D R A F T

FOR DISCUSSION ONLY

UNIFORM RULES OF EVIDENCE (199__)

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UNIFORM RULES OF EVIDENCE (199__)

WITH PREFATORY NOTE AND REPORTER'S NOTES

The ideas and conclusions set forth in this draft, including the proposed revised language of the Rules and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its

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UNIFORM RULES OF EVIDENCE (199__)

PREFATORY NOTE

Codification of the 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,* presents its preliminary work product to the 1998 Conference.

The assignment from Scope and Program and the Executive Committee 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* 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 and state circuits. Thus, the careful lawyer must 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 precise regard to other existing work product.

We propose to read line-by-line only those rules in which substantive amendments have been finalized, referring, as directed by the Executive Committee, to the balance on a rule heading by rule heading basis. The Reporter has developed the following chart that will be helpful to you as the particular rules are considered. There are also several rules to be read by rule heading that may require the development of some uniform definitions hopefully useable wherever certain terms

are referred to in the rules or that present substantive issues which have not been considered by the Drafting Committee in depth. Fifteen of these rules have been identified by double asterisks in the following chart to alert the Commissioners to rules where comments from the floor would be particularly useful. Moreover, all of the rules identified for rule heading reading do not preclude discussion of any not programmed for line-by-line consideration. Indeed, your input on the language of any rule is solicited.

Finally, we wish to mention some subjects that are not included in the present proposals. Perhaps others are not discussed because we have simply overlooked them or we have discussed them in conjunction with other amended rules.

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 an offense of sexual assault; (2) the admissibility of prior offenses of child molestation when, in a criminal proceeding, a person is accused of an offense 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 Advisory Committee's call for public response opposed the enactment of Rules 413 through 415 without equivocation. The principal objections expressed were two fold. 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, serious constitutional questions would arise in criminal proceedings where 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.

The propriety of including Rules 413 through 415 in the *Uniform Rules of Evidence* is 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 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 Reversal 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). Missouri also has a blanket rule admitting evidence of prior acts of child molestation similar to Federal Rule 414. *See* Mo. Ann. Stat. § 566.025 (West 1978). 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, 1009 (West 1997).

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 4-6, 1996, voted unanimously not to include Rules 413 through 415, or the Advisory Committee's proposed amendment to Rule 404 of the *Federal Rules of Evidence*, in the proposed amendments to the *Uniform Rules of Evidence* or to recommend their adoption by the Conference.

UNIFORM RULES OF EVIDENCE (199__)

ARTICLE I
GENERAL PROVISIONS

RULE 101. SCOPE.

(a) Rules applicable. ~~These~~ Except as otherwise provided in subdivision (b), these rules ~~govern~~ apply to all actions and proceedings in the [courts of this State] ~~to the extent and with the exceptions stated in Rule 1101~~.

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

(1) Preliminary questions of fact. Determinations of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a);

(2) Grand jury. Proceedings before grand juries;

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; [preliminary examination] ~~detention hearing~~ [probable cause hearing] in criminal cases; [sentencing]; granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise; and

(4) Contempt proceedings. Proceedings for contempt in which the court may act summarily.

Reporter's Note

This proposed amendment of Uniform Rule 101 incorporates the black letter of Uniform Rule 1101 into Rule 101 with one technical change in subdivisions (a) and (b), changes based on stylistic recommendations and one substantive change. In subdivision (b)(3), the black letter "probable cause hearing" placed in brackets is substituted for "detention hearing."

The **Comment** to existing Rule 1101 states as follows:

> The Uniform Rules of Criminal Procedure change the preliminary examination to a detention hearing. This terminology is used in Subdivision (b)(3).

Neither the existing black letter of subdivision (b)(3) nor the **Comment** are now applicable due to amendments made to the *Uniform Rules of Criminal Procedure*. The **Comment** to Rule 345 of the *Uniform Rules of Criminal Procedure* providing for a probable cause hearing states that "these Rules include no provision for preventative detention. The only issue in the Rule 345 hearing is that specified in subdivision (d) below, 'whether there is probable cause to believe that a crime has been committed and that the defendant committed it.' This is quite different from the issues regarding the defendant's dangerousness and likelihood of nonappearance. . . ."

The proposed amendment of Uniform Rule 101 departs from the existing structure of Uniform Rules 101 and 1101 and from the uniformity which currently exists between the structure of the *Uniform Rules of Evidence* and Rules 101 and 1101 of the *Federal Rules of Evidence*. The Advisory Committee on the Federal Rules has not recommended any amendments to Federal Rule 101. In considering the proposed amendment to Uniform Rule 101, it may be appropriate to revisit the question of the extent to which the Uniform Rules should depart from the existing uniformity with the Federal Rules. However, it should be noted that the departure is organizational only except for the substantive changes in revised Uniform Rule 101(b)(3).

Proposed Uniform Rule 101(b) retains in the introductory clause the black letter of the current Uniform Rule 1101(b) by providing that "[t]he rules other than those applicable with respect to privileges do not apply in the following situations." This general language concerning the inapplicability of the rules of evidence in the proceedings enumerated in subdivisions (1) through (4) is not intended to eliminate the requirement that the evidence offered in these proceedings be relevant and not substantially outweighed by the danger of unfair prejudice as provided in Uniform Rules 401 through 403. *See*, for example, *People v. Turner, 128 Ill.2d 540, 539 N.E.2d 1196, 132 Ill. Dec. 390 (Ill. 1989)*, that the test governing admissibility at

the sentencing hearing "is whether the evidence is relevant and reliable" and *State v. Williams, 73 Ohio St.3d 153, 652 N.E.2d 721 (Ohio 1995)*, holding that in sentencing proceedings the rules of evidence "impose upon the trial court the duty to weigh the probative value of the evidence against the potential for unfair prejudice, confusion of the issues, and misleading of the jury."

Unlike existing Uniform Rule 1101(b)(3), it is recommended that the word "sentencing" be bracketed in proposed Uniform Rule 101(b)(3) to give the States flexibility in determining the extent to which the rules of evidence are to apply in sentencing proceedings. It is true that a majority of the States in their black letter law provide that the rules of evidence do not apply in sentencing proceedings. These are: **Alabama**, *Ala. R. Evid. 1101(b)(3)*; **Alaska**, *Alaska R. Evid. 101(c)(2)*; **Arkansas**, *Ark. R. Evid. 1101(b)(3)*; **California**, *Pretrial and Trial Rules, Div. 3, c. IV, Rule 420(b) and c. V, Rule 433(c)(1)*; **Colorado**, *Colo. R. Evid. 1101(d)(3)*; **Connecticut**, *Conn. R. Evid. 1101(d)(3)*; **Delaware**, *Del. R. Evid. 1101(b)(3)*; **Hawaii**, *Haw. R. Evid. § 626-1, R.1101(d)(3)*; **Idaho**, *Idaho R. Evid. 101(e)(3);* **Indiana**, *Ind. R. Evid. 101(c)(2)*; **Iowa**, *Iowa R. Evid. 1101(c)(4)*; **Kentucky**, *Ky. R. Evid. 1101(d)(5)*; **Louisiana**, *La. Code Evid. Ann. art. 1101(c)(4) (West 1997)*; **Maine**, *Me. R. Evid. 1101(b)(4)*; **Maryland**, *Md. R. Evid. 5-101(b)(9)*; **Michigan**, *Mich. R. Evid. 1101(b)(3)*; **Minnesota**, *Minn. R. Evid. 1101(b)(3)*; **Montana**, *Mont. R. Evid. 101(c)(3)*; **Nebraska**, *Neb. Rev. Stat. § 27-1101(d)(3) (Supp. 1996)*; **Nevada**, *Nev. Rev. Stat. § 47.020(2)(C) (1995)*; **New Hampshire**, *N.H. R. Evid. 1101(d)(3)*; **New Jersey**, *N.J. R. Evid. 101*; **New Mexico**, *N.M. R. Evid. 11-1101*; **North Carolina**, *N.C. R. Evid. 1101(b)(3)*; **North Dakota**, *N.D. R. Evid. 1101*; **Ohio**, *Ohio R. Evid. 101(c)(3)*; **Oklahoma**, *Okla. Stat. Ann. tit. 12, § 2103(b)(3) (West 1997)*; **Oregon**, *Or. Rev. Stat. § 40.015(4)(d) (1989), Or. Rev. Stat. § 137.090(1) (1989)*; **Pennsylvania**, *42 Pa. C. S. A. § 9711(a)(2)*; **Rhode Island**, *R.I. R. Evid. 101(b)(3)*; **South Carolina**, *S.C. R. Evid. 1101(d)(3)*; **Utah**, *Utah R. Evid. 1101(b)(3)*; **Vermont**, *Vt. R. Evid. 1101(b)(3)*; **Washington**, *Wash. R. Evid. 1101(c)(3)*; **West Virginia**, *W.Va. R. Evid. 1101(b)(3)*; **Wisconsin**, *Wis. Stat. Ann. § 911.01(4)(c) (West 1997)*; and **Wyoming**, *Wyo. R. Evid. 1101(b)(3)*.

In the following seven States it has been held that a strict application of the rules of evidence is not required in the sentencing phase of the trial: **Illinois**, *People v. Turner, 128 Ill. 2d 540, 539 N.E.2d 1196, 132 Ill. Dec. 390 (Ill. 1989)*; **Kansas**, *State v. Torrence, 22 Kan. App. 2d 721, 922 P.2d 1109 (Kan. Ct. App. 1996)*; **Massachusetts**, *Commonwealth v. Goodwin, 414 Mass. 88, 605 N.E.2d 827 (Mass. 1993)*; **Mississippi**, *Williams v. State, 684 So. 2d 1179 (Miss. 1996)*; **New York**, *People v. Wright, 104 Misc. 2d 911, 429 N.Y.S.2d 993 (N.Y. Sup. Ct. 1980)*; **South Dakota**, *State v. Habbena, 372 N.W.2d 450 (S.D. 1985)*; and **Virginia**, *Alger v. Commonwealth, 19 Va. App. 252, 450 S.E.2d 765 (Va. Ct. App. 1994)*.

In contrast, there are three jurisdictions which require that the rules of evidence apply, in whole, or in part, to sentencing proceedings. These are: **Arizona**, *Ariz. R. Evid. 1101(d)*; **Tennessee**, *Tenn. Code Ann. § 40-35-209(b) (1995)*; and **Texas,** *Tex. R. Evid. 101(d)(1)*.

There are also five States which have specific provisions governing the applicability of the rules of evidence in capital cases. These are: **Florida**, *Fla. Stat. Ann. § 921.141(1) (West 1997)*; **Maryland**, *Md. Ann. Code of 1957, art. 27, § 413(c)*; **Ohio**, *Ohio Rev. Code Ann. § 2929.04(c)*; **Oregon**, *Or. Rev. Stat. § 163.150(1) (amended 1997)*; and **Tennessee**, *Tenn. Code Ann. § 39-13-204(c) (amended 1997)*.

Finally, in a few jurisdictions, limitations on the inapplicability of the rules of evidence in sentencing proceedings have been imposed by judicial decision even where the black letter law provides otherwise. See, for example, **Oklahoma**, where it has been held, as a general rule, that the rules of evidence do not apply to sentencing proceedings under *Okla. Stat. Ann. tit. 12, § 2103(B)(2) (West 1997)*. *See Hunter v. State, 825 P.2d 1353 (Okla. Crim. App. 1992)*. Notwithstanding, the Court of Criminal Appeals has held that the rules of evidence are applicable to sentencing proceedings under recidivist statutes [*Wade v. State, 624 P.2d 86 (Okla. Crim. App. 1981)*] and to second-stage jury sentencing proceedings [*Castro v. State, 745 P.2d 394 (Okla. Crim. App. 1987)*].

Accordingly, the Drafting Committee has concluded that the States should be afforded an option in the Uniform Rules to exercise their own discretion in fashioning rules governing the applicability of the rules of evidence in sentencing or other similar proceedings, including dispositions in juvenile cases.

RULE 102. PURPOSE AND CONSTRUCTION. These rules ~~shall~~ must be construed to secure fairness ~~in administration~~, ~~elimination of~~ eliminate unjustifiable expense and delay, and ~~promotion of~~ promote the growth and development of the law of evidence, to the end that the truth may be ascertained and ~~proceedings~~ issues justly determined.

Reporter's Note

This proposed amendment of Uniform Rule 102 is clarifying only and no change in substance is intended. The word "shall" has been changed to "must" based on a stylistic recommendation.

In considering this amendment to Uniform Rule 102, it may be appropriate to revisit the question of the extent to which the *Uniform Rules of Evidence* should depart from the existing uniformity of Uniform Rule 102 with its counterpart in Rule 102 of the *Federal Rules of Evidence* where changes in substance are not intended.

The Advisory Committee on the *Federal Rules of Evidence* has not recommended any amendments to Federal Rule 102.

RULE 103. RULINGS ON EVIDENCE.

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

(1) Objection. ~~In case~~ 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) Offer of proof. ~~In case~~ 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 ~~which~~ 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) Hearing of jury. In jury cases, proceedings ~~shall~~ 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 ~~in~~ within the hearing of the jury.

(d) Errors affecting substantial rights. Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court.

(e) Effect of pretrial ruling. A pretrial objection to, or proffer of, evidence must be timely renewed at trial unless, at the request of counsel or sua sponte, the court states that the ruling on the objection or proffer is final.

Reporter's Note

Non-substantive changes have been made in Uniform Rules 103(a)(1) and (2) and subdivision (c) as a result of a stylistic recommendation. The proposed amendment to add a subdivision (e) to Uniform Rule 103 is a revised version of the now withdrawn Proposed Rule 103(e) of the *Federal Rules of Evidence*. This proposed rule was withdrawn by the Advisory Committee due to the controversy surrounding the finality which should be accorded pretrial rulings on objections to, or proffers of, evidence. The withdrawn Proposed Federal Rule 103(e) provided as follows:

> **(e) Effect of pre-trial ruling.** A pretrial objection to or proffer of evidence must be timely renewed at trial unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is final.

As originally enacted, Federal Rule 103 did not deal with whether a losing party on a pretrial motion concerning the admissibility of evidence was required to renew its objection or offer of proof at trial to preserve the question for consideration on appeal. Differing approaches evolved in the several circuits with corresponding uncertainty among the litigants as to the manner in which the issue should be handled. This proposed Federal Rule 103(e) was intended to clarify the different practices among the several circuits regarding the finality of rulings on pretrial motions concerning the admissibility of evidence. *See*, for a survey of the cases, *United States v. Mejia-Alarcon, 995 F.2d 982 (10th Cir. 1993), cert. denied, 510 U.S. 927, 114 S.Ct. 334, 126 L.Ed.2d 279 (1993).*

The Advisory Committee Note to the withdrawn proposed Federal Rule 103(e) stated that the Rule "does not excuse a litigant from having to satisfy the requirements of *Luce v. United States*, 469 U.S. 38 [105 S.Ct. 460, 83 L.Ed.2d 443] (1984) to the extent applicable. In *Luce*, the Supreme Court held that an accused must testify at trial in order to preserve for appeal any Rule 609 objection to a trial court's ruling on the admissibility of the accused's prior convictions for impeachment." In public comment, the Committee

has been urged to abandon this approach because "it creates a tactical dilemma for defendants who believe that they have a better chance of obtaining an acquittal if they are silent, because the jury is likely to misuse their criminal history as propensity evidence rather than as impeachment. *(See Letter of Professor Myrna S. Raeder, Southwestern University School of Law, to Peter G. McCabe, dated March 1, 1996).* The effect of *Luce* on the necessity for renewing objections at trial impacts upon the impeachment of witnesses with prior convictions under Rule 609 of the *Federal Rules of Evidence.*

Public reaction to the withdrawn proposed Federal Rule 103(e) has been mixed. Some favored the rule as proposed. Others agreed that Federal Rule 103 should be clarified to deal with the uncertainty among litigants as to claiming error on a pretrial ruling admitting or excluding evidence, but have argued that the default solution should be the reverse of the rule as proposed and provide as follows:

> A pretrial objection to or proffer of evidence does not have to be renewed at trial, unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is not final.

Others voiced no opposition to the withdrawn Federal Rule 103. Still others took no position.

Finally, Professor Richard Friedman of the University of Michigan School of Law, testifying at the Public Hearing on Proposed Amendments to the Federal Rules of Evidence, and without questioning the need for a default rule, also argued that the default rule should be the opposite, namely, that the in limine objection or proffer should preserve the issue for consideration on appeal. *(See Public Hearing on Proposed Amendments to the Federal Rules of Evidence, January 18, 1996).*

The Advisory Committee on the *Federal Rules of Evidence* revisited the issue at its meeting on April 14-15, 1997 and approved the following amendment to Rule 103 to deal with rulings on motions in limine:

> **(e) Motions in limine.** If a party moves for an advance ruling to admit or exclude evidence, the court may rule before the evidence is offered at trial or may defer a decision until the evidence is offered. A motion for an advance ruling, when definitively resolved on the record, is sufficient to preserve error for appellate review. But in a criminal case, if the court's ruling is conditioned on the testimony of a witness or the pursuit of a defense, error is not preserved unless that testimony is given or that defense is pursued. Nothing in this subdivision precludes the court from reconsidering an advance ruling.

This proposed Federal Rule 103(e) retained in substance the default rule as earlier proposed in the withdrawn rule. At the same time, it also addressed the requirements of the *Luce* case, but in a broader context by requiring that "if the court's ruling is conditioned on the testimony of a witness or the pursuit of a defense, error is not preserved unless that testimony is given or that defense is pursued." The *Luce* principle has also been extended in the rule to include comparable situations to the issue addressed in *Luce* by some lower federal courts. See, for example, *United States v. Weichert, 783 F.2d 23 (2d Cir. 1986)* (applying *Luce* where defendant may be impeached with evidence offered under Rule 608); *United States v. DiPaolo, 804 F.2d 225 (2d Cir. 1986)* (impeachment of defendant's witness); *United States v. Ortiz, 857 F.2d 900 (2d Cir.), cert. denied, 489 U.S. 1070 (1989)* (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense).

However, the Standing Committee of the Judicial Conference of the United States rejected the proposed Federal Rule 103(e) on technical grounds. The Advisory Committee then revisited the issue at its meeting on October 20-21, 1997, considered alternatives to the proposed rule and approved sending to the Standing Committee a revised amendment dealing with the effect of pretrial rulings on the admissibility of evidence by adding the following paragraph at the end of Rule 103(a):

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

The newly proposed amendment to Rule 103(e) meets the technical objections of the Standing Committee, broadens the rule to apply to all motions, in limine and otherwise, broadens the holding in the *Luce* case, *supra*, to require the fulfillment of any condition precedent for claiming error on the admission or exclusion of evidence and includes the rule in subdivision (a) where the Advisory Committee believes the issue should more logically be addressed than in a separate subdivision of Rule 103. The Standing Committee of the Judicial Conference of the United States has now approved this proposed amendment of Rule 103(a). It will be issued for public comment on August 15, 1998.

In contrast to the now proposed amendment of Federal Rule 103(a), the proposed Rule 103(e) of the *Uniform Rules of Evidence* states as a default rule that counsel for the losing party must renew at trial any pretrial objection or offer of proof. It also differs from the proposed amendment of Rule 103(a) of the *Federal Rules of Evidence* in that a renewal of the objection or offer of proof is not required if the court,

either on the request of counsel, or the court on its own motion, states that "the objection or proffer is final." Counsel bears the risk of waiving an appealable issue if the requisite pretrial ruling of finality is not obtained or the objection, or offer of, proof is not renewed at trial.

Also, in contrast to the now approved Federal Rule 103(a) to be submitted for public comment, the proposed Uniform Rule 103(e) does not deal with the *Luce* problem or its progeny. Similarly, the Drafting Committee has elected not to deal with the *Luce* requirement in the narrower context of Uniform Rule 609 mandating that an accused testify at trial in order to preserve for appeal any objection to a court's pretrial ruling on the admissibility of the accused's prior conviction for impeachment purposes.

As proposed, the requirement in Uniform Rule 103(e) for the renewal of a pretrial objection or offer of proof at trial is in accord with the rule generally followed among the several States where the issue has been raised on appeal. *See*, in this connection, *State v. Barnett, 67 Ohio App. 3d 760, 588 N.E.2d 887 (Ohio Ct. App.1990)* as follows:

> An order granting or denying a motion in limine is a tentative, preliminary or presumptive ruling about an evidentiary issue that is anticipated, and an appellate court need not review the propriety of such an order unless the claimed error is preserved by a timely objection when the issue is actually reached during trial.

See also, State v. Maurer, 15 Ohio St. 3d 239, 15 O.B.R. 379, 473 N.E.2d 768 (Ohio 1984) and *Deagan v. Dietz, No. 91-OV-2867, 1996 WL 148612 (Ohio Ct. App. Mar. 29, 1996)*.

