TENTATIVE DRAFT #3

Articles V-VI

FOR DRAFTING COMMITTEE DISCUSSION ONLY

October 17 - 19, 1997

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UNIFORM RULES OF EVIDENCE OF 1974, AS AMENDED

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

_____

Drafting Committee to Revise
Uniform Rules of Evidence of 1974, As Amended

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Article V

PRIVILEGES

Rule 501. [Privileges Recognized Only as Provided].

Except as otherwise provided by constitution or statute or by these or other rules promulgated by [the Supreme Court of this State], no person has a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

Reporter's Note

There is no proposal for amending Uniform Rule 501 pending further discussion of the Drafting Committee.

Rule 502. [Lawyer-Client Privilege].

(a) Definitions. As used in this rule:

(1) "Client" means a person, including a public officer, corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) "Representative of the client" means (i) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client or (ii) any other person who, for the purpose of effectuating legal representation for the client, makes or

receives a confidential communication while acting in the scope of employment for the client.

(3) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) "Representative of the lawyer" means a person employed, or reasonably believed by the client to be employed, by the lawyer to assist the lawyer in rendering professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client (i) between the client or a representative of the client and the client's lawyer or a representative of the lawyer, (ii) between the lawyer and a representative of the lawyer, (iii) by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (iv) between representatives of the client or between the client and a representative of the client, or (v) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the

communication is presumed to have authority to claim the privilege but only on behalf of the client.

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

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction inter vivos.

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer.

(4) Documents attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness.

(5) Joint Clients. As to a communication relevant to a matter of common interest between or among 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

(6) Public Officer or Agency. As to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

As amended 1986.

Reporter's Note

The comments to Rule 502 read as follows:

Comment

[Subd. (c)]. Canon 4 of the Code of Professional Responsibility requires the lawyer to claim the privilege and not disclose confidential communications.

Comment to 1986 Amendment

The previous rule adopted the so-called "control group" test with regard to the scope of the attorney client privilege among corporate officers and employees. The U.S. Supreme Court rejected this rule in *Upjohn Co. v. United States,* 449 U.S. 383 (1981). There have not been any cases subsequent to *Upjohn* that have attempted to formulate a new rule. *Upjohn* itself is most notable for not giving much guidance. However, it would appear from the basic rationale of the case--that of furthering the efficacious rendition of legal services--that it probably should be read very broadly. The proposed rule does just that.

The language ", or reasonably believed by the client to be employed," is added in subparagraph (a)(4) to assure that the client does not lose the benefit of the privilege in situations where a representative of a lawyer is not in the employment of the lawyer, but is nevertheless reasonably believed by the client to be employed by the lawyer at the time of the communication intended by the client to be confidential.

There are no other proposals for amending Uniform Rule 502 at the present time.

Alternative #1

Rule 503. [Physician, ~~and~~ Psychotherapist and Mental Health Provider--Patient Privilege].

(a) Definitions. As used in this rule:

(1) A "patient" is a person who consults or is examined or interviewed by a [physician,] ~~or~~] psychotherapist~~.~~, [or mental health provider].

[(2) A "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.]

(3) A "psychotherapist" is (i) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or (ii) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

[(4) A "mental health provider" is a person [licensed] [certified] [authorized], or reasonably believed by the patient so to be, to engage in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction.]

(~~4~~5) A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the [physician] ~~or]~~ psychotherapist, [or mental health provider], including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's ~~his~~ [physical,] mental or emotional condition, including alcohol or drug addiction, among the patient ~~himself~~, the patient's ~~his~~ [physician] ~~or]~~ psychotherapist~~.~~, [or mental health provider] and persons who are participating in the diagnosis or treatment under the direction of the [physician] ~~or]~~ psychotherapist~~.~~, [or mental health provider], including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, the

patient's ~~his~~ guardian or conservator, or the personal representative of a deceased patient. The person who was the [physician,] ~~or~~] psychotherapist~~.~~, [or mental health provider] at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions. There is no privilege under this rule for communications relevant to:

(1) Proceedings for hospitalization. ~~There is no privilege under this rule for communications relevant to~~ an issue in proceedings to hospitalize the patient for mental illness, if the [physician] psychotherapist, [or mental health provider] in the course of diagnosis or treatment has determined that the patient is in need of hospitalization~~.~~;

(2) Examination by order of court. ~~If the court orders an~~ a court ordered investigation or examination of the [physical,] mental[,] or emotional condition of a patient, whether a party or a witness, ~~communications made in the course thereof are not privileged under this rule~~ with respect to the particular purpose for which the examination is ordered unless the court orders otherwise~~.~~;

(3) Condition an element of claim or defense. ~~There is no privilege under this rule as to~~ an issue of the [physical,] mental[,] or emotional condition of the patient in any proceeding in which the patient ~~he~~ relies upon the condition as an element of the patient's ~~his~~ claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the patient's ~~his~~ claim or defense~~.~~;

(4) Divorce, custody or paternity. an issue in a divorce, custody, or paternity proceeding;

(5) Commission of crime or physical injury. the patient's planning, contemplating, or engaging in, the commission of a crime, or physical injury to the patient's self, or others;

(6) Victim of child, elder, handicapped, or mental patient abuse or neglect. the patient being the victim of child, elder, handicapped, or mental patient abuse or neglect;

(7) Competency of mental health provider. an issue in proceedings challenging the competency of the mental health provider; or

(8) Breach of duty by the mental health provider or patient. a breach of duty by the mental health provider to the patient, or by the patient to the mental health worker.

Reporter's Note

The Comment to existing Rule 503 reads as follows:

Comment

Language in brackets should be included if it is desired to provide a Physician-Patient Privilege.

Similarly, the language in brackets relating to the "mental health provider" should be included if it is desired to provide for a "mental health provider" privilege.

This Alternative #1 for amending Rule 503 also eliminates the gender-specific language in subdivisions (b), (c) and (d). It is technical and no change in substance is intended.

Alternative #1 is the outgrowth of the initial thinking of the Drafting Committee that some form of a "licensed social worker" privilege should be incorporated within the Uniform Rules of Evidence and comport, at least in part, with the recent decision of the Supreme Court of the United States in *Jaffee v. Redmond, ___ U.S. ___, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996),* and with a majority of the jurisdictions in the United States recognizing what may be described generally as a "licensed social worker" privilege.

The following states have separate statutes creating a so-called "licensed social worker" privilege: **Arizona,** *Ariz. Rev. Stat. Ann. § 32-3283 (1996);* **Arkansas,** *Ark. Code Ann. § 14-46-107 (1995);* **California,** *Cal. Evid. Code §§ 1010, 1012, 1014 (1996);* **Colorado,** *Colo.Rev.Stat. § 13-90-107 (1987);* **Connecticut,** *Conn. Gen. Stat. § 52-146q (1994);* **Delaware,** *24 Del.Code Ann. Tit. 24, § 3913 (1995)*; **District of Columbia,** *D.C. Code § 14-307 (1995);* **Florida,** *Fla. Stat. § 90,503 (1996);* **Georgia,** *Ga. Code Ann. § 24-9-21 (1996);* **Hawaii**, *HRS § 505.5 (1996);* **Idaho**, *Idaho Code § 54-3213 (1996);* **Illinois**, *Ill. Comp. Stat., ch. 225, § 20/16 (1996);* **Indiana**, *Burns Ind. Code Ann. § 25-23. 6-6-1 (1996);* **Iowa**, *Iowa Code § 622.10 (1996);* **Kansas**, *Kan.Stat.Ann. § 65-6315 (1995);* **Kentucky**, *Ky. Rule Evid. 507 (1996);* **Louisiana**, *La.Code.Evid. Art. 510 (1996);* **Maine**, *Me. Rev. Stat. Ann. Tit. 32, § 7005 (1988);* **Maryland**, *Md. Cts. & Jud. Proc. Code Ann. § 9-121 (1996);* **Massachusetts**, *Mass.Gen.Laws § 112:135A, 135B (1994);* **Michigan**, *Mich. Comp. Stat. Ann. § 18,425(1610) (1996);* **Minnesota**, *Minn. Stat. § 595.02 (1996);* **Mississippi**, *Miss. Code Ann. § 73-53-29 (1996);* **Missouri**, *Mo.Ann.Stat. § 337.636 (Supp. 1996);* **Montana**, *Mont. Code. Ann. § 37-22-401;* **Nebraska**, *Neb. Rev.Stat.Ann. § 71-1,335 (1996);* **Nevada**, *Nev.Rev.Stat.Ann. §§ 49.215, 49.252, 49.235, and 49.254 (1995);* **New Hampshire**, *N.H.Rev.Stat.Ann. § 330-A:19 (1996;* **New Jersey**, *N.J.Stat.Ann. § 45:15BB-13 (1996);* **New Mexico**, *N.M.Stat.Ann. § 61-31-24 (1996);* **New York**, *N.Y. Civ. Prac. Law § 4508 (1996);* **North Carolina**, *N.C. Gen. Stat. § 8-53.7 (1996);* **Ohio**, *Ohio Rev. Code Ann. § 2317.02 (1996);* **Oklahoma**, *59 Okla.Stat., Tit. 59, § 1261.6 (1995);* **Oregon**, *Ore. Rev. Stat. § 40.250 (1996); OEC § 504-4;* **Rhode Island**, *R.I. Gen. Laws §§ 5-37.3-3, 5-37.3-4 (1996);* **South Carolina**, *S.C.Code Ann. § 19-11-95 (1995);* **South Dakota**, *S.D. Codified Laws § 36-26-30 (1996);* **Tennessee**, *Tenn.Code.Ann. § 63-11-213 and § 33-10-(301-304);* **Texas**, *Tex. Rule Civ. Evid. 510;* **Utah**, *Utah Rule Evid. 506 (1996);* **Vermont**, *Vt.Rule.Evid. 503 (1996);* **Virginia**, *Va.Code Ann. 8.01-400.2 (1996)*; **Washington**, *Wash. Rev. Code § 18.19.180 (1996);* **West Virginia**, *W.Va.Code § 30-30-12 (1996);* **Wisconsin**, *Wis. Stat. § 905.04 (1996);* and **Wyoming**, *Wyo. Stat. § 33-38-109 (Supp. 1995).*

