UNIFORM RULES OF EVIDENCE ACT
(Last Revised or Amended in 2005)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-EIGHTH YEAR
IN DENVER, COLORADO
JULY 23 – 30, 1999

WITH PREFATORY NOTE AND COMMENTS

March 8, 2005

ABOUT NCCUSL

The **National Conference of Commissioners on Uniform State Laws** (NCCUSL), now in its 114th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

Conference members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

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- NCCUSL statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.

- NCCUSL keeps state law up-to-date by addressing important and timely legal issues.

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- NCCUSL Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.

- NCCUSL's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.

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UNIFORM RULES OF EVIDENCE

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Rules of Evidence was as follows:

C. ARLEN BEAM, U.S. Court of Appeals, 435 Federal Building, Lincoln, NE 68508, *Chair*
ROBERT H. ARONSON, University of Washington, School of Law, 110 NE Campus Parkway, Seattle, WA 98105-6617
RHODA B. BILLINGS, Wake Forest University, School of Law, P.O. Box 7206, Winston-Salem, NC 27109
W. GRANT CALLOW, Suite 610, 425 G. Street, Anchorage, AK 99501
MICHAEL B. GETTY, 1560 Sandburg Terrace, Suite 1104, Chicago, IL 60610
SHAUN P. HAAS, Legislative Council, Suite 401, 1 E. Main Street, Madison, WI 53701-2536
DAVID PEEPLES, 224th District Court, Bexar County Courthouse, 100 Dolorosa, San Antonio, TX 78205
RUSSELL G. WALKER, JR., Superior Court, 19-B Judicial District, 145 Worth Street, Asheboro, NC 27203
LEO H. WHINERY, University of Oklahoma, College of Law, 300 Timberdell Road, Norman, OK 73019, *National Conference Reporter*
D. JOE WILLIS, Suites 1600-1950, Pacwest Center, 1211 S.W. 5th Avenue, Portland, OR 97204

EX OFFICIO

GENE N. LEBRUN, P.O. Box 8250, 9th Floor, 909 St. Joseph Street, Rapid City, SD 57709, *President*
BARRY H. EVENCHICK, 8th Floor, One Gateway Center, Newark, NJ 07102, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

MYRNA S. RAEDER, Southwestern University, School of Law, 675 S. Westmoreland Avenue, Los Angeles, CA 90005, *Co-Advisor*
HENRY dePONT RIDGELY, Superior Court of Delaware, Courthouse, Dover, DE 19901, *Judicial Administration Division – National Conference of Administrative Law Judges Section Advisor*
REAGAN W. SIMPSON, Suite 5100, 1301 McKinney, Houston, TX 77010, *Co-Advisor*

EXECUTIVE DIRECTOR

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman, OK 73019, *Executive Director*
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195

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UNIFORM RULES OF EVIDENCE

PREFATORY NOTE

Codification of rules of evidence has proven to be more of a "work in progress" enterprise than was originally anticipated by the various drafting bodies at work in the 1970's. Societal changes, advances in both the hard and soft science and improvements in information technology have exposed many problematic evidentiary situations routinely faced by lawyers and judges. With increasing frequency, the rules fail to fit into a new environment, or alternatively, if they fit, they produce measurable inequity. It is within this context that the Drafting Committee to revise the Uniform Rules of Evidence of 1974, as amended, presented its final work product to the National Conference of Commissioners on Uniform State Laws at its 1999 Annual Meeting in Denver, Colorado.

The assignment from the Conference's Scope and Program and Executive Committees authorized a comprehensive analysis of significant problems, with directions to keep in mind that the law of evidence, being applicable to an almost unlimited range of subject matter, does not reasonably respond to micro-management by the rule maker.

It may be prudent to anticipate one area of inquiry arising from an earlier mandate directed to the Drafting Committee that concluded its work with the 1986 amendments adopted at the Boston Conference. Responding to the expanding interstate and intercourt nature of the practice of law, the Drafting Committee was charged with bringing the language of the Uniform Rules of Evidence into line with comparable provisions in the Federal Rules of Evidence, where reasonably possible. The underlying theory was, apparently, that a trial practitioner need master only one set of rules to comfortably practice in both federal and state forums located in various States, Districts, and Circuits. However, in practice, this theory does not seem to work as well as expected. In operation, the same words are often construed differently by different courts, even by sister federal circuits and state jurisdictions. Thus, the careful lawyer must continue to research certain rules of evidence on a case-by-case basis.

As a result, the current Drafting Committee has endeavored to draft the amended rules in clear and reasonably understandable terms without slavish regard for other existing work product. In this context, you will note, for the first time, that we have created a definitions rule, as amended Rule 101, containing terms that are used in several different Uniform Rules. The Drafting Committee is also proposing a unique approach to accommodate the admissibility of electronic evidence through the use of the term "record" throughout the rules in lieu of the

terminology "writings," "recordings," and "photographs" and appropriately defining "record" in Rule 101(3). Numerous stylistic changes have also been made throughout the Uniform Rules as recommended by the Committee on Style.

The Drafting Committee also met on October 30–November 1, 1998 and February 26–28, 1999 to consider the comments, criticisms and suggestions of the Committee of the Whole of the Conference at the First Reading in 1988 of proposed amendments to the Uniform Rules. Hopefully, the Committee gave due consideration to all of the views expressed by Commissioners at the First Reading even though for various reasons all of them were not recommended or adopted. Among the Uniform Rules in which substantive revisions have been made based upon recommendations of the Committee of the Whole are: Rule 404(c) narrowing the scope of the procedural rules to apply in criminal cases when evidence of other crimes, wrongs or acts is offered against an accused; Rule 407 clarifying the meaning of an event in determining the applicability of the rule excluding evidence of subsequent remedial measures; Rules 803(6) and 803(8) to provide that public records inadmissible under Rule 803(8) are inadmissible as business records under Rule 803(6); and Rule 807 which tightens up the criteria for determining the admissibility of statements of children relating to neglect, or physical or sexual abuse.

It should also again be noted that Congress added Rules 413 through 415 of the Federal Rules of Evidence on September 13, 1994, Pub. L. 103-222, § 320935(a), 108 Stat. 2135, effective July 9, 1995. Rules 413 through 415 permit respectively, (1) the admissibility of evidence of prior offenses of sexual assault when, in a criminal proceeding, a person is accused of such an offense; (2) the admissibility of evidence of prior offenses of child molestation when, in a criminal proceeding, a person is accused of child molestation, and (3) the admissibility of evidence of prior offenses of sexual assault, or of child molestation when, in a civil proceeding, a claim for damages or other relief is sought against a party who is alleged to have committed an act of sexual assault or child molestation.

The overwhelming majority of judges, lawyers, law professors and legal organizations who responded to the Federal Advisory Committee's call for public response opposed the enactment of Rules 413 through 415 without equivocation. The principal objections expressed were twofold. First, the rules would permit the admission of unfairly prejudicial evidence by focusing on convicting a criminal defendant for what the defendant **is** rather than what the defendant **has done**.

Second, the rules contained numerous drafting problems apparently not intended by their authors. For example, mandating the admissibility of the evidence without regard to the other rules of evidence such as the Rule 403 balancing test and the hearsay rule. In turn, it was believed that serious

constitutional questions would arise in criminal proceedings in which the rules were invoked. For these and related reasons, the Advisory Committee on the Federal Rules of Evidence, the Standing Committee on Rules of Practice and Procedure and the Judicial Conference of the United States opposed the enactment of Rules 413 through 415.

Alternatively, the Standing Committee and the Judicial Conference recommended the adoption of an amendment to Rules 404 and 405 of the Federal Rules of Evidence proposed by the Advisory Committee which would provide for the admission of such evidence under limited conditions. However, Congress elected not to accept the recommendation.

In spite of the expressed concerns for the constitutionality of Rules 413 through 415, they are being given surprising vitality among the federal circuit courts that have considered the issue. These courts have held that the rules do not violate the Due Process Clause subject to the balancing of relevancy against unfair prejudice as provided in Rule 403 of the Federal Rules of Evidence. *See United States v. Mound*, 149 F.3d 799 (8th Cir. 1998); *United States v. Summer*, 119 F.3d 658 (8th Cir. 1997); *United States v. Castillo*, 140 F.3d 874 (10th Cir. 1998); *United States v. Guardia*, 135 F.3d 1326 (10th Cir. 1998); *United States v. Enjady*, 134 F.3d 1427 (10th Cir. 1998); and *United States v. Larson*, 112 F.3d 600 (2d Cir. 1997).

However, there is still some lingering for the constitutionality of these rules. *See* the dissenting opinion from an order denying a petition for rehearing *en banc* in *United States v. Mound*, 157 F.3d 1153 (8th Cir. 1998), in which it is argued that an *en banc* court ought to consider the constitutionality of Rule 413 because the rule "presents [so] great a risk that the jury will convict a defendant for his past conduct or unsavory character" that it violates due process. *Id.* at 157 F.3d 1153. *See further*, M.A. Sheft, *Federal Rules of Evidence 413: A Dangerous New Frontier*, 33 Am. Crim. L. Rev. 57, 77-82 (1995).

In any event, the propriety of including Rules 413 through 415 in the Uniform Rules of Evidence was considered questionable at best. There is no state which has adopted these rules to date. In Arizona, their adoption was considered by the Supreme Court of Arizona, but was rejected largely for the same reasons they were rejected by the Judicial Conference of the United States. *See* Robert L. Gottsfield, *We Just Don't Get It: Improper Admission of Other Acts Under Evidence Rule 404(B) as Needless Cause of Reversgal in Civil and Criminal Cases*, Ariz. Att'y, Apr. 1997 at 24. Connecticut has reprinted Federal Rules 413 through 415 in its Trial Lawyers Guide to Evidence, but they are inapplicable in state court proceedings. Indiana has a rule similar to Federal Rule 414, but it is more carefully drawn with procedural safeguards. *See* Ind. Code Ann. § 35-37-4-15 (West 1997).

California also has statutes authorizing the introduction of prior sexual offenses or acts of domestic violence subject to balancing relevancy against unfair prejudice. *See* Cal. Evid. Code §§ 1108, 1109 (West 1997). Section 1108 has been held constitutional by the California Court of Appeal in *People v. Fitch* (App. 3 Dist. 1997), 63 Cal. Rptr. 753, 55 Cal. App. 4th 172. Missouri also had a blanket statutory rule, since held unconstitutional, admitting evidence of prior acts of child molestation similar to Federal Rule 414. *See* Mo. Ann. Stat. § 566.025 (West 1978).

For the foregoing reasons and apparent lack of support to date among the several states for the enactment of rules similar to Rules 413 through 415, the Drafting Committee, at its meeting in Cleveland, Ohio, on October 46, 1996, voted unanimously not to include or recommend the adoption of Rules 413 through 415 by the Conference.

Similarly, the Drafting Committee did not recommend the adoption of the Advisory Committee's earlier carefully drawn proposed amendment to Rule 404 of the Federal Rules of Evidence to deal with the issue.

These decisions of the Drafting Committee have now been reinforced by the decision of the Supreme Court of Missouri in *State v. Burns*, 978 S.W.2d 759 (Mo. 1998), holding that Section 566.025, *supra*, contravened the Missouri Constitution. In Burns, a prosecution for statutory sodomy, the trial court admitted the testimony of two witnesses relating to prior uncharged acts of sexual abuse committed by the defendant pursuant to Section 566.025, RSMo 1994, providing that evidence of other charged and uncharged crimes "shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he is charged."