Other jurisdictions adhering to the general rule requiring the renewal of an objection at trial are: **Alabama**, *Evans v. Fruehauf Corp., 647 So. 2d 718 (Ala. 1994)* and *Grimsley v. State, 678 So. 2d 1197 (Ala. Crim. App. 1996)*; **Florida**, *Rindfleisch v. Carnival Cruise Lines, 489 So. 2d 488 (Fla. Dist. Ct. App. 1986)* and *Lindsey v. State, 636 So. 2d 1327 (Fla. 1994)*; **Illinois**, *Lundquist v. Nickels, 605 N.E.2d 1373 (Ill. App. Ct. 1992)* and *People v. Rodriguez, 655 N.E.2d 1022 (Ill. App. Ct. 1995)*; **Indiana**, *Paullus v. Yarnelle, 633 N.E.2d 304 (Ind. Ct. App. 1994)* and *Carter v. State, 634 N.E.2d 830 (Ind. Ct. App. 1994)*; **Kansas**, *Brunett v. Albrecht, 810 P.2d 276 (Kan. 1991)* and *State v. Goseland, 887 P.2d 1109 (Kan. 1994)*; **Maine**, *State v. Naoum, 548 A.2d 120 (Me. 1988)*; **Maryland**, *United States Gypsum Co. v. Mayor of Baltimore, 336 Md. 145, 647 A.2d 405 (Md. Ct. App. 1994)*; **Massachusetts**, *Adoption of Carla, 416 Mass. 510, 623 N.E.2d 1118 (1993)* and *Sandler v. Commonwealth, 419 Mass. 334, 644 N.E.2d 641 (1995)*; **Missouri**, *Vermillion v. Pioneer Gun Club, 918 S.W.2d 827 (Mo. Ct. App. 1996)* and *State v. McNeal, 699 S.W.2d 457 (Mo. Ct. App. 1985)*; **Nebraska**, *Molt v. Lindsay Mfg. Co., 248 Neb. 81, 532 N.W.2d 11 (1995)* and *State v.*

Coleman, 239 Neb. 800, 478 N.W.2d 349 (1991); **New York**, *People v. Alleyne, 154 A. 2d 473, (N.Y. App. Div. 1989)*; **Oklahoma**, *Braden v. Hendricks, 695 P.2d 1343 (Okla. 1985)* and *Fields v. State, 666 P.2d 1301 (Okla. Crim. App. 1983)*; **Oregon**, *State v. Lockner, 663 P.2d 792 (Or. Ct. App. 1983)*; **South Carolina**, *State v. Mueller, 460 S.E.2d 409 (S.C. Ct. App. 1995)*; **Texas**, *Keene Corp. v. Kirk, 870 S.W.2d 573 (Tex. App. 1993)* and *State v. Chapman, 859 S.W.2d 509 (Tex. Ct. App. 1993)*; and **Vermont**, *State v. Hooper, 151 Vt. 42, 557 A.2d 880 (1988)*.

The following jurisdictions do not require the renewal of an objection at trial. See **Arizona,** *State v. Burton, 144 Ariz. 248, 697 P.2d 331 (1985)*; **Arkansas**, *Massengale v. State, 319 Ark. 743, 894 S.W.2d 594 (1995)*; **Idaho**, *State v. Higgins, 122 Idaho 590, 836 P.2d 536 (1992)* and *Davidson v. Beco Corp., 112 Idaho 560, 733 P.2d 781 (Idaho Ct. App. 1986)*; **Louisiana**, *State v. Harvey, 649 So. 2d 783 (La. Ct. App. 1995)* (renewal of objection not required on any written motion); **New Hampshire**, *State v. Eldredge, 135 N.H. 562, 607 A.2d 617 (1992)*; **New Mexico**, *Buffett v. Jaramillo, 914 P.2d 1011 (N.M. Ct. App. 1993)* and *State v. Corneau, 109 N .M. 81, 781 P.2d 1159 (N.M. Ct. App. 1989)*; **North Dakota**, *Fischer v. Knapp, 332 N.W. 2d 76 (N.D. 1983)*; **Pennsylvania**, *Miller v. Schmitt, 405 Pa. Super. 502, 592 A.2d 1324 (Pa. Super. Ct. 1991)*; **Wisconsin**, *Schultz v. Am. Family Mut. Ins. Co., 178 Wis.2d 877, 506 N.W.2d 427 (Wis. Ct. App. 1993)* and *State v. Bustamante, 549 N.W.2d 746 (Wis. Ct. App. 1996)*; and **Wyoming**, *Sims v. Gen. Motors Corp., 751 P.2d 357 (Wyo. 1988)*.

There are at least six jurisdictions which apply an exception and excuse a renewal of the objection where "the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is final." These are: **California**, *People v. Morris, 53 Cal. 3d 152, 807 P.2d 949 (1991)*; **Hawaii**, *Lussier v. Mau-Van Dev., Inc., 4 Haw. App. 359, 667 P.2d 804 (Haw. Ct. App. 1983)*; **Maryland**, *Simmons v. State, 542 A.2d 1258 (Md. Ct. App. 1988)*; **Tennessee**, *Willis v. Grimsley, No. 01-A-01-9409-CV-00445, 1995 W7 89774 (Tenn. Ct. App. Mar. 3, 1995)* and *State v. Brobeck, 751 S.W.2d 828 (Tenn. 1988)*; **Utah**, *State v. Dibello, 780 P.2d 1221 (Utah 1989)* and *Salt Lake City v. Holtman, 806 P.2d 235 (Utah Ct. App. 1991)*; and **Washington**, *Sturgeon v. Celotex Corp., 52 Wash. App. 609, 762 P.2d 1156 (Wash. Ct. App. 1988)* and *State v. Ramirez, 46 Wash. App. 223, 730 P.2d 98 (Wash. Ct. App. 1986)*.

RULE 104. PRELIMINARY QUESTIONS.

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of ~~a person~~ an individual to be a witness, the existence of a privilege, or the

admissibility of evidence ~~shall~~ must be determined by the court, subject to the provisions of subdivision (b). In making its determination, ~~it~~ the court is not bound by the rules of evidence except those with respect to privileges.

(b) Determination of privilege. Before a person may successfully claim, or oppose, a privilege within Rule 104(a), the claimant or contestant must prove that the conditions prerequisite to the exclusion or admissibility of the privileged matter are more probably true than not. In making its determination, the court, in its discretion, may review the alleged privileged matter in camera.

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

~~(c)~~ (d) Hearing of jury. ~~Hearings~~ A hearing on the admissibility of a confessions in a criminal ~~cases shall~~ case must be conducted out of the hearing of the jury. ~~Hearings~~ A hearing on other preliminary matters in all cases, ~~shall~~ must be so conducted ~~whenever~~ if the interests of justice require or, in a criminal ~~cases, whenever~~ case an accused is a witness~~, if he~~ and so requests.

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

~~(e)~~ (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.

Reporter's Note

The existing **Comment** to Rule 104 states:

> The phrase, 'or in the court's discretion subject to' [in subd. (b)] [now subd. (c)] preserves the court's control of the order of proof as provided in Rule 611(a).

Renumbered subdivision (d) differs from its federal rule counterpart by substituting the phrase "in a criminal case" for the phrase "in all cases" in the first sentence, inserting in the second sentence the phrase "in all cases" after the word "matters" and the phrase "in a criminal case" between the words "or" and "an" and by deleting the word "whenever."

The proposed Uniform Rule 104 substitutes the word "individual" for "person" in subdivision (a), eliminates the gender-specific language in subdivisions (d) and (e), and makes certain other non-substantive changes as a result of stylistic recommendations. These changes are technical and no change in substance is intended.

The proposed 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. Initially, the Drafting Committee considered incorporating these rules in a proposal to amend Uniform Rule 512, but later decided to recommend amending Uniform Rule 104 to incorporate procedure governing the determination of the existence of a privilege. Rule 104(b), as now proposed, is believed to be a far more logical place to provide for a procedure to determine the existence of a privilege by the court.

Rule 104(b) is intended to accomplish two purposes. First, it carries forward the ABA proposal by codifying the evidentiary burden of persuasion "more probably true than not" to focus upon the proponent, or contestant, of a privilege by requiring a greater burden than simply the production of evidence to prove the existence of the privilege because of the importance which the existence of a privilege has in the trial of an issue of fact. It is true, at the federal level at least, 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 to the good sense of the trial judge." *See* 2 Weinstein's Evidence 503-121 (1992). *See further*, the opinion of the Supreme Court in *United States v. Zolin, 491 U.S. 563, 109 S.Ct. 2619, 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 of an issue of fact, requiring the minimal degree of persuasion to make such a finding provides both guidance to the court and emphasizes the importance of the admissibility issue when the existence of a privilege is involved.

The following States have applied the preponderance of evidence [more probably true than not] standard of persuasion in determining the existence of a privilege: **Alabama**, *Mead Corp. v. Hicks, 448 So.2d 308 (Ala. 1983)*; **Florida**, *Am. Tobacco Co. v. State, 697 So.2d 1249 (Fla. Dist. Ct. App. 1997)*; **Indiana**, *Mayberry v. State, 670 N.E.2d 1262 (Ind. 1996)*; **Louisiana**, *State v. Bright, 676 So.2d 189 (La. Ct. App. 1996)*; **Maryland**, *Whittington v. State, 262 A.2d 75 (Md. Ct. Spec. App. 1970)*; **Massachusetts**, *Purcell v. District Attorney for Suffolk District, 676 N.E.2d 436 (Mass. 1997)*; **New Jersey**, *State v. Santiago, 593 A.2d 357 (N.J. Super. Ct. App. Div. 1991)* and *United Jersey Bank v. Wolosoff, 483 A.2d 821 (N.J. Super. Ct. App. Div. 1984)*; **Oregon**, *State v. Hass, 942 P.2d 261 (Or. 1997)*; and **Wisconsin**, *Kurzynski v. Spaeth, 538 N.W.2d 554 (Wis. Ct. App. 1995).*

The following States have applied the more rigorous clear and convincing [highly probably true] standard of persuasion, to rebut the qualified privileged as to defamation of a public official: **Alabama**, *Mead Corp. v. Hicks, 448 So.2d 308 (Ala. 1983)*; **California**, *Fletcher v. San Jose Mercury News, 216 Cal. App. 3d 172 (Cal. Ct. App. 1989)*; **Colorado**, *Kuhn v. Tribune-Republican Publishing, 637 P.2d 315 (Colo. 1981)*; **Indiana**, *Moore v. Univ. of Notre Dame, 968 F.Supp. 1330 (N.D. Ind. 1997)*; **Kentucky**, *Ball v. E.W. Scripps Co., 801 S.W.2d 684 (Ky. 1990)*; **Louisiana**, *Neuberger, Cocrver & Goins v. Times Picayune Publishing Co., 597 So.2d 1179 (La. Ct. App. 1992)*; **Minnesota**, *Rose v. Koch, 154 N.W.2d 409 (Minn. 1967)*; and **Pennsylvania**, *Sprague v. Walter, 516 A.2d 706 (Pa. Super. Ct. 1986).*

Other jurisdictions in which this more rigorous standard of persuasion has been applied are: **New Jersey**, *Abella v. Barringer Resources, Inc., 615 A.2d 288 (N.J. Super. Ct. Ch. Div. 1992)* (rebuttal of an accountant's qualified privilege as to defamation); **Ohio**, *Doyle v. Fairfield Machine Co., No. 96-T-5488, 1997, WL 269329 (Ohio Ct. App. 1997)* (rebuttal of qualified privilege of governmental official for a report which may result in interference with an employment relationship); **Tennessee**, *State v. Curriden, 738 S.W.2d 192 (Tenn. 1987)* (divestiture of newscaster's qualified privilege against disclosure of information relating to the commission of a crime); and **Virginia**, *Southeastern Tidewater Opportunity Project, Inc. v. Bade, 435 S.E.2d 131 (Va. 1993)* (rebuttal of qualified privilege of executive of head start agency).

Second, the proposed amendment also deals with the anomaly in the current Uniform Rule 104(a) which arguably forecloses disclosure of privilege matter in determining the existence 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 proposed amendment addresses this problem by providing for an in camera disclosure of the privileged matter in determining the existence of a privilege. *See further*, in this connection, *United States v. Zolin, 491 U.S. 563, 109 S.Ct. 2619 (1989)*, that Rule 104(a) of the *Federal Rules of Evidence* does not prohibit the use of in camera review procedure when a District Court rules on a claim of privilege.

In camera hearings to determine the existence of a privilege are also widely sanctioned throughout the several States as follows: **Alabama**, *Assured Investors Life, Inc. v. Nat'l. Union Assoc., Inc., 362 So.2d 228 (Ala. 1978)*; **Alaska**, *Cent. Constr. Co. v. Home Indemnity Co., 794 P.2d 595 (Alaska 1990)* (factual basis to support good-faith belief that in camera review of materials is necessary); **California**, P*eople v. Sup. Ct., 44 Cal. Rptr.2d 734 (Cal. Ct. App. 1995)*; **Colorado**, *People v. Salazar, 835 P.2d 592 (Colo. Ct. App. 1992)*; **Connecticut**, *State v. Storlazzi, 464 A.2d 829 (Conn. 1983)*; **Delaware**, *Guy v. Judicial Nominating Comm'n, 659 A.2d 777 (Del. Super. Ct. 1995)* (factual basis of need for disclosure prior to holding in camera hearing); **Illinois**, *In re Decker, 606 N.E.2d 1094 (Ill. 1992)* (factual basis to support good-faith belief by a reasonable person that in camera review of materials is necessary to establish that crime-fraud exception applies), *Uhr v. Lutheran Gen. Hsop., 589 N.E.2d 723 (Ill. App. Ct. 1992)* (absolute right to in camera inspection of materials to determine existence of a privileged communication); **Louisiana**, *Campo v. Supre, 470 So.2d 234 (La. Ct. App. 1985)* (requiring in camera hearing to determine whether communication is privileged); **Massachusetts**, *Purcell v. District Attorney, 676 N.E.2d 436 (1997)* (in camera review of communication within discretion of court); **Michigan**, *People v. Stanaway, 521 N.W.2d 557 (Mich. 1994)* (requiring in camera disclosure of alleged privileged communication); **New Jersey**, *Kinsella v. Kinsella, 696 A.2d 556 (N.J. 1997)* (in camera review permissible in determining whether exception to attorney-client privilege is applicable); **New York**, *Levien v. LaCorte, 640 N.Y.S.2d 728 (N.Y. Sup. Ct. 1996)* (in camera review permissible); **North Carolina**, *Myers v. Liberty Lincoln-Mercury, Inc., 365 S.E.2d 663 (N.C. Ct. App. 1988)* (requiring court to hold in camera review of privileged matter); **Ohio**, *Gates v. Brewer, 442 N.E.2d 72 (Ohio Ct. App. 1981)* (requiring court to hold in camera review of privileged matter); **Pennsylvania**, *Commonwealth v. Stewart, 690 A.2d 195 (Pa. 1997)* (requiring court to hold in camera review of privileged matter); **South Dakota**, *Maynard v. Heeren, 563 N.W.2d 830 (S.D. 1997)* (party opposing discovery of privileged communication has a right to an in camera hearing); **Texas**, *R.K. v. Ramirez, 887 S.W.2d 836 (Tex. 1994)* (in camera review permissible); **Virginia**, *Hopelins v. Commonwealth, 450 S.E.2d 397 (Va. Ct. app. 1994)* (in camera review permissible); **Washington**, *Seattle Northwest Securities Corp. v. SDG Holding Company, Inc., 812 P.2d 488 (Wash. Ct. App. 1991)* (in camera review permissible); and **Wisconsin**, *State v. Circuit Court, 335 N.W.2d 367 (Wis. 1983)* (requiring in camera review of privileged matter).

RULE 105. LIMITED ADMISSIBILITY. ~~Whenever~~ If evidence ~~which~~ 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.

Reporter's Note

The existing **Comment** to Rule 105 states:

> "[t]his rule is not intended to affect the power of a court to order a severance or a separate trial of issues in a multi-party case."

Recommended stylistic changes have been made in revising Rule 105 by substituting the word "if" for "whenever" and the word "that" for "which."

There are no substantive proposals for amending existing Rule 105.

The Advisory Committee on the *Federal Rules of Evidence* has not recommended any amendments to Rule 105.

RULE 106. REMAINDER OF OR RELATED ~~WRITINGS OR RECORDED STATEMENTS~~ RECORDS. ~~Whenever~~ If a ~~writing or recorded statement~~ record or part thereof is introduced by a party, an adverse party may require ~~him~~ the introduction at that time ~~to introduce~~ of any other part or any other ~~writing or recorded statement which~~ record that in fairness ought to be considered contemporaneously with it.

Reporter's Note

The existing **Comment** to Rule 106 states:

> "[a] determination of what constitutes 'fairness' includes consideration of completeness and relevancy as well as possible prejudice."

Uniform Rule 106 also differs from its federal rule counterpart by substituting the phrase "in fairness ought" for the phrase "ought in fairness." In this revision recommended stylistic changes have been made by substituting the word "if" for "whenever" and the word "that" for the word "which."

Two amendments to Rule 106 are proposed. First, the revised Rule 106 eliminates the gender-specific language in the rule. This is technical and no change in substance is intended.

Second, the Drafting Committee proposes amending Uniform Rule 106 to substitute the word "record" for the language "writing or recorded statement" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. Comparable amendments are also made in Rules 612, 801(a), 803(5) through 803(17), 901 through 903 and 1001 through 1007.

"Record" is then defined in a proposed amendment to Uniform Rule 1001(1) as follows:

> "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. The term includes writings, recordings, photographs and images.

This definition of "record" is derived from § 5-102(a)(14) of the Uniform Commercial Code and would carry forward established policy of the Conference to accommodate the use of electronic evidence in business and governmental transactions. The Drafting Committee has also inserted a second sentence in the definition of record to include "writings, recordings, photographs and images" to accommodate the admissibility of records kept in the traditional forms of writings, recordings and photographs, as well as the more recent innovation of maintaining records in the form of images. The definitions of "writings", "recordings", and "photographs" are carried forward in Uniform Rule 1001, subdivisions (2) and (3), with clarifying amendments and the term "images" is newly defined in subdivision (4). *See further*, the **Reporter's Note** to Uniform Rule 1001, *infra*.

The Advisory Committee on the *Federal Rules of Evidence* has not recommended any amendments to Federal Rule 106.

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 ~~in that~~ because it is either ~~(1)~~ (i) generally known within the territorial jurisdiction of the trial court or ~~(2)~~ (ii) 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 ~~prior~~ 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 ~~any~~ a fact judicially noticed.

Reporter's Note

Recommended non-substantive stylistic changes have been made in the revision of Rule 201(b), (e), and (g).

Uniform Rule 201(g) differs from Rule 201(g) of the *Federal Rules of Evidence*. Federal Rule 201(g) provides as follows:

> In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

In contrast, Uniform Rule 201(g) does not distinguish between civil and criminal cases in instructing the jury to accept as conclusive a fact judicially noticed.

The Advisory Committee on the *Federal Rules of Evidence* has not recommended any amendments to Article II dealing with the judicial notice of adjudicative facts.

The Drafting Committee does not recommend any changes in Uniform Rule 201 including Rule 201(g), to make the Uniform rule consistent with the Federal rule.

It may be of interest to note that the black letter of the existing Uniform Rule 201(g) that "[t]he court shall instruct the jury to accept as conclusive any fact judicially noticed" is a reflection of Rule 201(g) of the 1971 Revised Draft of the *Proposed Rules of Evidence for the U.S. District Courts and Magistrates*. The Advisory Committee's Note to Rule 201(g) in the 1971 Revised Draft explained the rule as follows:

> Much of the controversy about judicial notice has centered upon the question whether evidence should be admitted in disproof of facts of which judicial notice is taken.
>
> * * *
>
> Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof. The judge instructs the jury to take judicially noticed facts as established.
>
> * * *
>
> Authority upon the propriety of taking judicial notice against an accused in a criminal case with respect to matters other than venue is relatively meager. Proceeding upon the theory that the right of jury trial

does not extend to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases.

* * *

Rule 201(g) in the 1971 Revised Draft is to be sharply distinguished from Rule 201(g) of the earlier 1969 Preliminary Draft which provided as follows:

> Instructing Jury. In civil jury cases, the judge shall instruct the jury to accept as conclusive any facts judicially noticed. In criminal jury cases, the judge shall instruct the jury that it may but is not required to accept as conclusive any fact that is judicially noticed.

The Advisory Committee's Note to this earlier draft explained the distinction between treating civil and criminal cases differently as follows:

> Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof in civil cases.
>
> * * *
>
> Criminal cases are treated somewhat differently in the rule. While matters falling within the common fund of information supposed to be possessed by jurors need not be proved . . . , these are not, properly speaking, adjudicative facts but an aspect of legal reasoning. The considerations which underlie the general rule that a verdict cannot be directed against the accused in a criminal case seems to foreclose the judge's directing the jury on the basis of judicial notice to accept as conclusive any adjudicative facts in the case. * * * However, this presents no obstacle to the judge's advising the jury as to a matter judicially noticed, if he instructs them that it need not be taken as conclusive.

It is noteworthy that it is this earlier 1969 version of Rule 201(g) which was adopted by Congress contrary to the recommendation of the Supreme Court which embodied the 1971 Revised Draft of Rule 201(g). The Report of the House explained the Congressional change as follows:

> Rule 201(g) as received from the Supreme Court provided that when judicial notice of a fact is taken, the court shall instruct the jury to accept that fact as established. Being of the view that mandatory instruction to a jury in a criminal case to accept as conclusive any fact

judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial, the Committee adopted the 1969 Advisory Committee draft of this subsection, allowing a mandatory instruction in civil actions and proceedings and a discretionary instruction in criminal cases.

See H.R. Rep. No. 93-650, 93rd Cong., 2d Sess. At 6-7 (1973).