The following states do not have a statutory licensed social worker privilege: **Alabama,** although having a statutory psychologist privilege, [*Ala. Code § 34-26-2*], *Phillips v. Alabama Dept. of Pensions, 394 So.2d 51 (Ala. 1981)* and *Parten v. Parten, 351 So.2d 613 (Ala. 1977)],* has not yet recognized a social worker-client privilege; **Alaska,** which has a rule recognizing a psychotherapist privilege [*Alaska Rule Evid. 504*], but the Commentary to which states that a social worker may fall within the meaning of "psychotherapist"; **North Dakota,** although having a psychotherapist privilege [*N.D. Rule Evid. 503*], *Copeland v. State, 448 N.W.2d 611 (N.D. 1989),* has not yet recognized a social worker-client privilege, *State v. Red Paint, 311 N.W.2d 182 (N.D. 1981)];* and **Pennsylvania,** although having a statutory psychologist privilege [*42 Pa. Cons. Stat. § 5944 (1996)*], *In re Pittsburgh Action Against Rape, 428 A.2d 126 (Pa. 1981),* does not recognize a social worker privilege. *See,* in this connection, the opinion of the dissenting judge in the *Pittsburgh* case arguing that there should be a social worker-patient privilege.

First, with respect to Alternative #1, the amendments to Rule 503 respond to the views expressed by some members of the Drafting Committee at its meeting on January 24-26, 1997

that a separate rule creating a "licensed social worker" privilege is unnecessary and is more appropriately incorporated within the existing Physician and Psychotherapist--Patient Privilege. At the same time, flexibility is preserved by bracketing the provisions relating to a mental health provider.

Second, as to the scope of the privilege, in a majority of the states the so-called "social worker privilege" is not considered a subpart of a "psychotherapist" privilege, but, with exceptions, broadly applies to prohibiting a social worker from disclosing "any information acquired from persons consulting the licensed social worker in his or her professional capacity." *See 59 Okl.St.Ann. § 1261.6.* Further, for example, the "practice of social work" in Oklahoma is defined as:

> [T]he professional activity of helping individuals, groups, or communities enhance or restore their capacity for physical, social and economic functioning and the professional application of social work values, principles and techniques in areas such as clinical social work, social service administration, social planning, social work consultation and social work research to one or more of the following ends: Helping people obtain tangible services; counseling with individuals, families and groups; helping communities or groups provide or improve social and health services; and participating in relevant social action. The practice of social work requires knowledge of human development and behavior; of social economic and cultural institutions and forces; and of the interaction of all of these factors. Social work practice includes the teaching of relevant subject matter and of conducting research in problems of human behavior and conflict. *See 59 Okl.St. Ann. § 1250.1(2).*

It is the Reporter's sense of Drafting Committee concern that a Uniform Rule establishing such a broadly defined social worker privilege would be fraught with interpretive difficulties and unnecessarily interfere with litigation in an evidentiary system based largely upon "the fundamental principle that "the public . . . has a right to every . . . [person's] evidence" and that testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." See Trammel v. United States, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980) together with United States v. Nixon, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974). Accordingly, Alternative #1 narrows considerably the scope of many of the so-called "licensed social worker" privileges recognized in the foregoing states by including within the privilege only communications relating to the "treatment of a mental or emotional condition, including alcohol or drug addiction."

The exceptions to the rule set forth in subdivision (d) present the greatest difficulty, at least in terms of how broadly, or narrowly, the privilege ought to be applied when compared to the exceptions recognized in the several states. There are at least twenty-three exceptions which have been recognized in one, or more, of the several states. The exceptions most commonly recognized are where: (1) the patient is planning, or contemplating the commission of a crime, or physical injury to the patient's self, or others; (2) a minor patient is the victim of a crime, or the

communication involves child abuse or neglect, elderly abuse, handicapped abuse, or mental patient abuse; (3) the patient brings proceedings challenging the competency of the licensed social worker; (4) the patient, personal representative, guardian, or beneficiary of life insurance consents to disclosure; and (5) the patient's mental condition is an element of a claim or defense.

Other exceptions to the privilege recognized in some states include: (1) proceedings for hospitalization; (2) court-ordered counseling; (3) claims of licensed social workers for fees; (4) court or board-ordered disclosure; (5) custody, divorce and paternity proceedings; (6) breach of duty by the licensed social worker to the patient, or by the patient to the licensed social worker; (7) criminal proceedings against the patient, such as murder, battery, or a violent physical act; (8) criminal proceedings of any type against the patient; (9) testimonial evidence concerning blood alcohol level or intoxication of the patient; (10) consultation with colleagues or supervisors; (11) a decision by a court that the information is not germane to the privilege; and (12) when the interests of justice so require.

As to the exceptions set forth in Alternative #1, subdivisions (1) and (3) remain unchanged since there appears to be general Drafting Committee agreement that these exceptions to the general rule of the privilege are appropriate to a mental health provider privilege.

The word "investigation" has been added in subdivision (2) at the suggestion of the Drafting Committee.

Subdivision (4) has been added in this draft at the suggestion of the Drafting Committee as an additional exception to the privilege.

With respect to Subdivision (5), the words "or engaging in" have been added at the suggestion of the Drafting Committee.

In Subdivision (6) the words "a crime" have been deleted from the exception as set forth in Tentative Draft #2 due to expressed Committee concern that the exception would be overly broad and create interpretive difficulties, for example, permitting the disclosure of communications to a mental health provider relating to the prior sexual behavior of a rape victim.

Finally, although it is not entirely clear from the Transcript of the Drafting Committee meeting in Dallas on January 24-26, 1997, Subdivision (8) has been added to the list of exceptions to the general rule of the privilege.

In all events, the Drafting Committee may want to revisit the enumerated exceptions, including subdivision (8), at its next meeting.

Alternative #2

Rule 504. [Mental Health Provider Privilege]

(a) Definitions. As used in this rule:

(1) a "patient" is a person who consults, or is examined or interviewed, by mental health provider.

(2) a "mental health provider" is a person [licensed] [certified] [authorized], or reasonably believed by the patient so to be, while engaged in to engage in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction.

(3) a communication is "confidential" if not intended to be disclosed to third persons**,** except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the consultation, examination, or interview under the direction of the mental health provider, including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's mental health provider and persons who are participating in the diagnosis or treatment under the direction of the mental health provider, including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, the patient's guardian or conservator, or the personal representative of a deceased patient. The person who was the mental health provider at the time of the confidential communication is

presumed to have authority to claim the privilege but only on behalf of the patient.

(d) **Exceptions.** There is no privilege under this rule for communications relevant to:

(1) **Proceedings for hospitalization.** an issue in proceedings to hospitalize a patient for mental illness if the mental health provider in the course of diagnosis and treatment has determined that the patient is in need of hospitalization;

(2) **Examination by order of court.** a court ordered investigation or examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, with respect to the particular purpose for which the investigation or examination is ordered unless the court orders otherwise;

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

(4) **Divorce, custody or paternity.** an issue in a divorce, custody, or paternity proceeding;

(5) **Commission of crime or physical injury.** the patient's planning, contemplating, or engaging in, the commission of a crime, or physical injury to the patient's self, or others;

(6) **Victim of child, elder, handicapped, or mental patient abuse or neglect.** the patient being the victim of child, elder, handicapped, or mental patient abuse or neglect;

(7) Competency of mental health provider. an issue in proceedings challenging the competency of the mental health provider; or

(8) Breach of duty by the mental health provider or patient. a breach of duty by the mental health provider to the patient, or by the patient to the mental health worker.

Reporter's Note

A new Uniform Rule 504 to establish a mental health provider privilege, labeled Alternative #2, is retained in this Tentative Draft #3 as a separate rule to give the members of the Drafting Committee an opportunity to again consider whether the so-called "mental health provider" privilege should be established as a separate rule, or combined, as in Alternative #1, with the physician and psychotherapist privilege of Uniform Rule 503. As in Alternative #1, this Alternative #2 narrows considerably the scope of many of the so-called "licensed social worker" privileges recognized in a majority of the states by including within the privilege only communications relating to the "treatment of a mental or emotional condition, including alcohol or drug addiction." *See,* in this connection, the **Reporter's Note** to Alternative #1, *supra.*

"Patient" is defined in subdivision (a)(1) and is consistent with the definition of a "patient" in the physician and psychotherapist--patient privilege of Uniform Rule 503.

"Mental health provider" is defined in subdivision (a)(2) consistent with the expressed view of the Drafting Committee that the privilege should be limited to consultation with a person engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction. The language "[licensed] [certified] [authorized], or reasonably believed by the patient so to be" is intended to limit the privilege to communications with persons who have, or are believed to have, been determined under applicable state laws to be qualified to engage in the diagnosis and treatment of a mental or emotional condition, including alcohol or drug addiction.