The Missouri Supreme Court reasoned that Section 566.025 violated Article I, Section 17 providing "[t]hat no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information" and Article I, Section 18(a) providing "[t]hat in criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation; . . . ." In doing so it rejected the state's argument that Section 566.062 did not violate Sections 17 and 18(a) of Article I since the defendant was not "on trial" for the uncharged conduct because he could be convicted only for the formally charged crime. This interpretation, the Court reasoned, would enable the jury to "improperly convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the charged crime. * * * As a result, the defendant is forced to defend against the uncharged conduct in addition to the charged crime."

The Court also rejected the State's argument that in determining the admissibility of propensity evidence under Section 566.025 the trial court can balance the value and effect of evidence of other crimes. This interpretation, the Court also reasoned, would require ignoring the Legislature's use of the mandatory term "shall," an approach which has largely been ignored by the federal circuit courts in dealing with this issue. Finally, the defendant also contended that Section 566.025 violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. However, the Court did not reach these issues by concluding that the challenge under the Missouri Constitution was dispositive.

Within the foregoing approach the proposed amendments of the Uniform Rules of Evidence (1999) were approved and recommended for enactment in all states at the Conference's Annual Meeting, meeting in its One-Hundred-and-Eighth Year in Denver, Colorado, July 23–30, 1999.

UNIFORM RULES OF EVIDENCE

ARTICLE I
GENERAL PROVISIONS

RULE 101. DEFINITIONS. In these rules:

(1) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(2) "Public record" means a record of a public office or agency in which the record is prepared, filed, or recorded pursuant to law.

(3) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(4) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Comment

Rules 101 and 102 have been reorganized to include a definitions rule as Rule 101. The definitions in Rule 101 are of terms that have a generic application in their use throughout the Uniform Rules of Evidence. In contrast, terms that have application only in specific Articles or Rules are separately defined in those particular Articles or Rules. With the exception of the definition of "record" in Rule 101(3), the definitions in Rule 101 are self-evident and do not need further comment.

"Record" is separately defined in Rule 101(3) to support the use of the term in Rules 106, 612, 801(a), 803(5) through 803(17), 901 through 903 and 1001 through 1007. Although the Uniform Rules prior to their amendment in 1999 included specific reference to "data compilations" to accommodate the admissibility of records stored electronically, many business and governmental records do not now consist solely of "data compilations." Rather, in today's technological environment, or as it may develop in the future, records are, or may be, kept in a variety of mediums other than in just "data compilations." Presently, "records" may include items created, or originated, on a computer, such as through word processing or spreadsheet programs; records sent and received, such as electronic mail; data stored through scanning or image processing of paper originals; and information compiled into data bases. One, or all, of these processes may be involved in ordinary and customary business and governmental record-keeping. Modern technology thus dictates that any of the foregoing types of records should be admissible when they are relevant if reasonable evidentiary thresholds of evidentiary reliability are satisfied. The Rule 101(3) definition of "record" and the substitution of the word "record" for the terms "writing," "memorandum," "report," "document," "recorded statement," and "data compilation," when appropriate, are intended to accommodate the foregoing modern innovations in record keeping. At the same time, the approach accommodates the use of these more traditional forms of record keeping as evidence.

The definition of "record" in Rule 101(3) is derived from § 5-102(a)(14) of the Uniform Commercial Code and carries forward consistently the established policy of the Conference to accommodate the use of electronic evidence in business and governmental transactions. It should be made clear that the definition includes all writings, recordings, photographs and images for the purpose of interpreting the amendments to the Uniform Rules where the term "record" is used. "Writings," "recordings," "photographs," and "images" are separately defined in Rule 1001 of Article X as these terms are used in the interpretation of the original writing rule. See further, the Comment to Uniform Rule 1001.

RULE 102. SCOPE, PURPOSE, AND CONSTRUCTION.

(a) Rules applicable. Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the courts of this State.

(b) Rules inapplicable. These rules, other than those applicable to privileges, do not apply in:

(1) the determination of questions of fact preliminary to admissibility of evidence if the issue is to be determined by the court under Rule 104(a);

(2) proceedings before grand juries;

(3) proceedings for contempt in which the court may act summarily; and

(4) miscellaneous proceedings, such as proceedings involving extradition or rendition; [preliminary] [probable cause] hearings in criminal cases; [sentencing]; granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and release on bail or otherwise.

(c) Purpose and construction. These rules must be construed to secure fairness, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence, to the end that truth may be ascertained and issues justly determined.

Comment

Rule 102 combines in three subdivisions the black letter of former Rule 101 dealing with the scope of the Uniform Rules with the black letter of revisions in Rule 102 dealing with the purpose and construction of the Uniform Rules. This was done to facilitate the drafting of definitions Rule 101.

Subdivisions (a) and (b) incorporate the black letter of Uniform Rule 1101 with one technical change in subdivisions (a) and (b), style changes and one substantive change. In subdivision (b)(4) "probable cause hearing" is substituted for "detention hearing" to conform the rule to Rule 345 of the Uniform Rules of Criminal Procedure.

The phrase "miscellaneous proceedings, such as" is included in Rule 102(b)(4) to accommodate the expansion of the types of proceedings in which the rules of evidence should not apply, such as juvenile disposition hearings, to avoid attempting to catalogue the myriad types of proceedings in which the rules of evidence may not apply in the several state jurisdictions.

The word "sentencing" is bracketed in Rule 102(b)(4) to give the states flexibility in determining the extent to which rules of evidence are to apply in sentencing proceedings. This accommodates the diversity that currently exists among the several states with respect to the applicability of the rules of evidence in sentencing proceedings.

RULE 103. RULINGS ON EVIDENCE.

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

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

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

(b) Record of offer and ruling. The court may add any other or further statement that shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Effect of pretrial ruling. If the court makes a definitive pretrial ruling on the record admitting or excluding evidence, a party need not renew an objection or offer of proof at trial to preserve a claim of error for appeal.

(d) Hearing of jury. In jury cases, proceedings must be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions within the hearing of the jury.

(e) Errors affecting substantial rights. This rule does not preclude a court from taking notice of an error affecting a substantial right even if it was not brought to the attention of the trial court.

Comment

Rule 103 is amended to add a subdivision (c) to promote a uniform rule among the several states that if the court makes a definitive pretrial ruling on the record on the admission or exclusion of evidence a party need not renew the objection at trial.

RULE 104. PRELIMINARY QUESTIONS.

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of an individual to be a witness, the existence of a privilege, or the admissibility of evidence must be determined by the court, subject to subdivision (b). In making its determination, the court is not bound by the rules of evidence except the rules with respect to privileges.

(b) Determination of privilege. A person claiming a privilege must prove that the conditions prerequisite to the existence of the privilege are more probably true than not. A person claiming an exception to a privilege must prove that the conditions prerequisite to the applicability of the exception are more probably true than not. If there is a factual basis to support a good faith belief that a review of the

allegedly privileged material is necessary, the court, in making its determination, may review the material outside the presence of any other person.

(c) Relevancy conditioned on fact. If the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, in the court's discretion, subject to the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(d) Hearing of jury. A hearing on the admissibility of a confession in a criminal case must be conducted out of the hearing of the jury. A hearing on any other preliminary matter must be so conducted if the interests of justice require or, in a criminal case, an accused is a witness and so requests.

(e) Testimony by accused. An accused, by testifying upon a preliminary matter, does not become subject to cross-examination as to other issues in the case.

(f) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Comment

The amendment of Uniform Rule 104 to include a subdivision (b) is a condensed version of procedural rules originally proposed by the ABA Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence. Rule 104(b) is intended to accomplish two purposes.

First, it carries forward the ABA proposal by placing upon the proponent or contestant of a privilege the ultimate burden of persuasion "more probably true than not" rather than simply the production of evidence because of the importance which the existence of a privilege has in the trial of an issue of fact. It is true, at least at the federal level, that codification of an evidentiary burden 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 for the good sense of the trial judge." *See* 2 Weinstein's Evidence, ¶ 503-121 (1992). *See further*, the opinion of the Supreme Court of the United States in *United States v. Zolin*, 491 U.S. 554, 109

S.Ct. 2619, 105 L.Ed. 2d 469, n. 7 (1989), in which the Court deferred a decision on the issue. At the same time, if determining the existence of a privilege is a critical decision in the trial, requiring this minimal degree of persuasion provides both guidance to the court and emphasizes the importance of the admissibility issue when the existence of a privilege is involved.

Second, the proposed amendment also deals with the anomaly in Rule 104(a) that arguably forecloses the disclosure of privileged matter in determining the existene of a privilege by providing that "[i]n making its determination . . . [the court] is not bound by the rules of evidence except those with respect to privileges." The amendment addresses this problem by providing for disclosure of the privileged matter "outside the presence of any other person." This language in the black letter is employed in lieu of the language "in camera" sometimes employed to describe a judge's private review of evidentiary material. The terminology "in camera" is sometimes used to describe a court's private review of files without the presence of the parties, their attorneys, or spectators. *See State v. Warren*, 304 Or. 428. 746 P.2d 711 (1987). However, this is not invariably the case. The term "in camera" is sometimes used to describe a hearing outside the presence of the jury or unnecessary spectators. *See Wofford v. State*, 903 S.W.2d 796 (Tex. App. 1995). Accordingly, the rule contains the more specific language to describe the type of review authorized under Rule 104(b). However, the discretion accorded to the trial court in reviewing the material outside the presence of any other person is not unfettered. The rule requires that the court find that "there is a factual basis to support a good faith belief that a review of the allegedly privilege material is necessary . . ." *See United States v. Zolin*, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989) to the same effect

RULE 105. LIMITED ADMISSIBILITY. If evidence that is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Comment

This rule is not intended to affect a power of a court to order a severance or separate trial of issues in a multi-party case.

RULE 106. REMAINDER OF, OR RELATED, RECORD. If a record or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other record that in fairness ought to be considered contemporaneously with it.

Comment

A determination of what constitutes "fairness" includes consideration of completeness and relevancy as well as possible unfair prejudice.

ARTICLE II

JUDICIAL NOTICE

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS.

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one that is not subject to reasonable dispute because it is:

(1) generally known within the territorial jurisdiction of the trial court; or

(2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of earlier notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. The court shall instruct the jury to accept as conclusive

a fact judicially noticed.

ARTICLE III

PRESUMPTIONS

RULE 301. DEFINITIONS. In this article:

(1) "Basic fact" means a fact or group of facts that give rise to a presumption.

(2) "Inconsistent presumption" means that the presumed fact of one presumption is inconsistent with the presumed fact of another presumption.

(3) "Presumed fact" means a fact that is assumed upon the finding of a basic fact.

(4) "Presumption" means that when a basic fact is found to exist, the presumed fact is assumed to exist until the nonexistence of the presumed fact is determined as provided in Rules 302 and 303.

Comment

This definitions rule is intended to circumvent the various confusing uses of the word "presumption" and clarify its meaning by confining its use to what has been known and applied traditionally as a "rebuttable presumption." In addition to defining the terms "basic fact" and "presumed fact," a "presumption" is given a rebuttable effect by defining the word in Rule 301(4) to mean that the presumed fact of the presumption is assumed to exist until it is determined not to exist as provided in Rule 302 governing the effect of presumptions in civil cases or Rule 303 governing the effect of presumptions in criminal cases.

