2 following are examples of authentication or identification conforming with the requirements  
3 of this rule:

4           **(1) Testimony of witness with knowledge.** Testimony of a witness with  
5 knowledge that a matter is what it is claimed to be.

6  
7                                   **Reporter's Notes**

8  
9           There are no proposals at the present time for amending Rule 901(b)(1).

1           **(2) Nonexpert opinion on handwriting.** Nonexpert opinion as to the  
2 genuineness of handwriting, based upon familiarity not acquired for purposes of the  
3 litigation.

4  
5                           **Reporter's Notes**

6  
7           There are no proposals at the present time for amending Rule 901(b)(2).

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

3  
4                   **Reporter's Notes**

5  
6                   There are no proposals at the present time for amending Rule 901(b)(3).

1                   **(4) Distinctive characteristics and the like.** Appearance, contents, substance,  
2 internal patterns, or other distinctive characteristics, taken in conjunction with  
3 circumstances.

4  
5                   **Reporter's Notes**

6  
7                   There are no proposals at the present time for amending Rule 901(b)(4).

1                   **(5) Voice identification.** Identification of a voice, whether heard firsthand or  
2 through mechanical or electronic transmission or recording, by opinion based upon hearing  
3 the voice at any time under circumstances connecting it with the alleged speaker.

4  
5                   **Reporter's Note**

6  
7                   There are no proposals at the present time for amending Rule 901(b)(5).  
8

**(6) Telephone conversations.** Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

## Reporter's Note

There are no proposals at the present time for amending Rule 901(b)(6).

(7) **Public records or reports.** Evidence that a public record writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

## Reporter's Notes

It is proposed that Rule 901(b)(7) be amended to add the words "public record" and delete the words "writing authorized by law to be recorded or filed and in fact recorded or filed in a public office" and "report, statement, or data compilation, in any form" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the Uniform Rules of Evidence, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, *supra*.

There are no other proposals at the present time for amending Rule 803(16).

(8) **Ancient records. ~~documents or data compilation~~.** Evidence that a record ~~document or data compilation~~, in any form, (i) (A) is in such condition as to create no suspicion concerning its authenticity, (ii) (B) was in a place where it, if authentic, would likely be, and (iii) (C) has been in existence 20 years or more at the time it is offered.

## Reporter's Notes

It is proposed that Rule 901(b)(8) be amended to add the word "record" and delete the words "document or data compilation, in any form" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the Uniform Rules of Evidence, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, *supra*.

It is also proposed that the subdivisions be recast to conform the rule to the format generally followed in the Uniform Rules of Evidence.

There are no other proposals at the present time for amending Rule 901(b)(8).



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

3  
4                                   **Reporter's Note**

5  
6                   There are no proposals at the present time for amending Rule 901(b)(9).

**(10) Methods provided by statute or rule.** Any method or authentication or identification provided by [the Supreme Court of this State or by] a statute or as provided in the Constitution of this State.

## Reporter's Note

There are no proposals at the present time for amending Rule 901(b)(10).

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

**(2) Domestic public documents not under seal.** A document purporting to bear a signature in the official capacity of an officer or employee of any entity designated in paragraph (1), having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

## Reporter's Notes

There are no proposals at the present time for amending Rule 902(2).

(3) **Foreign public documents.** A document purporting to be executed or attested in the official capacity of an individual authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the executing or attesting individual, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may for good cause shown order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

## Reporter's Notes

There are no proposals at the present time for amending Rule 902(3).

1           **(4) Certified copies of public records.** A copy of an official record or report  
2 or entry therein, or of a document authorized by law to be recorded or filed and actually  
3 recorded or filed in a public office, including data compilations in any form, certified as  
4 correct by the custodian or other person authorized to make the certification, by certificate  
5 complying with paragraph (1), (2), or (3) or complying with any law of the United States  
6 or of this State.

7  
8                           **Reporter's Notes**

9  
10           There are no proposals at the present time for amending Rule 902(4).

**(5) Official publications.** Books, pamphlets, or other publications, or other publicly issued records, in the form of a writing or other record, if in a form indicative of the genuineness of such a record, issued by public authority.

## Reporter's Notes

It is proposed that Rule 902(5) be amended to delete the words "or other" and add the words "or other publicly issued records, in the form of a writing or other record, if in a form indicative of the genuineness of such a record" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. These changes will reflect official publications or reports in non-written formats. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the Uniform Rules of Evidence, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, *supra*.