"Confidential communication" is defined in subdivision (a)(3) and is generally consistent with the definition employed in the physician and psychotherapist--patient privilege of Uniform Rule 503(a)(4). The definition also comports with the persons to whom the confidentiality of the communication extends in most of the states having the more generally recognized social worker privilege. Accordingly, the communication is confidential and protected by the privilege even though it is disclosed to persons who work with the mental health provider, including employees, such as secretaries, and to persons participating in the counseling, including family members.

The privilege is set forth in subdivision (b). The language employed is similar to that used in **California, Florida, Hawaii, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, Nevada, Utah, Vermont and Wisconsin,** although it does not differ markedly from most of the other states recognizing the privilege in the broader social worker context.

Subdivision (c) sets forth the persons who may claim the privilege and it is consistent with the rule applicable in the case of the physician and psychotherapist--patient privilege. It is also consistent with the rule applicable to the licensed social worker privilege in **California, Florida, Hawaii, Idaho, Louisiana, Nevada, Texas, Utah, Vermont and Wisconsin.**

The exceptions to the rule set forth in subdivision (d), as in the case of Alternative #1, present the greatest difficulty, at least in terms of how broadly, or narrowly, the privilege ought to be applied when compared to the exceptions recognized in the several states. There are at least twenty-three exceptions which have been recognized in one, or more, of the several states. The exceptions most commonly recognized are where: (1) the patient is planning, or contemplating the commission of a crime, or physical injury to the patient's self, or others; (2) a minor patient is the victim of a crime, or the communication involves child abuse or neglect, elderly abuse, handicapped abuse, or mental patient abuse; (3) the patient brings proceedings challenging the competency of the licensed social worker; (4) the patient, personal representative, guardian, or beneficiary of life insurance consents to disclosure; and (5) the patient's mental condition is an element of a claim or defense.

Other exceptions to the privilege recognized in some states include: (1) proceedings for hospitalization; (2) court-ordered counseling; (3) claims of licensed social workers for fees; (4) court or board-ordered disclosure; (5) custody, divorce and paternity proceedings; (6) breach of duty by the licensed social worker to the patient, or by the patient to the licensed social worker; (7) criminal proceedings against the patient, such as murder, battery, or a violent physical act; (8) criminal proceedings of any type against the patient; (9) testimonial evidence concerning blood alcohol level or intoxication of the patient; (10) consultation with colleagues or supervisors; (11) a decision by a court that the information is not germane to the privilege; and (12) when the interests of justice so require.

The exceptions set forth in subdivision (d) are identical to those set forth in the proposed amendments to Uniform Rule 503 as Alternative #1. *See,* in this connection, the **Reporter's Note** to Alternative #1, *supra*.

Rule ~~504~~505. [Husband-Wife Privilege]

(a) Marital communications. An individual has a privilege to refuse to testify or to prevent the individual's ~~his or her~~ spouse or former spouse from testifying as to any confidential communication made by the individual to the spouse during their marriage. The privilege may be waived only by the individual holding the privilege or by the holder's guardian, conservator, or personal representative. A communication is confidential if it is made privately by an individual to the individual's *his or her* spouse and is not intended for disclosure to any other person.

(b) Spousal testimony in criminal proceedings. The spouse of an accused in a criminal proceeding has a privilege to refuse to testify against the accused spouse.

(c) Exceptions. There is no privilege under this rule in any civil proceeding in which the spouses are adverse parties, in any criminal proceeding in which a prima facie showing is made that the spouses acted jointly in the commission of the crime charged, or in any proceeding in which one spouse is charged with a crime or tort against the person or property of (i) the other, (ii) a minor child of either, (iii) an individual residing in the household of either, or (iv) a third person if the crime or tort is committed in the course of committing a crime or tort against any of the individuals previously named in this sentence. The court may refuse to allow invocation of the privilege in any other proceeding if the interests of a minor child of either spouse may be adversely affected.

As amended 1986.

Reporter's Note

The comment to Rule 504 reads as follows:

Comment to 1986 Amendment

> The previous rule provided for a "marital communication" privilege, as does the new rule. However, it is sometimes difficult to determine the boundaries of what constitutes a communication (e.g., the spouse who merely is present and sees a crime being committed by the other spouse). Thus, there are times when a privilege against testifying ought to obtain with or without the existence of a marital communication. The new rule reiterates the provision with regard to marital communications. However, a new privilege dealing with spousal testimony in a criminal proceeding has been added. This new rule also works to permit the testifying spouse to assert the marital communication privilege on behalf of an accused spouse, when appropriate, as could be done under the old rule.
>
> Under the marital communication privilege, the communicating spouse holds the privilege. And, the rule is applicable whether or not the communicating spouse is a party to the proceeding. However, this privilege is not limited to criminal cases as under the previous rule. It would also apply in civil cases. The underlying rationale--that of encouraging or at least not discouraging communications between

spouses--applies in both types of cases.

Under the spousal testimony privilege, only the spouse of the accused in a criminal case has a privilege to refuse to testify. The rationale--that of not disrupting the marriage--can only be justified in criminal proceedings and then there is no basis for giving the privilege to the accused. This provision codifies the holding of the United States Supreme Court in *Trammel v. United States*, 445 U.S. 40 (1980).

The provision in the previous rule regarding exceptions is also modified. Those exceptions dealt with the situation where a spouse is charged with a crime. The new rule extends the exceptions to include proceedings where a spouse is accused of a tort. It also creates exceptions where the spouses acted jointly in committing a crime, where the spouses are adverse parties, and where the court feels that the interests of a child of either should be given preference. There is no privilege in such situations under Rule 504.

This proposal for amending renumbered Rule 505 eliminates the gender-specific language in subdivision (a). It is technical and no change in substance is intended.

There are no other proposals for amending renumbered Uniform Rule 505.

Rule ~~505~~506. [Religious Privilege].

(a) Definitions. As used in this rule:

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

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a ~~"clergyman"~~ "cleric" in the cleric's ~~his~~ professional character as spiritual adviser.

(c) Who may claim the privilege. The privilege may be claimed by the person, the person's ~~by~~

~~his~~ guardian or conservator, or the person's ~~by his~~ personal representative if the person ~~he~~ is deceased. The person who was the ~~"clergyman"~~ "cleric" at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

Reporter's Note

This proposal for amending renumbered Rule 506 eliminates the gender-specific language in subdivisions (b) and (c). It is technical and no change in substance is intended.

There are no other proposals for amending renumbered Uniform Rule 506.

Rule ~~506~~507. [Political Vote].

(a) General rule of privilege. Every person has a privilege to refuse to disclose the tenor of the person's ~~his~~ vote at a political election conducted by secret ballot.

(b) Exceptions. This privilege does not apply if the court finds that the vote was cast illegally or determines that the disclosure should be compelled pursuant to the [election laws of the state].

Reporter's Note

This proposal for amending renumbered Rule 507 eliminates the gender-specific language in subdivision (a). It is technical and no change in substance is intended.

There are no other proposals for amending renumbered Uniform Rule 507.

Rule ~~507~~508. [Trade Secrets].

A person has a privilege, which may be claimed by the person ~~him~~ or the person's ~~his~~ agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person ~~him~~, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require.

Reporter's Note

This proposal for amending renumbered Rule 508 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

There are no other proposals for amending renumbered Uniform Rule 508.

Rule ~~508~~509. [Secrets of State and Other Official Information; Governmental Privileges].

(a) Claim of privilege under law of United States. If the law of the United States creates a governmental privilege that the courts of this State must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

(b) Privileges recognized as created by laws of state. No other governmental privilege is recognized except as created by the Constitution or statutes of this State.

(c) Effect of sustaining claim. If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action.

Reporter's Note

Headings for subdivisions (a) and (b) of renumbered Rule 509 have been added for consistency with subdivision (c). There are no other proposals for amending renumbered Uniform Rule 509.

Rule ~~509~~510. [Identity of Informer].

(a) Rule of privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who may claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

(c) Exceptions:

(1) Voluntary disclosure; informer a witness. No privilege exists under this rule if the identity of the informer or the informer's ~~his~~ interest in the subject matter of the informer's ~~his~~ communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the government.

(2) Testimony on relevant issue. If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the informed public entity invokes the privilege, the court shall give the public entity an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose the informer's ~~his~~ identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one or more of the following: requiring the prosecuting attorney to comply, granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required of the defendant ~~him~~, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court shall be sealed and

preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under this subdivision except a showing *in camera* at which no counsel or party shall be permitted to be present.

Reporter's Note

This proposal for amending renumbered Rule 510 eliminates the gender-specific language in subdivision (c) of the rule. It is technical and no change in substance is intended.

There are no other proposals for amending renumbered Uniform Rule 510.

Rule ~~510~~511. [Waiver of Privilege].~~ by Voluntary Disclosure].~~

(a) Voluntary disclosure. A person upon whom these rules confer a privilege against disclosure waives the privilege if the person ~~he~~ or the person's ~~his~~ predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(b) Involuntary disclosure. A claim of privilege is not waived by a disclosure which was:

(1) compelled erroneously; or

(2) made without an opportunity to claim the privilege.

Reporter's Note

This proposal for amending renumbered Rule 511(a) with the heading "Voluntary disclosure" in this Tentative Draft #3 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

Renumbered Rule 511 is also recast to deal with both the voluntary and involuntary waiver of a privilege as a matter of substance in one comprehensive rule by proposing the deletion of existing Uniform Rule 511 as in Tentative Draft #2 and also deleting Rule 512(c) as was also proposed in Tentative Draft #2. Subdivision (a) deals with waiver by voluntary disclosure and

embraces the substance of existing Uniform Rule 510, now renumbered as Rule 511, which it is suggested be amended to eliminate the gender-specific language. Subdivision (b) deals with involuntary waiver and is the same in substance as existing Uniform Rule 511.