RULE 302. EFFECT OF PRESUMPTIONS IN CIVIL CASES.

(a) General rule. In a civil action or proceeding, unless otherwise provided by statute, judicial decision, or these rules, a presumption imposes on the party

against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

(b) Inconsistent presumptions. If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight, neither presumption applies.

(c) Effect if federal law provides the rule of decision. The effect of presumption respecting a fact that is an element of a claim or defense as to which federal law provides the rule of decision is determined in accordance with federal law.

Comment

Rule 302(a) in its amended form governs the effect of presumptions in civil cases by retaining former Uniform Rule 301 providing that a presumption, unless otherwise provided by statute, judicial decision, or these rules, imposes upon the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. The reasons for giving this effect to rebuttable presumptions are set forth in the United States Supreme Court Advisory Committee's Note, 56 F.R.D. 183 (1972).

Rule 302(b) deals with the effect of inconsistent presumptions and retains the effect of former Rule 301(b) by providing that the presumption applies that is founded on weightier policy considerations. Neither presumption applies if the presumptions are based upon policy considerations of equal weight.

Rule 302(c) incorporates former Uniform Rule 302 providing for the effect of presumptions when federal law supplies the rule of decision. Parallel jurisdiction in state and federal courts exists in many instances. The modification of Rule 302(c) is made in recognition of this situation. The rule prescribes that when a federally created right is litigated in a state court, any prescribed federal presumption shall be applied.

RULE 303. SCOPE AND EFFECT OF PRESUMPTIONS IN CRIMINAL CASES.

(a) Scope. Except as otherwise provided by statute or judicial decision, this rule governs presumptions against an accused in criminal cases, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt.

(b) Submission to jury. The court may not direct the jury to find a presumed fact against an accused. If a presumed fact establishes guilt, is an element of the offense, or negates a defense, the court may submit the question of guilt or of the existence of the presumed fact to the jury, but only if a reasonable juror on the evidence as a whole, including the evidence of the basic fact, could find guilt or the presumed fact beyond a reasonable doubt. If the presumed fact has a lesser effect, the question of its existence may be submitted to the jury if the basic fact is supported by substantial evidence or is otherwise established, unless the court determines that a reasonable juror could not find on the evidence as a whole the existence of the presumed fact.

(c) Instructing the jury. At the time the existence of a presumed fact against the accused is submitted to the jury, the court shall instruct the jury that it may regard the basic fact as sufficient evidence of the presumed fact but is not required to do so. In addition, if a presumed fact establishes guilt, is an element of the offense, or negates a defense, the court shall instruct the jury that its existence, on all the evidence, must be proved beyond a reasonable doubt.

Comment

Rule 303 retains the substance of former Uniform Rule 303 which is the same in substance as Proposed Rule 303 of the Federal Rules of Evidence. The rule provides that the effect of a presumption in a criminal case is permissive only by providing that the court may not direct the jury to find a presumed fact against an accused. If the court submits the question of the existence of a presumed fact to the jury, it shall instruct the jury that it may regard the basic fact as sufficient evidence of the presumed fact but is not required to do so. The permissive effect given to a presumption in criminal cases under Rule 303 is constitutionally in accord with this lesser effect to be given presumptions in criminal cases without incorporating the complexities associated with the allocation of the burden of producing evidence or of persuasion where a presumption is found to be mandatory. *See County Court of Ulster County v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

ARTICLE IV

RELEVANCY AND ITS LIMITS

RULE 401. DEFINITION OF "RELEVANT EVIDENCE." In this article, relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE. All relevant evidence is admissible, except as otherwise provided by statute, these rules, or other rules applicable in the courts of this State. Evidence that is not relevant is not admissible.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT, EXCEPTIONS; OTHER CRIMES.

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving the person acted in conformity therewith on a particular occasion, except:

(1) evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut that evidence;

(2) evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut that evidence, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; and

(3) evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show the person acted in conformity therewith. However, it may be admissible for another purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(c) Determination of admissibility. Evidence is not admissible under subdivision (b) unless:

(1) the proponent gives to all adverse parties reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the nature of the evidence the proponent intends to introduce at trial;

(2) if offered against an accused in a criminal case, the court conducts a hearing to determine the admissibility of the evidence and finds:

(A) by clear and convincing evidence, that the other crime, wrong, or act was committed;

(B) that the evidence is relevant to a purpose for which the evidence is admissible under subdivision (b); and

(C) that the probative value of the evidence outweighs the danger of unfair prejudice; and

(3) upon the request of a party, the court gives an instruction on the limited admissibility of the evidence pursuant to Rule 105.

Comment

Rule 404 has been amended to add a subdivision (c) to incorporate procedural guidelines to govern the admissibility of other crimes wrongs, or acts evidence when it is offered for one of the permissible purposes authorized by Rule 404(b) and reflect in black letter a substantial body of decisional law existing among the several states The notice provision in Rule 404(c)(1) applies to any party seeking to offer the evidence in any case, civil or criminal, without requiring a request by the accused, or any other party.

Rules 404 (c)(2) through (c)(3) apply in criminal cases only when offered against an accused. The procedural provisions would then have to be satisfied before evidence could be admitted for one of the exceptional purposes authorized in Rule 404(b). Subdivision (c)(2) requires the trial court to conduct a hearing to determine the admissibility of the evidence and determine as a preliminary question for the court that the other crime, wrong, or act was committed. Subdivisions (c)(2)(A) through (C) also require that the court find by the clear and convincing evidence standard of persuasion that the other crime, wrong, or act was committed,

is relevant to a purpose for which the evidence is admissible under Rule 404(b) other than conduct conforming with a character trait and that the probative value of the evidence outweighs the danger of unfair prejudice.

Subdivision (c)(3) provides that upon the request of a party the court shall give an instruction on the limited admissibility of the evidence pursuant to Uniform Rule 105. This approach is preferable for three reasons. First, it gives the party against whom the evidence is being admitted the discretion of deciding whether a limiting instruction ought to be given against the risk of unnecessarily emphasizing the limited purpose for which the evidence is being admitted. Second, at the same time, it requires the trial court to give the instruction when requested by a party. Third, it emphasizes the importance of a party considering, and the court giving, a limiting instruction because of the risks associated with the admission of other crimes, wrongs, or acts evidence.

RULE 405. METHODS OF PROVING CHARACTER.

(a) Reputation or opinion. If evidence of character or a trait of character of a person is admissible, proof may be by testimony as to reputation or in the form of opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. If character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

RULE 406. HABIT; ROUTINE PRACTICE.

(a) Admissibility. Evidence of the habit of an individual or of the routine practice of a person other than an individual, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of

the individual or other person on a particular occasion was in conformity with the habit or routine practice.

(b) Method of proof. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

RULE 407. SUBSEQUENT REMEDIAL MEASURES. If, after an event, measures are taken that, if taken previously, would have made injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. Evidence of subsequent measures may be admissible if offered for another purpose, such as impeachment or, if controverted, proof of ownership, control, or feasibility of precautionary measures. An event includes the sale of a product to a user or consumer.

Comment

Rule 407 has been amended to make the rule applicable to products liability cases even though the states are almost evenly divided on the issue. Nevertheless, the rule as amended reflects the judgment of the Conference that the policy supporting the exclusion of evidence of subsequent remedial measures ought to apply to products liability cases as well as to negligence actions unless the evidence is offered for one or the other of the purposes set forth in the second sentence of the rule. An "event," as used in the rule, is defined in the last sentence to include "the sale of a product to a user or consumer" and also reflects the judgment of the Conference that the rule ought to apply to pre-accident, post-manufacturing remedial measures as well as to post-accident remedial measures. The rule thereby provides an incentive to take remedial measures before the injury, or harm, giving rise to the cause of action has occurred.

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE.

Evidence of furnishing, offering, promising to furnish, or accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim that was disputed as to either validity or amount is not admissible to prove liability for, invalidity of, or amount of the claim, or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Comment

Rule 408 has been adopted as amended in 1988 with the exception of the last sentence "[c]ompromise negotiations encompass mediation." As amended the rule is silent with respect to the forms of voluntary dispute resolution in which compromise negotiations falling within the rule can be conducted. The rule thus avoids any attempt at uniformity with respect to what constitutes inadmissible compromise negotiations in voluntary dispute resolution mechanisms, an area with respect to which there is considerable disagreement from state to state. This is left to state statutory or decisional law on a case-by-case basis.

RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES.

Evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS.

(a) General. Except as otherwise provided in subdivision (b), evidence of the following is not admissible in a civil or criminal proceeding against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty that was later withdrawn;

(2) a plea of nolo contendere;

(3) a statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure, [Rules 443 and 444 of the Uniform Rules of Criminal Procedure, or comparable state procedure of this or any other State] regarding either of the foregoing pleas; and

(4) a statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

(b) Exceptions. A statement described in subdivision (a) is admissible:

(1) in a proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and, in fairness, the statement should be considered contemporaneously with the other statement; and

(2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

Comment

Rule 410, with changes in format, has been amended by substituting the substance of revised Rule 410 of the Federal Rules of Evidence which became effective December 1, 1980 for the former Rule 410 excluding evidence of withdrawn pleas, offers to plead and statements made in connection with any such pleas or offers to plead. Most of the litigation throughout the several states has centered on the statements that are made during the plea negotiation process and the persons to whom such statements must be made to determine whether the statutory ban on the admission of evidence of such negotiations is applicable. In the latter case, interpretive difficulties have been encountered in determining whether statements made to persons other than attorneys for the prosecuting authorities fall within the exclusionary rule. This problem is avoided in Rule 410 by providing only for the exclusion of "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."

RULE 411. LIABILITY INSURANCE. Evidence that a person was or was not insured against liability is not admissible upon the issue as to whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

RULE 412. SEXUAL BEHAVIOR.

(a) Definition. In this rule, "sexual behavior" means behavior relating to the sexual activities of an individual, including the individual's experience or observation of sexual intercourse or sexual contact, use of contraceptives, history of marriage or divorce, sexual predisposition, expressions of sexual ideas or emotions, and activities of the mind such as fantasies or dreams.

(b) Evidence of sexual behavior generally inadmissible. Except as otherwise provided in subdivisions (c) and (d), in a criminal proceeding involving the alleged sexual misconduct of an accused, evidence may not be admitted to prove that the alleged victim engaged in other sexual behavior.

(c) Exceptions. Evidence of specific instances of an alleged victim's sexual behavior, if otherwise admissible under these rules, is admissible to prove:

(1) that a person other than the accused was the source of the semen, injury, disease, other physical evidence, or pregnancy;

(2) that a person other than the accused was the source of the alleged victim's knowledge of sexual behavior;

(3) consent, if the alleged victim's sexual behavior involved the accused or constituted conduct so distinctive and which so closely resembles the accused's version of the sexual behavior of the alleged victim at the time of the alleged sexual misconduct that it corroborates the accused's claim of reasonable belief that the alleged victim consented to the alleged misconduct; or

(4) a fact of consequence whose exclusion would violate the constitutional rights of the accused.

(d) Procedure to determine admissibility. Evidence is not admissible under subdivision (c) unless:

(1) the proponent gives to all parties and to the alleged victim, or the alleged victim's guardian or representative, reasonable notice in advance of trial, or

during trial if the court excuses pretrial notice for good cause shown, of the nature of such evidence the proponent intends to introduce at trial;

(2) the court conducts a hearing in chambers, affords the alleged victim and the parties a right to attend the hearing and be heard, and finds:

(A) that the evidence is relevant to a fact of consequence for which the evidence is admissible under subdivision (c); and

(B) that the probative value of the evidence is not substantially outweighed by the danger of harm to the alleged victim or of unfair prejudice to any party; and

(3) upon request, the court gives an instruction on the limited admissibility of the evidence, pursuant to Rule 105.