The following state jurisdictions have rejected Uniform Rule 201(g) based upon the 1971 Revised Draft by adopting a rule comparable to Rule 201(g) of the *Federal Rules of Evidence* as finally enacted by Congress: **Alaska**, *Alaska R. Evid. 203(c)*; **Colorado**, *Colo. R. Evid. 201(g)*; **Hawaii**, *Haw. R. Evid. 201(g)*; **Indiana**, *Ind. R. Evid. 201(g)*; **Iowa**, *Iowa R. Evid. 201(g)*; **Louisiana**, *La. Code Evid. Ann. art. 201(G) (West 1997)*; **Maryland**, *Md. R. Evid. 5-201*; **Michigan**, *Mich. R. Evid. 201(f)*; **Mississippi**, *Miss. R. Evid. 201(g)*; **Montana**, *Mont. R. Evid. 201(g)*; **Nebraska**, *Neb. R. Evid. 201(7)*; **New Hampshire**, *N.H. R. Evid. 201(g)*; **New Jersey**, *N.J. R. Evid. 201(g)*; **New Mexico**, *N.M. R. Evid. 11-201*; **North Carolina**, *N.C. R. Evid. 201(g)*; **Ohio**, *Ohio R. Evid. 201(G)*; **Oklahoma**, *Okla. Stat. Ann. tit. 12, § 2202(E) (West 1997)*; **Oregon**, *Or. Rev. Stat. § 40.085 (1989)*; **Rhode Island**, *R.I. R. Evid. 201(g)*; **Tennessee**, *Tenn. R. Evid. 201(g)*; **Texas**, *Tex. R. Evid. 201(g)*; **Utah**, *Utah R. Evid. 201(g)*; **Vermont**, *Vt. R. Evid. 201(g)*; **West Virginia**, *W. Va. R. Evid. 201(g)*; and **Wyoming**, *Wyo. R. Evid. 201(g).*

The following state jurisdictions follow Uniform Rule 201(g): **Arizona**, *Ariz. R. Evid. 201(g)*; **Arkansas**, *Ark. R. Evid. 201(g)*; **Delaware**, *Del. R. Evid. 201(g)* (inserts the words "Upon request" at beginning of Rule); **Maine**, *Me. R. Evid. 201(g)*; **Minnesota**, *Minn. R. Evid. 201(g)*; **North Dakota**, *N.D. R. Evid. 201(g)*; **South Carolina**, *S.C. R. Evid. 201(g)*; and **Wisconsin**, *Wis. Stat Ann. § 902.01(7) (West 1997).*

Washington omits Uniform Rule 201(g) altogether. See *Wash. R. Evid. 201* and the accompanying Comment.

Florida has a discretionary rule authorizing the court to instruct the jury during trial to accept as a fact a matter judicially noticed. *See Fla. Stat. Ann. § 90.206 (West 1997).*

Judicial authority with respect to instructing on the effect of judicial notice in criminal cases is sparse. *See,* however, *United States v. Mentz, 840 F.2d 315 (6th Cir. 1988),* in which the Court reversed the defendant's conviction for bank robbery, finding that the trial judge invaded the province of the jury and violated the Sixth Amendment by instructing the jury that banks were insured by the Federal Deposit Insurance Corporation. *See further, State v. Vejvoda, 231 Neb. 668, 438 N.W.2d 461 (Neb. 1989),*

State v. Pierson, 368 N.W.2d 427 (Minn. Ct. App. 1985) and *State v. Willard, 96 Or. App. 219, 772 P.2d 948 (Or. Ct. App. 1989)*, generally differentiating between the conclusive and permissive effect to be accorded matters judicially noticed in civil and criminal cases.

As indicated above, there is respectable authority that it is a violation of the Sixth Amendment right to jury trial by failing to instruct the jury pursuant to Federal Rule 201(g) that "it may, but is not required to, accept as conclusive any fact judicially noticed," in particular, where a fact is judicially noticed which constitutes an essential element of the crime charged. *See United States v. Mentz, supra*.

However, following discussion by the members of the Drafting Committee, it is recommended that Uniform Rule 201(g) as originally adopted by the Conference be retained.

ARTICLE III

PRESUMPTIONS

RULE 301. DEFINITIONS.

(a) Basic Fact. A basic fact means a fact or group of facts that give rise to a presumption.

(b) Presumed Fact. A presumed fact means a fact that is assumed upon the finding of a basic fact.

(c) Presumption. A presumption means that when a basic fact exists the existence of the presumed fact must be assumed until the presumed fact is rebutted as provided in Rule 302.

Reporter's Note

As described by one authority, "'presumption' is the slipperiest member of the family of legal terms, except its first cousin, "burden of proof." *McCormick on Evidence, v. 2, § 342 (4th ed. 1992)*. The definitional provisions of Proposed Rule 301 are intended to have a clarifying effect and avoid the confusion that currently exists in the loose use and corresponding ambiguous meanings employed by the courts and textwriters in the use of the word "presumption."

There are at least seven senses in which the term has been used by legislatures and the courts. First, the word "presumption" has been used to describe what is more particularly known as the "presumption of innocence." In truth, the "presumption of innocence" is merely another form of expression to describe the accepted rule in a criminal case that the accused may remain inactive and secure until the prosecution adduces evidence and produces persuasion beyond a reasonable doubt that the accused is guilty as charged.

Second, the term "presumption" has also been used to create and define the elements of an affirmative defense. In this sense the term describes nothing more than a rule of law established by either statute or judicial decision which allocates the burden of producing evidence, or of persuasion, to one or the other of the parties to the litigation. In criminal cases, an excellent example of the use of the so-called "presumption" to allocate the burden of producing evidence, or of persuasion, is the "presumption of

sanity." In such a case, the accused who seeks to rely upon the defense of insanity must, depending upon the rules in force in the particular jurisdiction, either produce evidence, or persuade the trier of fact, of the accused's insanity at the time of the commission of the offense. In either case, the effect of a "presumption" used in this sense is to create only an affirmative defense.

Third, the terms "prima facie," or "prima facie evidence" are often used interchangeably, or in conjunction with, the term "presumption." For example, the term "prima facie evidence" has been employed in discriminatory practice acts to create a "presumption of authority" or, in other situations, to describe a "presumption of agency." Presumptions have also been statutorily described as "prima facie presumptions" or, in the case of the presumption of delivery, by judicial decision, as a "prima facie presumption" of the delivery of a letter upon the introduction of sufficient evidence that the letter has been properly addressed, stamped and deposited in the mail. This imprecision in the use of terminology has produced confusion in interpretation, particularly with respect to the *effect* of rebuttable presumptions. "Prima facie evidence," properly used to avoid confusion, should be confined to those situations in which the party having the burden of first producing evidence has, in fact, introduced *sufficient* evidence from which the trier of fact can conclude that the fact exists.

Fourth, the courts, on occasion, have also used the terms "inference" and "presumption" synonymously. However, strictly speaking, an "inference" is simply a permissible deduction from evidence, while a "presumption" arises from a rule of law rather than from the logical force of evidence to prove the existence of a fact. It is quite true that the basic facts of a presumption created by a rule of law will also often have probative value of the existence of the presumed fact, such as with the presumption that a child born during wedlock is legitimate, the presumption of the delivery of a letter to the addressee which is properly addressed, stamped and deposited in the mail, or the presumption that a vehicle driven by a regular employee of the owner of a vehicle is driven in the course of the owner's business. However, the significance of the distinction between an "inference" and a "presumption" is that the "inference" arises only from the *probative force of the evidence*, while the "presumption" arises from a *rule of law*.

Fifth, "inference" may also become standardized in the sense that a *rule of law* will establish that a fact, or facts, are sufficient to permit, though not require in the absence of rebuttal evidence, a finding of the desired inference. Most frequently the inference called for by the rule of law is one which a court would properly have construed to be a permissible deduction from the evidence even in the absence of a rule of law. In this sense, such a rule of law need be viewed no differently from an inference which arises as a matter of logic. *Res ipsa loquitur* illustrates rules of law of this sort. The negligence of the defendant may be inferred from evidence that the plaintiff was injured by an instrumentality in the control of the defendant under circumstances that would not ordinarily occur in the absence of the defendant's negligence.

Sixth, on occasion the terminology "conclusive presumption" has been used by legislatures and courts to describe a basic fact –presumed fact relationship in which the presumption may not be rebutted. In actuality, the terminology is a contradiction in terms and, in Wigmore's view, there can be no such conceptual principle in the law known as a "conclusive presumption." Rather, the law simply formulates a rule of law prohibiting the introduction of contradictory evidence of a particular fact. An example is the statutory presumption that "[e]vidence of statistical probability of paternity established at ninety-eight percent (98%) or more creates a conclusive presumption of paternity." *See*, for example, *Okla. Stat. Ann. tit. 10 § 504(D) (West 1997).*

Finally, the term "presumption" has been used to describe what has been more specifically denominated as a "rebuttable presumption" which arises from a rule of law creating a basic fact – presumed fact relationship in which a finding of the basic fact *requires* a finding of the existence of the presumed fact unless it has been rebutted as may be required by law. Most scholars, led by Thayer and Wigmore, as well as many judges, believe that the term "presumption" should be employed only in this sense. Proposed Rule 301 adopts this approach to clarify the confusion that often exists in the use of the term and to promote uniformity in its use throughout the several States.

Consistent with this approach, Proposed Rule 301 defines the terminology employed in the use of the word "presumption." Rule 301(a) defines "basic fact" as the fact or group of facts giving rise to the presumption. The basic fact of a presumption may be established in an action just as any other fact may be established, either by the pleadings, by stipulation of the parties, by judicial notice, or by a finding of the basic fact from evidence.

Rule 301(b) defines "presumed fact" as the fact which must be assumed upon a finding of the "basic fact."

Rule 301(c) defines a "presumption" in terms of a "basic fact," "presumed fact" relationship which requires a finding of the presumed fact until the presumed fact of the presumption is rebutted as provided in Proposed Rule 302. This definition thereby limits the use of the term "presumption" to what can be described more particularly as a "rebuttable presumption."

RULE ~~301~~ 302. PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS.

~~(a) Effect.~~ In all civil actions and proceedings, unless not otherwise provided ~~for~~ by statute, judicial decision, or ~~by~~ these rules, a presumption imposes on the party

against whom it is directed the burden of rebutting the presumption by 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.~~

Reporter's Note

Three amendments to existing Rule 301(a), now numbered Rule 302, are proposed. The word "civil" is added to clarify that the rule applies only in civil, as distinct from criminal, cases. Second, the words "judicial decision" are added to accommodate those state jurisdictions in which a different effect from that embodied in the rule is given to presumptions by judicial decision. Third, subdivision (b) of the existing rule is deleted and a new Proposed Rule 303 is recommended to deal with inconsistent presumptions.

As to the effect to be accorded presumptions under Proposed Rule 302, the existing **Comment** to Uniform Rule 301(a) states:

> [t]he reasons for giving this effect to presumptions are well stated in the United States Supreme Court Advisory Committee's Note, 56 F.R.D. 183 (1972).

Unlike Rule 301 of the *Federal Rules of Evidence* which follows the Thayer-Wigmore theory of shifting only the burden of producing evidence to the party against whom the presumption operates, Uniform Rule 302 adopts the Morgan-McCormick theory of shifting the ultimate burden of persuasion to the opponent on the issue of the presumed fact by providing that "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." This effect was proposed in Rule 301 of the *Proposed Rules of Evidence for U.S. District Courts and Magistrates (1971 Revised Draft)* on the ground that the underlying reasons for creating presumptions did not justify giving a lesser effect to presumptions. *See* the *Advisory Committee's Note, 56 F.R.D. 183, 208 (1972)*. However, Congress rejected the Morgan-McCormick theory embraced within Uniform Rule 302 in favor of the Thayer-Wigmore theory of shifting only the burden of producing evidence. *See H.R. Conf. Rep. No. 1597, 93rd Cong., 2d Sess. At 5 (1974); 1974 U.S. C. C. A. N. 7098, 7099.*

The Advisory Committee on the *Federal Rules of Evidence* has not recommended any amendments to Rule 301.

However, the Drafting Committee recommends retaining the effects rule originally adopted by the Conference when the *Uniform Rules of Evidence* were adopted in 1974. This favors shifting the burden of persuasion, but does not preempt giving the lesser effect of shifting, for example, only the burden of producing evidence, when otherwise provided for "by statute, judicial decision, or these rules."

RULE 303. INCONSISTENT PRESUMPTIONS.

(a) Defined. Inconsistent presumptions means that the presumed fact of one presumption is inconsistent with the presumed fact of another presumption.

(b) Effect. 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.

Reporter's Note

Proposed Rule 303 is new and deals exclusively with inconsistent presumptions. Subdivision (a) defining "inconsistent presumptions" is new and recommended for adoption to clarify the meaning of the terminology in stating the effect of inconsistent presumptions in subdivision (b).

No change is recommended in proposed Rule 303(b) which is identical to the existing Uniform Rule 301(b). Rule 301(b) was drawn from, and is consistent with, Rule 15 of the *Uniform Rules of Evidence* of 1953 which were superseded by the *Uniform Rules of Evidence of 1974, As Amended*.

"Inconsistent presumptions," as defined in subdivision (a), can be illustrated as follows:

> W, asserting that she is the widow of H, claims her share of his property, and proves that on a certain day she and H were married. The adversary then proves that three or four years before W's marriage to H, W married another man. W's proof gives her the benefit of the presumption of the validity of a marriage. The adversary's proof gives rise to the general presumption of the continuance of a status or condition once proved to exist, and a specific presumption of the continuance of a marriage relationship. *See*, in this connection, *McCormick on Evidence, § 344, p. 465 (4th ed. 1992)*.

In this situation, as defined in Proposed Rule 303(a), the presumed fact of the validity of W's marriage to H is inconsistent with the presumed fact of the continuance of the marriage relationship with another man. How is this inconsistency in the presumed facts of the two presumptions to be resolved? Proposed Rule 303(b) provides that "the presumption applies that is founded upon weightier considerations of policy." The presumption of the validity of a marriage is founded on the strongest social policy favoring legitimacy and the stability of family inheritances and expectations. In contrast, the presumption of the continuance of a marriage relationship is founded principally on probability and trial convenience. The conflict should be resolved under Rule 303(b) in favor of the presumption of the validity of the marriage since it "is founded upon weightier considerations of policy." *See* Mollie D. Parker, *Annotation, Presumption as to Validity of Second Marriage*, 14 A. L. R. 2d 7, 37-44 (1950).

In contrast, where the presumption of control of a student driver by the person in the right front seat is inconsistent with the presumption of control by the owner of the vehicle, the considerations of policy are of equal weight and, under Uniform Rule 303(b), the issue of control would be determined without regard to the presumptions. *See*, in this connection, *McFetters v. McFetters, 98 N.C.App. 187, 390 S.E.2d 348 (N.C. Ct. App. 1990), review denied 327 N.C. 140, 394 S.E.2d 177(N.C. 1990).*

RULE ~~302~~ 304. APPLICABILITY OF FEDERAL LAW IN CIVIL ACTIONS AND PROCEEDINGS. In civil actions and proceedings, the effect of a presumption respecting a fact ~~which~~ that is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

Reporter's Note

The existing **Comment** to Rule 302, now renumbered as Rule 304, states:

> [p]arallel jurisdiction in state and federal courts exists in many instances. The modification of Rule 302 [Proposed Rule 304] 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.

The Drafting Committee does not recommend any amendments to Rule 302, now renumbered as Rule 304. A recommended stylistic change has been made by substituting the word "that" for the word "which."

RULE ~~303~~ 305. PRESUMPTIONS IN CRIMINAL CASES.

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

(b) Submission to jury. The court ~~is not authorized to~~ may not direct the jury to find a presumed fact against ~~the~~ an accused. If a presumed fact establishes guilt or is an element of the offense or ~~negatives~~ 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 facts, 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 ~~provided~~ if the basic facts are supported by substantial evidence or are otherwise established, unless the court determines that a reasonable juror could not find on the evidence as a whole ~~could not find~~ the existence of the presumed fact.

(c) Instructing the jury. Whenever 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 facts as sufficient evidence of the presumed fact but is not required to do so. In addition, if ~~the~~ a presumed fact establishes guilt or is an element of the offense or ~~negatives~~ negates a defense, the court shall instruct the jury that its existence, on all the evidence, must be proved beyond a reasonable doubt.

Reporter's Note

Uniform Rule 303, now renumbered as Rule 305, is the same in substance as Proposed Rule 303, Presumptions in Criminal Cases, of the *Federal Rules of Evidence*. Congress did not adopt the Proposed Federal Rule 303 at the time it was promulgated because the subject of presumptions in criminal cases was addressed in detail in bills pending before the Committee on the Judiciary to revise the federal criminal code. In contrast, the Conference elected to incorporate the substance of the proposed Federal Rule in the *Uniform Rules of Evidence*.

Recommended non-substantive stylistic changes have been made in the revision of renumbered Uniform Rule 305.

In the interim between the adoption of Uniform Rule 303 and the current study and drafting of revisions to the Uniform Rules, the Supreme Court of the United States has decided a number of cases impacting upon the constitutionality of presumptions in criminal cases. The issue turns on the existence of a rational connection between the basic fact and presumed fact of the presumption. The rational connection test was largely developed in determining the validity of presumptions under the 5th Amendment. *See* 2 Whinery, *Oklahoma Evidence §§ 9.16-9.17 (1994)*. However, it later became clear with the decision in *County Court of Ulster County v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979)*, that the rational connection test applies in interpreting the constitutionality of state statutory presumptions under the 14th Amendment. The decision, together with the Court's later decisions in *Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), on remand State v. Sandstrom, 184 Mont. 391, 603 P.2d 244 (Mont. 1979)* and *Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)*, introduced further complexities by distinguishing "permissive" and "mandatory" presumptions, distinguishing those presumptions which allocate to the defendant only the burden of producing evidence as distinguished from those which allocate to the defendant the ultimate burden of persuasion and the degree of persuasion which must be met to rebut the presumption. *See further*, 2 Whinery, *Oklahoma Evidence §§ 9.16-9.17 (1994)*, for a more detailed analysis of these issues.

The question then arises whether the constitutional complexities and evolving doctrine associated with the use of presumptions warrants any revisions in Uniform Rule 303, now renumbered as Rule 305. The Drafting Committee considered these issues, concluded that Rule 305 is at least consistent with evolving constitutional doctrine governing the effect of presumptions in criminal cases and decided not to recommend any amendments to the rule at this time.

ARTICLE IV

RELEVANCY AND ITS LIMITS

RULE 401. DEFINITION OF RELEVANT EVIDENCE. "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.

Reporter's Note

There are no proposals for amending Rule 401.

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

Reporter's Note

Recommended non-substantive stylistic changes have been made in Rule 402.

There are no other proposals for amending Rule 402.

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.

Reporter's Note

There are no proposals for amending Rule 403.

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 ~~his~~ character is not admissible for the purpose of proving ~~that he acted~~ the person acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of ~~his~~ the accused's character offered by an accused, or by the prosecution to rebut the ~~same~~ evidence;

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

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

(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 ~~that he acted~~ the person acted in conformity therewith. It may, however, be admissible for other purposes, 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) Reasonable notice. The proponent gives to the adverse party reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence the proponent intends to introduce at trial; and

(2) Procedural guidelines. The court conducts a hearing to determine the admissibility of the evidence and finds:

(A) Degree of Persuasion. By clear and convincing evidence that the other crime, wrong, or act was committed;

(B) Relevancy. That the evidence is relevant to a fact of consequence in the action other than conduct conforming with a character trait; and

(C) Unfair Prejudice. That the probative value of admitting the evidence is not substantially outweighed by the danger of unfair prejudice;

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

Reporter's Note

The proposal for amending Rules 404(a) and 404(b) eliminates the gender-specific language in the existing rules. For purposes of clarity, the phraseology in the proposed Uniform Rule 404 differs from the gender-neutral language employed in Federal Rules 404(a) and (b), but the proposal is similarly technical and no change in substance is intended.

The Advisory Committee on the *Federal Rules of Evidence* has proposed and the Standing Committee of the Judicial Conference of the United States has approved an amendment to Federal Rule 404(a)(1) as follows:

> **(1) Character of accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same~~;~~,or if evidence of a trait of character of the victim of the crime is

offered by an accused and admitted under subdivision (a)(2), evidence of pertinent trait of character of the accused offered by the prosecution;

The Advisory Committee Note to the proposed amendment of Rule 404(a)(1) reads as follows:

> Rule 404(a)(1) has been amended to provide that when the accused attacks the character of a victim under subdivision (a)(2) of this Rule, the door is opened to an attack on a corresponding character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985) (when the defendant offers proof of self-defense, this permits proof of the victim's character trait for peacefulness, but it does not permit proof of the defendant's character trait for violence).
>
> The amendment makes clear that the accused cannot attack the victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the accused's own corresponding character trait. For example, in a murder case where the defendant claims self-defense, the defendant, to bolster this defense, might offer evidence of the victim's allegedly violent disposition. If the government has evidence that the defendant has a violent character, but is not allowed to offer this evidence as part of its rebuttal, then the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the defendant's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the defendant's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when the accused chooses to attack the character of the victim.
>
> The amendment does not affect the admissibility of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion. Finally, the amendment does not permit proof of the defendant's character when the defendant attacks the victim's character as a witness under Rules 608 or 609.

This proposed amendment to the *Federal Rules of Evidence* will be issued for public comment on August 15, 1998.

The Drafting Committee considered a similar amendment to Uniform Rule 404(a)(1) at its meeting on October 17-19, 1997. However, after extended discussion, the Committee decided not to recommend amending Rule 404(a)(1) at this time to permit the prosecution to rebut evidence of a trait of character of the victim of a crime if it is put in issue by the accused. As expressed by one member of the Drafting Committee, it is an issue which can be revisited after the reading of the draft of the revision in the Uniform Rules at the 1998 Annual Meeting of the Conference.

There are no proposals at the present time for making any other substantive changes in Uniform Rule 404(a).

The proposal for amending Uniform Rule 404(b) in its substance reflects the action of the Drafting Committee at its meetings in Cleveland, Ohio, on October 4-6, 1996 and in Dallas, Texas, on January 24-26, 1997.