Proposed Uniform Rule 511 in this Tentative Draft #3 does not address the subject of inadvertent disclosure as a waiver in the blackletter of the rule. In contrast, three general approaches have been employed by the courts to determine whether an inadvertent disclosure constitutes a waiver: an objective analysis; a subjective analysis; and a balancing analysis. Under an objective analysis, an inadvertent waiver will result since the court need only confirm that the document was made available to opposing counsel; "the 'confidentiality' of the document has been breached by the disclosure, thereby destroying the basis for the continued existence of the privilege." See *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., supra,* citing *Underwater Storage, Inc. v. United States Rubber Co., 314 F.Supp 546 (D. D.C. 1970).* Under a subjective analysis, inadvertent disclosure can never result in a true waiver because "there was no intention to waive the privilege, and one cannot waive the privilege without intending to do so." See *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 851 F.R.D. 204 (N.D. Ill. 1990),* citing *Connecticut Mutual Life Insurance Co. v. Shields, 18 F.R.D. 448 (S.D. N.Y. 1955).* Under a balancing analysis, the court considers five factors to determine if a party has waived the privilege. These are: "(1) the reasonableness of the precautions taken to prevent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness." See *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., supra,* citing *Bud Antle, Inc. v. Grow Tech, Inc., 131 F.R.D. 179 (N.D. Cal. 1990)*.

First, a majority of the state jurisdictions appear to apply the objective analysis and conclude that an inadvertent disclosure results in a waiver of the privilege. These are: **Alabama,** *Bassett v. Newton, 658 So.2d 398 (Ala. 1995)*(waiver of the attorney-client privilege by conduct, such as a partial disclosure, that would make it unfair for the client to claim the privilege thereafter); **Alaska,** *Houston v. State, 602 P.2d 784 (Alaska 1979)*(waiver of the attorney-client privilege by examining a defense psychiatrist who relied on the report of a psychiatrist who had conducted a pre-trial psychiatric examination at defense counsel's request) and *Lowery v. State, 762 P.2d 457 (Alaska 1988)*(waiver of work-product privilege to reports of an investigator used to impeach one witness and refresh the recollection of another witness); **Arizona,** *State v. Cuffle, 171 Ariz. 49, 828 P.2d 773 (1992)*(waiver of attorney-client privilege to at least as much of what was previously privileged as necessary to enable an attorney to defend himself to a client's claim of the ineffective assistance of counsel); **Arkansas,** *Firestone Tire & Rubber Company v. Little, 276 Ark. 511, 639 S.W.2d 726 (1982)*(waiver of attorney-client privilege through surrender of letter in answer to a discovery motion which defendant inadvertently permitted to fall into the hands of a third party); **California,** *Aerojet-General Corporation v. Transport Indemnity Insurance, 18 Cal.App.4th 996, 22 Cal. Rptr.2d 862 (1993)*("The attorney-client privilege is a shield against deliberate intrusion; it is not an insurer against inadvertent disclosure.") and *Kanter v. Superior Court, 253 Cal.Rptr. 810 (1988)*("Even though a communication is made in confidence to an attorney, the privilege may be lost (i.e., impliedly waived) by disclosure of the subject communication or by conduct inconsistent with a claim of privilege."); **Colorado,** *Lanari v. People, 827 P.2d 495 (Colo. 1992)*(waiver of attorney-

client privilege through endorsement of a psychiatrist as a witness, failure to object to the prosecution's interview of the witness and failure to request the trial court to enter protective orders with respect to any statements of the defendant obtained during the course of the interview); **Idaho,** *Farr v. Mischler, 923 P.2d 446 (Idaho 1996)*(waiver of attorney-client privilege by seller of business by leaving a letter in files which were among the assets of the business transferred to the buyers upon the sale of the business); **Iowa,** *State v. Randle, 484 N.W.2d 220 (Iowa 1992)*(waiver of physician-patient privilege by sexually abused victim releasing results of MMPI test to Department of Criminal Investigation); **Kentucky,** *Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985)*(waiver of attorney-client privilege by client where the competence of the client's attorney is attacked); **Maine,** *Northup v. State, 272 A.2d 747 (Me. 1971);*(waiver of attorney-client privilege by client where the competence of the client's attorney is attacked); **Minnesota,** *State v. Schneider, 402 N.W.2d 779 (Minn. 1987)*(Implied waiver of attorney-client privilege where defendant was required to submit to an examination by a court-appointed psychiatrist to avail himself of the defense of insanity); **Mississippi,** *Alexander v. State, 358 So.2d 379 (Miss. 1979)*(waiver of physician-patient privilege where information given to expert witness for the express purpose of preparing to testify and forming a basis for testimony that the defendant was insane); **Nevada,** *Wardleigh v. Second Judicial Dist. Court of State of Nev. in and for County of Washoe, 111 Nev. 345, 891 P.2d 1180 (1995)*(waiver of attorney-client privilege as it relates to subject matter of privileged communication partially disclosed); **Ohio,** *State v. McDermott, 79 Ohio App.3d 772, 607 N.E.2d 1164 (1992)*(waiver of attorney-client privilege when the client discloses any part of a confidential communication that is inconsistent with the maintenance of the confidential nature of the attorney-client privilege); **Oklahoma,** *Driskell v. State, 659 P.2d 343 (Okl. Cr. 1983)*(waiver of physician-patient privilege when permission given by patient for physician to speak to officers investigating a murder) and *Herbert v. Chicago, Rock Island and Pacific Railroad Company, 544 P.2d 898 (Okl. 1975)*(waiver of physician-patient privilege relating to back injuries where patient testifies at trial concerning nature and treatment of back injuries even though physician not called by the patient as a witness); **Rhode Island,** *State v. von Bulow, 475 A.2d 995 (R.I. 1984)*(waiver of attorney-client privilege where there is a selective disclosure of otherwise privileged communications); **South Carolina,** *Marshall v. Marshall, 282 S.C. 534, 320 S.E.2d 44 (1984)*(waiver of attorney-client privilege not only as to the specific communication voluntarily disclosed, but as to all other communications relating to the same subject matter); **Virginia,** *Clagett v. Commonwealth, 252 Va. 79, 472 S.E.2d 263 (1996)*(attorney-client privilege waived on cross-examination where expert overheard defense counsel's conversation regarding expert's mistake while testifying on direct examination); and **West Virginia,** *State ex rel. McCormick v. Zakaib, 189 W.Va. 258, 430 S.E.2d 316 (1993)* and *Marano v. Holland, 179 W.Va. 156, 366 S.E.2d 117 (1988)*(waiver of attorney-client privilege not only as to the specific communication voluntarily disclosed, but as to all other communications relating to the same subject matter).

There is at least one jurisdiction where the court has refused to decide the question of whether an inadvertent disclosure of privileged information waives the privilege. In **Florida,** in *Kusch v. Ballard, 645 So.2d 1035 (Dist. Ct. App. 1994),* the court did suggest a more expansive approach in resolving the issue as follows: ". . . we do not have the kind of fully developed record of facts and law in this common law certiorari case that would allow us to assay whether it is

necessary to pronounce a global rule on the subject. It might be enough, if the issue were directly and necessarily presented, to decide that whether the privilege is lost by inadvertent disclosure depends on the totality of the circumstances. If there is no need for a universal rule, then we should not create one."

Second, other jurisdictions apply a subjective test in determining whether there has been a inadvertent waiver of the privilege by requiring an intent to waive the privilege. These are: **Delaware,** *Moyer v. Moyer, 602 A.2d 68 (Del. 1992)*(". . . the privilege does not apply to communications between an attorney and his client where the circumstances indicate that the client did not intend the communication to remain confidential, and therefore, the attorney may be examined as to such communications."); and **Indiana,** *Hazlewood v. State, 609 N.E.2d 10 (Ind. 1993)* and *Kindred v. State, 524 N.E.2d 279 (Ind. 1988)*(marital privilege is not waived unless there is an express manifestation of the intent to waive the privilege). In **Michigan,** "waiver through inadvertent disclosure requires a finding of no intent to maintain confidentiality or circumstances evidencing a lack of such intent." See *Sterling v. Keidan, 162 Mich. App. 88, 412 N.W.2d 255 (1987).* In **New Jersey,** "it must be shown the party charged with the waiver knew their legal rights and deliberately intended to relinquish them." See *Triology Communications, Inc. v. Excom Realty, Inc., 279 N.J.Super. 442, 652 A.2d 1273 (1994).*

In **Georgia,** the client's intent, together with the circumstances of the disclosure, appear to govern the waiver of a privilege. See, respectively, *Revera v. State, 223 Ga. App. 450, 477 S.E.2d 849 (1996)* and *Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981).*