Comment

Rule 412 constitutes a new rule providing for the exclusion in a criminal proceeding involving the alleged sexual misconduct of an accused of evidence of the past sexual behavior of the alleged victim. There are six features of Rule 412 that deserve comment. First, the applicability of the rule is limited to criminal cases and is consistent in this respect with the overwhelming majority rule among the several states. Applying Rule 412 in all criminal cases seems obvious in view of the strong social policy of protecting the privacy of victims of sexual misconduct, as well as encouraging victims to report criminal acts of sexual misconduct. It is less clear whether the rule should apply in the civil context in view of the few state jurisdictions which inconsistently apply the exclusionary rule in such proceedings. For these reasons a rule has been adopted which applies only to criminal proceedings.

Second, consistently with state jurisdictions, Rule 412 employs and broadly defines the term "sexual behavior" for the broadest type of protection to alleged victims of sexual misconduct of an accused.

Third, Rule 412 applies only to the "alleged victims" of sexual misconduct. This terminology is used because there will frequently be a dispute as to whether the alleged sexual misconduct occurred. However, the rule does not apply unless

the person against whom the evidence is offered can reasonably be characterized as a victim of the alleged sexual misconduct. In addition, and consistently with the statutory rules in force in most of the states, Rule 412 applies only where the accused is a party to the proceeding on the complaint of the victim of the alleged sexual misconduct.

Fourth, Rule 412 seeks to achieve its objectives by affording the broadest possible protection to alleged victims of sexual misconduct, whether offered as substantive evidence or for impeachment, unless permitted under one of the designated exceptions set forth in subdivision (c).

Fifth, generally speaking, the exceptions to the general rule excluding evidence of the sexual behavior of an alleged victim are narrower than in former Rule 412. Subdivision (c)(1) admitting specific instances of the alleged victim's sexual behavior to prove that a person other than the accused was the source of the semen, injury, disease, other physical evidence, or pregnancy is consistent with former Uniform Rule 412 and is a commonly recognized exception throughout the several states.

The exception in subdivision (c)(2) admitting specific instances of an alleged victim's sexual behavior to prove that a person other than the accused was the source of the alleged victim's knowledge of sexual behavior applies where that victim's knowledge of sexual behavior is unusual, given the age, intelligence, or level of experience of the victim. At the same time, this exception should not be read so broadly as to permit the introduction of evidence of other sexual behavior that has not been raised as an issue in the case. Balancing the relevancy of the evidence against the danger of unfair prejudice under Uniform Rules 401 and 403 is also required in determining the admissibility of the evidence under subdivision (c)(2).

Subdivision (c)(3) is intended to facilitate proof of consent to the sexual behavior where it has been made an issue in the case. *See* Model Penal Code § 2.11(1) providing that consent is a defense to a crime "if such consent negatives an element of the offense" or if it "precludes the infliction of the harm or evil sought to be prevented by the law defining the offense." The defense is based upon the general rule that mistake of fact will disprove a crime if the mistaken belief is honestly entertained, based upon reasonable grounds and is of such a nature that the conduct would have been lawful and proper if the facts had been as they reasonably seemed to be. *See* Perkins and Boyce, Criminal Law 1045 (3d ed. 1982). However, even if the sexual behavior involved the accused it is not automatically admissible. The factors of remoteness and similarity should be considered in determining the relevancy of the alleged victim's sexual behavior with the accused, as well as

determining whether the relevancy of the evidence is substantially outweighed by the danger of unfair prejudice within the meaning of Uniform Rules 401 and 403.

If the sexual behavior involved the alleged victim's sexual behavior with a person other than the accused it must be so distinctive and so closely resemble the accused's version of the sexual behavior of the alleged victim with the accused that it corroborates the accused's claim of reasonable belief that the alleged victim had consented to the alleged sexual misconduct. As in the case of consent based upon the past sexual behavior of the accused, the rule also requires a Uniform Rule 401 and 403 balancing process in the determining the admissibility of the evidence of sexual behavior of the alleged victim with a person other than the accused.

The exception in subdivision (c)(4) provides that specific instances of the alleged victim's sexual behavior is admissible to prove "a fact of consequence the exclusion of which would violate the constitutional rights of the accused." This exception is based upon the recognition of the Supreme Court of the United States that an accused may have a right to introduce evidence pursuant to the Confrontation Clause which would otherwise be precluded by an evidence rule. *See Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988), in which the Court held that a defendant in his prosecution for rape had a right to inquire into the alleged victim's cohabitation with another man to prove bias. If the evidence is constitutionally required it is admissible without regard to the balancing process provided for in the procedural rules of subdivision (d).

The procedural rules set forth in subdivision (d) requiring the giving of notice, holding a hearing in chambers to determine the admissibility of the evidence, a finding that the evidence is relevant to a fact of consequence for which it is offered, a finding that the relevancy of the evidence is not substantially outweighed by the danger of unfair prejudice and the giving of a limiting instruction are consistent with, though not necessarily identical to, varying procedural rules in force in the several states.

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 record; or

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

Comment

The word "record" has been substituted for the word "writing." See the Comment to Rule 101.

RULE 502. LAWYER-CLIENT PRIVILEGE.

(a) Definitions. In this rule:

(1) "Client" means a person for whom a lawyer renders professional legal services or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A communication is "confidential" if it is 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.

(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 country.

(4) "Representative of the client" means a person having authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client or a 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.

(5) "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.

(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:

(1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(2) between the lawyer and a representative of the lawyer;

(3) 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;

(4) between representatives of the client or between the client and a representative of the client; or

(5) among lawyers and their representatives representing the same client.

(c) Who may claim privilege. The privilege under this rule 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. A 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) 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 was a crime or fraud;

(2) 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) 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) as to a communication necessary for a lawyer to defend in a legal proceeding an accusation that the lawyer assisted the client in criminal or fraudulent conduct;

(5) as to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(6) as to a communication relevant to a matter of common interest between or among two 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; or

(7) 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 act upon the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

Comment

The language ", or reasonably believed by the client to be employed," is added in subdivision (a)(5) 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. While the test in this subdivision, as in subdivision (a)(3), is partially subjective, it is not totally subjective since there must be some reasonable basis for the belief.

Rule 502 has also been amended to include a subdivision (d)(4) providing that there is no privilege under the rule "as to a communication necessary for a lawyer to defend in a legal proceeding a charge that the lawyer assisted the client in criminal or fraudulent conduct." Access to otherwise privileged communications

seems essential if the lawyer is defending a charge of assisting a client in criminal or fraudulent conduct.

RULE 503. [PSYCHOTHERAPIST] [PHYSICIAN AND PSYCHOTHERAPIST] [PHYSICIAN AND MENTAL-HEALTH PROVIDER] [MENTAL-HEALTH PROVIDER] – PATIENT PRIVILEGE.

(a) Definitions. In this rule:

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

[(2) "Mental-health provider" means a person authorized, in any State or country, or reasonably believed by the patient to be authorized, to engage in the diagnosis or treatment of a mental or emotional condition, including addiction to alcohol or drugs.]

[(3) "Patient" means an individual who consults or is examined or interviewed by a[psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider].]

[(4) "Physician" means a person authorized in any State or country, or reasonably believed by the patient to be authorized to practice medicine.]

[(5) "Psychotherapist" means a person authorized in any State or country, or reasonably believed by the patient to be authorized, to practice medicine, while engaged in the diagnosis or treatment of a mental or emotional condition, including addiction to alcohol or drugs, or a person licensed or certified under the laws of any State or country, or reasonably believed by the patient to be licensed or certified, as a psychologist, while similarly engaged.]

(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 [physical,] mental[,] or emotional condition, including addiction to alcohol or drugs, among the patient, the patient's [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider] and persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider].

(c) Who may claim the privilege. The privilege under this rule 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 [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [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 a communication:

(1) relevant to an issue in proceedings to hospitalize the patient for mental illness, if the [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider], in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization;

(2) made in the course of a court-ordered investigation or examination of the [physical,] mental[,] or emotional condition of the patient, whether a party or a witness, with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise;

(3) relevant to an issue of 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 party's claim or defense;

(4) if the services of the [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider] were sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew, or reasonably should have known, was a crime or fraud or mental or physical injury to the patient or another individual;

(5) in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual;

(6) relevant to an issue in a proceeding challenging the competency of the [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider];

(7) relevant to a breach of duty by the [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider]; or

(8) that is subject to a duty to disclose under [statutory law].

Comment

The amendment of Rule 503 to incorporate a "mental health provider" privilege is an outgrowth of a belief that some form of a "licensed social worker" privilege should be incorporated in the Uniform Rules of Evidence to comport, at least in part, with the decision of the Supreme Court of the United States in *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), recognizing what may be generally described as a "social worker privilege" privilege. However, the amendment represents a narrower concept of the privilege than a broadly defined "social worker privilege" which would be fraught with interepretive 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). This policy led the Conference to adopt a narrower form of the privilege denominated a "mental health provider" privilege protecting only communications relating to the "treatment of a mental or emotional condition, including alcohol or drug addiction" and incorporating the privilege in the physician and psychotherapist-patient privilege of Rule 503.

The exceptions to the privilege established by Rule 503 have also been broadened in subdivision (d). The exceptions have a generic application, not only to the mental health provider privilege, but also to the physician-patient or psychotherapist-patient privilege embraced within the rule as well. The exceptions to the "social worker privilege" recognized in the several states are numerous and varied. However, it is believed that most of the exceptions recognized in the several states will be subsumed under one or the other of the exceptions set forth in amended Rule 503(d), in particular, under subdivision (d)(8) providing that there is no privilege under the rule for a communication "that is subject to a duty to disclose under [statutory law]."

Finally, flexibility for the several states in the adoption of the rule is preserved through bracketing the provisions relating to the physician-patient, psychotherapist-patient and mental health provider privileges.

RULE 504. SPOUSAL PRIVILEGE.

(a) Confidential communication. A communication is confidential if it is made privately by an individual to the individual's spouse and is not intended for disclosure to any other person.

(b) Marital communications. An individual has a privilege to refuse to testify and to prevent the individual's 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 or conservator, or the individual's personal representative if the individual is deceased.

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

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

(1) in any civil proceeding in which the spouses are adverse parties;

(2) in any criminal proceeding in which an unrefuted showing is made that the spouses acted jointly in the commission of the crime charged,;

(3) in any proceeding in which one spouse is charged with a crime or tort against the person or property of the other, a minor child of either, an individual residing in the household of either, or a third person if the crime or tort is

committed in the course of committing a crime or tort against the other spouse, a minor child of either spouse, or an individual residing in the household of either spouse; or

(4) in any other proceeding, in the discretion of the court, if the interests of a minor child of either spouse may be adversely affected by invocation of the privilege.

RULE 505. RELIGIOUS PRIVILEGE.

(a) Definitions. In this rule:

(1) "Cleric" means 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 individual consulting the cleric.

(2) A communication is "confidential" if it is 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. An individual has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the individual to a cleric in the cleric's professional capacity as spiritual adviser.