First, the Drafting Committee considered at length the amendment of Rule 404(b) to add either a lustful disposition, or modus operandi, exception recognized in some jurisdictions as one of the permissible purposes for which other crimes, wrongs, or acts evidence may be admitted. A number of state jurisdictions do recognize a so-called "lustful disposition" exception to the general rule barring evidence of other crimes, wrongs, or acts to show action in conformity therewith on a particular occasion. These are: **Georgia**, *Gable v. State, 222 Ga. App. 768, 476 S.E.2d 66 (Ga. Ct. App. 1996), Johnson v. State, 222 Ga. App. 722, 475 S.E.2d 918 (Ga. Ct. App. 1996)* and *Loyd v. State, 222 Ga. App. 193, 474 S.E.2d 96 (Ga. Ct. App. 1996)*; **Idaho**, *State v. Moore, 120 Idaho 743, 819 P.2d 1143 (1991)* and *State v. Maylett, 108 Idaho 671, 701 P.2d 291 (Idaho Ct. App. 1985)*; **Indiana**, if it relates to the sexual abuse of a child. See *Ind. Code Ann. § 35-37-4-15 (West 1997)*; **Iowa**, *State v. Maestas, 224 N.W.2d 248 (Iowa 1974)*; **Kentucky**, *McDonald v. Commonwealth, 569 S.W.2d 134 (Ky. 1978)*; **Louisiana**, *State v. Coleman, 673 So.2d 1283 (La. Ct. App. 1996)* and *State v. Crawford, 672 So.2d 197 (La. Ct. App. 1996)*; **Mississippi**, *Lovejoy v. State, 555 So.2d 57 (Miss. 1989), Mitchell v. State, 539 So.2d 1366 (Miss. 1989)* and *Hicks v. State, 441 So.2d 1359 (Miss. 1983)*; **Missouri**, if it constitutes "propensity of the defendant to commit the crime or crimes with which he is charged" when it relates to a sex crime against a victim under fourteen years of age. *State v. Barnard, 820 S.W.2d 674 (Mo. Ct. App. 1991)* and *Mo. Ann. Stat. § 566.025(Veron 199)*; **New Mexico**, *State v. Gray, 79 N.M. 424, 444 P.2d 609 (N.M. Ct. App. 1968)*; **Oklahoma**, *Landon v. State, 77 Okl. Cr. 190, 140 P.2d 242 (Okla. Crim. App. 1943)*, a pre-Code case cited in dictum in *Hawkins v. State, 782 P.2d 139 (Okla. Crim. App. 1989)*; **Rhode Island**, *State v. Jalette, 382 A.2d 526 (R.I. 1978), State v. Pignolet, 465 A.2d 176 (R.I. 1983), State v. Tobin, 602 A.2d 528 (R.I. 1992)* and *State v. Quattrocchi, 681 A.2d 879 (R.I. 1996)*;

Washington, *State v. Ray, 116 Wash.2d 531, 806 P.2d 1220 (1991), State v. Pingitore, Nos. 35027-1-I, 37246-7-I, 1996 WL 456020 (Wash. Ct. App. Aug. 12, 1996)* and *State v. Dawkins, 71 Wash. App. 902, 863 P.2d 124 (Wash. Ct. App. 1993)*; and **West Virginia**, *State v. Edward Charles L., Sr., 183 W.Va. 641, 398 S.E.2d 123 (1990)*; overruling *State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986)*.

Other state jurisdictions recognize an exception similar to the lustful disposition, but describe it differently. One State describes it as "depraved sexual instinct:" **Arkansas**, *Mosley v. State, 325 Ark. 469, 929 S.W.2d 693 (1996)* and *Clark v. State, 323 Ark. 211, 913 S.W.2d 297 (1996)*. Two others label the exception "lewd disposition": **Alaska**, *Pletnikoff v. State, 719 P.2d 1039 (Alaska Ct. App. 1986)*; and **South Carolina**, *State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (S.C. Ct. App. 1994)*. One State employs the label "unnatural sexual passion": **Alabama**, *Ex parte Register, 680 So.2d 225 (Ala. 1994)* and *Corbitt v. State, 596 So.2d 426 (Ala. Crim. App. 1991)*. The terminology "emotional propensity" and "emotional propensity for sexual aberration" has been employed in another State: **Arizona**, *State v. Treadaway, 116 Ariz. 163, 167, 568 P.2d 1061, 1065 (1977)* and *State v. McFarlin, 110 Ariz. 225, 227, 517 P.2d 87, 89 (1973)*. **Massachusetts** admits prior acts of sexual activity "to prove an inclination to commit the facts charged in the indictment." *Commonwealth v. King, 387 Mass. 464, 441 N.E.2d 248 (Mass. 1982)*.

Other States characterize the exception as "modus operandi." See, for example, *State v. Craig, 219 Neb. 70, 361 N.W.2d 206 (1985)*, as follows:

> "Modus operandi" is "a characteristic method employed by a defendant in the performance of repeated criminal acts." "Modus operandi" means, literally, "method of working," and refers to a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer.

In contrast, there are also several States which do not recognize a "lustful disposition" exception. These are: **California**, *People v. Balcolm, 7 Cal. 4th 414, 422, 867 P.2d 777, 782, 27 Cal. Rptr. 2d 666, 670 (1994)*, with one dissenting judge arguing for recognition of a lewd disposition exception. But see, *People v. Stewart, 181 Cal. App.3d 300, 226 Cal. Rptr. 252 (Cal. Dist. Ct. App. 198)* (applying the "plan" exception to establish lewd disposition toward victim) and *People v. Barney, 192 Cal. Rptr. 172, 143 Cal. App.3d 490 (Cal. Dist. Ct. App. 1983)* (applying "modus operandi" to establish lewd disposition toward victim); **Delaware**, *Getz v. State, 538 A.2d 726 (Del. 1988)*; **Florida**, *Hodges v. State, 403 So.2d 1375 (Fla. Dist. Ct. App. 1981)*; **Indiana**, *Pirnat v. State, 612 N.E.2d 153 (Ind. Ct. App. 1993)* and *Lannan v. State, 600 N.E.2d 1334 (Ind. 1992)*; **Kansas**, *State v. Clements, 241 Kan. 77, 734 P.2d 1096 (1987), State v. Dotson, 256 Kan. 406, 886 P.2d 356 (1994)*; **Oregon**, *State v. Davis, 54 Or. App. 133, 634 P.2d 279 (Or. Ct. App. 1981)*; *Oregon v. Zybach, 93 Or. App. 218, 761 P.2d 1334 (Or.*

Ct. App. 1988), but see, the dissenting opinion criticizing the majority of the court for refusing to recognize the lustful disposition exception to the admission of other crimes, wrongs or acts evidence; **Tennessee**, *State v. Rickman, 876 S.W.2d 824 (Tenn. 1994)*; **Vermont**, *State v. Winter, 162 Vt. 388, 648 A.2d 624 (1994)*.

Arguments have been advanced for both the retention and rejection of the exception. Recently, in abandoning the "lustful disposition" or "depraved sexual instinct" rule, the Supreme Court of Indiana focused upon the following competing rationales for recognition of the rule:

> First, the exception has been based on a recidivist rationale: "Acts showing a perverted sexual instinct are circumstances which with other circumstances may have a tendency to connect an accused with a crime of that character." * * * Second, the exception has been based on the need to bolster the testimony of victims: to lend credence to a victim's accusations or testimony which describe acts which would otherwise "seem improbable standing alone."

In responding to these arguments for the retention of the rule, the court observed:

> [w]e do not allow the State to introduce previous drug convictions in its case-in-chief in a prosecution for selling drugs, however, even though it can hardly be disputed that such evidence would be highly probative. * * * If a high rate of recidivism cannot justify a departure from the propensity rule for drug defendants, logic dictates it does not provide justification for departure in sex offense cases.
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> * * *
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> . . . there remains what might be labeled the "rationale behind the rationale," the desire to make easier the prosecution of child molesters, who prey on tragically vulnerable victims in secluded settings, leaving behind little, if any, evidence of their crimes. * * * The emotional appeal of such an argument is powerful, given the special empathy that child victims of sexual abuse evoke. But even this cannot support continued application of an exception which allows the prosecution to accomplish what the general propensity rule is intended to prevent.

See *Lannan v. State, 600 N.E.2d 1334, 1335-38 (Ind. 1992)*.

Initially, at least some members of the Drafting Committee believed that such an exception in Uniform Rule 404(b) would not only be useful intrinsically in physical and

sexual abuse cases, but would also be a rational alternative to Rules 413-415 of the *Federal Rules of Evidence*. See the Introduction discussing Federal Rules 413-415 which have not been adopted in any State to date. However, after further consideration, the Committee decided not to recommend amending Uniform Rule 404(b) in this respect for at least three reasons. First, a "lustful disposition" exception is closely related to propensity evidence which is inadmissible under the general rule of Uniform Rule 404(b) barring specific instances of physical and sexual conduct to prove the character of a person to show action in conformity therewith on a particular occasion.

Second, it was reasoned by some members of the Committee that it would rarely be necessary to invoke a special exception, such as "lustful disposition" or "modus operandi," because it would be admissible under one of the normal noncharacter permissible purposes for which prior acts of physical or sexual abuse could be admitted, for example, to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. It would only be necessary to invoke such a special exception where the evidence is irrelevant to the proof of one of the commonly recognized exceptions to the general rule barring evidence of other crimes, wrongs, or acts evidence. *See*, in this connection, *Edward J. Imwinkelreid, Uncharged Misconduct Evidence, ¶¶ 4:12, 4:13 (1990)*.

Third, some members of the Committee also find the reasoning of the **Indiana** Supreme Court in *Lannan v. State, supra*, persuasive. If a high rate of recidivism among drug offenders does not justify a departure from the propensity rule for these offenders, then there is no justification for departure from the propensity rule in sex offense cases. Some members of the Committee also believe that while the emotional appeal of relaxing the propensity rule in the case of child victims of sexual abuse is powerful, it does not support the creation of an exception allowing the prosecution to accomplish indirectly what the general propensity rule is intended to prevent directly.

The Drafting Committee is recommending that Uniform Rule 404(b) be amended 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 the Rule. The proposed amendments to Uniform Rule 404(b) incorporate a provision for notice and contain five other conditions which the Drafting Committee adopted at its meeting in Cleveland, Ohio on October 4-6, 1996 and in Dallas, Texas on January 24-26, 1997.

The notice provision now incorporated in proposed Uniform Rule 404(c)(1) would apply to any party seeking to offer evidence under the Rule, apply in any case, civil or criminal, and eliminate the necessity of a request by the accused, or any other party, for information regarding the general nature of the evidence a party intends to offer at trial. This provision is also consistent with the concern and objections raised by members of the Drafting Committee at its meeting in Dallas, Texas, on January 26-28,

1997 as to the notice provision of Rule 404(b) of the Federal Rules of Evidence and, at least indirectly, to comparable state statutory provisions.

Accordingly, the notice requirement of Uniform Rule 404(b)(1) recommended by the Drafting Committee differs from that contained in Rule 404(b) of the *Federal Rules of Evidence* which provides as follows:

> provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The notice requirement in Federal Rule 404(b) applies in criminal cases only and, in this respect, is in accord with eleven state jurisdictions and the Virgin Islands requiring statutory notice of the intent to introduce evidence of other crimes, wrongs, or acts in criminal cases. Notice is required by statute in **Alabama**, *Ala. R. Evid. 404(b)* (upon request by accused, prosecution shall give reasonable notice in advance of trial or during trial if trial court excuses pretrial notice on good cause shown); **Florida**, *Fla. Stat. Ann. § 90.404(2)(b) (West 1997)* (State shall give to accused a minimum of 10 days notice prior to trial except when used for impeachment or on rebuttal); **Hawaii**, *Haw. R. Evid. 404* (proponent of evidence shall give reasonable notice in advance of trial, or during trial if trial court excuses pretrial notice on good cause shown); **Indiana**, *Ind. R. Evid. 404(b)* (upon request by accused, prosecution shall give reasonable notice in advance of trial or during trial if the trial court excuses pretrial notice on good cause shown); **Kentucky**, *Ky. R. Evid. 404(c)* (prosecution shall give reasonable pretrial notice to defendant and if it fails to do so the proffered evidence may be excluded unless notice is excused by trial court which may then grant a continuance or such other remedy as necessary to prevent unfair prejudice to accused); **Louisiana**, *La. Code Evid. Ann. art. 404(B) (West 1997)* (upon request by accused, prosecution shall provide reasonable notice in advance of trial); **Michigan**, *Mich. R. Evid. 404(b)(2)* (prosecution shall provide reasonable notice in advance of trial, or during trial if trial court excuses notice on good cause shown); **North Dakota**, *N.D. R. Evid. 404(b)* (prosecution shall provide reasonable notice in advance of trial, or during trial if trial court excuses notice on good cause shown); **Texas**, *Tex. R. Evid. 404(b)* (upon timely request by accused, State shall give reasonable notice in advance of trial); **Vermont**, *Vt. R. Evid. 404(b)* and *Vt. R. Crim. P. 26(c)* (State shall furnish notice to defendant at least seven days before trial except court may allow notice to be given at later date, including during trial, if evidence is newly discovered or issue to which evidence relates has newly arisen in case, but no notice is required for evidence used for impeachment or in rebuttal); **West Virginia**, *W.Va. R. Evid. 404(b)* (upon request by accused, prosecution shall give reasonable notice in advance of trial, or during trial if trial court excuses notice on good cause shown); and **Virgin Islands**, *V.I. Fed. R. Evid. 404(b)* (upon request by accused,

prosecution shall give reasonable notice in advance of trial, or during trial if trial court excuses pretrial notice on good cause shown).

The notice requirement of Federal Rule 404(b) also conditions the giving of notice upon the request of the accused. The statutory giving of notice is also conditioned upon a request by the accused in **Indiana**, **Louisiana**, **Texas**, **West Virginia** and the **Virgin Islands**. **Florida**, **Hawaii**, **Kentucky**, **Michigan**, and **North Dakota** require the prosecution, or the proponent, to give notice without a request.

Reasonable notice in advance of trial, or during trial if pretrial notice is excused for good cause shown is also required under Federal Rule 404(b). All of the foregoing jurisdictions with the exception of **Florida**, **Louisiana** and **Texas** have similar requirements. **Florida** requires at least ten days notice in advance of trial, while **Louisiana** and **Texas** require only reasonable notice in advance of trial.

Finally, Federal Rule 404(b) also requires that the general nature of the evidence which the proponent intends to offer be disclosed. All of the foregoing jurisdictions have comparable statutory requirements.

Decisional law in a number of state jurisdictions also requires notice of the intent to offer other crimes, wrongs, or acts evidence. These are **Alaska**, *Moor v. State, 709 P.2d 498 (Alaska Ct. App. 1985)* ("prosecution should be required to give advance notice to the defendant and the court"); **Minnesota**, *State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965), State v. Slowinski, 450 N.W.2d 107 (Minn. 1990)* ("[e]vidence of other crimes may not be received unless there has been [advance] notice as required by State v. Spreigl"); **Montana**, *State v. Just, 184 Mont. 262, 602 P.2d 957 (1979), State v. Croteau, 248 Mont. 403, 812 P.2d 1251 (1991)* ("notice requirement must be given sufficiently in advance of trial to afford a defendant a reasonable opportunity to prepare to meet the evidence against him"); **Ohio**, *State v. Jurek, 52 Ohio App. 3d 30, 556 N.E.2d 1191 (Ohio Ct. App.1989)* ("in light of potential for unfair prejudice, such [notice] procedure should, upon timely request, be followed prior to the admission of evidence of other crimes"), but see, *No. 467, 1993 WL 63443 (Ohio Ct. App. Ar. 2, 1993)*, intimating that absent an amendment of Rule 404(b) of the Ohio Rules of Evidence requiring notice, that notice of the intent to introduce "other acts" evidence will not be required; and **Oklahoma**, *Burks v. State, 594 P.2d 771 (Okla. Crim. App. 1979)* ("[T]he State shall, within ten days before trial, or at a pretrial hearing, whichever occurs first, furnish the defendant with a written statement of the other offenses it intends to show, described with the same particularity of an indictment or information . . . [but] no such notice is required if the other offenses are prior convictions, or are actually a part of the res gestae of the crime charged and thus are not chargeable as separate offenses").

The requirement of notice is also qualified in some state jurisdictions. See, for example, Oklahoma where the requirement of notice under *Burks v. State*, *supra*, is

unnecessary where the other crime evidence is a part of the *res gestae* of the crime charged *[Brogie v. State, 695 P.2d 538 (Okla. Crim. App. 1985)]*, where the other crime evidence is offered during the presentation of rebuttal evidence *[Freeman v. State, 681 P.2d 84 (Okla. Crim. App. 1984)]*, where the State introduces the other crime evidence during cross or re-cross examination *[Smith v. State, 695 P.2d 864 (Okla. Crim. App. 1985)]*, or, perhaps, even where "the State was unaware of the [other crime] evidence in time to have afforded pre-trial notice" *[Brogie v. State, supra]*.

There are also a number of jurisdictions that do not appear to require any notice at all. These are: **Arizona**; **Arkansas**; **California**; **Colorado**; **Connecticut**; **Delaware**; **Georgia**; **Idaho**; **Illinois**; **Iowa**; **Kansas**; **Maine**; **Maryland**; **Massachusetts**; **Mississippi**; **Missouri**; **Nebraska**; **Nevada**; **New Hampshire**; **New Jersey**; **New Mexico**; **New York**; **North Carolina**; **Oregon**; **Pennsylvania**; **Rhode Island**; **South Carolina**; **South Dakota**; **Tennessee**; **Utah**; **Virginia**; **Washington**; **Wisconsin**; and **Wyoming**; and the **District of Columbia**. In Delaware, the Delaware Study Committee, citing the Florida rules of evidence, has recommended that the Superior Court Criminal Rules be amended to provide for the giving of notice under Rule 404(b) of Delaware's Rules of Evidence. The rules have not been so amended to date.

The proposed amendments to Uniform Rule 404(b) also embrace five other conditions in subdivision (2) which would have to be satisfied before evidence could be admitted for one of the exceptional purposes authorized by the Rule. The intent is to propose a uniform rule which will restrict and eliminate the abuses believed to currently exist in the admissibility of other crimes, wrongs or acts evidence throughout the several jurisdictions of the United States.

Subdivision (c)(2) of Uniform Rule 404(b) requires the trial court to conduct a hearing to determine the admissibility of the evidence. A few States currently require that the hearing be conducted *in camera*. It is required by statute in **Tennessee**. See *Tenn. R. Evid. 404(b)(1)*. It is required by judicial decision in **West Virginia**. See *State v. McGhee, 193 W.Va. 164, 455 S.E.2d 533 (1995)* and *State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994)*. In **Oklahoma**, an *in camera* hearing is also required in the event the prosecution attempts to use other crimes, wrongs, or acts evidence in rebuttal. See *Burks, supra at 44*. The amendment as proposed by the Drafting Committee would leave within the discretion of the trial court the type of hearing to conduct in determining the admissibility of other crimes, wrongs, or acts under one or the other of the permissible purposes for which the evidence is admissible.

Subdivision (c)(2)(A) of Uniform Rule 404(b) proposed by the Drafting Committee provides that the commission of the other crime, wrong or act be determined by clear and convincing evidence. This procedural rule is supported by decisional law in **Delaware**, *Getz v. State, 538 A.2d 726 (Del. 1988)* ("plain, clear and conclusive evidence"); **Maryland**, *Harris v. State, 324 Md. 490, 597 A.2d 956 (Md. Ct. App.*

1991) ("clear, convincing and uncomplicated proof"); **Minnesota**, *State v. Slowinski, 450 N.W.2d 107 (Minn. 1990)* ("clear and convincing evidence"); **Nevada**, *Cipriano v. State, 111 Nev. 534, 894 P.2d 347 (1995)* ("clear and convincing evidence"); **New Hampshire**, *State v. Dushame, 136 N.H. 309, 616 A.2d 469 (1992)* ("clear proof"); **Oklahoma**, *Burks v. State* ("clear and convincing proof"); **South Carolina**, *State v. Raffaldt, 456 S.E.2d 390 (S.C. 1995)* ("clear and convincing proof"); and **South Dakota**, *State v. Sieler, 397 N.W.2d 89 (S.D. 1986)* ("clear and convincing evidence").

Subdivision (c)(2) also provides that the "court finds . . . that the other crime, wrong or act was committed" to make clear that this is a preliminary question of fact for the court. This departs from the holding in *Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988)*, that the admissibility of other crimes, wrongs, or acts evidence is a question of conditional relevancy under Rule 104(b) of the Federal Rules of Evidence. The Drafting Committee believes that the preferable view is to insulate the jury from hearing this evidence until there has been a final decision by the trial court under the clear and convincing evidence standard that the other crime, wrong, or act has, in fact been committed.

Subdivision (c)(2)(B) proposed by the Drafting Committee also provides that the trial court find that the evidence is relevant to a fact of consequence in the action other than conduct conforming with a character trait. The substance of this subparagraph is followed in a number of States. These are: **Arkansas**, *Henry v. State, 309 Ark. 1, 828 S.W.2d 346 (1992)*; **California**, *People v. Balcom, 7 Cal. 4th 414, 867 P.2d 777 (Cal. 1994)*; **Colorado**, *State v. McKibben, 862 P.2d 991 (Colo. Ct. App. 1993)*; **Connecticut**, *State v. Santiago, 224 Conn. 325, 618 A.2d 32 (1992)*; **District of Columbia**, *Campbell v. United States, 450 A.2d 428 (D.C. 1982)*; **Illinois**, *People v. Davis, 248 Ill. App. 3d 886, 617 N.E.2d 1381 (Ill. App. Ct. 1993)*; **Kansas**, *State v. Searles, 246 Kan. 567, 793 P.2d 724 (Kan. 1990)*; **Maryland**, *Harris v. State, 324 Md. 490, 597 A.2d 956 (Md. 1991)*; **Nebraska**, *State v. Carter, 246 Neb. 953, 524 N.W.2d 763 (Neb. 1994)*; **Nevada**, *Cipriano v. State, 111 Nev. 534, 894 P.2d 347 (Nev. 1995)*; **New Jersey**, *State v. Stevens, 115 N.J. 289, 558 A.2d 833 (N.J. 1989)*; **New Mexico**, *State v. Aguayo, 114 N.M. 124, 835 P.2d 840 (N.M. Ct. App. 1992)*; **New York**, *People v. Alvino, 71 N.Y.2d 233, 519 N.E.2d 808 (N.Y. 1987)*; **Pennsylvania**, *Commonwealth v. Seiders, 531 Pa. 592, 614 A.2d 689 (Pa. 1992)*; **Rhode Island**, *State v. Brown, 626 A.2d 228 (R.I. 1993)*; **West Virginia**, *State v. McGhee, 193 W. Va. 164, 455 S.E.2d 533 (W.Va. 1995)*; and **Washington**, *State v. Peerson, 62 Wash. App. 755, 816 P.2d 43 (Wash. Ct. App. 1991)*.