Finally, there appear to be nine jurisdictions which employ a balancing analysis in determining whether there is a waiver of the privilege through an inadvertent disclosure. See **Illinois,** *Dalen v. Ozite Corporation, 230 Ill.App.3rd 18, 594 N.E.2d 1365 (1992)*(". . . we adopt the 'balancing test' set forth in Golden Valley [,*supra*]. The two other approaches, the objective and subjective approaches would appear to result in decisions based on mere mechanical application rather than a judicial reason and fairness.") and *People v. Knuckles, 165 Ill.2d 125, 650 N.E.2d 974, 209 Ill.Dec. 1 (1995)*(the attorney-client privilege is not waived merely by pleading the insanity defense and employing a psychiatrist to assist in the preparation of the defense); **Montana,** *Pacificorp v. Department of Revenue of the State of Montana, 254 Mont. 387, 838 P.2d 914 (1992)*(the mere inadvertent production of documents is not in itself sufficient to establish a waiver of the attorney-client privilege, but it requires consideration of the elements of implied intention, and fairness and consistency); **Nebraska,** *League v. Vanice, 221 Neb. 34, 374 N.W.2d 849 (1985)*(fairness is an important and fundamental consideration in determining whether the attorney-client privilege has been waived); **New Mexico,** *Hartman v. El Paso Natural Gas Company, 107 N.M. 679, 763 P.2d 1144 (1988)*(waiver of the attorney-client privilege and work-product immunity requires an application of the five factors set forth in Golden Valley Microwave Foods, Inc., *supra*); **New York,** *Manufacturers and Traders Trust Company v. Servotronics, Inc., 132 A.D.2d 392, 522 N.Y.S.2d 999 (Sup.Ct. App.Div. 1987)*(waiver of the attorney-client privilege involves the client's intent to retain the confidentiality of the privileged materials and taking reasonable steps to prevent

disclosure, together with determining whether the party claiming the waiver will suffer prejudice if a waiver is not granted); **North Dakota,** *Farm Credit Bank of St. Paul v. Heuther, 454 N.W.2d 710 (N.D. 1990)*(waiver of the attorney-client privilege requires an application of the five factors set forth in Golden Valley Microwave Foods, Inc., *supra*); **Oregon,** *Goldsborough v. Eagle Crest Partners, Ltd., 314 O4. 336, 838 P.2d 1069 (1992)*(waiver of the attorney-client privilege involves a consideration of whether the disclosure was inadvertent, an attempt was made to remedy the error promptly and the preservation of the privilege will occasion unfairness to the opponent); **Utah,** *Gold Standard, Inc. v. American Barrick Resources Corporation, 805 P.2d 164 (Utah 1991)*(waiver of attorney-client privilege, as well as work-product protection, requires an application of the five factors set forth in Golden Valley Microwave Foods, Inc., *supra*); and **Washington,** *State v. Balkin, 48 Wash. App. 1, 737 P.2d 1035 (Wash. App. 1987*(waiver of privilege involves consideration of elements of implied intention, fairness and consistency).

See also, **Kansas,** which has applied a "balance of interests" test in determining whether a qualified privilege of so-called "self-critical analysis" has been waived. See *Kansas, Gas & Electric v. Eye, 246 Kan. 419, 789 P.2d 1161 (1990).* In **Maryland,** a balancing test is applied in determining a right of access to records of internal police investigations which are confidential. See *Blades v. Woods, 107 Md. App. 178, 667 A.2d 917 (1995).* In **Texas,** a balancing test is also applied by weighing the (1) circumstances confirming an involuntary disclosure; (2) precautionary measures taken; (3) delay in rectifying the error; (4) extent of any inadvertent disclosure; and (5) scope of discovery. Inadvertent production is distinguishable from involuntary production and will constitute a waiver. *Granada Corp. v. Honorable First Court of Appeals, 844 S.W.2d 223 (Tex. 1992).*

No cases specifically dealing with the inadvertent disclosure of privileged information were found for **Connecticut, Hawaii, Massachusetts, Missouri, New Hampshire, North Carolina, Pennsylvania, South Dakota, Tennessee, Vermont, Wisconsin** and **Wyoming.**

For an exhaustive analysis of federal authorities on the issue of inadvertent disclosure, see *Simpson, Reagan Wm., Civil Discovery and Depositions § 3.41 (2d ed.).*

Uniform Rule 612 may also be implicated in the waiver issue, in particular with regard to waiving attorney work-product information that has been supplied to an expert in developing theories of liability or defense. Rule 612 permits an opposing party to examine written materials used to refresh the recollection of a witness. For example, do the written materials furnished to an expert have a sufficient impact on an expert's testimony to implicate an application of Rule 612 and thereby waive the privilege of work-product? Or, in the words of one court analyzing the question under Rule 612 of the Federal Rules of Evidence,

> "it is disquieting to posit that a party's lawyer may 'aid' a witness with items of work-product and then prevent totally the access that might reveal and counteract the effects of such assistance. There is much to be said for a view that a party or its lawyer, meaning to invoke the privilege, ought to use other and different materials, available later to a cross-examiner, in the preparation of witnesses. When this simple

choice emerges the decision to give the work product to the witness could well be deemed a waiver of the privilege."

See *Berkey Photo, Inc. v. Eastman Kodak Company, 74 F.R.D. 613 (S.D.N.Y. 1977).*

However, it has been argued that Federal Rule 612:

"does not provide a good means for resolving the issue of waiver when work product is provided to a testifying expert. In most situations, the expert is not really using the documents to refresh his or her memory. A better way to analyze the problem is purely on waiver grounds. Was the work product immunity waived by providing information to a testifying expert, whose opinions are intended to be disclosed to an adversary?

See *Reagan William Simpson, et al., Recent Developments in Civil Procedure and Evidence, 32 Tort & Ins. L. J. 231 (1997).*

~~**Rule 511. [Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege].**~~

~~A claim of privilege is not defeated by a disclosure which was (a) compelled erroneously or (b) made without opportunity to claim the privilege.~~

Reporter's Note

Pending further discussion of the Drafting Committee, it is recommended that this rule be deleted since it has been incorporated as subdivision (b) of the proposed renumbered Uniform Rule 511 without substantive change.

~~**Rule 512. [Comment Upon or Inference from Claim of Privilege; Instruction].**~~

~~**(a) Comment or inference not permitted.** The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.~~

~~**(b) Claiming privilege without knowledge of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the~~

~~knowledge of the jury.~~

~~**(c) Jury instruction.** Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.~~

Reporter's Note

Pending further discussion of the Drafting Committee, it is recommended that this rule be deleted since it has been incorporated as subdivisions (c), (d) and (e) of the proposed Uniform Rule 512 without substantive change.

Rule 512. [Procedures Relating to Claim of Privileged Communication]

(a) Proof of conditions prerequisite to privilege in general. Except as hereinafter provided, before a person may successfully claim a privilege within Rules 502 to 510, the claimant must prove the conditions prerequisite to a claim of the privilege by a preponderance of the evidence [more probably true than not].

(1) Proof of lack of confidentiality of communication. A communication which otherwise qualifies as a privileged communication shall be considered as made in confidence unless the communication is proven by a preponderance of the evidence [more probably true than not] not to have been made in confidence.

(2) Proof of claim of privilege on behalf of communicant. A person authorized under these rules to claim the privilege on behalf of the communicant may claim the privilege unless that person is shown by a preponderance of the evidence [more probably true than not] to lack the communicant's authority to do so.

(3) Proof of exception to privileged communication. When a person contests an

asserted privilege on the ground that an exception to the privilege applies,

(A) if the person presents lawfully obtained evidence not adjudicated to be privileged which is sufficient to support a finding that the alleged exception is applicable, the court may. in its discretion, order an in camera review of the alleged privileged communication, but

(B) the alleged privilege shall apply unless the party proves by a preponderance of the evidence [more probably true than not] that the exception is applicable.

(c) Comment or inference from claim of privilege not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(d) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(e) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

Reporter's Note

Proposed Uniform Rule 512 in this Tentative Draft #3 dealing with procedures relating to a claim of a privileged communication is identical, with one exception, to the Rule as proposed in Tentative Draft #2. The Rule as proposed in Tentative Draft #2, as suggested by the Drafting Committee following the discussion of Tentative Draft #1 of Article V, contained three features. First, as earlier proposed by the ABA Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence, Proposed Rule 512 incorporated the provisions of Proposed Rules 501(e)(1) and (f) dealing with the burden of persuasion as to the conditions prerequisite to claiming a privilege. Second, Proposed Rule 512 as set forth in Tentative Draft #2 combined the ABA Proposed Rules 501(e) and (f) with the existing Uniform Rules 511 and 512, with the substance of Uniform Rule 511 dealing with the involuntary waiver of a privilege being included in Tentative

Draft #2 as Proposed Uniform Rule 512(b). Third, the Proposed Rule 512 as set forth in Tentative Draft #2, combined the substance of existing Uniform Rules 512(a) through (c) with the ABA Proposed Privilege Rule 501(e)(2), (4) and (5) as Proposed Uniform Rules 512(c) through (e).

At the suggestion of the Drafting Committee in its discussion of Tentative Draft #2 in Dallas, Texas, January 24-26, 1997, Proposed Uniform Rule 512 has now been modified in this Tentative Draft #3 to delete Subdivision (b) of the then Proposed Uniform Rule 512 to deal separately with involuntary waivers of the privilege as a matter of substance in Proposed Uniform Rule 511. See the blackletter of Proposed Uniform Rule 511 and the accompanying Reporter's Note, *supra.* No other changes are proposed in this Tentative Draft #3.

As currently proposed, Uniform Rule 512(a) is the same in substance as ABA Proposed Rule 501(e)(1) with only the parenthetical language "[more probably true than not]" to clarify the meaning of "preponderance of the evidence." As pointed out in the Commentary to the ABA proposed rule, it is intended to codify the burden of persuasion applicable in claiming a privilege. Codification of the evidentiary burden of persuasion was suggested in the ABA proposal because of the significance which privileges bear in the trial of an issue of fact. At the federal level, at least, this is an issue which is open to dispute with one commentator taking the position that "[t]he absence of any test . . . has the advantage of leaving the question to the good sense of the trial judge." See *2 Weinstein's Evidence 503-121 (1992).* See also, *United States v. Zolin, 491 U.S. 563, n. 7 (1989).* In such a case, Uniform Rule 104(a), as in the case of other evidentiary rulings, would leave the determination of the conditions of the privilege "to the good sense of the trial judge" without imposing any particular evidentiary burden of producing evidence or of persuasion on the judge.