(c) Who may claim the privilege. The privilege under this rule may be claimed by an individual or the individual's guardian or conservator, or the individual's personal representative if the individual is deceased. The individual

who was the cleric at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

RULE 506. POLITICAL VOTE.

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

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

RULE 507. TRADE SECRETS. A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, 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.

RULE 508. 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 created by laws of State. No governmental privilege is recognized except as provided in subdivision (a) or created by the constitution, statutes, or rules 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.

RULE 509. IDENTITY OF INFORMER.

(a) Rule of privilege. The United States or a State has a privilege to refuse to disclose the identity of an individual who has furnished information relating to or assisted 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 under this rule may be claimed by an appropriate representative of the government to which the information was furnished.

(c) Exceptions. There is no privilege under this rule if the identity of the informer or the informer's interest in the subject matter of the informer's communication has been disclosed by a holder of the privilege or by the informer's own action to persons who would have cause to resent the communication or if the informer appears as a witness for the government.

(d) Procedures. If it appears that an informer may be able to give testimony relevant to an issue in a criminal case, or to a fair determination of a material issue on the merits in a civil case to which the government is a party, and the informed government invokes the privilege, the court shall give the government an opportunity to show in chambers facts relevant to whether the informer can, in fact, supply the testimony. The showing ordinarily will be by affidavit, 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 government elects not to disclose the informer's 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, prohibiting the prosecuting

attorney from introducing specified evidence, and dismissing charges. In civil cases, the court may issue any order the interests of justice require. Evidence submitted to the court must be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents may not otherwise be revealed without consent of the informed government. All counsel and parties may be present at every stage of a proceeding under this subdivision except a showing in chambers, if the court has determined that no counsel or party may be present.

RULE 510. WAIVER OF PRIVILEGE.

(a) Voluntary disclosure. A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's 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 that was compelled erroneously or made without an opportunity to claim the privilege.

Comment

Uniform Rule 510 has been amended to deal with both the voluntary and involuntary waiver of a privilege in one comprehensive rule. Existing Rule 511 has been deleted and Rule 512 has been renumbered as Rule 511. There is no change in the substance of either of the rules.

RULE 511. COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION.

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

(b) Claiming privilege without knowledge of jury. In jury cases, proceedings must 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.

ARTICLE VI
WITNESSES

RULE 601. GENERAL RULE OF COMPETENCY. Every individual is competent to be a witness except as otherwise provided in these rules.

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 has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. This rule is subject to Rule 703, relating to opinion testimony by expert witnesses.

RULE 603. OATH OR AFFIRMATION. Before testifying, each witness must declare under oath or affirmation that the witness will testify truthfully. The oath or affirmation must be administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to testify truthfully.

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 to make a true and complete rendition of all communications made during the interpretive process to the best of the interpreter's knowledge and belief.

Comment

Rule 604 has been amended to reflect the interpretive process involved in the translation of languages. The Rule avoids requiring a conscientious interpreter to swear or affirm that the translation to be rendered will be a one-hundred percent true rendition of the statements in the original language. As explained elsewhere "[t]ranslation [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." See Russian Interpreters Co-op, Cambridge, Mass. (1997)

RULE 605. COMPETENCY OF JUDGE AS WITNESS. The judge presiding at a trial may not testify in that trial as a witness. An objection need not be made to preserve the point.

RULE 606. COMPETENCY OF JUROR AS WITNESS.

(a) At the trial. A member of a jury may not testify as a witness before the jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the parties must 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 the following rules apply:

(1) A juror may not testify to a matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

(2) A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received.

(3) A juror may testify as to whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon a juror.

RULE 607. WHO MAY IMPEACH. The credibility of a witness may be attacked by any party, including the party calling the witness.

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, subject to the following:

(1) The evidence may refer only to character for truthfulness or untruthfulness, and

(2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other

than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. However, in the discretion of the court, if probative of truthfulness or untruthfulness, they may be inquired into on cross-examination of the witness (i) concerning the witness's character for truthfulness or untruthfulness, or (ii) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

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

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 has been convicted of a crime is admissible, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime is admissible if the court determines that the probative value of the evidence substantially outweighs the danger of unfair prejudice the accused.

(2) Evidence that a witness has been convicted of a crime of untruthfulness or falsification is admissible, regardless of punishment, if the statutory elements of the crime necessarily involve untruthfulness or falsification.

(b) Time limit. Evidence of a conviction is not admissible under this rule if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for the conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of evidence of the conviction supported by specific facts and circumstances substantially outweighs its unfair prejudicial effect.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if the conviction has been:

(1) the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the individual convicted, and that individual has not been convicted of a subsequent crime punishable by death or imprisonment in excess of one year; or

(2) the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of a juvenile adjudication is generally not admissible under this rule. Except as otherwise provided by statute, however, in a criminal case the court may 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 of the evidence is necessary for a fair determination of the issue of guilt or innocence.

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

(f) Notice. Evidence is not admissible under this rule unless the proponent of the evidence gives to all adverse parties reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the nature of the conviction.

(g) Record. If objection is made to evidence offered pursuant to subdivision (a)(1) or (2), the court shall state on the record the factors it considered in determining admissibility.

(h) Evidence. If admissible, evidence of a conviction may be by testimony of the witness during direct or cross-examination, by the introduction of a public record, or by other extrinsic evidence if the public record is not available and good cause is shown.

Comment

Rule 609 has been amended substantively in five respects. First, subdivision (a)(1) has been amended to make the admissibility of a conviction for the impeachment of a witness other than the accused subject to the balancing process of Rule 403 of the Uniform Rules. As amended the rule is in accord with the parallel rule in the Federal Rules of Evidence.

Second, in the case of a witness who is the accused the word "substantially" is incorporated in the applicable balancing test by providing "that the probative value of the evidence substantially outweighs the danger of unfair prejudice to the accused."

Third, to clarify the types of convictions admissible for impeachment purposes without regard to punishment, Rule 609(a)(2) has been amended to provide that only those crimes that contain the statutory elements of untruthfulness or falsification are admissible. The amendment is derived from the 1987 recommendation of the American Bar Association Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence to clarify the meaning of the language "dishonesty or false statement" in the former rule and avoid the endless dispute and divergent results reached in the several states as to what crimes are embraced within the language "dishonesty or false statement."

Fourth, Rule 609(b) has been amended to require that convictions more than ten years old are not admissible unless it is determined "that the probative value of the evidence of the conviction supported by specific facts and circumstances substantially outweighs its unfair prejudicial effect." The rule as amended in this respect is now in accord with the comparable balancing test applicable under Rule 609(b) of the Federal Rules of Evidence.

Finally, subdivisions (f), (g) and (h) set forth procedures to be followed in determining the admissibility of convictions for impeachment purposes. These include, respectively, the giving of notice, the making of a record of the factors considered by the court in ruling on the admissibility of the evidence and the methods of proof of the conviction.

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 the witness's credibility is impaired or enhanced.

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 make the interrogation and presentation effective for the ascertainment of the truth, avoid

needless consumption of time, and 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, in the exercise of discretion, may 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 is necessary to develop the witness's testimony. Ordinarily leading questions should be permitted on cross-examination. A party may interrogate a hostile witness, an adverse party, or a witness identified with an adverse party, by leading questions.

Comment

In applying subdivision (a) of Rule 611 to protect witnesses from harassment or undue embarrassment the court should be particularly sensitive to protecting the sensibilities of children while testifying in court.

RULE 612. RECORD OR OBJECT USED TO REFRESH MEMORY.

(a) While testifying. If, while testifying, a witness uses a record or object to refresh the witness's memory, an adverse party is entitled to have the record 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 or object to refresh 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 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 or object produced under this rule is entitled to inspect it, cross-examine the witness thereon, and introduce in evidence portions of the record which relate to the testimony of the witness. If production of the record 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 or object contains matter not related to the subject matter of the testimony, the court shall examine the record or object in chambers, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections must be preserved and made available to the appellate court in the event of an appeal. If a record 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 must be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Comment

Rule 612 has been amended to substitute the word "record" for the language "writing" in the rule. See the Comment to Rule 101.

RULE 613. PRIOR STATEMENT OF WITNESS.

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether in a record or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request it must 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 statement and the opposing party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This subdivision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

RULE 614. CALLING AND INTERROGATION OF WITNESS BY COURT.

(a) Calling by court. The court, at the suggestion of a party or on its own motion, may call a witness, and all parties may cross-examine the witness thus called.

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

(c) Objection. An objection to the calling or interrogation of a witness by the court may be made at the time or at the next available opportunity when the jury is not present.

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 on its own motion. This Rule does not authorize exclusion of a party who is an individual, an officer or employee of a party that is not an individual designated as its representative by its attorney, or an individual whose presence is shown by a party to be essential to the presentation of the party's cause or is otherwise authorized by statute, judicial decision, or court rule.

Comment

The phrase "or is otherwise authorized by statute, judicial decision, or court rule" has been added at the end of Rule 615 to accommodate state law permitting other individuals, such as victims, to be present in the hearing room.

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 a party to the case is admissible.

ARTICLE VII

OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES. If a witness's testimony is not based on scientific, technical, or other specialized knowledge within the scope of Rule 702, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences that are rationally based on the perception of the witness, and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Comment

Rule 701 has been amended by adding a new provision that scientific, technical or other specialized knowledge may not form the basis for opinions or inferences of lay witnesses under Rule 701. The amendment is intended to eliminate the risk that the reliability requirements for the admissibility of scientific, technical or specialized knowledge under Rule 702 will be evaded through the expedient of proffering an expert as a lay witness under Rule 701. The amendment distinguishes between expert and lay **testimony** and not between expert and lay **witnesses** since it is possible for the same witness to give both lay and expert testimony in the same case. However, the amendment makes clear that any of the testimony of the witness that is based on scientific, technical, or specialized knowledge must be governed by the standards of Rule 702.

RULE 702. TESTIMONY BY EXPERTS.

(a) General rule. If a witness's testimony is based on scientific, technical, or other specialized knowledge, the witness may testify in the form of opinion or otherwise if the court determines the following are satisfied:

(1) the testimony will assist the trier of fact to understand evidence or determine a fact in issue;

(2) the witness is qualified by knowledge, skill, experience, training, or education as an expert in the scientific, technical, or other specialized field;

(3) the testimony is based upon principles or methods that are reasonably reliable, as established under subdivision (b), (c), (d), or (e);

(4) the testimony is based upon sufficient and reliable facts or data; and

(5) the witness has applied the principles or methods reliably to the facts of the case.

(b) Reliability deemed to exist. A principle or method is reasonably reliable if its reliability has been established by controlling legislation or judicial decision.

(c) Presumption of reliability. A principle or method is presumed to be reasonably reliable if it has substantial acceptance within the relevant scientific, technical, or specialized community. A party may rebut the presumption by proving that it is more probable than not that the principle or method is not reasonably reliable.

(d) Presumption of unreliability. A principle or method is presumed not to be reasonably reliable if it does not have substantial acceptance within the relevant scientific, technical, or specialized community. A party may rebut the presumption by proving that it is more probable than not that the principle or method is reasonably reliable.

(e) Other reliability factors. In determining the reliability of a principle or method, the court shall consider all relevant additional factors, which may include:

(1) the extent to which the principle or method has been tested;

(2) the adequacy of research methods employed in testing the principle or method;

(3) the extent to which the principle or method has been published and subjected to peer review;

(4) the rate of error in the application of the principle or method;

(5) the experience of the witness in the application of the principle or method;

(6) the extent to which the principle or method has gained acceptance within the relevant scientific, technical, or specialized community; and

(7) the extent to which the witness's specialized field of knowledge has gained acceptance within the general scientific, technical, or specialized community.