Subdivision (c)(2)(C) proposed by the Drafting Committee sets forth a balancing test for determining the admissibility of other crimes, wrongs or acts evidence. The balancing test recommended by the Drafting Committee requires only that the probative value of admitting the evidence be substantially outweighed by the danger of unfair prejudice. This is in accord with the balancing test set forth in Uniform Rule 403.

In the jurisdictions adhering to this test, the other crimes, wrongs or acts evidence is presumptively admissible. The States adhering to this balancing test are: **Arizona**, *State v. Barr, 904 P.2d 1258 (Ariz. Ct. App. 1995)*; **Arkansas**, *Henry v. State, 309 Ark. 1, 828 S.W.2d 346 (1992)* and *Price v. State, 268 Ark. 535, 597 S.W.2d 598 (1980)*; **Delaware**, *Getz v. State, 538 A.2d 726 (Del. 1988)* and *Trowbridge v. State, 647 A.2d 1076 (Del. 1994)*; **Idaho**, *State v. Moore, 120 Idaho 743, 819 P.2d 1143 (1991)* and *State v. Medina, 909 P.2d 637 (Idaho Ct. App. 1996)*; **Illinois**, *State v. Davis, 248 Ill. App. 3d 886, 617 N.E.2d 1381 (Ill. App. Ct. 1993)*; **Maine**, *State v. Webber, 613 A.2d 375 (Me. 1992)*; **Massachusetts**, *Commonwealth v. Brousseau, 659 N.E.2d 724 (Mass. 1996)*; **Missouri**, *State v. Kitson, 817 S.W.2d 594 (Mo. Ct. App. 1991)*; **Montana**, *State v. Paulson, 250 Mont. 32, 817 P.2d 1137 (1991)*; **New Hampshire**, *State v. Dushame, 136 N.H. 309, 616 A.2d 469 (1992)*; **New Jersey**, *State v. Stevens, 115 N.J. 289, 558 A.2d 833 (N.J. 1989)*; **Ohio**, *State v. Jurek, 556 N.E.2d 1191 (Ohio Ct. App. 1989)*; **South Dakota**, *State v. Floody, 481 N.W.2d 242 (S.D. 1992)*; **Tennessee**, *Tenn. R. Evid. 404(b)(3)* and *State v. Nichols, 877 S.W.2d 722 (Tenn. 1994)*; **West Virginia**, *State v. McGhee, 193 W. Va. 164, 455 S.E.2d 533 (1995)*; **Wisconsin**, *State v. Landrum, 191 Wis.2d 107, 528 N.W.2d 36 (Wis. Ct. App. 1995);* and **Wyoming**, *Mitchell v. State, 865 P.2d 591 (Wyo. 1993)* and *Gezzi v. State, 780 P.2d 972 (Wyo. 1989)*. See also, **District of Columbia**, *Campbell v. United States, 450 A.2d 428 (D.C. 1982)*.

In other jurisdictions the evidence is presumptively inadmissible by requiring that the court find that the probative value of admitting the evidence outweighs the danger of unfair prejudice. The States adhering to this balancing test are: **California**, *People v. Balcom, 7 Cal. 4th 414, 867 P.2d 777 (Cal. 1994)*; **Colorado**, *People v. McKibben, 862 P.2d 991 (Colo. Ct. App. 1993)*; **Connecticut**, *State v. Santiago, 224 Conn. 325, 618 A.2d 32 (1992)*; **Kansas**, *State v. Searles, 246 Kan. 567, 793 P.2d 724 (1995)*; **Maryland**, *Harris v. State, 324 Md. 490, 597 A.2d 956 (1991)*; **Nebraska**, *State v. Carter, 246 Neb. 953, 524 N.W.2d 763 (1994)*; **Nevada**, *Cipriano v. State, 111 Nev. 534, 894 P.2d 347 (1995)*; **New Mexico**, *State v. Aguayo, 114 N.M. 124, 835 P.2d 840 (N.M. Ct. App. 1992)*; **New York**, *People v. Alvino, 71 N.Y.2d 233, 519 N.E.2d 808 (1987)*; **Pennsylvania**, *Commonwealth v. Seiders, 531 Pa. 592, 614 A.2d 689 (1992)*; **Rhode Island**, *State v. Brown, 626 A.2d 228 (R.I. 1993)*; **South Carolina**, *State v. Raffaldt, 456 S.E.2d 390 (S.C. 1995)*; and **Washington**, *State v. Peerson, 62 Wash. App. 755, 816 P.2d 43 (Wash. Ct. App. 1991)*.

The state jurisdictions are almost evenly divided on the balancing test to apply in determining the admissibility of other crimes, wrongs or acts evidence, although a slight majority favor the less stringent standard by requiring only that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. The Drafting Committee recommends the less stringent standard as embodied in subdivision (c)(2)(C) because it is consistent with the test of Uniform Rule 403 governing generally the balancing of relevancy against the danger of unfair prejudice and with the balancing test

recommended by the Drafting Committee in determining the admissibility of evidence under the exceptions to the general rule barring evidence of a rape victim's prior sexual behavior. *See*, in this connection, the **Reporter's Note** to proposed Uniform Rule 412, *infra*.

Subdivision (c)(3) proposed by the Drafting Committee provides that upon the request of a party, the court shall give an instruction on the limited admissibility of the evidence, as provided in Rule 105. The requirement for giving a limiting instruction, either with or without the request of a party, is followed in the following jurisdictions as indicated: **Arizona**, *State v. Barr, 904 P.2d 1258 (Ariz. Ct. App. 1995)* (if requested); **Delaware**, *Getz v. State, 538 A.2d 726 (Del. 1988)* (if requested); **Minnesota**, *State v. Fallin, 540 N.W.2d 518 (Minn. 1995)* (required); **Nebraska**, *State v. Carter, 246 Neb. 953, 524 N.W.2d 763 (1994)* (if requested); **New Jersey**, *State v. Loftin, 670 A.2d 557 (N.J. 1996)* (if not requested, must demonstrate failure to give instruction was capable of producing unjust result); **Ohio**, *State v. Jurek, 52 Ohio App.3d 30, 556 N.E.2d 1191 (Ohio Ct. App. 1989)* (if requested); **Oklahoma**, *Burks v. State, 594 P.2d 771 (Okla. Crim. App. 1979)*; **Pennsylvania**, *Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (1989)* (required); **Rhode Island**, *State v. Brown, 626 A.2d 228 (R.I. 1993)* (required); **Utah**, *State v. Smith, 700 P.2d 1106 (Utah 1985)* (if requested); **West Virginia**, *State v. McGhee, 193 W.Va. 164, 455 S.E.2d 533 (1995)* (required); and **Wyoming**, *Goodman v. State, 601 P.2d 178 (Wyo. 1979)* (if requested).

The Drafting Committee believes that the giving of a limiting instruction on the request of a party is preferable for two reasons. First, the party against whom the evidence is being admitted ought to have the discretion of whether a limiting instruction ought to be given as against the risk of unnecessarily emphasizing the limited purpose for which the evidence is admitted. Second, the black letter of this procedural requirement is consistent with both the black letter and the policy supporting the black letter of Uniform Rule 105 conditioning the giving of limiting instructions generally upon the request of a party.

The Advisory Committee on the *Federal Rules of Evidence* has not recommended any procedural amendments to Federal Rule 404(b).

RULE 405. METHODS OF PROVING CHARACTER.

(a) Reputation or opinion. ~~In all cases in which~~ If evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to

reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. ~~In cases in which~~ 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 ~~his~~ the person's conduct.

Reporter's Note

This proposal for amending Rule 405 eliminates the gender-specific language in subdivision (b). The change is technical and no change in substance is intended.

Recommended non-substantive stylistic changes have also been made in Rule 405.

There are no other recommendations for amending Rule 405.

RULE 406. HABIT: ROUTINE PRACTICE.

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

Reporter's Note

The word "individual" is substituted for the word "person" in Rule 406 to differentiate between an "individual" and an "entity" as a person.

RULE 407. SUBSEQUENT REMEDIAL MEASURES. ~~Whenever~~ If, after an event, measures are taken ~~which~~ that, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or~~ culpable conduct, ~~in connection with the event. This rule does not require the exclusion of evidence~~ 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 when offered for another purpose, such as ~~proving~~ impeachment or, if controverted, proof of ownership, control, or feasibility of precautionary measures~~, if controverted, or impeachment~~.

Reporter's Note

The amendments to Rule 407 recommended by the Drafting Committee reflect the action of the Committee at its meeting in Cleveland, Ohio on October 4-6, 1996. First, the Rule retains the existing language of Uniform Rule 407 as set forth in Lines 3, 4, 5 and 6 to reflect the judgment of the Drafting Committee that the Rule ought to apply to pre-accident, post-manufacturing measures as well as post-accident measures to provide an incentive to take remedial measures before the injury giving rise to the action has occurred. Second, the rule as now drafted, retains in Lines 5-7, with two minor punctuation changes, the language of amended Rule 407 of the *Federal Rules of Evidence* which took effect December 1, 1997. It is consistent with the general feeling of the members of the Drafting Committee that the general rule of exclusion ought to apply to products liability cases as well as to negligence actions.

In contrast to the black letter of Uniform Rule 407 as now recommended, Federal Rule 407 provides:

> When, after an injury or harm allegedly caused by an event measures are taken ~~which~~ that, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct defect in a product, a defect in a product's design, or a need for a warning or instruction ~~in connection with the event. This rule does not require the exclusion of~~. Evidence of subsequent measures may be ~~when~~ offered for another purpose, such as impeachment or – if controverted – ~~proving~~ proof of

ownership, control, or feasibility of precautionary measures ~~controverted, or impeachment~~.

The rationale for the amendment of Federal Rule 407 is explained in the Advisory Committee Note as follows:

> The amendment to Rule 407 makes two changes in the rule. First, the words "an injury or harm allegedly caused by" were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the "event" do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. See Chase v. General Motors Corp., 856 F.2d 17, 21-22 (4th Cir. 1988).
>
> Second, Rule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove "a defect in a product, a defect in a product's design, or a need for a warning or instruction." This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions. See Raymond v. Raymond Corp., 938 F.2d 1518, 1522 (1st Cir. 1991); In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong World Industries, Inc., 995 F.2d 343, 345 (2d Cir. 1993); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982); Kelley v. Crown Equipment Co., 970 F.2d 1273, 1275 (3d Cir. 1972); Werner v. Upjohn Co., Inc., 628 F.2d 848, 856 (4th Cir, 1980), cert. denied, 449 U.S. 1080 (1981); Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883, 887 (5th Cir. 1983); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Flaminio v. Honda Motor Company, Ltd., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF, Inc., 788 F.2d 634, 636-37 (9th Cir. 1986).
>
> Although this amendment adopts a uniform federal rule, it should be noted that evidence of subsequent remedial measures may be admissible pursuant to the second sentence of Rule 407. Evidence of subsequent remedial measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.

Public reaction to Federal Rule 407 was mixed. Some favored the Rule as proposed. *(See Letter of William B. Poff, Chair of Ad Hoc Committee, National Association of Railroad Trial Counsel, to Study Proposed Changes to the Federal*

Rules, to Peter G. McCabe, dated March 1, 1996; *Comment of Mark Laponsky from Kent S. Hofmeister, Section Coordinator, Federal Bar Association, to Peter G. McCabe, dated February 29, 1996*; *Letter of Virginia M. Morgan, President, Federal Magistrate Judges Association, to Peter G. McCabe, dated January 23, 1996*; *Letter of James A. Strain, President, The Seventh Circuit Bar Association, to Peter G. McCabe, dated February 29, 1996*; and *Letter of Virginia M. Morgan, President, Federal Magistrate Judges Association, to Peter G. McCabe, dated January 23, 1996).*

Others qualified their support of the Rule. *(See Letter of David P. Leonard, Professor of Law, Loyola Law School, to Peter G. McCabe, dated March 1, 1996, arguing that the meaning of "after an event" be clarified "to apply the exclusionary principle to all cases in which admission might materially affect the decision whether to repair, regardless of whether the measure was taken before or after the accident in question")*;

(See Comments, Gerald G. Paul, Chair, Commercial and Federal Litigation Section from Robert F. Wise, Jr., Chair, Federal Procedure Committee, New York State Bar Association, dated February 28, 1996, recommending that the words "an injury or harm allegedly caused by" following the words "after an" be added "at the beginning of the rule to make it clear that subsequent remedial measures are inadmissible only when taken after the event that caused the damage");

(See Letter of Hugh F. Young, Jr., Executive Director, Product Liability Advisory Council, to Peter G. McCabe, dated February 29, 1996, recommending that the Committee "revise the Rule to make clear that, in product liability cases, it applies not only to changes made in a product line after an accident occurs but also to any product line changes made after the sale of the product involved in the case"); and

(See Comment of Thais L. Richardson, The Proposed Amendment to Federal Rule of Evidence 407: A Subsequent Remedial Measure That Does Not Fix the Problem, 45 Am. U. L. Rev. 1453 (1996), arguing "that while the rule's expansion to cover products liability actions is appropriate, limiting the scope of the exclusionary rule to measures taken after personal injury or property damage in products liability actions is inconsistent with both the public policy behind the rule and substantive products liability law").

Others oppose the Rule. *(See Letter of Pamela Anagnos Liapakis, President, Association of Trial Lawyers of America, to Peter G. McCabe, dated March 1, 1996).*

Still others took no position with regard to the amendment of Rule 407. *(See Letter of Nanci L. Clarence, Chair, Federal Practice Subcommittee, Litigation Section of the State Bar of California, to Peter G. McCabe, dated February 28, 1996*; *Letter of Harriet L. Turney, General Counsel, State Bar of Arizona, to Peter G. McCabe, dated*

February 27, 1996; *Memorandum of Paul Berghoff, Subcommittee Chairman, from Donald R. Dunner, Chair, Section of Intellectual Property Law, American Bar Association, to Peter G. McCabe, dated March 1, 1996*; *Letter of Carolyn B. Witherspoon, President, Arkansas Bar Association, to Peter G. McCabe, dated January 31, 1996*; and *Letter of Don W. Martens, President, American Intellectual Property Law Association, to Peter G. McCabe, dated February 29, 1996).*

Finally, Ms. Thais L. Richardson, Law Student, American University School of Law, testifying at the Public Hearing on Proposed Amendments to the Federal Rules of Evidence, and while concurring that the expansion of Rule 407 to cover products liability actions is appropriate, the limiting of the scope of the exclusionary rule to measures taken after personal injury or property damage in products liability actions is inconsistent with both the public policy behind the rule and substantive products liability law. *(See Public Hearing on Proposed Amendments to the Federal Rules of Evidence, January 18, 1996).*

Uniform Rule 407 as recommended is not significantly different in substance from the Federal Rule 407. Uniform Rule 407 does depart in two respects from the rule now applicable in a number of state jurisdictions.

First, as to the meaning of "event" as that term is now used in Uniform Rule 407 in contrast to Federal Rule 407, the state courts have taken varying approaches. Some have held that the word "event" refers to the time of the injury rather than to the date of manufacturer or distribution of the product. In such a case the exclusionary rule would not be a bar to the admissibility of remedial measures, such as warning labels issued after the date of manufacture, but prior to the date of injury. See, for example, **Florida**, *Keller Indust. v. Volk, 657 So.2d 1200 (Fla. Dist. Ct. App. 1995)*; and **New Jersey**, *Dixon v. Jacobsen Mfg. Co., 270 N.J. Super. 569, 637 A.2d 915 (N.J. Super. Ct. App. Div. 1994).* However, other state jurisdictions have construed the word "event" as the date of manufacture. See, for example, **Kansas**, *Patton v. Hutchinson Wil-Rich Mfg. Co., 253 Kan. 741, 861 P.2d 1299 (1993)*; and **Montana**, *Mont. R. Evid. 407, Rix v. Gen. Motors Corp., 222 Mont. 318, 723 P.2d 195 (1986), followed in, Krueger v. Gen. Motors Corp. 240 Mont. 266, 783 P.2d 1340 (1989).*

Second, the most significant revision in proposed Uniform Rule 407 is in making the exclusion of remedial measures expressly applicable to products liability actions and thereby conform the Uniform Rule to the Federal Rule and the majority rule among the federal circuits of the United States prior to the amendment of Federal Rule 407. Only the Eighth and Tenth Circuits formerly admitted evidence of subsequent remedial measures in strict liability cases. See *Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993)* and *Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322 (10th Cir. 1983).*

In contrast, the States are almost evenly divided on the issue of admitting remedial measures in product liability actions. Subsequent remedial measures have been held to be *inadmissible* in strict liability cases in the following state jurisdictions: **Arizona**, *Hallmark v. Allied Prod. Co., 132 Ariz. 434, 646 P.2d 319 (Ariz. Ct. App. 1982)* and *Hohlenkamp v. Rheem Mfg. Co., 134 Ariz. 208, 655 P.2d 32 (Ariz. Ct. App. 1982)*, discussed in *Readnor v. Marion Power Shovel, 149 Ariz. 442, 719 P.2d 1058 (1986)*; **Florida**, *Fla. Stat. Ann. § 90.407(West 1997), Voynar v. Butler Mfg. Co., 463 So.2d 409 (Fla. Dist. Ct. App. 1985)*; **Idaho**, *Idaho R. Evid. 407, Idaho Code § 6-1406 (1994)*; *Watson v. Navistar Int'l. Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992)*; **Kansas**, *Kan. Stat. Ann. § 60-3307 (1992 Supp.)* and *Patton v. Hutchinson Wil-Rich Mfg. Co., 253 Kan. 741, 861 P.2d 1299 (1993)*; **Maryland**, *Troja v. Black & Decker Mfg. Co., 62 Md. App. 101, 488 A.2d 516, cert. denied, 303 Md. 471, 494 A.2d 939 (Md. Ct. Spec. App. 1985)*; **Minnesota**, *Minn. R. Evid. 407, Kallio v. Ford Motor Co., 407 N.W.2d 92 (Minn. 1987)*; **Montana**, *Mont. R. Evid. 407, Rix v. Gen. Motors Corp., 222 Mont. 318, 723 P.2d 195 (1986), followed in, Krueger v. Gen. Motors Corp. 240 Mont. 266, 783 P.2d 1340 (1989)*; **Nebraska**, *Neb. Rev. Stat. § 27-407 (1995), Rahmig v. Mosley Mach. Co., 226 Neb. 423, 412 N.W.2d 56 (1987)*; **New Hampshire**, *N.H. R. Evid. 407, Cyr v. J.I. Case Co., 139 N.H. 193, 652 A.2d 685 (1994)*; **New Jersey**, *Dixon v. Jacobsen Mfg. Co., 270 N.J. Super. 569, 637 A.2d 915 (N.J. Super. Ct. App. Div. 1994), Price v. Buckingham Mfg. Co., 110 N.J. Super. 462, 266 A.2d 140 (N.J. Super. Ct. App. Div. 1970)*; **North Carolina**, *N.C. R. Evid. 407*, and see, *Commentary to Rule 407,* stating that "It is the intent of the Committee that the rule should apply to all types of actions." See further, *Jenkins v. Helgren, 26 N.C. App. 653 (N.C. Ct. App. 1975)*; **Oregon**, *Or. R. Evid. 407, Krause v. Am. Aerolights, 307 Or. 52, 762 P.2d 1011 (1988)*; and **Tennessee**, *Tenn. R. Evid. 407*, expressly providing that the exclusionary rule is applicable to strict liability actions.

See further, **Colorado**, *Colo. R. Evid. 407, Uptain v. Huntington Lab, Inc., 723 P.2d 1322 (Colo. 1986)*, **Indiana**, *Ind.R. Evid. 407, Ortho Pharmaceutical Corp. v. Chapman, 180 Ind. App. 33, 388 N.E.2d 541 (Ind. Ct. App. 1979)*; **Michigan**, *Mich.R. Evid. 407, Smith v. E.R. Squibb & Sons, Inc., 405 Mich. 79, 273 N.W.2d 476 (1979)*, applying the exclusionary rule in "failure to warn" cases.