Similarly, Proposed Uniform Rules 512(a)(1) and (2) are the same in substance as ABA Proposed Rules 501(1)(A) and (B) by providing, respectively, that a lack of confidentiality, or lack of authority to claim the privilege on behalf of a communicant, must be proved by a preponderance of the evidence, also parenthetically defined as [more probably true than not].

Proposed Uniform Rules 512(3)(A) and (B) deal with the proof of exceptions to the privilege. It is the same in substance as ABA Proposed Rules 510(f)(1) and (2) and applies the *Zolin* sufficiency test to *all* exceptions and not simply to the "crime or fraud" exception involved in the case. The language "lawfully obtained evidence not adjudicated to be privileged which is sufficient to support a finding that the alleged exception is applicable" is drawn from the case. The rule also permits, but does not require, an *in camera* hearing regarding the applicability of the exception. Finally, although the *Zolin* case did not deal with the degree of persuasion required to establish the existence of the exception, Proposed Uniform Rule 512(3)(B), as in the case of ABA Proposed Rule 501(f)(1) adopts a preponderance of the evidence [more probably true than not] standard of persuasion.

Proposed Uniform Rules 512(c), (d) and (e) are taken verbatim from existing Uniform Rules 512(a), (b) and (c) and they comport with the comparable ABA Proposed Rules 501(e)(2), (4) and (5). There does not appear to be enough state law to draw any firm conclusions as to the status of the law in the several states concerning comment or the drawing of adverse inferences from a claim of privilege.

The ABA proposed rules 501(e)(3) and (f) dealing with the court determination of the existence of privileged matter have not been incorporated in Proposed Rule 512 in the belief that it would constitute an unnecessary duplication of the substance of Uniform Rule 104(a).

It should also be noted that the substance of the combined ABA Proposed Rules and the Uniform Rules has been retained with only changes in format recommended to comport generally with the organizational format of the Uniform Rules.

As noted the only change in this Tentative Draft #3 of Proposed Uniform Rule 512 is in the deletion of Subdivision (b) from the earlier Tentative Draft #2 of Rule 512 and its inclusion in this Tentative Draft #3 as Proposed Uniform Rule 511 to deal with the subject of waiver as a matter of substance in one comprehensive rule.

After studying the Transcript of Proceedings of the Drafting Committee Meeting in Dallas, Texas, January 24-26, 1997, the Reporter is unclear as to any other substantive and organizational changes which the Committee wishes to make in Proposed Uniform Rule 512. There was discussion as to (1) whether the blackletter should make clear that Proposed Uniform Rule 512 was only applicable in contests concerning the existence of a privilege; (2) whether the Rule ought to embrace only a burden of producing evidence, including sufficiency of the evidence to sustain a finding, or the ultimate burden of persuasion, concerning the applicability of a privilege; and (3) whether the provisions of the current Uniform Rule 512(a)-(c) relating to comment upon or inference from a claim of privilege and jury instructions should be incorporated, modified, or rejected altogether in an amended Uniform Rule 512. The following questions arose out of the deliberations of the Committee at its meeting on January 24-26, 1997, but were not definitively resolved:

1. Does the Drafting Committee want to add qualifying language to Proposed Uniform Rule 512 limiting its application to "contested cases only" if the proposed rule is retained in its present, or amended, format?

2. Does the Drafting Committee want to include provisions setting forth the burden of persuasion to be applied by the trial judge in deciding the claim of a privilege as is currently provided in Proposed Rule 512(a)?

3. Does the Drafting Committee want to include provisions in the procedural rule setting forth the burden of persuasion to be applied by the trial judge in deciding the lack of confidentiality of the communication, or the lack of authority to claim the privilege as currently provided in Proposed Rule 512(a)(1) and (2)?

4. Does the Drafting Committee want to include a provision governing the holding of an *in camera* hearing in determining whether an applicable exception to a claim of privilege exists as is currently provided in Proposed Uniform Rule 512(a)(3)(A)?

5. Does the Drafting Committee want to include a provision setting forth the burden of persuasion to be applied by the trial judge in deciding whether an exception to the privilege is applicable as is currently provided in Proposed Uniform Rule 512(a)(3)(B)?

6. Does the Drafting Committee want to incorporate, modify, or reject altogether, the provisions of the current Uniform Rule 512(a), (b) and (c) incorporated in Proposed Uniform Rule 512(c), (d) and (e) dealing with comment on the claim of a privilege, claiming the privilege without jury knowledge and instructions to the jury?

Finally, in considering the drafting of a rule setting forth procedures to be followed in determining the existence of a privilege, the question arose in the Reporter's mind whether such a rule might be included more effectively in the Uniform Rules other than in Article V. Accordingly, if the Drafting Committee decides to retain a procedural rule either in its current substance and format, or some variation thereof, should the rule be included in the Uniform Rules through an amendment to Uniform Rule 104(a) dealing with the determination of preliminary questions concerning the existence of a privilege? It might also afford an opportunity for dealing with the anomaly in the current Uniform Rule 104(a) that "[i]n making its determination . . . [the court] is not bound by the rules of evidence except those with respect to privileges." See further, in this connection, *United States v. Zolin, 491 U.S. 563*, *109 S.Ct. 2619 (1989),* that Rule 104(a) does not prohibit the use of *in camera* review procedures when a District Court rules on privilege claims.

Article VI

WITNESSES

Rule 601. [General Rule of Competency].

Every person is competent to be a witness except as otherwise provided in these rules.

Reporter's Note

The comment to Rule 601 reads as follows:

> This repeals the "deadman's statute." We recommend this. If it is desired to retain the deadman's statute a sentence should be added recognizing the exception provided in the local "deadman's statute."

There are no proposals for amending Uniform Rule 601 pending further discussion of the Drafting Committee.

Rule 602. [Lack of Personal Knowledge].

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness ~~he~~ has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. ~~of the witness himself.~~ This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Reporter's Note

This proposal for amending Rule 602 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

There are no other proposals at the present time for amending Uniform Rule 602.

Rule 603. [Oath or Affirmation].

Before testifying, every witness shall be required to declare that ~~he~~ the witness will testify

truthfully, by oath or affirmation administered in a form calculated to awaken ~~his~~ the witness' conscience and impress ~~his~~ the witness' mind with ~~his~~ the duty to do so.

Reporter's Note

This proposal for amending Rule 603 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

There are no other proposals at the present time for amending Uniform Rule 603.

Rule 604. [Interpreters].

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation ~~that he will~~ to make a true ~~translation~~ and complete rendition of all communications made during the interpretive process to the best of the interpreter's knowledge and belief.

Reporter's Note

This proposal for amending Rule 604 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

The use of the word "translation" in Uniform Rule 604 prompted extensive discussion by the Drafting Committee at its meeting in Cleveland, Ohio, October 4-6, 1996. In turn, this useful discussion prompted further investigation and research to determine whether an amendment of the rule should be recommended which would more nearly reflect the interpretive process and, in particular, the oath or affirmation that should be administered to the interpreter.

In practical terms "the difference between interpreting and translation is only the difference in the medium: the interpreter translates orally, while a translator interprets written text." See What does an interpreter do?, p. 1, Russian Interpreters Co-op, Cambridge, Mass. (1997). See also, Merriam Webster's Collegiate Dictionary, Tenth Edition (1993), defining an "interpreter" as one who translates orally for parties conversing in different languages." More to the point, the Russian Interpreters Coop describes the process as follows:

> Translation [or interpretation] is not a matter of substituting words in one language for words in another. It is a matter of understanding the thought expressed in one language and then explaining it using the resources of another language. In other words, what an interpreter does is change words into meaning, and then change

meaning back into words--of a different language. So interpreting is basically paraphrasing.

See also, Rasmussen v. Baker, 50 P. 819, 825, 7 Wyo. 117, 140, 38 L.R.A. 773 ( ), in which the court states that "[t]o translate is to give the sense or equivalent of, as a word, expression, or an entire work, in another language or dialect. * * * Generally speaking, a translation need not consist of transferring from one language into another. It may apply to the expression of the same thoughts in other words of the same language. As applied to a state Constitution, a translation into a foreign language is not a copy thereof."

Accordingly, the question arises whether an interpreter ought to be forced to swear or affirm that what the interpreter is about to do is a 100-percent true rendition of the statements in the original language. The proposed amendment of the required oath of an interpreter in Uniform Rule 604 is intended to reflect the interpretive process as explained above and not require an oath to which a conscientious interpreter could not subscribe. The words "all communications during the interpretive process" are employed in the blackletter to assure that the interpretive process includes both verbal and nonverbal means of communication, as well as questions, answers, or other statements that may be made during the interpretive process.

Judicial authority with respect to the interpretive process is sparse. Generally speaking, the courts are committed to requiring a "continuous word for word translation of everything relating to the trial. . . ." See United States v. Joshi, 896 F.2d 1303 (11th Cir. 1990). At the same time, it has also been held that "[a]lthough defendants have no constitutional "right" to flawless, word for word translations, . . . interpreters should nevertheless strive to translate exactly what is said; courts should discourage interpreters from "embellishing" or "summarizing" live testimony. See United States v. Gomez, 908 F.2d 809 (11th Cir. 1990). Even then "[t]he legislative history of the Court Interpreters Act contemplates that under certain circumstances even "summary translations" allowing the interpreter to "condense and distill the speech of the speaker" would be permissible. See United States v. Joshi, supra, at p. 1309, n. 6. See also, Court Interpreters Act, 28 U.S.C.A. § 1827. See further, H.R. Rep. No. 1687, 95th Cong., 2d Sess. at 8, reprinted in, 1978 U.S. Code Cong. & Admin. News at 4659.