Comment

Rule 702 combines the modified historic Frye standard governing the admissibility of expert testimony as a procedural rule with the reliability standards established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Kumho Tire Company, L.T.D. v. Carmichael*, ____U.S.____, 119 S.Ct. 1167, ____L.Ed.2d____ (1999). The presumption of reliability or of unreliability in subdivisions (c) and (d) can be rebutted by resort to, among others, the reliability criteria set forth in subdivision (e). Rule 702 meaningfully avoids the use of the terminology "scientific" and "non-scientific" principles or methods and does not mandate that the Daubert reliability criteria necessarily apply in determining the admissibility of scientific, technical, or specialized knowledge, an approach which is consistent with *Kumho Tire Company, L.T.D. v. Carmichael*, *supra*. This facilitates the admissibility of expert testimony in social science areas where the falsifiability and potential rate of error factors enumerated in the Daubert case could rarely be met. Also, by eliminating the focus on "scientific knowledge" in Rule 702 the criteria set forth in subdivision (e) accommodates the admissibility of expert testimony involving only the

application of a principle or method provided for in subdivision (a)(5) as opposed to the determination of the reliability of the principle or method in the first instance. Subdivision (e) further meets concerns that have been expressed with respect to whether the Daubert criteria, as reaffirmed in the Kumho case, apply when the expert is testifying solely on the basis of experience.

Reinstating a modified Frye standard as a procedural rule in subdivisions (c) and (d) is expected to promote greater reliability in the evidence offered, relieve the trial judge of the initial gate-keeping responsibility and avoid the criticism that the Daubert approach to admissibility "will result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595-596, 113 S.Ct. 2786, 2798, 125 L.Ed.2d 469 (1993).

Finally, Rule 702 accommodates the divergence that exists among the several states between applying the historic Frye standard, a pre-Daubert standard of reliability, a Daubert standard of reliability and varying other approaches to the admissibility of expert testimony and thereby promotes uniformity among the several states in determining the admissibility of expert testimony.

RULE 703. BASIS OF OPINION TESTIMONY BY EXPERT. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence for the opinion or inference to be admissible.

Comment

The language "for the opinion or inference to be admissible" has been incorporated in Rule 703 to clarify that the admission of the opinion or inference does not thereby render the underlying facts or data admissible. See, in this connection, Rule 705 providing for the disclosure of the facts or data underlying expert opinion.

RULE 704. OPINION ON ULTIMATE ISSUE. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION. An expert may testify in terms of opinion or inference and give reasons therefore without previous disclosure of the underlying facts or data, unless the court requires otherwise. The expert may be required to disclose the underlying facts or data on cross-examination.

RULE 706. COURT APPOINTED EXPERT WITNESS.

(a) Appointment. The court, on motion of any party or its own motion, may issue an order to show cause why an expert witness should not be appointed, and may request the parties to submit nominations. The court may appoint an expert witness agreed upon by the parties, and may appoint an expert witness of its own selection. An expert witness may not be appointed by the court unless the witness consents to act. A witness so appointed must be informed of the witness's duties by the court in writing, a copy of which must be filed with the clerk, or at a conference in which the parties have an opportunity to participate. A witness so appointed shall advise the parties of the witness's findings, if any. The witness's deposition may be taken by any party. The witness may be called to testify by the

court or any party. The witness is subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. An expert witness appointed by the court is entitled to reasonable compensation as determined by the court. The compensation is payable from funds that are provided by law in criminal cases and in civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the parties shall pay the compensation in such proportion and at such time as the court directs, and the compensation is to be charged as costs.

(c) Disclosure of appointment. The court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. This rule does not limit the parties in calling expert witnesses of their own selection.

Comment

The caption to Rule 706 has been changed to "Court Appointed Witness" to more nearly reflect the testimonial functions performed by the expert pursuant to Rule 706. Rule 706 thus applies only to expert *witnesses* and not to expert *consultants* appointed by the trial judge in performing the gate-keeping function in admitting scientific, technical, or specialized knowledge under Rule 702. See the Comment to Rule 702.

ARTICLE VIII

HEARSAY

RULE 801. DEFINITIONS; EXCLUSIONS.

(a) General. In this article:

(1) "Declarant" means a person who makes a statement.

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

(3) "Statement" means an oral assertion, an assertion in a record, or nonverbal conduct of a person who intends it as an assertion.

(b) A statement is not hearsay if:

(1) the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is:

(A) inconsistent with the declarant's testimony and was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;

(B) consistent with the declarant's testimony, is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive and was made before the supposed fabrication, influence, or motive arose; or

(C) one of identification made shortly after perceiving the individual identified.

(2) the statement is offered against a party and is:

(A) the party's own statement, in either an individual or a representative capacity;

(B) a statement of which the party has manifested adoption or belief in its truth;

(C) a statement by an individual authorized by the party to make a statement concerning the subject;

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Comment

Rule 801 has been amended in three respects. First, in subdivision (a)(3) the words "an assertion in a record" have been substituted for the words "or written." See the Comment to Rule 101.

Second, in subdivision (b)(1)(A) the phrase ", if offered in a criminal proceeding," has been stricken to require the oath as a foundational requirement in **both** civil and criminal proceedings for admitting a prior inconsistent statement of a witness. There is no significant difference between civil and criminal proceedings in requiring an oath as a condition to the admissibility of a prior inconsistent statement under Rule 801(b)(1)(A). The amendment also brings the rule into accord with both the federal rule and the rule followed in a majority of the states.

Third, in subdivision (b)(1)(B) the rule has been amended by adding the language "and was made before the supposed fabrication, influence, or motive arose" to codify the holding of the United States Supreme Court in *Tome v. United States*, 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995). The rule as amended is thereby in accord with at least half of the states adhering to a pre-motive requirement

An amendment to subdivision (b)(2)(E) to conform the Uniform Rule to Rule 801(d)(2)(E) of the Federal Rules of Evidence which took effect on December 1, 1997 to incorporate the holding in *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), was considered and rejected. In *Bourjaily* the United States Supreme Court held that a court may consider the contents of a co-conspirator's statement in determining the existence of, and participation in, the conspiracy by the declarant and the defendant, but left unresolved the question of whether the declarant's statement alone was sufficient to establish a conspiracy in which the declarant and the defendant participated. The amendment to Federal Rule 801(a)(2)(E) resolved both issues by providing that the declarant's statement could be considered, but was not alone sufficient to establish the existence of, or participation in, the conspiracy. However, the division of authority that currently exists among the several states, including the majority rule that the existence of the conspiracy must be determined by evidence independent of the hearsay statements themselves, led the Conference to conclude that a uniform rule on the issue should not be promulgated at this time. *See*, in this connection, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) and *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

RULE 802. HEARSAY RULE. Hearsay is not admissible except as provided by law or by these rules.

Comment

Rule 802, together with Rule 801(b) defining statements as non-hearsay and Rules 803 through 807 setting forth exceptions to the hearsay rule must now be read in conjunction with Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In Crawford, the Supreme Court held that a declarant's interview statement against criminal interest was inadmissible against a defendant on confrontation grounds. This ruling effectively rejected the twenty-five year history of the Confrontation Clause jurisprudence initially established in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

In Ohio v. Roberts, the Court established that a non-hearsay statement or a hearsay statement within one of the exceptions to the hearsay rule satisfied the Confrontation Clause if its reliability was established either (1) through failing within a "firmly rooted" exception to the hearsay rule or (2) upon a finding that the statement had a particularized guarantee of trustworthiness. Later, in United States v. Inadi, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986) and White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992), the Court made it clear that a declarant's unavailability was "a necessary part of Confrontation Clause

inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." White v. Illinois, supra, at 112 S.Ct. 741.

In rejecting the framework of Ohio v. Roberts, supra, for use in determining whether a statement satisfies the Confrontation Clause the Court reasoned in the Crawford case, supra, that the original intent of the Clause was not to exclude unreliable evidence per se, but rather to exclude "testimonial" hearsay statements that had not been cross-examined by the accused. In short, under Crawford, "testimonial" hearsay statements are inadmissible against an accused unless the declarant is unavailable as a witness *and* the accused has cross-examined the declarant or had an opportunity to do so. Unless these two requirements are met the statement must be excluded even though it is reliable and even though it fits within a standard hearsay exception. A good example of where a statement would qualify under Crawford is the reported testimony of an unavailable declarant at a preliminary hearing offered at a subsequent trial on the merits where the accused had either cross-examined or had an opportunity to cross-examine the declarant. Unavailability is reaffirmed by the Court through reliance on Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

The largely unresolved question after Crawford is whether the statement is "testimonial." The Supreme Court did not fully define the term. The recorded statement made during a police interrogation of the petitioner's wife who was unavailable because of Washington's marital privilege was "testimonial." Beyond this, the word was defined only obliquely by the Court as follows:

> "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
>
> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," . . . "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," . . . "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," . . . . These formulations all share a common nucleus and then defined

> the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition–for example, *ex parte* testimony at a preliminary hearing.

Crawford v. Washington, 124 S.Ct. At 1364. (Citations Omitted)(Alteration in Original).

It remains unclear what exceptions to the hearsay rule may be affected and under what circumstances. It appears that under some circumstances, some exceptions such as Rules 803(1), present sense impression; 803(2), excited utterance; 803(3), then existing mental, emotional, or physical condition; 803(4), statements for purposes of mental diagnosis or treatment; 804(b)(2), statement under belief of impending death; 804(b)(3), statement against interest; and 807, residual exception may be affected. Others, such as Rules 803(6), records of regularly conducted activity; and 803(8), public records and reports may not be affected. The range of other non-hearsay statements or exceptions to the hearsay rule that may be affected as being "testimonial" in nature will have to wait further developments in the decisional law relating to the new relationship between the Confrontation Clause and hearsay as established in the Crawford case.

RULE 803. HEARSAY EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL. The following are not excluded by the hearsay rule, even if the declarant is available as a witness:

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

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

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical

condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

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

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

Comment

Rule 803(5) has been amended to substitute the word "record" for the words "memorandum or." See the Comment to Rule 101.

(6) Record of regularly conducted business activity. A record of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person having knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that

business activity to make the record, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11) or (12), or with a statute providing for certification, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness. In this paragraph, business includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. A public record inadmissible under paragraph (8) is inadmissible under this exception.

Comment

First, Rule 803(6) has been amended to delete the words "memorandum," "report" ", or data compilation, in any form," "memorandum," "report," "or data compilation,". See the Comment to Rule 101.

Second, Rule 803(6) has been amended to provide for satisfying the foundational requirements for the admissibility of a business record through certification as an alternative to the expense and inconvenience of producing a time-consuming foundational witness. This amendment should also be interpreted with reference to Uniform Rules 901(11) and 902(12) providing for the self-authentication of domestic and foreign records under the certification procedure provided for in Rule 803(6).

Third, Rule 803(6) has been amended to add the provision at the end of the rule that "[a] public record inadmissible under paragraph (8) is inadmissible under this exception." This forecloses admitting under the business records exception a public record that is inadmissible under Uniform Rule 803(8). See the Comment to Rule 803(8).