Subsequent remedial measures have been held to be *admissible* in strict liability cases in the following state jurisdictions: **Alaska**, *Alaska R. Evid., 407, Commentary to Rule 407, Agostino v. Fairbanks Clinic Partnership, 821 P.2d 714 (Alaska 1991)*; **California**, *Cal. Evid. Code § 1151, Ault v. Int'l. Harvester Co., 13 Cal.3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (Cal. 1974)*; **Connecticut**, *Hall v. Burns, 213 Conn. 446, 569 A.2d 10 (Conn. 1990)*; **Delaware**, *Del. R. Evid. 407, Wilson v. Teagle, 1987 WL 6458 (Del. Super. Ct. Jan. 9, 1987)*, following *Ault v. Int'l. Harvester Co., supra*; **Georgia**, *General Motors Corp. v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302 (Ga. Ct. App. 1994)*; **Hawaii**, *Haw. R. Evid. 407*, expressly providing that the exclusionary rule does not apply when offered for a purpose other than to prove negligence or

culpable conduct, "such as proving dangerous defect in products liability cases. . ."; **Iowa**, *Iowa R. Evid. 407*, expressly providing that the exclusionary rule does not apply "when offered in connection with a claim based on strict liability in tort or breach of warranty. . .", *McIntosh v. Best W. Steeplegate Inn, 546 N.W.2d 595 (Iowa 1996)*; **Kentucky**, *Ky. R. Evid. 407*, expressly providing that "[t]his rule does not require the exclusion of evidence of subsequent measures in products liability cases . . .", *Ford Motor Co. v. Fulkerson, 812 S.W.2d 119 (Ky. 1991)*; **Louisiana**, *La. Code Evid. Ann. art. 407 (West 1997), Toups v. Sears, Roebuck & Co., 507 So.2d 809 (La. 1987)*; **Missouri**, *Pollard v. Ashby, 793 S.W.2d 394 (Mo. Ct. App. 1990), Tune v. Synergy Gas Corp., No. 18273, 1993 WL 309055 (Mo. Ct. App. Aug. 17, 1993)*; **Nevada**, *Nev. Rev. Stat. § 48.095, Jeep Corp. v. Murray, 101 Nev. 640, 708 P.2d 297 (1985), Robinson v. G.G.C., Inc., 107 Nev. 135, 808 P.2d 522 (1991)*; **New York**, *Caprara v. Chrysler Corp., 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981)*; **Ohio**, *Ohio. R. Evid. 407, McFarland v. Bruno Mach. Corp., 68 Ohio St. 3d 305, 626 N.E.2d 659 (1994)*; **Pennsylvania**, *Matsko v. Harley Davidson Motor Co., 325 Pa. Super. 452, 473 A.2d 155 (Pa. Super. Ct. 1984)*; **Rhode Island**, *R.I R. Evid. 407*, expressly providing "[w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is admissible"; **South Dakota**, *Klug v. Keller Indust., Inc., 328 N.W.2d 847 (S.D. 1982), Shaffer v. Honeywell, 249 N.W.2d 251 (S.D. 1976)*; **Texas**, *Tex. R. Evid. 407*, expressly providing "[n]othing in this rule shall preclude admissibility in products liability cases based on strict liability"; **Wisconsin**, *Wis. Stat. Ann. § 904.07(West 1997), D.L. v. Huebner, 110 Wis. 2d 581, 329 N.W.2d 890 (1983), Chart v. Gen. Motors Corp., 80 Wis. 2d 91, 258 N.W.2d 680 (1977)*; and **Wyoming**, *Wyo. R. Evid. 407, Caldwell v. Yamaha Motor Co., 648 P.2d 519 (Wyo. 1982)*.

The applicability of the exclusionary rule in strict liability cases appears to be unresolved in the following state jurisdictions: **Alabama**; **Arkansas**; **Illinois**; **Maine**, where the rule permitting the admissibility of subsequent remedial measures of subsequent remedial measures was repealed by legislative enactment in 1996 by 1996 Me. Laws Ch. 576; **Massachusetts**; **Mississippi**; **New Mexico**; **North Dakota**; **Oklahoma**; **South Carolina**; **Utah**; **Vermont**; **Virginia**; **Washington**; **West Virginia**; **District of Columbia**; **Puerto Rico**; and **Virgin Islands**.

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE. Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim ~~which~~ <u>that</u> 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 any 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, ~~negativing~~ negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

~~Compromise negotiations encompass mediation.~~

Reporter's Note

Uniform Rule 408 as adopted by the Conference in 1974 provided as follows:

> Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which 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 exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

As amended in 1988, Rule 408 provided as follows:

> Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which 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 any 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, negativing a contention of undue delay, or

proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass mediation.

The 1988 amendments to the text of Uniform Rule 408 are shown by underlines. They were approved by the Executive Committee at its Mid-Year Meeting on February 6, 1988 as technical amendments to Rule 408. See the *Minutes of the Scope and Program Committee dated August 4, 1987* and the *Minutes of the Executive Committee dated August 4-5, 1987 and February 6, 1988*. The Comment to Rule 408 states that "[t]he amendment is intended to make it clear that the rule as originally adopted already extends to all forms of voluntary dispute resolution. Thus, no substantive change to the rule is intended."

Rule 408 now recommended by the Drafting Committee incorporates the 1988 amendments to the text of the rule as originally adopted with the exception of the last sentence "Compromise negotiations encompass mediation." As submitted, 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 undoubtedly considerable disagreement from State to State. This is left to state law determination on a case-by-case basis.

Recommended non-substantive stylistic changes have been made in the revision of Rule 408.

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.

Reporter's Note

There are no recommendations for amending Rule 409.

RULE 410. WITHDRAWN PLEAS AND OFFERS.

~~Evidence of a plea later withdrawn, of guilty, or admission of the charge, or nolo contendere, or of an offer so to plead to the crime charged or any other crime, or of statements made in connection with any of the foregoing withdrawn pleas or offers, is~~

~~not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer.~~

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

(1) Withdrawn guilty plea. A plea of guilty which was later withdrawn;

(2) Plea of nolo contendere. A plea of nolo contendere;

(3) Statement regarding withdrawn guilty plea or plea of nolo contendere. A statement made in the course of any proceedings regarding either of the foregoing pleas; and

(4) Statement made to prosecuting authority. 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 plea or statement described in subdivision (a) is admissible:

(1) Related statement. In a proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement should in fairness be considered contemporaneously with the other statement.

(2) Perjury or false statement. 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.

(3) Agreement to use plea or statement for impeachment. In a proceeding wherein the defendant has knowingly and voluntarily entered into an agreement to permit the use of such pleas or statements for impeachment purposes.

Reporter's Note

The Drafting Committee recommends, with changes in format and one substantive change, substituting the substance of revised Rule 410 of the *Federal Rules of Evidence* which became effective on December 1, 1980 for the existing Uniform Rule 410 excluding evidence of withdrawn pleas, offers to plead and statements made in connection with any such pleas or offers to plead.

The existing Uniform Rule 410, with insubstantial modifications, was drawn from the rule originally promulgated by the Supreme Court when the Uniform Rules were adopted in 1974. Rule 410 of the Federal Rules, as originally proposed by the Supreme Court, when first enacted by Congress, included the provision that "[t]his rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement." This amendment was made to reduce the scope of Federal Rule 410 in order to prevent "injustice", particularly in cases where "a defendant would be able to contradict his previous statement and thereby lie with impunity." *Report of the Senate Committee on the Judiciary, 93rd Cong., 2d Sess., Oct. 18, 1974, p. 11.*

In 1975 Congress amended Rule 11(e)(6) of the Federal Rules of Criminal Procedure. See *Federal Rules of Criminal Procedure of 1975, Pub. L. 94-64, 89 Stat. 371*. It then amended Rule 410 of the Federal Rules of Evidence to conform to Rule 11(e) (6) as follows:

> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible 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. *Federal Rules of Evidence of 1975, Pub. L. 94-149, 89 Stat. 805.*

Subsequently, the Supreme Court promulgated an amendment to Rule 410, which became effective on December 1, 1980 due to the failure of Congress to take any action on the amendment as proposed by the Supreme Court. *Federal Rules of Evidence of 1979, Pub. L. 96-42, 93 Stat. 326.* Aside from clarifying language, the principle thrust of the amendments was to assure that the rule did not cover discussions between suspects and law enforcement agents.

It is this version of the rule which the Drafting Committee is recommending for adoption by the Conference. Most of the litigation throughout the several States has centered on what constitutes a plea negotiation [*People v. Oliver, 111 Mich. App. 734, 314. N.W.2d 740 (Mich. Ct. App. 1981)*] and what statements made during the plea negotiation process [*State v. Lewis, 539 So.2d 1199 (La. 1989)*] and the persons to whom the statements must be made [*Fritz v. State, 811 P.2d 1353 (Okla. Crim. App. 1991)*] are such as to fall within the statutory ban on the admission of evidence of such negotiations. In the latter case, comparable state law rules to Uniform Rule 410 have created interpretive difficulties for the courts insofar as statements made to persons other than attorneys for the prosecuting authorities. See, for example, *People v. Rollins, 759 P.2d 816 (Colo. Ct. App. 1988)* and *Fritz v. State, supra*. This problem is avoided in Rule 410(3) of the Federal Rules of Evidence, and would be avoided in proposed Uniform Rule 410(a)(4) by providing 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 410 of the *Federal Rules of Evidence* is also virtually identical to Rule 11(e)(6) of the Federal Rules of Criminal Procedure, both of which generally prohibit the admission of plea negotiated statements. Both Rules, as is the proposed Uniform Rule 410, are designed to promote plea agreements by encouraging unrestrained candor in the plea bargaining process. This duality in purpose and similarity in language of Rules 410 and 11(e)(6) led the Advisory Committee currently considering amendments to the *Federal Rules of Evidence* to defer to the Advisory Committee on the Criminal Rules for its views on whether any amendments to Rules 410 or 11(e)(6) would be appropriate.

The Advisory Committee on the Criminal Rules discussed the subject of amending Rule 410 at its meeting in October, 1993, but, noting that the 9th Circuit decision in *United States v. Mezzanatto, 998 F.2d 1452 (9th Cir. 1993)* had triggered debate concerning the waiver of the rule excluding pleas and plea statements under Rule 410 for impeachment purposes, tabled the matter pending further development of the caselaw. The issue was finally resolved in *United States v. Mezzanatto, 513 U.S. 196, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995)*, with the Supreme Court broadly holding that an agreement to waive the plea-statement exclusionary provisions is valid and enforceable in the absence of some affirmative indication that the defendant entered into the agreement unknowingly or involuntarily. The issue raised and decided in *Mezzanatto* presents a fundamental question. Would the waiver of the protections of Rules 410 and 11(e)(6)

"have a chilling effect on the entire plea bargaining process" and undercut the policy implicit in the rules to promote effective plea bargaining through frank discussion in negotiations? A resolution of the issue through amendments to Rules 410 and 11(e)(6) has not yet been reached by either the Advisory Committee on the *Federal Rules of Evidence* or the Advisory Committee on the Criminal Rules.

The substantive change in Uniform Rule 410 proposed for adoption is in the addition of an exception in subdivision (b)(3) admitting a plea or statement "in any proceeding wherein the defendant has knowingly and voluntarily entered into an agreement to permit the use of such pleas or statements for impeachment purposes." The addition of this exception is narrower than the holding of the Supreme Court in the *Mezzanatto* case by applying a waiver rule to the admission of such pleas or statements only for impeachment purposes to reflect the opinion of the Concurring Justices Ginsberg, O'Connor and Breyer as follows:

> The Court holds that a waiver allowing the Government to impeach with statements made during plea negotiations is compatible with Congress's intent to promote plea bargaining. It may be, however, that a waiver to use such statements in the case-in-chief would more severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining. As the Government has not sought such a waiver, we do not here explore this question.

Uniform Rule 410 as proposed, except for the substantive change embraced in subdivision (b)(3), would also be consistent with Rule 410 of the *Federal Rules of Evidence* which has been widely adopted in state jurisdictions. These are: **Delaware**, *Del. Court of Common Pleas R. Crim. Proc. 11(e)(4)* and *Del. Super. Ct. R. Crim. Proc. 11(e)(6)*; **Hawaii**, *Haw. R. Evid. Rule 410* and *Haw. R. Penal Proc. 11(e)(4)*; **Indiana**, *Ind. R. Evid. 410*; **Iowa**, *Iowa R. Evid. 410*; **Louisiana**, *La. Code of Evid. Ann. art. 410(West 1997)*; **Maryland**, *Md. R. Evid. 5-410*; **Michigan**, *Mich. R. Evid. 410*; **Mississippi**, *Miss. R. Evid. 410*; **North Carolina**, *N.C. R. Evid. 410*; **North Dakota**, *N.D. R. Evid. 410*, but compare, *N.D. R. Crim. Proc. 11(d)(6)*; **New Hampshire**, *N.H. R. Evid. 410*; **Ohio**, *Ohio R. Evid. 410*; **Oklahoma**, *Okla. Stat. Tit. 12, § 2410 (1981)*; **Rhode Island**, *R.I. R. Evid. 410*; **South Carolina**, *S.C. R. Evid. 410*; **Tennessee**, *Tenn. R. Evid. 410*; **Texas**, *Tex. R. Evid. 410* and *Tex. R. Crim. Evid. 410*; **Utah**, *Utah R. Evid. 410*; **Virginia**, *Va. R. Crim. Proc. & Prac. 3A:8(c)(5)*; **Vermont**, *Vt. R. Evid. 410* and *Vt. R. Crim. Proc. 11(e)(5)*; **West Virginia**, *W. Va. R. Evid. 410* and *W. Va. R. Crim. Proc. 11(e)(6)*; and **Wyoming**, *Wyo. R. Crim. Proc. 11(e)(6).*

New Jersey, *N.J. R. Evid. 410* and **Washington**, *Wash. R. Evid. 410* have rules which are similar, though they differ in some respects, from Rule 410 of the Federal Rules.

Florida, *Fla. R. Crim. Proc. 3.172(h)*; has a rule quite similar to Uniform Rule 410.

There are three States which provide for the exclusion of plea bargains, but they are quite different in their approach. These are: **Arizona**, *Ariz. R. Evid. 410*; **New Mexico**, *District Ct. R. Crim. Proc. 5-304(F)*; and **Oregon**, *Or. Evid. Code 410*.

RULE 411. LIABILITY INSURANCE. Evidence that a person was or was not insured against liability is not admissible upon the issue as to whether ~~he~~ 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.

Reporter's Note

This proposal for amending Rule 411 makes one stylistic change and eliminates the gender-specific language in the rule. These are technical and no change in substance is intended.

There are no other proposals for amending Rule 411.

RULE 412. SEXUAL BEHAVIOR.

~~(a) When inadmissible. In a criminal case in which a person is accused of a sexual offense against another person, the following is not admissible:~~

~~(1) Reputation or opinion. Evidence of reputation or opinion regarding other sexual behavior of a victim of the sexual offense alleged.~~

~~(2) Specific instances. Evidence of specific instances of sexual behavior of an alleged victim with persons other than the accused offered on the issue of whether the alleged victim consented to the sexual behavior with respect to the sexual offense alleged.~~

~~(b) Exceptions. This rule does not require the exclusion of evidence of (i) specific instances of sexual behavior if offered for a purpose other than the issue of consent, including proof of the source of semen, pregnancy, disease, injury, mistake, or the intent of the accused; (ii) false allegations of sexual offenses; or (iii) sexual behavior with persons other than the accused which occurs at the time of the event giving rise to the sexual offense alleged.~~

(a) Sexual behavior defined. 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) Source of condition. That an individual other than the accused was the source of the semen, injury, disease, other physical evidence, or pregnancy;

(2) Victim's knowledge. That an individual other than the accused was the source of the alleged victim's knowledge of sexual behavior;

(3) Consent. Consent, if the alleged victim's sexual behavior either (i) involved the accused or (ii) was a pattern 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 reasonable belief that the alleged victim had consented to the act or acts of alleged misconduct; or

(4) Constitutional rights. 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) Notice by proponent. The proponent (i) 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 on good cause shown, of the nature of such evidence the proponent intends to introduce at trial and

(2) Hearing on admissibility. The court conducts a hearing in camera, affords the alleged victim and parties a right to attend the hearing and be heard and finds:

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

(B) Danger of unfair prejudice. That the probative value of admitting the evidence is not substantially outweighed by the danger of unfair prejudice; and

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

Reporter's Note

Rule 412, subdivisions (a) and (b) dealing with the admissibility of a rape victim's sexual behavior were added to the Uniform Rules of Evidence in 1986. The **Comment to 1986 Amendment** reads as follows:

> Congress added a "rape-shield" provision to the Federal Rules of Evidence when it adopted Rule 412 in 1978. A great majority of states have also added similar provisions to their rules of evidence or criminal codes. Unfortunately, the rules and statutes vary greatly in detail and in basic structure. The committee reviewed a number of the state provisions as well as the federal version and opted for a concise rule of evidence rather than a rule of criminal procedure. No provision is made for notice or *in camera* hearings as do many of the state, as well as the federal, versions. This omission is not intended to preclude such procedures. It was felt that existing rules of criminal procedure and the inherent power of the court to conduct criminal proceedings in an orderly and fair manner already provide adequate protection to the parties. The prosecutor may move for an *in camera* proceeding to determine the admissibility under Rule 403 of highly prejudicial evidence concerning the sexual behavior of a prosecuting witness. The court should seriously consider granting any such motion.
>
> The rule applies only to criminal cases and then only to cases where a person is accused of a sexual offense against another person. Evidence of reputation or opinion concerning sexual behavior of an alleged victim of the sexual offense is not admissible under any circumstances. The low probative value when weighed against the risk of great prejudice is thought to justify a *per se* rule. The rule does not preclude the introduction of expert testimony regarding, for example, mental or emotional illness of the victim, subject to the provisions of Rule 403 and Article VII.
>
> With regard to the issue of consent to the sexual offense alleged, evidence of specific instances of sexual behavior of the alleged victim with persons other than the accused is not admissible. This obviously raises serious constitutional questions with regard to a defendant's right to adduce evidence and to cross-examine witnesses. Although certainly not free from doubt, it would seem that notice and/or an *in camera* hearing would not cure any constitutional defect in this regard. The U.S. Supreme Court has yet to rule on the matter.
>
> It matters not that the sexual behavior took place after the alleged offense but before trial rather than before the alleged offense.

The rule provides that the evidence is admissible on other issues and details those situations in subdivision (b).

Earlier law left the subject of this rule to other more general rules such as those relating to the credibility and character of victims generally. Thus, some clarification is in order concerning the relationship between Rule 412 and other rules which may also seem to cover the evidence. Examples of these other rules might be Rules 403, 404-406, 608-609, and Article VII. Such other rules may on occasion be either more restrictive or less restrictive than Rule 412. It is intended that the restrictions in Rule 412 apply notwithstanding more permissive provisions of other rules. However, provisions of Rule 412 which appear to permit evidence are meant to be read as exceptions only to Rule 412's ban. They are therefore subject to any more restrictive provisions in other rules that may apply. This is consistent with the scheme of most of the Uniform Rules of Evidence and the relationship among them.

In the administration of Rule 412, the court should have due regard for the mandate of Rule 611(a)(3), which applies to evidence sought to be admitted pursuant to a provision of Rule 412.

This proposal of the Drafting Committee for amending Uniform Rule 412 combines, with some substantive modifications, the substance of Federal Rule 412 and a proposed, though not enacted, Wisconsin rape shield law. See *Proposed Revision, Wis. St. § 972.11(2)(a), (b) and (c)*. There are at least six features of the recommended Rule which 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. All of the States, with the exception of **Montana**, exclude in criminal cases evidence relating to the past sexual behavior of complaining witnesses in sexual assault cases. These are: **Alabama**, *Ala. Code § 12-21-203 (1975)*; **Alaska**, *Alaska Stat. § 12.45.045 (1985)*; **Arkansas**, *Ark. Code Ann. § 16-42-101 (Michie 1993)*; **California**, *Cal. Evid. Code § 782 (Deering 1989)* and *Cal. Evid. Code § 1103(c)(1) (West 1991)*; **Colorado**, *Colo. Rev. Stat. Ann. § 18-3-407 (West 1997)*; **Connecticut**, *Conn. Gen. Stat. Ann. § 54-86f (West 1997)*; **Delaware**, *Del. Code Ann. tit. 11, § 3508 (1995); (Del. R. Evid. 412 omitted because adequately covered by this section)*; **Florida**, *Fla. Stat. Ann. § 794.022 (West 1997)*; **Georgia**, *Ga. Code Ann. § 24-2-3 (1989)*; **Hawaii**, *Haw. Rev. Stat. Ann. § 626-1, R. 412 (1992)*; **Idaho**, *Idaho R. Evid. 412*; **Illinois**, *Ill. Ann. Stat. ch. 72, para. 5/115-7 (Smith-Hurd 1994)*; **Indiana**, *Ind. R. Evid. 412*; **Iowa**, *Iowa R. Evid. 412*; **Kansas**, *Kan. Stat. Ann. § 21-3525 (1993)*; **Kentucky**, *Ky. R. Evid. 412*; **Louisiana**, *La. Code Evid. Ann. art. 412 (West 1997)*; **Maine**, *Me. R. Evid. 412*; **Maryland**, *Md. Code Ann., Crim. Law § 461A (1977)*; **Massachusetts**, *Mass. Gen. Laws Ann. ch. 233,*

§ 21B (West 1997); **Michigan**, *Mich. Comp. Laws Ann. § 750.520j (West 1997)*; **Minnesota**, *Minn. R. Evid. 412*; **Mississippi**, *Miss. Code Ann. § 97-3-68 (1993)* and *Miss. R. Evid. 412*; **Missouri**, *Mo. Rev. Stat. § 491.015 (1986)*; **Nebraska**, *Neb. Rev. Stat. § 27-404(1)(b) (1993); (Neb. R. Evid. 404)*; **Nevada**, *Nev. Rev. Stat. § 48.069 (1991)*; **New Hampshire**, *N.H. R. Evid. 412* and *N.H. Rev. Stat. Ann. § 632-A:6I (1993)*; **New Jersey**, *N.J. Stat. Ann. § 2C:14-7 (West 1997)*; **New Mexico**, *N.M. R. Evid. 11-413*; **New York**, *N.Y. Crim. Proc. Law § 60.42 (McKinney 1975)* and *N.Y. Crim. Proc. Law § 60.43 (McKinney 1990)*; **North Carolina**, *N.C. R. Evid. 412*; **North Dakota**, *N.D. Cent. Code § 12.1-20-14 (1975)*; **Ohio**, *Ohio. Rev. Code Ann. § 2907.02(D) (Baldwin 1995)*; **Oklahoma**, *Okla. Stat. Ann. tit. 12, § 2412 (West 1997)*; **Oregon**, *Or. Rev. Stat. § 40.210 (1993)*; **Pennsylvania**, *18 Pa. Cons. Stat. Ann. § 3104 (1976)*; **Rhode Island**, *R.I. R. Evid. 412*; **South Carolina**, *S.C. R. Evid. 412* and *S.C. Code Ann. § 16-3-659.1 (Law. Co-op. 1977)*; **South Dakota**, *S.D. Codified Laws Ann. § 23A-22-15 (1995)*; **Tennessee**, *Tenn. R. Evid. 412*; **Texas**, *Texas R. Evid. 412*; **Utah**, *Utah R. Evid. 412)*; **Vermont**, *Vt. Stat. Ann. tit. 13, § 3255 (1993)*; **Virginia**, *Va. Code Ann. § 18.2-67.7 (Michie 1981)*; **Washington**, *Wash. Rev. Code Ann. § 9A.44.020 (West 1997)*; **West Virginia**, *W. Va. R. Evid. 404(3)* and *W. Va. Code § 61-8B-11 (1986)*; **Wisconsin**, *Wis. Stat. Ann. § 972.11 (West 1997)*; and **Wyoming**, *Wyo. Stat. § 6-2-312 (1982)*.