There are no proposals at the present time for amending Rule 604 in any other respect.

Rule 605. [Competency of Judge as Witness].

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Reporter's Note

There are no proposals for amending Uniform Rule 605 pending further discussion of the

Drafting Committee.

Rule 606. [Competency of Juror as Witness].

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which ~~he~~ the juror is sitting ~~as a juror~~. If ~~he~~ the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon ~~his~~ that or any other juror's mind or emotions as influencing ~~him~~ the juror to assent to or dissent from the verdict or indictment or concerning ~~his~~ the juror's mental processes in connection therewith, nor may ~~his~~ the juror's affidavit or evidence of any statement by ~~him~~ the juror concerning a matter about which ~~he~~ the juror would be precluded from testifying be received, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Reporter's Note

This proposal for amending Rule 606 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

There are no other proposals at the present time for amending Uniform Rule 606.

Rule 607. [Who May Impeach].

The credibility of a witness may be attacked by any party, including the party calling ~~him~~ the witness.

Reporter's Note

This proposal for amending Rule 607 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

There are no other proposals at the present time for amending Uniform Rule 607.

Rule 608. [Evidence of Character and Conduct of Witness].

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

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

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

Reporter's Note

This proposal for amending Rule 608 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

There are no other proposals at the present time for amending Uniform Rule 608.

Rule 609. [Impeachment by Evidence of Conviction of Crime].

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused ~~he~~ has been convicted of a crime shall be admitted, subject to Rule 403, ~~but only~~ if the crime ~~(1)~~ was punishable by death or imprisonment in excess of one year under the law under which the witness ~~he~~ was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence substantially outweighs its prejudicial effect to the accused ~~a party or the witness,~~; and ~~or~~

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. Except as otherwise provided by statute, however, the court may in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(f) Procedure governing the admissibility of convictions to attack the credibility of a witness.

(1) The proponent of evidence of a conviction for purposes of attacking the credibility of a witness pursuant to this Rule shall give to the adverse party reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such conviction, or convictions, the proponent intends to introduce at trial.

(2) The court shall articulate on the record the factors considered in making its determination of the admissibility of evidence of convictions offered under either Subdivision (a)(1) or Subdivision (a)(2) of this Rule. The court may consider such factors among others, as:

(A) the degree to which the crime is indicative of veracity;

(B) the point in time of the conviction and the witness' subsequent history;

(C) the similarity between the conviction offered for impeachment and the charged crime if the witness is either a defendant in a criminal case or a witness who would be associated with the defendant;

(D) the importance of the witness' testimony;

(E) the importance of the credibility of the witness to the outcome of the proceeding;

(F) other evidence offered or to be offered by the proponent to impeach the witness; and

(G) whether the witness testified in the case in which the witness was convicted.

(3) If the conviction is determined to be admissible under Subdivision (f)(2) and provided the witness is at some point afforded a fair opportunity to reply, the conviction may be elicited from the witness during examination or cross-examination, established by public record, or presented during the trial by other extrinsic evidence if the public record is not available and good cause is shown.

(4) If a conviction is admitted at trial under either Subdivision (a)(1) or Subdivision (a)(2) of this Rule, the court, upon the request of a party, shall give an instruction on the limited admissibility of the evidence, as provided in Rule 105.

(g) Details of conviction which may be admitted. Unless the right is waived by a party whose witness is being impeached by a conviction as provided in Subdivision (a)(1) or Subdivision (a)(2), the only details of the conviction which may be admitted for impeachment purposes are the:

(A) fact of the conviction;

(B) name of the crime;

(C) time, place and number of times convicted; and

(D) fact that the crime is either a felony or a misdemeanor.

Inquiry into any rebutting details of the conviction is permissible if any statement is made

in mitigation of the conviction.

(h) Preserving error for reviewing the admission of evidence of convictions. Error is not preserved on appeal for reviewing a pretrial ruling on the admissibility of evidence of an accused's prior convictions under Rule 609 unless the accused testifies at trial.

Reporter's Note

This proposal for amending Uniform Rule 609 eliminates the gender-specific language in subdivision (a). These changes are technical and no change in substance is intended.

In addition, the proposal conforms Uniform Rule 609(a) to the blackletter of Rule 609(a) of the Federal Rules of Evidence as amended March 2, 1987, eff. Oct. 1, 1987 and Jan. 26, 1990, eff. Dec. 1, 1990. Uniform Rule 609(a)(1) currently provides that in determining the admissibility of convictions for crimes punishable by death or imprisonment in excess of one year the court must find "that the probative value of admitting this evidence outweighs its prejudicial effect to a party or the witness." The rule as proposed would change the substance of Uniform Rule 609(a) by providing, in the case of a witness other than the accused, that the conviction is admissible unless, pursuant to Uniform Rule 403, the probative value of the conviction is substantially outweighed by the danger of unfair prejudice. In the case of the accused, the rule would require the court to determine "that the probative value of admitting this evidence substantially outweighs its prejudicial effect to the accused."

The word "substantially" is not contained in the balancing test applicable to the admissibility of an accused's convictions under Federal Rule 609(a)(1). Incorporating the requirement of "substantially" in Uniform Rule 609(a)(1) would conform the balancing test applicable in the case of the accused to the balancing test proposed in subdivision (b) relating to the time limit on the admissibility of convictions for impeachment purposes.

The addition of the language in subdivision (a)(2) that "evidence that any witness has been convicted of a crime shall be admitted if it" is intended to have only a clarifying effect.

The proposal for amending Uniform Rule 609(b) would bring into the rule the comparable balancing test found in Federal Rule 609(b) for determining the admissibility of convictions more than ten years old. In Tentative Draft #2, Rule 609(b) also contained a notice provision, but, unlike the notice provision in Federal Rule 609(b), provided for the giving of notice in a manner comparable to that now contained in the proposed Final Draft of Uniform Rule 404(b). The notice provision contained in Rule 609(b) was intended to carry forward the view that a consistent rule for the giving of notice be established whenever notice is required under the Uniform Rules. See, in this connection, the Reporter's Note to Rule 404(b).

However, in this Tentative Draft #3, the notice provision contained in earlier Tentative Drafts of Rule 609(b) has been deleted and is now incorporated in proposed Subdivision (f) providing for the procedures to be followed in determining the admissibility of convictions for the purpose of attacking the credibility of a witness.

No amendments to subdivisions (c) through (e) are proposed in this Tentative Draft #3 pending further discussion of the Drafting Committee.

A Subdivision (f) is also proposed in this Tentative Draft #3 to provide in the blackletter of Rule 609 for procedures to be followed in determining the admissibility of convictions to attack the credibility of a witness.

Subdivision (f)(1) sets forth a notice requirement and, as mentioned, adopts the notice provision contained in proposed Uniform Rule 404(b) to provide for consistency in the giving of notice under the Uniform Rules when it is required as a condition to the admissibility of evidence. As presently proposed, the notice provision applies to the entirety of proposed Uniform Rule 609 whenever a proponent seeks the admission of a conviction to attack the credibility of a witness and not just for the purpose of seeking the admission of a conviction under Uniform Rule 609(b) dealing with the time limit on the admissibility of convictions.

Subdivisions (f)(2) through (f)(4) and Subdivision (g) are drawn from the procedural rules proposed, but rejected, for amending Federal Rule 609 at the meeting of the Advisory Committee on the Federal Rules of Evidence on April 14-15, 1997.

Subdivision (h) has been drafted to carry forward the view of the Drafting Committee that the requirements of Luce v. United States, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984), ought to be addressed in the narrow context of the review of pretrial rulings on the admissibility of an accused's prior convictions under Uniform Rule 609. Subdivision (h) responds to this preliminary view of the Drafting Committee. See, in this connection, the **Reporter's Note** to Rule 103 at pages 7-8 of the Final Draft of Articles I-IV with the default rule of 103(e) adopted by the Drafting Committee at its meeting in Cleveland, Ohio, October 4-6, 1996.

The Drafting Committee may wish to consider revisiting subdivision (a)(2) of proposed Uniform Rule 609 in view of the Committee's discussion at its meeting in Cleveland, October 4-6, 1996 concerning the desirability of making changes to clarify the meaning of "dishonesty or false statement." In 1987 The ABA Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence recommended amending Rule 609(a)(2) of the Federal Rules to clarify the meaning of the language "dishonesty or false statement." In Rule 609's 1990 amended form the ABA proposal would read as follows:

> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved ~~dishonesty or false statement,~~ untruthfulness or falsification, regardless of the punishment, unless the court determines that the probative value of admitting this evidence is substantially outweighed by the danger of unfair prejudice. This

subsection (2) applies only to those crimes whose statutory elements necessarily involve untruthfulness or falsification.

The rationale for the proposed amendment of Rule 609(a) is explained as follows:

> Proposed section (a)(2) both clarified and changes the existing Rule. The current wording of (a)(2) refers to crimes of dishonesty or false statement. Endless dispute has resulted from the inclusion of "dishonesty" in the Rule. Some courts gave used this provision to include crimes of stealth such as larceny, robbery, burglary or even on occasion narcotics violations. Some have looked at the factual details of the conduct underlying the charge rather [than?] the statutory language of the offense. . . .
>
> Proposed Rule 609(a)(2) applies only to convictions for untruthfulness or falsification. This change more accurately implements the intention of present Rule 609. The proposed Rule intends the focus to be on the statutory elements since a mini-trial is virtually necessary under any other approach. This revision would probably not result in substantial change in practice since most circuits currently view (a)(2) narrowly because of the existing controversy over whether a court has discretion under Rule 403 to exclude such convictions.
>
> The proposed Rule also makes clear that courts can exclude convictions under (a)(2) when the probative value of the conviction is substantially outweighed by the danger of unfair prejudice. * * *

See Federal Rules of Evidence: A Fresh Review and Evaluation, 120 F.R.D. 299, 356, 359-360 (1987).