There are no other proposals at the present time for amending Rule 902(5).

1           **(6) Newspapers and periodicals.** Publicly distributed ~~Printed~~ material  
2           purporting to be newspapers or periodicals.

3  
4                                   **Reporter's Notes**

5  
6           It is proposed that Rule 902(6) be amended to add the words "Publicly distributed"  
7           and delete the word "printed" to conform the rule to the recommendations of the Task Force  
8           on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of  
9           Commerce in Cyberspace, Section on Business Law of the American Bar Association. These  
10          changes will reflect publicly distributed material in non-written formats. It is proposed that  
11          "record" in the amended rule be defined by amending Rule 1001 of the Uniform Rules of  
12          Evidence, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform  
13          Commercial Code and thereby carry forward the established policy of the Conference to  
14          accommodate the use of electronic evidence in business transactions. See, in this connection,  
15          the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, *supra*.

16  
17          There are no other proposals at the present time for amending Rule 902(6).



(7) **Trade inscriptions and the like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

## Reporter's Note

There are no proposals at the present time for amending Rule 902(7).

(8) **Acknowledged documents records.** Documents Records accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

## Reporter's Note

It is proposed that Rule 902(8) be amended to delete the words "documents" and add the words "records" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. These changes will reflect publicly distributed material in non-written formats. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the Uniform Rules of Evidence, to embrace the definition of "record" as derived from '5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, *supra*.

There are no other proposals at the present time for amending Rule 902(8).

(9) **Commercial paper and related ~~documents~~ records.** Commercial paper, signatures thereon, and ~~documents~~ records relating thereto or having the same legal effect as commercial paper to the extent provided by general commercial law.

## Reporter's Note

It is proposed that Rule 902(9) be amended by deleting the word "documents" and adding the words "records" and "or having the same legal effect as commercial paper" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. These changes will facilitate the authentication of commercial paper in non-written formats. It is proposed that "record" in the amended rule be defined by amending Rule 1001 of the Uniform Rules of Evidence, to embrace the definition of "record" as derived from ' 5-102(a)(14) of the Uniform Commercial Code and thereby carry forward the established policy of the Conference to accommodate the use of electronic evidence in business transactions. See, in this connection, the Reporter's Note to Rule 106 of the Uniform Rules of Evidence, *supra*.

There are no other proposals at the present time for amending Rule 902(9).

**(10) Presumptions created by law.** Any signature, document, or other matter declared by any law of the United States or of this State, to be presumptively or prima facie genuine or authentic.

## Reporter's Note

There are no proposals at the present time for amending Rule 902(10).

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;<sub>2</sub>

7                   ~~—— (ii) (2) is~~ was kept in the course of the regularly conducted activity;<sub>2</sub> 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.~~

### Reporter's Note

7  
8  
9  
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                   **(12) Certified foreign records of regularly conducted activity.**  
2

3                   (a) The original or a duplicate of a foreign record of regularly conducted activity  
4 which would be admissible under Rule 803(6), and which is accompanied by a written  
5 declaration by the custodian thereof or another qualified person that the record:

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

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

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

10                  The record must be signed in a manner which, if falsely made, would subject the  
11 maker to criminal penalty under the laws of the country where the record is signed.

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

16  
17                   **Reporter's Note**  
18

19                  Uniform Rule 902(12) is new and, except for changes in formatting, the proposed  
20 rule is based upon the Proposed Rule 902(12) of the Federal Rules of Evidence which was  
21 approved by the Advisory Committee at its meeting on October 20-21, 1997 and recently  
22 approved by the Standing Committee of the Judicial Conference of the United States for  
23 publication for official comment. A uniform rule of evidence providing for satisfying the  
24 foundational requirements for self-authentication of business records through certification  
25 would appear to be compatible with a federal rule on the subject. The Proposed Advisory  
26 Committee Note to Rule 902(12) reads as follows:

27  
28                  The rule provides a means . . . for parties to authenticate foreign  
29 records of regularly conducted activity other than through the testimony of  
30 a foundation witness. See the proposed amendment to Rule 803(6). The  
31 notice requirement is intended to provide the opponent of the evidence with



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 is 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.