(7) Absence of entry in records kept in accordance with paragraph (6). Evidence that a matter is not included in the records kept in accordance with paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a record was regularly made and preserved, all as shown by the testimony of the custodian or other qualified witness, or by

certification that complies with Rule 902(11) or (12), or with a statute providing for certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

Comment

First, Rule 803(7) has been amended to delete the words "memoranda," "reports," ", or data compilations, in any form," "memorandum," "report," ", or data compilation." See the Comment to Rule 101.

Second, as in the case of Rule 803(6), Rule 803(7) has been amended to provide for satisfying the foundational requirements for the admissibility of the absence of a business entry in a record through certification. See also Rules 901(11) and (12) providing for the authentication of domestic and foreign under the certification procedure of Rule 803(7).

(8) Record or report of public office. Unless the sources of information or other circumstances indicate lack of trustworthiness, a record of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:

(A) an investigative report by police and other law enforcement personnel, except when offered by an accused in a criminal case;

(B) an investigative report prepared by or for a government, public office, or agency when offered by it in a case in which it is a party;

(C) factual findings offered by the government in criminal cases; and

(D) factual findings resulting from special investigation of a particular complaint, case, or incident, unless offered by an accused in a criminal case.

Comment

First, Rule 803(8) has been amended to delete the words "records, reports, statements, or data compilations in any form" and insert the words "a record". See the Comment to Rule 101.

Second, an issue addressed in the amendment of Rule 803(6) relates to the introductory clause of the exceptions to Rule 803(8) stating "[t]he following are not *within this exception* to the hearsay rule." (Emphasis Added) The rule as originally adopted created an interpretive problem with respect to whether the foregoing narrowing language "opened the back door" to the admissibility of a public record under another exception, such as the business record exception of Uniform Rule 803(6). The Drafting Committee recommended that a record inadmissible under Rule 803(8) ought not to be admissible under Uniform Rule 803(6) and its recommendation was accepted by amending Rule 803(6) to include the limiting language that "[a] public record inadmissible under paragraph (8) is inadmissible under this exception." See the Comment to Rule 803(6).

(9) Record of vital statistics. A record of birth, fetal death, death, or marriage, if the report thereof was made to a public office.

Comment

Rule 803(9) has been amended to delete the words "[r]ecords or data compilations, in any form". See Comment to Rule 101.

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

Comment

Rule 803(10) has been amended to delete the words "report, statement, or data compilation, in any form" and "report, statement, or data compilation,". See the Comment to Rule 101.

(11) Record of religious organization. A statement of birth, marriage, divorce, death, legitimacy, ancestry, relationship by blood or marriage, or other similar fact of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certified record. A statement of fact contained in a certified record that the maker performed a marriage or other ceremony or administered a sacrament, made by a cleric, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

Comment

Rule 803(12) has been amended to substitute the words "certified record" for "certificates." See the Comment to Rule 101.

(13) Family record. A statement of fact concerning personal or family history contained in a family Bible, genealogy, chart, engraving on a ring, an inscription on a family portrait, an engraving on an urn, crypt, or tombstone, or the like.

(14) Record of document affecting an interest in property. A public record purporting to establish or affect an interest in property, as proof of the content of

the original recorded document and its execution and delivery by each person by whom it purports to have been executed and delivered.

Comment

Rule 803(14) has been amended to delete the words "of a document." See the Comment to Rule 101.

(15) Statement in record affecting an interest in property. A statement contained in a record purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the record, unless dealings with the property since the record was made have been inconsistent with the truth of the statement or the purport of the record.

Comment

Rule 803(15) has been amended to substitute the word "record" for the words "documents" and "document." See the Comment to Rule 101.

(16) Statement in ancient record. A statement in a record in existence 20 years or more, the authenticity of which is established.

Comment

Rule 803(16) has been amended to substitute the word "record" for the word "documents" and "document." See the Comment to Rule 101.

(17) Market report, commercial publication. Market quotation, tabulation, list, directory, or other published or publicly recorded compilations, generally used and relied upon by the public or by persons in particular occupations.

Comment

Rule 803(17) has been amended to add the words "or publicly recorded" to accommodate the admissibility of records kept in electronic form. See the Comment to Rule 101.

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

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

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting land in the community, and reputation as to an event of general history important to the community, State, or country in which located.

(21) Reputation as to character. Reputation of a person's character among the person's associates or in the community.

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

(23) Judgment as to personal, family, or general history, or boundaries. A judgment as proof of a matter of personal, family or general history, or boundaries, essential to the judgment, if the matter is provable by evidence of reputation.

Comment

Rule 803(24) is eliminated to combine the rule with the identical Uniform Rule 804(b)(5) in a single new Uniform Rule 808 governing the admissibility of evidence under the residual exception to the hearsay rule. See the Comment to Uniform Rule 808.

RULE 804. HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE.

(a) Unavailability as a witness. In this rule:

(1) Unavailability as a witness includes situations in which the declarant:

(A) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(B) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(C) testifies to a lack of memory of the subject matter of the declarant's statement;

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

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

(2) A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the declarant from attending or testifying.

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

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

(2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant's death was imminent, concerning the

cause or circumstances of what the declarant believed to be the declarant's impending death.

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

Comment

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Court, in determining that the original intent of the Confrontation Clause was not to exclude unreliable hearsay evidence per se, but rather to exclude "testimonial" hearsay statements, held that the admission of the Petitioner's spouse's recorded statement made during a police interrogation under Washington's statement against interest Rule 804(b)(3) violated his Sixth Amendment right to be confronted with the witnesses against him on the ground that the statement was "testimonial" in nature which had not been tested by the crucible of cross-examination. The Petitioner's spouse was unavailable to testify at trial under Washington's marital privilege. See the *Comment* to Rule 802, supra, for a further explanation of the interpretation of the Confrontation Clause by the Court in the Crawford case.

(4) Statement of personal or family history. A statement concerning:

(A) the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated or

(B) the matters listed in subparagraph (A) or the death of another individual if the declarant was related to the other individual by blood, adoption, or marriage or was so intimately associated with the other individual's family as to be likely to have accurate information concerning the matter declared.

Comment

In jurisdictions that enact the Uniform Parentage Act, the word "parentage" should be substituted for the word "legitimacy" in Rule 804(b)(4)(A).

Rule 804(b)(5) is deleted from the Uniform Rules. This exception was promulgated by the United States Supreme Court as Rule 804(b)(2) of the proposed Federal Rules of Evidence. However, it was rejected by House Committee on the Judiciary and not reinstated on the ground it did not bear sufficient guarantees of trustworthiness, even though it was recommended by the Standing Committees on Rules of Practice and Procedure of the Judicial Conference of the United States and the Advisory Committee on the Federal Rules. See Report of Committee on the Judiciary, House of Representatives, 93rd Congress, 1st Session, Federal Rules of Evidence, No. 93-650, p. 6 (1973). The rule as recommended, or in a modified form, has only been adopted in five states. Moreover, statements of recent perception would be admissible in appropriate circumstances under the newly approved residual exception of Uniform Rule 808

Rule 80(b)(6) is eliminated to combine the rule with the identical Uniform Rule 803(24) in a single new Uniform Rule 808 governing the admissibility of evidence under the residual exception to the hearsay rule. See the Comment to Uniform Rule 808.

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

Comment

Rule 804(b)(5) has been added to provide that a party forfeits the right to object to the admission of a declarant's statement when the unavailability of the declarant has been procured through a party's wrongdoing or the party's acquiescence in the wrongdoing of another. It is a preventative rule designed to deal with abhorrent behavior that is inconsistent with the system of justice. As adopted the rule is in accord with Rule 804(b)(6) of the Federal Rules of Evidence.

RULE 805. HEARSAY WITHIN HEARSAY. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT. If a hearsay statement, or a statement described in Rule 801(b)(2)(C),(D), or(E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant inconsistent with the declarant’s hearsay statement is not subject to a requirement that the declarant has been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party may examine the declarant on the statement as if under cross-examination.

RULE 807. STATEMENT OF CHILD VICTIM.

(a) Statement of child not excluded. A statement made by a child under [seven] years of age describing an alleged act of neglect, physical or sexual abuse, or sexual contact performed against, with, or on the child by another individual is not excluded by the hearsay rule if:

(1) subject to subdivision (b), the court conducts a hearing outside the presence of the jury and finds that the statement concerns an event within the child's personal knowledge and is inherently trustworthy; and

(2) the child testifies at the proceeding [or pursuant to an applicable state procedure for the giving of testimony by a child], or the child is unavailable to testify at the proceeding, as defined in Rule 804(a), and, in the latter case, there is evidence corroborative of the alleged act of neglect, physical or sexual abuse, or sexual contact.

(b) Determining trustworthiness. In determining the trustworthiness of a child's statement, the court shall consider the circumstances surrounding the making of the statement, including:

(1) the child's ability to observe, remember, and relate the details of the event;

(2) the child's age and mental and physical maturity;

(3) whether the child used terminology not reasonably expected of a child of similar age, mental and physical maturity, and socioeconomic circumstances;

(4) the child's relationship to the alleged offender;

(5) the nature and duration of the alleged neglect, physical or sexual abuse, or sexual contact;

(6) whether any other descriptions of the event by the child have been consistent with the statement;

(7) whether the child had a motive to fabricate the statement;

(8) the identity, knowledge and experience of the person taking the statement;

(9) whether there is a video or audio recording of the statement and, if so, the circumstances surrounding the taking of the statement; and

(10) whether the child made the statement spontaneously or in response to suggestive or leading questions.

(c) Making a record. The court shall state on the record the circumstances that support its determination of the admissibility of the statement offered pursuant to subdivision (a).

(d) Notice. Evidence is not admissible under this rule unless the proponent gives to all adverse parties reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the nature of any such evidence the proponent intends to introduce at trial.

Comment

The substance of former Rule 807 was rejected and a new child victim witness exception was adopted to account for intervening developments in the law since Rule 807 was adopted by the Conference in 1986. There are seven aspects of the rule that deserve comment. First, the favored age at which the exception should

apply is seven years of age. However, the age is bracketed to afford the states flexibility in determining at what age the exception should apply.

Second, the scope of the rule is broadened to include acts of neglect and sexual contact in addition to physical or sexual abuse.

Third, the rule applies in all proceedings, civil, juvenile and criminal as provided in Rule 102(a). See the Comment to Rule 102.

Fourth, the rule focuses on the requirement of trustworthiness and the criteria to be considered in making this determination. *See Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

Fifth, in lieu of providing within the exception for the admissibility of recorded statements or the methods of taking the testimony of children, Rule 807(a)(2) requires that the child either testify at the proceeding or pursuant to an applicable state procedure for the giving of testimony, such as closed circuit television, currently recognized in thirty states, or a videotape recording of the child's testimony, currently also recognized in thirty states. If the child is unavailable to testify either in person or through an applicable state procedure, the statement is admissible only if there is corroborating evidence of the statement.

Sixth, as provided in subdivision (c), the court must make a record of the circumstances supporting its determination of the admissibility of the statement.

Finally, notice is required in subdivision (d) by a rule consistent with the other notice provisions in the amended Uniform Rules.

RULE 808. RESIDUAL EXCEPTION.

(a) Exception. In exceptional circumstances a statement not covered by Rules 803, 804, or 807 but possessing equivalent, though not identical, circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the court determines that

(1) the statement is offered as evidence of a fact of consequence;

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

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

(b) Making a record. The court shall state on the record the circumstances that support its determination of the admissibility of the statement offered pursuant to subdivision (a).