The Evidence Project recommends that subdivisions 609(a)(2) and (c) of Rule 609 of the Federal Rules of Evidence be revised as follows:

> **(2)** evidence that any witness has been convicted of a crime, shall be admitted if it involved an element of dishonesty or false statement, regardless of punishment.
>
> **(c) Effect of pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction ~~is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction~~ that has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence is not admissible under this rule.

See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of Evidence, 171

F.R.D. 553-558 (1997).

A preliminary assessment of state law with regard to crimes which embrace the element of dishonesty are in a state of confusion. For example, as to the crime of burglary, or robbery, the following states treat the crime as one of dishonesty and admissible per se against a criminal defendant for impeachment purposes: **Connecticut**, State v. Prutting, 669 A.2d 1228 (Conn. App. 1996)(11-year old robbery convictions probative of dishonest intent in the general sense); **Michigan,** People v. Cross, 508 N.W.2d 144 (Mich. App. 1993)(theft is an element of robbery, and indicator that defendant is of dishonest character and may not testify truthfully); and **Washington,** State v. Rivers, 921 P.2d 495 (Wash. 1996) and State v. Black, 938 P.2d 362 (Wash. App. Div. 1 1997)(convictions for robbery and burglary admissible per se as crime of dishonesty). The following states do not treat burglary, or robbery, as crimes of dishonesty or false statement: **Minnesota,** State v. Hoffman, 549 N.W.2d 372 (Minn. App. 1996); **Mississippi,** Townsend v. State, 605 So.2d 767 (Miss. 1992); and **Utah,** State v. Morrell, 803 P.2d 292 (Utah App. 1990). The following states consider the admissibility of the crimes of burglary and robbery for impeachment purposes as felony crimes and admissible under rules equivalent to proposed Uniform Rule 609(a)(1). See **Arkansas, California, Georgia, Illinois, Indiana, Louisiana, Maine, Massachusetts, Maryland, Nevada, New York, Ohio, Rhode Island, South Carolina, Texas,** and **Vermont.**

Larceny has been held to constitute a crime of dishonesty or false statement and admissible against a testifying defendant for impeachment purposes in the following jurisdictions: **Connecticut,** State v. Dawkins, 681 A.2d 989 (Conn. App. 1996); **Florida,** Reichmann v. State, 581 So.2d 133 (Fla. 1991); **Illinois,** People v. Elliot, 654 N.E.2d 636 (Ill. App. 1 Dist. 1995); **Maine,** State v. Grover, 518 A.2d 1039 (Me. 1986); **New York,** People v. Moody, 645 N.Y.S.2d 375 (N.Y. A.D. 4 Dept. 1996); **Oklahoma,** Cline v. State, 782 P.2d 399 (Okl.Cr. 1989); and **Washington,** State v. Brown, 782 P.2d 1013 (Wash. 1989). In contrast, larceny is not considered a crime of dishonesty or false statement in the following jurisdictions: **Nebraska,** State v. Williams, 326 N.W.2d 678 (Neb. 1982); **North Dakota,** State v. Bohe, 447 N.W.2d 277 (N.D. 1989); **Oregon,** State v. Reitz, 705 P.2d 762 (Or. App. 1985); and **Utah,** State v. Johnson, 784 P.2d 1135 (Utah 1989).

Does the Drafting Committee want to explore further an amendment to proposed Uniform Rule 609(a)(2) to deal with this interpretive problem and promote greater uniformity among the states in determining what convictions are sufficiently related to untruthfulness or falsification to justify per se admissibility?

Rule 610. [Religious Beliefs and Opinions].

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

Reporter's Note

This proposal for amending Rule 610 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

There are no other proposals at the present time for amending Uniform Rule 610.

Rule 611. [Mode and Order of Interrogation and Presentation].

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop ~~his~~ the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Reporter's Note

This proposal for amending Rule 611 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

The Drafting Committee agreed at its meeting in Cleveland, October 4-6, 1996, that the comment to the rule should include a statement to the effect that, in applying Uniform Rule 611(a)(3) to protect witnesses from harassment or undue embarrassment, the court should be particularly sensitive to protecting the sensibilities of children when they are giving testimony in court.

There are no other proposals at the present time for amending Uniform Rule 611.

Rule 612. [Record ~~Writing~~ or Object Used to Refresh Memory].

(a) While testifying. If, while testifying, a witness uses a record ~~writing~~ or object to refresh ~~his~~ memory, an adverse party is entitled to have the record ~~writing~~ or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) Before testifying. If, before testifying, a witness uses a record ~~writing~~ or object to refresh ~~his~~ memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the record ~~writing~~ or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) Terms and conditions of production and use. A party entitled to have a record ~~writing~~ or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the record ~~writing~~ or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the record ~~writing~~ or object contains matters not related to the subject matter of the testimony, the court shall examine the record ~~writing~~ or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a record ~~writing~~ or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Reporter's Note

First, this proposal for amending Rule 612 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

Second, it is proposed that Rule 612 be amended to substitute the word "record" for the language "writing" 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. "Record" would then be defined by amending Rule 1001(1), or some other appropriate rule 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 Uniform Rule 612.

The Evidence Project would amend Rule 612 of the Federal Rules of Evidence as follows:

> Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either
>
> (1) while testifying, or
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
>
> ~~an adverse~~ <u>any</u> party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence<u>, for the purpose of establishing similarities between the witness' testimony and the writing,</u> those portions which relate to the testimony of the witness. <u>If the writing used is protected by the attorney-client privilege, use of the writing to refresh prior to trial does not constitute a waiver of the privilege.</u> If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order the delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of Evidence, 558-563 (1997).

Rule 613. [Prior Statements of Witnesses].

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by ~~him~~ the witness, whether written or not, the statement need not be shown nor its contents disclosed to ~~him~~ the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate ~~him~~ the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Reporter's Note

This proposal for amending Rule 613 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

There are no other proposals at the present time for amending Uniform Rule 613.

The Evidence Project would amend subdivision (b) of Rule 613 of the Federal Rules of Evidence by striking the last sentence and include a new subdivision (c) as follows:

> **(c) Prior consistent statements of hearsay declarant offered for rehabilitation.** A prior consistent statement may be offered to rehabilitate a witness. If offered to rebut an express or implied charge against a witness of motive to misstate, a consistent statement must have been made before the motive to misstate arose.

See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of Evidence, 563-566, 298-301 (1997).

Rule 614. [Calling and Interrogation of Witnesses by Court].

(a) Calling by court. The court, at the suggestion of a party or on its own motion, may call

witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Reporter's Note

There are no proposals for amending Uniform Rule 614 pending further discussion of the Drafting Committee.

Rule 615. [Exclusion of Witnesses].

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of ~~his~~ the party's cause.

Reporter's Note

This proposal for amending Rule 615 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

There are no other proposals at the present time for amending Uniform Rule 615.

~~**Rule 616. [Bias of Witness].**~~

~~For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.~~

~~As added 1986.~~

Rule 616. [Bias of Witness]

A witness may be impeached with evidence of bias, subject to the limitations of rule 609. Extrinsic evidence of bias is not admissible unless the witness has been afforded an opportunity to explain or deny the same while initially testifying and the opposing party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Reporter's Note

The Comment to the 1986 Amendment states as follows:

> Neither the Federal nor the Uniform Rules of Evidence contain a provision authorizing the introduction of evidence of bias, prejudice, or interest to attack the credibility of a witness. Some confusion has arisen as to the admissibility of this type of evidence. Thus, the committee recommended that the conference adopt such a rule. The rule codifies the holding in United States v. Abel, 469 U.S. 45 (1984).
>
> As is the usual format of these rules, the evidence described by Rule 616 is not automatically to be admitted, but is subject to other rules such as Rule 403.

It was the consensus of the Drafting Committee at its meeting in Cleveland, Ohio, October 4-6,1996 to delete Uniform Rule 616 with an appropriate comment in Uniform Rule 607 that the deletion of Uniform Rule 616 is not to suggest that bias is not a permissible form of impeachment, but simply a matter of relevancy under Uniform Rule 401, unless its admissibility is affected by some other rule, such as exclusion under Uniform Rule 403 on grounds of unfair prejudice.

Historically, the objective under both the Federal Rules of Evidence and the Uniform Rules has been to formulate rules governing impeachment where change or clarification in the law was deemed necessary and not to incorporate a comprehensive set of rules dealing with the entire body of law governing the impeachment and rehabilitation of witnesses. Unless the entire approach to the issue of the impeachment and rehabilitation of witnesses under the rules is to be changed, efforts to single out untroublesome methods historically recognized for impeachment purposes seems misplaced.

However, at the Drafting Committee meeting in Dallas, Texas, January 24-26, 1997, the Committee decided to restore a rule addressing the issue of bias in the blackletter of the Uniform Rules of Evidence by adopting the rule proposed by The Evidence Project under the direction of Professor Rice by adding a Rule 616 to the Federal Rules of Evidence. The Evidence Project proposal is as follows:

Revised Rule 616. Bias

A witness may be impeached with evidence of bias, subject to the limitations of rule 609. Extrinsic evidence of bias is not admissible unless the witness has been afforded an opportunity to explain or deny the same while initially testifying and the opposing party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

See Rice, Paul R., The Evidence Project, Proposed Revisions to the Federal Rules of Evidence, 566-567 (1997).