In **Arizona**, the exclusionary rule has been established by judicial decision. See *State ex rel. Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (1976)* and *State v. Castro, 163 Ariz. 465, 788 P.2d 1216 (Ariz. Ct. App. 1989)*.

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 come forward and report criminal acts.

In contrast, Rule 412 of the *Federal Rules of Evidence* extends the exclusion of a victim's prior sexual behavior to civil cases "to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusing of sexual innuendo into the factfinding process." See *Notes of Advisory Committee to 1994 Amendment*.

However, unlike criminal cases, the exclusion of such evidence in civil cases varies greatly in the state jurisdictions depending upon the nature of the action, the black letter of the applicable rule, the interpretive scope given to the rule and the individual whose past sexual behavior is in issue. **California** statutorily excludes such evidence in civil cases. The *Cal. Evid. Code § 1106 (West 1997)*, with exceptions, provides that "[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery . . . evidence . . . of plaintiff's sexual conduct . . . is not admissible by the defendant in order to prove consent by the plaintiff or absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of

consortium." At the same time, it has been held that the rule has no application in an action brought against a psychologist to recover damages for medical malpractice and infliction of emotional distress through sexual contact with the defendant where the proximate cause of the plaintiff's injuries were alleged to be due to her pre-treatment psycho-sexual history through parental sexual abuse, prostitution and topless dancing. See *Patricia C. v. Mark D., 12 Cal. App. 4th 1211, 16 Cal.Rptr.2d 71 (Cal. Dist. Ct. App. 1993)*. At the same time, and without reference to Section 1106, in *Kelly-Zurian v. Wohl Shoe Co., 22 Cal. App. 4th 397, 27 Cal. Reptr.2d 457 (Cal. Dist. Ct. App. 1994)*, an action by the plaintiff for sexual harassment by a supervisory employee, the court sustained under *Cal. Evid. Code* § 352 (West 1997) the exclusion of plaintiff's viewing of x-rated video tapes, her abortions and her prior sexual conduct on the ground that "even assuming the evidence was marginally relevant, given the divisiveness of the issue and extreme potential for prejudice, exclusion of the evidence was proper."

In **Massachusetts**, in a proceeding to revoke a psychiatrist's license to practice medicine, the Supreme Judicial Court interpreted the public policy expressed in both the State's rape shield statute *[Mass. Gen. L. ch. 233, § 21B (1986))]* and prior decisional law *[Commonwealth v. Joyce, 382 Mass. 222, 415 N.E.2d 181 (1981)]*, both applicable in criminal cases, to hold that evidence of the patient-victim's sexual history in a civil proceeding should be rejected "unless the proponent of the evidence demonstrates that evidence of a patient's prior sexual conduct is more than marginally relevant to an important issue of fact." See *Morris v. Bd. of Registration in Medicine, 405 Mass. 103, 539 N.E.2d 50 (1989)*. The same reasoning has been applied in **North Carolina** in excluding evidence of the prior sexual conduct of a college student in an action brought against a fraternity and fraternity members to recover damages for sexual assault and battery and intentional infliction of emotional distress. The Court of Appeals observed that *N.C. R. Evid. 412* to date had only been applied in criminal cases, but that the reasoning applied in the prior criminal case of *State v. Younger, 306 N.C. 692, 295 S.E.2d 453 (N.C. 1982)* was equally applicable in civil cases, namely, that "[t]oday, 'common sense and sociological surveys make clear that prior sexual experiences by a woman with one man does not render her more likely to consent to intercourse with an often armed and frequently strange attacker.'" See *Wilson v. Bellamy, 105 N.C. App. 446, 414 S.E.2d 347 (N. C. Ct. App. 1992)*.

In contrast, in **Indiana**, the Supreme Court has held that the Indiana Rape Shield Statute was not enacted to apply in civil cases. In an action for compensatory and punitive damages brought by a daughter against her father, the Court held that the trial court erred in excluding evidence of the daughter's prior sexual experiences which could have caused or contributed to her injury. It reasoned that "[u]nlike the victim in a criminal case, the plaintiff in a civil damage action is 'on trial' in the sense that he or she is an actual party seeking affirmative relief from another party. Such plaintiff is a voluntary participant, with strong financial incentive to shape the evidence that determines the outcome. It is antithetical to principles of fair trial that one party may

seek recovery from another based on evidence it selects while precluding opposing relevant evidence on grounds of prejudice." See *Barnes v. Barnes, 603 N.E.2d 1337 (Ind. 1992)*.

It has also been held in some jurisdictions that the admissibility of evidence of a victim's prior sexual behavior is a matter of relevancy versus unfair prejudice. As earlier observed, in **California**, even though evidence of past sexual conduct is statutorily excluded in civil cases, it has been held that the rule has no application in an action brought against a psychologist to recover damages for medical malpractice and infliction of emotional distress through sexual contact with the defendant where the proximate cause of the plaintiff's injuries were alleged to be due to her pre-treatment psycho-sexual history through parental sexual abuse, prostitution and topless dancing. See *Cal. Evid. Code § 1106 (West 1997)* and *Patricia C. v. Mark D., 12 Cal. App.4th 1211, 16 Cal. Rptr.2d 71 (Cal. Dist. Ct. App. 1994), supra*, at 73. Similarly, in **Tennessee**, in an action for assault, malicious harassment and civil conspiracy, evidence of plaintiff's failed relationships, prior sexual encounters and elective abortions was held to be relevant under Tennessee's Rule 401 as to the issue of causation of plaintiff's psychological and emotional damage in that the evidence provided the jury with other plausible explanations for plaintiff's condition. See *Vafaie v. Owens, No. 92C-1642, 1996 WL 502133 (Tenn. Ct. App. Sept. 6, 1996)*. In **Utah**, in a patient's action against her therapist to recover damages for sexual misconduct, it has been held that it is permissible to cross-examine the patient relating to prior sexual behavior to demonstrate that the patient's condition was not worsened by the sexual misconduct of the therapist. See *Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989)*.

However, in some jurisdictions the evidence is excluded on either grounds of relevancy or unfair prejudice. In **Louisiana**, depositional evidence of previous sexual experiences of a plaintiff in an action for damages for rape has been excluded on the ground that the evidence "as offered, is inaccurately and poorly phrased, incomplete and vague and would tend to mislead and confuse the jury . . . . [which] outweigh its probative value." See *Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So.2d 70 (La. Ct. App. 1989)*. Similarly, in **Missouri**, in an action to dismiss a highway patrolman for, among other grounds, engaging in immoral conduct, the Supreme Court held that the trial court did not err in excluding evidence of the complainant's prior sexual victimization on the ground that it related only collaterally to the competency of the complainant and not on a probative issue in the case, as well as carrying the danger of unfair prejudice and surprise. See *Gamble v. Hoffman, 732 S.W.2d 890 (Mo. 1987)*.

It is also of interest to note that **Utah** patterned its Rule 412 on Federal Rule 412, as amended in 1994, when it was in draft form issued by the Committee on Rules and Practice and Procedure of the Judicial Conference of the United States in July of 1993. However, as explained in the Advisory Committee Note, unlike the draft of the federal rule, the Committee elected at that time to limit Rule 412's application to criminal

cases because of the "lack of judicial experience or precedent imposing these evidentiary restrictions in a civil context." See *Advisory Committee's Note, Utah R. Evid. 412).*

It is also the position of the Drafting Committee that the proposed Uniform Rule 412 not be broadened to apply in civil cases at the present time. The relatively few jurisdictions and types of actions in which the issue has arisen, the varying approaches utilized in determining the admission or exclusion of evidence of victims' past sexual behavior and the need for further precedential support all suggest that it would be premature to extend the proposed Uniform Rule 412 to civil cases. Uniform Rules 401, 402 and 403 admitting relevant evidence and excluding evidence that is unfairly prejudicial provide adequate safeguards to the admission of a victim's past sexual behavior in the civil context pending further judicial experience with the issue.

In this respect, mention should also be made of cases that have arisen in several jurisdictions involving the admissibility in civil actions of alleged sexual conduct of persons other than the victims. These have all been resolved either on grounds of relevancy versus unfair prejudice, the exclusion or admission of prior bad acts testimony, or under special statutory rules. These include: **California**, *Bihum v. AT & T Info. Sys., Inc., 13 Cal. App. 4th 976, 16 Cal. Rptr.2d 787 (Cal. Dist. Ct. App. 1993)* (evidence of supervisor's sexual conduct toward other female employees admissible in plaintiff's action for sexual harassment); **Colorado**, *Connes v. Molalla Transp. Sys., Inc., 831 P.2d 1316 (Colo. 1992)* (evidence of truck driver's past lewd conduct admissible as evidence of negligence in plaintiff's action against employer for damages for sexual assault), *Q & T Food Stores, Inc. v. Zamarripa, 910 P.2d 44 (Colo. Ct. App. 1995)* (evidence principal officer of convenience store was not person of good character admissible in action to revoke convenience store's license as lottery sales agent) and *JRM, Inc. v. Bd. of County Comm. of Adams County, 200 Colo. 384, 615 P.2d 31 (1980)* (evidence of sex acts and nudity in operation of massage parlors admissible in licensing massage parlor under statutory licensing procedures); **Illinois**, *Doe v. Lutz, 281 Ill. App.3d 630, 668 N.E.2d 564, 218 Ill. Dec. 80 (Ill. App. Ct. 1996)* (evidence of prior acts of sexual harassment by defendants inadmissible in action for damages for sexual harassment of plaintiff's child); **Iowa**, *Lynch v. Des Moines, 454 N.W.2d 827 (Iowa 1990)* (evidence of sexual harassment admissible to prove hostile work environment in plaintiff's action against city for sexual discrimination); **Minnesota**, *M. L. V. Magnuson, 531 N.W.2d 849 (Minn. Ct. App. 1995)* (evidence of other acts of sexual abuse by defendant was inadmissible to prove intent, absence of mistake or accident since these matters were not in dispute, while in related case evidence of other incidents of sexual abuse was admissible to prove modus operandi under *Minn. R. Evid. 404(b)*); **New York**, *Salerno v. N.Y. State Bd. for Professional Medical Conduct, 210 A.D.2d 599, 619 N.Y.S.2d 869 (N.Y. App. Div. 1994)* (evidence of doctor's acknowledgment of improper sexual contact with patients admissible in proceeding to revoke license to practice medicine); **South Dakota**, *Strain v. Rapid City Sch. Bd. for Rapid City Area Sch. Dist.*, 447 N.W.2d 332 (S.D. 1989) (evidence of teacher's prior acts of sexual

contact with students admissible to prove intent, motive, plan and lack of mistake under S.D. Codified Laws Ann. § 19-12-5); **Texas**, *McLellan v. Benson, 877 S.W.2d 454 (Tex. Ct. App. 1994)* (by analogy to *Tex. R. Civ. Evid. 404(b)* (evidence of an assault by defendant on another woman under similar circumstances 26 months earlier is relevant to intent on issue of consent and not subject to exclusion on grounds of unfair prejudice under then *Tex. R. Civ. Evid. 403)* and *Porter v. Nemir, 900 S.W.2d 376 (Tex. Ct. App. 1995)* (by analogy to then *Tex. R. Civ. Evid. 404(b)* (evidence of defendant's assault of another woman is relevant to intent on issue of consent, but excluded on grounds of unfair prejudice under then *Tex. R. Civ. Evid. 403)*; and **Washington**, *Himango v. Prime Time Broadcasting, Inc., 37 Wash. App. 259, 680 P.2d 432 (Wash. Ct. App. 1984)* (probative value of evidence of plaintiff's extramarital sexual activity substantially outweighed by danger of unfair prejudice in action for defamation growing out of report that plaintiff was seen in compromising position with married woman).

Finally, it is of interest to note that in **New Hampshire**, the state Senate recently requested an opinion of the Justices of the Supreme Court concerning the constitutionality of a pending act to admit evidence of prior acts of sexual assault in civil and criminal cases. The Court concluded that the separation of powers doctrine would be violated because the pending bill directly conflicted with Rule 404(b) which was a rule concerning a uniquely judicial function. See *Opinion of Justices, 688 A.2d 1006 (N.H. 1997).*

Second, proposed Uniform Rule 412 adopts the term "sexual behavior" in lieu of "sexual conduct." With only five exceptions the States limit the inadmissible evidence to evidence of sexual conduct or sexual behavior connoting all activities involving actual physical conduct. The Drafting Committee recommends a broad definition of "sexual behavior." In subdivision (a), unlike Federal Rule 412 adopting the term "sexual behavior" without definition, the term is defined broadly which is consistent with a broader definition of the term to be found in five state jurisdictions. In **Alabama**, **Georgia**, **Utah**, **Washington** and **Wisconsin** the excluded evidence extends to both evidence of sexual conduct and sexual behavior other than physical conduct. In **Alabama "**sexual behavior" is defined as behavior which "includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress and general reputation for promiscuity, nonchastity or sexual mores contrary to community standards." See *Ala. Code § 12-21-203(a)(3) (1975).* **Georgia's** definition of "sexual behavior" is the same. See *Ga. Code Ann. § 24-2-3(a) (1989).* **Utah** excludes "evidence offered to prove any alleged victim's sexual predisposition." See *Utah R. Evid. 412(a)(2).* **Washington** excludes "[e]vidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards. . . ." See *Wash. Rev. Code Ann. § 9A.44.020(2) and (3) (West 1997).* **Wisconsin** defines "sexual conduct" as "any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior sexual intercourse

or sexual contact, use of contraceptives, living arrangement and life style." *Wis. Stat. Ann. § 972.11 (West 1994)*.

Third, as in the case of Rule 412 of the *Federal Rules of Evidence*, the proposed Uniform Rule 412 applies only to the "alleged victims" of sexual misconduct. The terminology "alleged victim" is used in the rule 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 the victim of "the alleged sexual misconduct of an accused." However, unlike Federal Rule 412 the proposed Uniform Rule 412 applies only where the accused is a party to the proceeding on the complaint of the victim of the alleged crime. This comports with the statutory rules currently in force in most of the States. *See*, in this connection, the enumeration of the statutory rules in the several States, *supra*.

Fourth, the proposed Uniform Rule 412 seeks to achieve its objectives by affording the broadest possible protection to 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). However, unlike Uniform Rule 412, as well as Federal Rule 412, a few States, in addition to other enumerated exceptions, permit the admission of such evidence to impeach the credibility of the complaining witness within varying limitations. These include: **California**, *Cal. Evid. Code § 1103(c)(1)* and *Cal. Evid. Code § 782 (Deering 1989)*; **Connecticut**, *Conn. Gen. Stat. Ann. § 54-86f (West 1997)*; **Indiana**, *Ind. R. Evid. 412*; **Kansas**, *Kan. Stat. Ann. § 21-3525(c) (1993)*; **Maryland**, *Md. Code Ann., Crim. Law § 461A(a)(4) (1977)*; **Oregon**, *Or. Rev. Stat. § 40.210 (1993)*; **South Carolina**, *S.C. Code Ann. § 16-3-659.1(1) (Law. Co-op. 1977)*; **Tennessee**, *Tenn. R. Evid. 412(c)(2)*; **Texas**, *Texas R. Evid. 412(b)(2)(C)*; **Vermont**, *Vt. Stat. Ann. tit. 13, § 3255(a)(3) (1993)*; **Virginia**, *Va. Code Ann. § 18.2-67.7 (Michie 1981)*; and **West Virginia**, *W. Va. R. Evid. 404(3)* and *W. Va. Code § 61-8B-11 (1986)*.

Fifth, generally speaking the exceptions to the general rule excluding evidence of the sexual behavior of an alleged victim are narrower than in the existing Uniform Rule 412, but generally comport with both the Federal Rule 412 and those recommended in the proposed Wisconsin statute which has also been used as a model in the drafting of the proposed Uniform Rule 412.

The exception in subdivision (c)(1), except for proving mistake or the intent of the accused, comports with existing Uniform Rule 412 and is commonly recognized throughout the several States.

The exception in subdivision (c)(2) is drawn from the proposed Wisconsin rule, but is broader by applying to victims generally as opposed only to child victims. The

exception thereby applies where any victim's knowledge of sexual behavior is unusual, given the age, intelligence, or level of ordinary experience of the victim.

The exception in subdivision (c)(3) is intended to facilitate the proof of consent to the sexual behavior where it is 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 a mistake of fact will disprove a crime if the mistaken belief is honestly entertained, based upon reasonable grounds and of such a nature that the conduct would have been lawful and proper if the facts had been as they were reasonably assumed to be. *See* Perkins and Boyce, Criminal Law 1045 (3rd ed. 1982).

The exception has two aspects to facilitate the proof of consent. First, subdivision (c)(3)(i) permits evidence to prove "consent if the alleged victim's sexual behavior . . . involved the accused." However, this evidence of prior sexual behavior is not automatically admissible. The remoteness and similarity of the victim's prior sexual behavior with the accused to that of the alleged sexual misconduct of the accused are certainly factors to be taken into consideration in determining the admissibility of evidence under this exception. However, in determining the admissibility of evidence under subdivision (c)(3)(i), the Drafting Committee is of the view that the factors of remoteness and similarity should be considered in determining whether the relevancy of the victim's prior sexual behavior with the accused is substantially outweighed by the danger of unfair prejudice within the context of Uniform Rules 401 and 403 as expressly provided in the procedural rules of subdivisions (d)(2)(A) and (B).

Second, subdivision (c)(3)(ii) authorizes the admission of specific instances of the alleged victim's sexual behavior where it is so distinctive as to corroborate the accused's reasonable belief that the victim had consented to the acts of alleged sexual misconduct. The black letter of this exception is to be strictly construed by requiring a finding that each of the three components of the exception have been met. There must be (1) "a pattern" of sexual behavior, (2) sexual behavior which is "distinctive" and (3) sexual behavior which "so closely resembled the accused's version of the sexual behavior of the alleged victim" that it tends to prove that the victim consented to the alleged acts of sexual misconduct. *See State v. Sheline*, 955 S.W.2d 42 (Tenn. 1997).

The practice of wearing "a suggestive costume," even if constituting a "pattern" of behavior, is not so distinctive as to fall within the exception, even though it may closely resemble the costume worn by the alleged victim at the time of the commission of the alleged sexual misconduct. *See People v. Leonhardt, 527 N.E.2d 562 (Ill App. 1 Dist. 1988)*. Previous sexual encounters of the alleged victim with a boyfriend over an extended period of time, while perhaps satisfying the requirement of a pattern of distinctive sexual behavior, is not admissible under the exception if it does not closely

resemble the accused's version of the sexual behavior of the victim at the time of the alleged sexual misconduct. *See State v. Mustafa, 113 N.C. App. 240, 437 S.E.2d 906 (1994)*. Similarly, previous sexual encounters of the alleged victim with third parties in "dating-type circumstances" that does not occur in the alleged victim's home where the alleged sexual misconduct occurred would not be admissible under the exception. *See State v. Smith, 45 N.C. App. 501, 263 S.E.2d 371 (1980)*. Leaving a bar "with perfect strangers" in the past does not closely resemble the accused's story that the alleged victim left the bar with the accused in light of the uncontroverted evidence that the alleged victim had been threatened with a gun. *See State v. Wilhite, 58 N.C. App. 654, 294 S.E.2d 396 (1982)*. Even though evidence of the alleged victim having exchanged sex for crack cocaine on an occasion prior to the time of exchanging sex for cocaine with the accused may constitute distinctive sexual behavior closely resembling the accused's version of the encounter, it has been held that this does not constitute the requisite pattern of exchanging sex for cocaine. *See State v. Ginyard, 122 N.C. App. 25, 468 S.E.2d 525 (1996)*.

In contrast, evidence that the alleged victim commonly accosted strangers in parking lots looking for sexual partners, or met men in apartment parking lots looking for sexual partners, or met men in apartment parking lots and took them to her car to engage in sexual relations which resembles the accused's version of the sexual encounter with the accused, would be admissible under Uniform Rule 412(c)(3). Unlike the previous illustrations, these would constitute patterns which are "so distinctive and so closely resembled 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 reasonable belief that the alleged victim had consented to the act of alleged misconduct." *See State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980)*. In summary, the behavior must be so distinctive and so repetitive that it constitutes a plan or common scheme such as would be admissible under Rule 404(b) of the *Uniform Rules of Evidence*.

Subdivision (c)(3)(ii), as in the case of subdivision (c)(3)(i), also requires a Uniform Rule 401 and 403 balancing process as expressly provided in the procedural rules of subdivision (d)(2)(A) and (B).