(c) Notice. A statement is not admissible under this exception unless the proponent gives to all parties reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the substance of the statement and the identity of the declarant.

Comment

Uniform Rule 808 combines the abrogated Rules 803(24) and 804(b)(5) named "Other Exceptions" and renames the rule "Residual Exception." Substantive changes have been made in subdivision (1) to deal with two difficult and recurring issues that have arisen in the states under comparable black letter rules. The first of these is whether a statement which almost, but fails to meet the requisite foundational requirements of one of the specific exceptions can nevertheless be admitted under the residual exception. The black letter of the amended rule is intended to foreclose the admission of statements under the residual exception that fail to meet all of the specific exception's foundational requirements for admissibility. *See*, in this connection, *Shakespeare v. State*, 827 P.2d 454, 460 (Alaska App. 1992) and *Shoch's Estate v. Kail*, 209 Neb. 812, 311 N.W.2d 903 (1981).

The second issue arises out of the language "having equivalent circumstantial guarantees of trustworthiness." *See Shakespeare v. State* and *Shoch's Estate v. Kail*, *supra*. Accordingly, the rule has been amended to provide that a statement may be admitted under Rule 808 in only "exceptional circumstances"

and then only if the statement possesses "equivalent, though not identical, circumstantial guarantees of trustworthiness."

A determination of whether the statement possesses circumstantial guarantees of trustworthiness is a fact-intensive inquiry to be resolved on a case-by-case basis. *See People v. Bowers*, 773 P.2d 1093, 1096 (Colo. App. 1988), *affirmed,* 801 P.2d 511 (1990). Among the factors that have been identified in determining trustworthiness are: (1) the age, education and experience of the declarant; (2) the personal knowledge of the declarant regarding the subject matter of the statement; (3) the oral or written nature of the statement; (4) the ambiguity of the statement; (5) the consistency with which the statement is repeated; (6) the time lapse between the event and the making of the statement; (7) the partiality of the declarant and the relationship between the declarant and the witness; (8) the declarant's motive to speak truthfully or untruthfully; (9) the spontaneity of the statement, as opposed to responding to leading questions; (10) the making of the statement under oath; (11) the declarant being subject to cross-examination at the time the statement was made; and (12) the recantation or repudiation of the statement after it was made. *See*, for example, *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544, 550-551 (1993).

Subdivision (b) requires the court to state on the record the circumstances supporting its admission of a statement pursuant to subdivision (a).

Subdivision (c) requires the giving of notice to offer a statement under Rule 808 and is consistent with other notice requirements in the Uniform Rules.

ARTICLE IX
AUTHENTICATION AND IDENTIFICATION

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION.

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

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

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

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

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by an expert witness with a specimen that has been authenticated.

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

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

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person, if:

(A) in the case of an individual, circumstances, including self-identification, which show that the individual who answered was the one called; or

(B) in the case of a person other than an individual, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a public record or a purported public record is from the public office where items of this nature are kept.

Comment

The rule has been amended to delete the words "writing" and "report, statement, or data compilation, in any form" to accommodate the admissibility of records kept in electronic form. See the Comment to Rule 101.

(8) Ancient records. Evidence that a record is in such condition as to create no suspicion concerning its authenticity, was in a place where it, if authentic, would likely be, and has been in existence 20 years or more at the time it is offered.

Comment

Rule 901(b)(8) has been amended to add the word "record" and delete the words "document or data compilation, in any form" to accommodate the admissibility of records kept in electronic form. See the Comment to Rule 101.

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

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

RULE 902. SELF-AUTHENTICATION. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public document under seal. A document bearing a seal purporting to be that of the United States, or of any State, or of a political subdivision, department, officer, or agency of one of them, and a signature purporting to be an attestation or execution.

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

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

(4) Certified copy of public record. A copy of a public record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, certified as correct by the custodian or other authorized person by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.

(5) Official publication. A book, pamphlet, publication, or other publicly issued record issued by public authority, if in a form indicative of the genuineness of such a record.

Comment

Rule 902(5) has been amended to add the words "or other publicly issued record issued by public authority, if in a form indicative of the genuineness of such a record" to accommodate the admissibility of public records kept in electronic form. See the Comment to Rule 101.

(6) Newspaper or periodical. Publicly distributed material purporting to be a newspaper or periodical.

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

(8) Acknowledged record. A record accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

Comment

Rule 902(8) has been amended to delete the word "Documents" and add the words "A record" to accommodate the admissibility of an acknowledged record kept in electronic form. See the Comment to Rule 101.

(9) Commercial paper and related record. Commercial paper, a signature thereon, and a record relating thereto or having the same legal effect as commercial paper, to the extent provided by general commercial law.

Comment

Rule 902(9) has been amended to substitute the word "record" for "documents" to accommodate the admissibility of records kept in electronic form. See the Comment to Rule 101.

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

(11) Certified domestic record of regularly conducted business activity. The original or a duplicate of a domestic record of regularly conducted activity, within the scope of Rule 803(6), which the custodian thereof acts, events, conditions, opinions, or diagnoses if:

(A) the document is accompanied by a written declaration under oath of the custodian of the record or other qualified individual that the record was made, at or near the time of the occurrence of the matters set forth, by, or from information transmitted by, a person having knowledge of those matters; was kept in the course of the regularly conducted business activity; and was made pursuant to the regularly conducted activity;

(B) the party intending to offer the record in evidence gives notice of that intention to all adverse parties and makes the record available for inspection sufficiently in advance of its offer to provide the adverse parties with a fair opportunity to challenge the record; and

(C) notice is not given to the proponent, sufficiently in advance of the offer to provide the proponent with a fair opportunity to meet the objection or

obtain the testimony of a foundation witness, raising a genuine question as to the trustworthiness or authenticity of the record.

Comment

Rule 902(11) has been amended to provide for self-authentication through certification of domestic records of regularly conducted activity in both civil and criminal cases. The rule complements the amendment of Uniform Rule 803(6) providing for the admissibility of business records through certification as an alternative to the testimony of a foundation witness.

The notice provision of subdivision (1)(B) differs from the notice provisions incorporated generally in the amendments to the Uniform Rules by requiring that the record be made available for inspection by all adverse parties prior to its offer in evidence to provide them with a fair opportunity to challenge the record.

A separate, but comparable provision for the authentication of foreign records of a regularly conducted activity is contained in Rule 902(12).

(12) Certified foreign record of regularly conducted business activity. The original or a duplicate of a record from a foreign country of acts, events, conditions, opinions, or diagnoses if:

(A) the document is accompanied by a written declaration under oath of the custodian of the record or other qualified individual that the record was made, at or near the time of the occurrence of the matters set forth, by or from information transmitted by a person having knowledge of those matters, was kept in the course of a regularly conducted business activity, and was made pursuant to the regularly conducted activity;

(B) the party intending to offer the record in evidence gives notice of that intention to all adverse parties and makes the record available for inspection

sufficiently in advance of its offer to provide the adverse parties with a fair opportunity to challenge the record; and

(C) notice is not given to the proponent, sufficiently in advance of the offer to provide the proponent with a fair opportunity to meet the objection or obtain the testimony of a foundation witness, raising a genuine question as to the trustworthiness or authenticity of the record.

Comment

See the Comment to Rule 902(11).

RULE 903. SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY.

The testimony of a subscribing witness is not necessary to authenticate a record unless required by the laws of the jurisdiction whose laws govern the validity of the record.

Comment

The word "record" has been substituted for the word "writing" to accommodate the admissibility of records kept in electronic form. See the Comment to Rule 101.

ARTICLE X

CONTENT OF RECORD, WRITING, RECORDING, PHOTOGRAPH, IMAGE, AND OTHER RECORD

RULE 1001. DEFINITIONS. In this article:

(1) "Duplicate" means a counterpart in the form of a record produced by the same impression as the original, from the same matrix, by means of photography, including enlargements and miniatures, by mechanical or electronic re-recording, by chemical reproduction, or by another equivalent technique that accurately reproduces the original.

(2) "Image" means a form of a record which consists of a digitized copy or image of information.

(3) An "original" of a writing, recording, or other record means the writing, recording, or other record itself or any counterpart intended to have the same effect by a person executing or issuing it. The term, when applied to a photograph, includes the negative or any print therefrom. The term includes a printout or other perceivable output of a record of data or images stored in a computer or similar device, if shown to reflect the data or images accurately.

(4) "Photograph" means a form of a record which consists of a still photograph, stored image, X-ray film, video tape, or motion picture.

(5) "Writing" and "recording" mean letters, words, sounds, or numbers, or their equivalent, inscribed on a tangible medium or stored in an electronic or other machine and retrievable in perceivable form by handwriting, typewriting, printing,

photostating, photographing, mechanical or electronic recording, or other technique.

Comment

The amendments to Article X consisting of Rules 1001 through 1008 elaborate on the meaning of the term "record" to facilitate the use of the term throughout Articles I through IX, as well as Article X governing various applications of the original writing ("best evidence") rule to provide guarantees against inaccuracies and fraud. However, it should be made clear that the term "record," when used in Rule 1002 through 1008, includes writings, recordings and photographs. Accordingly, when more traditional forms of record keeping are called in question within the original writing rule, the same governing rules are applicable as has been the case under Article X of the Uniform Rules prior to their amendment. This application of the original writing rule to writings, recordings and photographs is facilitated through the definition of these terms in the amendments to Rules 1001(4) and (5) as well as the definition of record in Rule 101(c). See the Comment to Rule 101.

RULE 1002. REQUIREMENT OF ORIGINAL. To prove the content of a writing, recording, photograph, or other record, the original record, writing, recording, photograph, or other record is required, except as otherwise provided in these rules or by [rules adopted by the Supreme Court of this State or by] statute.

Comment

See the Comment to Rule 1001.

RULE 1003. ADMISSIBILITY OF DUPLICATES. A duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity or continuing effectiveness of the original or in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Comment

See the Comment to Rule 1001.

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS. The original is not required, and other evidence of the contents of a record is admissible if:

(1) all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(2) an original cannot be obtained by any available judicial process or procedure;

(3) at a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or

(4) the record is not closely related to a controlling issue.

Comment

See the Comment to Rule 1001.

RULE 1005. PUBLIC RECORDS. The contents of an official record, or of a private record authorized to be recorded or filed in the public records and actually recorded or filed, if otherwise admissible, may be proved by a copy in perceivable form, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy complying with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be admitted.

Comment

See the Comment to Rule 1001.

RULE 1006. SUMMARIES. The contents of voluminous records which cannot conveniently be examined in court may be presented in the form of a chart, summary, calculation, or other perceivable presentation. The original, or a duplicate, must be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Comment

See the Comment to Rule 1001.

RULE 1007. TESTIMONY, OR ADMISSION IN RECORD OF PARTY. The contents of a record may be proved by the testimony or deposition of the party against whom offered or by that party's written admission without accounting for the nonproduction of the original.

Comment

See the Comment to Rule 1001.

RULE 1008. FUNCTIONS OF COURT AND JURY. If the admissibility under these rules of other evidence of the contents of a record depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with Rule 104. However, if an issue is raised as to whether the asserted record ever existed, another

record produced at the trial is the original, or other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine.

Comment

See the Comment to Rule 1001.

ARTICLE XI

MISCELLANEOUS RULES

RULE 1101. TITLE.

These rules shall be known and may be cited as Uniform Rules of Evidence.