In contrast to the exceptions proposed in subdivision (c), the exceptions recognized in the several state jurisdictions vary greatly. They range from the relatively specific exceptions as set forth in the existing Uniform Rule 412(b), as in the case of **Idaho** *[Idaho R. Evid. 412(b)(2)]*, to the exceptions as set forth in Federal Rule 412, As Amended in 1994, as in the case of **Utah** *[Utah R. Evid. 412(b)]*, to a discretionary approach, as in the case of **Alaska** *[Alaska Stat. § 12.45(a) (1985)]*, which permits the introduction of evidence of sexual conduct "[i]f the court finds that the evidence offered by the defendant regarding the sexual conduct of the complaining witness is relevant, and that the probative value of the evidence offered is not outweighed by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted

invasion of the privacy of the complaining witness . . . ." The Drafting Committee prefers the narrower, more specific, approach to the permissible exceptions as recommended in the proposed Uniform Rule 412.

The exception in subdivision (c)(4) provides that specific instances of the 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 similar to Rule 412(b)(1)(C) of the *Federal Rules of Evidence*. The existing Uniform Rule 412 does not contain a similar black letter rule. However, the **Comment to 1986 Amendment** alludes to the "serious constitutional questions with regard to the defendant's right to adduce evidence and to cross-examine witnesses" by excluding evidence of "specific instances of sexual behavior of the alleged victim with persons other than the accused" to prove consent. As observed in the Notes of the Advisory Committee on the 1994 Amendment of Rule 412 of the *Federal Rules of Evidence*, "statements in which the victim has expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape defendant seeking to prove consent." The United States Supreme Court has recognized that a defendant may have a right to introduce evidence pursuant to the Confrontation Clause which would otherwise be precluded by an evidence rule. *See*, in this connection, *Olden v. Kentucky, 488 U.S. 227 (1988)*, in which the Court held that a defendant in a rape case 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 set forth in subdivision (d). *See*, in this connection, *Olden v. Kentucky, supra*.

Sixth, in those cases where evidence of the prior sexual behavior of the alleged victim is admissible under one of the exceptions set forth in subdivisions (c)(1) through (3) of the proposed Uniform Rule 412, the procedures set forth in subdivision (d) must be followed to protect the sensibilities of the parties involved in the disclosure of the evidence to determine its admissibility. The procedural rules require the giving of notice to all concerned persons, holding an *in camera* hearing to determine the admissibility of the evidence, a finding that the evidence is relevant to a fact of consequence for which such evidence is admissible, a finding that the evidence is not substantially outweighed by the danger of unfair prejudice and the giving of an instruction on the limited admissibility of the evidence as provided in Uniform Rule 105. All of the States except **Arizona**, **Maine**, **Montana**, **Nebraska**, **North Dakota**, **South Carolina** and **West Virginia** have varying provisions governing the procedure to be followed in determining the admissibility of sexual conduct or behavior under the recognized exceptions to the rule. The procedural rules recommended by the Drafting Committee in proposed Uniform Rule 412(d) are also in accord with the procedural rules recommended by the Drafting Committee to govern the admissibility of sensitive other crimes, wrongs, or acts evidence under proposed Uniform Rule 404(b).

ARTICLE V

PRIVILEGES

RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED. Except as otherwise provided by constitution or statute or by these or other rules promulgated by [the Supreme Court of this State], no person has a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

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

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

Reporter's Note

Recommended non-substantive stylistic changes have been made in Uniform Rule 501.

The only substantive changes in Article V are in the proposed amendment of Uniform Rule 502(a)(4) broadening the . . . definition of a "representative of the lawyer" and the amendment of Uniform Rule 503 to broaden the physician and psychotherapist privilege to include a mental health provider privilege.

The Drafting Committee is also aware of movements at both the federal Congressional and state levels to establish a parent-child privilege. Senator Leahy has sponsored S.1721, introduced in the Senate on March 6, 1998, requiring, *inter alia*, the Judicial Conference of the United States to review, report and propose amendments to Congress regarding the amendment of the Federal Rules of Evidence to guarantee the confidentiality of communications by a child to the child's parent in proceedings that do not involve allegations of violent, or drug trafficking, conduct. H.R. 3577 was also introduced in the House of Representatives on March 27, 1998 to enact legislation to provide for a parent-child testimonial privilege in federal civil and criminal proceedings. At both the federal and state level, the following eight Courts of Appeals addressing the issue have declined to recognize a parent-child privilege: **2d Circuit**, *In re Erato*, 2 F.3d 11 (2d Cir. 1993); **4th Circuit**, *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982); **5th Circuit**, *In re Grand Jury Proceedings (Starr)*, 647 F.2d 511 (5th Cir. Unit A May

1981) (per curiam); *Port v. Heard*, 764 F.2d 423 (5th Cir. 1985); **6th Circuit**, *United States v. Ismail*, 756 F.2d 1253 (6th Cir. 1985); **7th Circuit**, *United States v. Davies*, 768 F.2d 893 (7th Cir.), *cert. denied sub nom. Kaprelian v. United States*, 474 U.S. 1008, 106 S.Ct. 533, 88 L.Ed.2d 464 (1985); **9th Circuit**, *United States v. Penn*, 647 F.2d 876 (9th Cir.) (en banc), *cert. denied*, 449 U.S. 903, 101 S.Ct. 276, 66 L.Ed.2d 134 (1980); **10th Circuit**, *In re Grand Jury Proceedings (John Doe)*, 842 F.2d 244 (10th Cir.), *cert. denied*, 488 U.S. 894, 109 S.Ct. 233, 102 L.Ed.2d 223 (1988); and **11th Circuit,** *In re Grand Jury Subpoena (Santarelli)*, 740 F.2d 816 (11th Cir.) (per curiam), *reh'g denied*, 749 F.2d 722 (11th Cir. 1984). Moreover, the remaining federal Courts of Appeals that have not explicitly rejected the privilege have not chosen to recognize the privilege either.

At the state level the following state courts have refused to recognize a parent-child privilege: **Arizona**, *Cf. Stewart v. Superior Court, 163 Ariz. 227, 787 P.2d 126 (App. 1989)*; **California**, *In re Terry W., 59 Cal.App.3d 745, 130 Cal. Rptr. 913 (1976)*; **Florida**, *Marshall v. Anderson, 459 So.2d 384 (Fla.Dist.Ct.App. 1984)*; **Illinois**, *People v. Sanders, 99 Ill.2d 262, 75 Ill.Dec. 682, 457 N.E.2d 1241 (1983)*; **Indiana**, *Gibbs v. State, 426 N.E.2d 1150 (Ind.Ct.App. 1981)* and *Cissna v. State, 170 Ind.App. 437, 352 N.E.2d 793 (1976)*; **Iowa**, *State v. Gilroy, 313 N.W.2d 513 (Iowa 1981)*; **Maine**, *State v. Willoughby, 532 A.2d 1020, 1022 (Me. 1987)* and *State v. Delong, 456 A.2d 877 (Me. 1983)*; **Massachusetts**, *Three Juveniles v. Commonwealth, 390 Mass. 357, 455 N.E.2d 1203 (1983), cert. denied sub nom. Keefe v. Massachusetts, 465 U.S. 1068, 104 S.Ct. 1421, 79 L.Ed.2d 746 (1984)*; **Michigan**, *State v. Amos, 163 Mich.App. 50, 414 N.W.2d 147 (1987)* (per curiam); **Mississippi**, *Cabello v. State, 471 So.2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S.Ct. 2291, 90 L.Ed.2d 732 (1986)*; **Missouri**, *State v. Bruce, 655 S.W.2d 66, 68 (Mo.Ct.App. 1983)*; **New Jersey**, *In re Gail D., 217 N.J.Super. 226, 525 A.2d 337 (App.Div. 1987)*; **Oregon**, *State ex rel. Juvenile Dept. of Lane County v. Gibson, 79 Or.App. 154, 718 P.2d 759 (1986)*; **Rhode Island**, *In re Frances J., 456 A.2d 1174 (R.I. 1983)*; **Texas**, *De Leon v. State, 684 S.W.2d 778 (Tex.Ct.App. 1984)*; **Vermont**, *In re Inquest Proceedings, 676 A.2d 790 (Vt. 1996)*; and **Washington**, *State v. Maxon, 110 Wash.2d 564, 756 P.2d 1297 (1988)*.

New York is the only State which has judicially-recognized a parent-child privilege. *See In re Mark G.*, 65 A.D.2d 917, 410 N.Y.S.2d 464 (1978); *In re A & M*, 61 A.D.2d 426, 403 N.Y.S.2d 375 (1978); *In re Ryan*, 123 Misc.2d 854, 474 N.Y.S.2d 931 (N.Y.Fam.Ct. 1984); *People v. Fitzgerald*, 101 Misc.2d 712, 422 N.Y.S.2d 309 (Westchester County Ct. 1979). The privilege so-recognized is essentially derived from New York's constitution. The New York Appellate Division explained that the privilege it recognized was rooted in the constitutional right to privacy:

> Notwithstanding the absence of a statutory privilege, we may, nevertheless, draw from the principles of privileged communications in determining in what manner the protection of the *Constitution* should be

> extended to the child-parent communication . . . . We conclude . . . . that communications made by a minor child to his parents within the context of the family relationship may, under some circumstances, lie within the 'private realm of family life which the state cannot enter.'

In re A & M, 403 N.Y.S.2d at 381 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944)) (emphasis added); *see also People v. Harrell*, 87 A.D.2d 21, 450 N.Y.S.2d 501, 504 (1982) (privilege is not rooted in common law, statute, or the 6th amendment).

New York courts apply the parent-child privilege sparingly. For example, New York's Court of Appeals declined to apply the parent-child privilege to a murder confession made by a 28 year old defendant to his mother, due to the defendant's age; lack of confidentiality; subject of the conversation; and the fact that the mother had already testified in front of grand jury proceeding. *See People v. Johnson*, 84 N.Y.2d 956, 620 N.Y.S.2d 822, 822, 644 N.E.2d 1378, 1378 (1994). However, the privilege has only been recognized by inferior New York courts.

Idaho and Minnesota are the only States which have recognized a variant of the parent-child privilege through statute. *See* Idaho Code § 9-203(7) (1990 & Supp. 1995); Minn.Stat. § 595.02(1)(j) (1988 & Supp. 1996).

Massachusetts law prevents a minor child from testifying against a parent in a criminal proceeding. However, the statute does not go so far as to recognize a parent-child testimonial privilege. First, the Massachusetts statute does not create a testimonial privilege. Rather, it is in the nature of a witness-disqualification rule. Second, the testimonial bar is not of common-law origin but is statutory. Finally, the statute only bars a minor child, under certain circumstances, from testifying against a parent, and does not extend to children of all ages in all circumstances. *See* Mass. Gen. L. ch. 233, § 20 (1986 & Supp. 1996).

Accordingly, the Drafting Committee is not recommending adoption of a parent-child privilege in light of the almost uniform rejection of the privilege at both the federal and state levels.

There has also been some discussion at the federal level to amend the *Federal Rules of Evidence* to include a privilege for confidential communications from sexual assault victims to their therapists or counselors. This follows the recent decision of the Supreme Court of the United States recognizing a privilege for confidential statements made to a licensed clinical social worker in a therapy session. *See Jaffee v. Redmond, ___ U.S. ___, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996)*, discussed in the **Reporter's Note** to Uniform Rule 503, *infra*. However, the exact parameters of the privilege established in the *Jaffee* case are yet to be developed. Nevertheless, the Drafting

Committee is recommending a narrowly drawn "mental health provider" privilege in its proposal to amend Uniform Rule 503. It is the belief of the Drafting Committee that confidential communications from sexual assault victims to their therapists or counselors would fall within this privilege. *See* the black letter and **Reporter's Note** to Uniform Rule 503, *infra*.

The Drafting Committee is also aware of numerous other privileges which are either not well-recognized or seldom of consequence in discovery practice. These may include law enforcement investigative files, grand jury privileges, privileges for accountants, bankers, brokers, stenographers, or telegraphers, employer records, blood donor records and criminal incident reports. However, with the exception of broadening the physician-patient privilege to include "mental health providers" no further revisions in the *Uniform Rules of Evidence* are recommended. The Drafting Committee recommends only retaining the privileges traditionally recognized by statute or judicial decision that are embraced in Article V. As observed by one commentator,

> Privileges always stand in the way of relevant information. If the information were not relevant, the issue of privilege need never be reached, for one cannot discover totally irrelevant information. Because privilege cases obstruct truth seeking, courts do not always view them as absolutes but use certain standards in applying them. *See* Simpson, Reagan Wm., Civil Discovery and Depositions §§ 3.18-3.39 (2d ed. 1994).

Accordingly, the myriad of miscellaneous privileges not addressed in Article V, are more rationally respected in the discovery process and handled by protective orders rather than by evidentiary rules.

RULE 502. LAWYER-CLIENT PRIVILEGE.

(a) Definitions. As used in this rule:

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

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

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

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

(5) A communication is "confidential" if 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.

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

and concerning a matter of common interest therein, (iv) between representatives of the client or between the client and a representative of the client, or (v) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. ~~The~~ 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) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known ~~to be~~ was a crime or fraud~~.~~;

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

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

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

(5) Joint ~~Clients~~ clients. As to a communication relevant to a matter of common interest between or among ~~2~~ 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

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

[As amended 1986.]

Reporter's Note

The **Comment** to Rule 502 reads as follows:

Comment

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

Comment to 1986 Amendment

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

Recommended non-substantive stylistic changes have been made in the revision of Uniform Rule 502.

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

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

RULE 503. PHYSICIAN, ~~AND~~ PSYCHOTHERAPIST AND MENTAL HEALTH PROVIDER-PATIENT PRIVILEGE.

(a) Definitions. ~~As used in~~ In this rule:

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

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

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

[(4) "Mental-health provider" means a person [or entity] 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.]

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

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

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

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

(1) Proceedings for hospitalization. ~~There is no privilege under this rule for communications relevant~~ Relevant to an issue in proceedings to hospitalize ~~the~~ a patient

for mental illness, if the [physician] psychotherapist, [or mental-health provider], in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.;

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

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

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

(5) Commission of crime or physical injury. If the services of the [physician,] psychotherapist, [or 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's self or others;

(6) Victim of child, elder, handicapped, or mental patient abuse or neglect. Relevant to a patient being the perpetrator or victim of neglect or abuse of a child, elder, handicapped individual, or mental patient;

(7) Competency of [physician,] psychotherapist, [or mental-health provider]. Relevant to an issue in proceedings challenging the competency of the [physician,] psychiatrist, [or mental-health provider]; or

(8) Breach of duty by the [physician,] psychotherapist, [mental health provider,] or patient. Relevant to a breach of duty by the [physician,] psychiatrist, [or mental-health provider] to a patient, or by the patient to the [physician,] psychiatrist, [or mental-health provider.]

Reporter's Note

The **Comment** to existing Rule 503 reads as follows:

Comment

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

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

This proposal for amending Rule 503 eliminates the gender-specific language in subdivisions (b), (c) and (d) and includes recommended stylistic changes. These are technical and no change in substance is intended.

As to substance, this proposal for amending Rule 503 is the outgrowth of the belief of the Drafting Committee that some form of a "licensed social worker" privilege should be incorporated within the *Uniform Rules of Evidence* and comport, at least in part, with the recent decision of the Supreme Court of the United States in *Jaffee v. Redmond, ___ U.S. ___, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996),* and with a majority of the jurisdictions in the United States recognizing what may be described generally as a "licensed social worker" privilege.

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

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

opinion of the dissenting judge in the *Pittsburgh* case arguing that there should be a social worker-patient privilege.

First, the amendments to Rule 503 respond to the views expressed by the Drafting Committee that a separate rule creating a "licensed social worker" privilege is unnecessary and is more appropriately incorporated within the existing Physician and Psychotherapist-Patient Privilege. At the same time, flexibility is preserved by bracketing the provisions relating to a mental health provider.

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

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

However, the Drafting Committee believes that a Uniform Rule establishing such a broadly defined social worker privilege would be fraught with interpretive difficulties and unnecessarily interfere with litigation in an evidentiary system based largely upon "the fundamental principle that "the public . . . has a right to every . . . [person's] evidence" and that testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *See Trammel v. United States, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980)*, together with *United States v. Nixon, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974)*. Accordingly, proposed Uniform Rule 503 narrows considerably the scope of many of the so-called "licensed social worker" privileges recognized in the foregoing states by including within

the privilege only communications relating to the "treatment of a mental or emotional condition, including alcohol or drug addiction."

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

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

The Drafting Committee believes that the exceptions set forth in subdivision (d) are, for the most part, generic in nature and, in most cases, the more specific exceptions to the "social worker privilege" recognized in the several states will be subsumed under one, or the other, of these more general exceptions proposed by the Drafting Committee. For example, evidence concerning the blood alcohol level, or intoxication, of a patient is a recognized exception in some jurisdictions. At the same time, evidence of this type will either be placed in issue, or be relevant to the commission of a crime, and would come within the exception set forth in subdivision (d)(3). Similarly, the exception recognized in some states for disclosure of privileged matter in proceedings for hospitalization would fall within subdivisions (d)(1) and (2) of the proposed exceptions to the privilege. At the same time, the existing exceptions in Uniform Rule 503 have been broadened to include communications that have not historically been recognized as exceptions, such as the competency of health providers or breach of duty, as in the case of subdivisions (d)(7) and (8).

The Drafting Committee is also proposing that communications relating to the competency, or breach of duty, recognized in some states as exceptions to the "social

worker privilege" be expanded to include not only mental health providers, but physicians and psychotherapists as well since such exceptions are equally applicable to these health providers. *See*, in this connection, subdivisions (d)(7) and (8).

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

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

At the suggestion of the Drafting Committee, subdivision (d)(4) has been added as an additional exception to the privilege.

With respect to subdivision (d)(5), the exception is drawn from Uniform Rule 502(d)(1) of the Lawyer-Client Privilege and includes not only "planning to commit," but "committing" a crime, fraud, or physical injury to comport with the recommendation of the Drafting Committee.

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

Subdivisions (d)(7) and (8) create exceptions to the general rule of the privilege where the competency of, or breach of duty by, the physician, psychiatrist, or mental-health provider are placed in issue.

Statutory exceptions to the physician-patient privilege similar either to subdivisions (d)(7) and (8), or both, have been adopted in the following states: **Colorado**, Colo. Rev. Stat. § 13-90-107(d)(1) provides that the physician-patient privilege does not apply to " . . . any cause of action arising out of or connected with physician's or nurse's care or treatment . . . ."; **Kansas**, Kan. Stat. Ann. § 60-427, establishing a physician-patient privilege, provides in Subd. (d) that "[t]here is no privilege under this section in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party."; **Michigan**, Mich. Comp.Laws § 600.2157, Subd. (5) provides that there is no privilege under the physician-patient privilege when the patient brings a malpractice action against the physician; **Pennsylvania**, Pa. Cons. Stat. § 5929 provides that there is no physician-patient privilege when the patient brings an

action against the physician "for damages on account of personal injuries."; **Texas**, Tex. R. Evid. 509(e)(1) provides that there is no physician-patient privilege when the proceedings are brought by a patient against the physician, "including, but not limited to malpractice proceedings, and "any license revocation proceeding in which the patient is a complaining witness . . . ."; and **Puerto Rico**, P.R.R. Evid. 26(c)(7), providing that there is no physician-patient privilege if "[t]he communication is relevant to an issue of breach of duty arising out of the physician-patient relationship."

Statutory exceptions to the psychotherapist-patient privilege similar either to subdivisions (d)(7) and (8), or both, have been adopted in the following states: **Alabama**, Ala. R. Evid. 503(d)(4) provides that "[t]here is no privilege under this rule as to an issue of breach of duty by the psychotherapist to the patient or by the patient to the psychotherapist."; **Maryland**, Md. Code Ann., Cts. & Jud. Proc. § 9-109 provides that there is no privilege for communications between a patient and psychiatrist or psychologist if "the patient, an authorized representative of the patient, or the personal representative of the patient makes a claim against the psychiatrist or licensed psychologist for malpractice."; and **Massachusetts**, Mass. Gen. Laws ch. 233, § 20(B) provides, in the case of the psychotherapist-patient privilege, that there is no privilege "[i]n any proceeding brought by a patient against the psychotherapist, and in any malpractice, criminal or license revocation proceeding, in which disclosure is necessary or relevant to the claim or defense of the psychotherapist."

Similar statutory exceptions to both the physician-patient and psychotherapist-patient privilege have been adopted in the following states: **Alaska**, Alaska R. Evid. 504(d)(3) provides that "[t]here is no privilege under this rule . . . [a]s to communication relevant to an issue of breach, by the physician, or by the psychotherapist, or by the patient, of a duty arising out of the physician-patient or psychotherapist relationship"; **California**, Cal. Evid. Code §§ 996, 1016, applying respectively to the physician-patient and psychotherapist-patient privileges, provide that "[t]here is no privilege . . . as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by: (a) [t]he patient; (b) [a]ny party claiming through or under the patient; (c) [a]ny party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or (d) [t]he plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury of death of the patient"; **Hawaii**, Haw. R. Evid. 504 and 504.1(d)(4), provide respectively, in the case of both the physician-patient and the psychotherapist-client privilege, that "[t]here is no privilege under this rule in any administrative or judicial proceeding in which the competence, practitioner's license, or practice of the physician [psychotherapist] is at issue, provided that the identifying data of the patients whose records are admitted into evidence shall be kept confidential unless waived by the patient. The administrative agency, board or commission may close the proceeding to the public to protect the confidentiality of the patient"; **Mississippi**, Miss. R. Evid. 503 provides that there is no privilege under the physician and psychotherapist-patient privilege "as to an issue of

breach of duty by the physician or psychotherapist to his patient or by the patient to his physician or psychotherapist"; and **Texas**, Tex. R. Evid. 509(e)(1) and 510(d)(1) provides that in civil actions there is no physician-patient or mental health professional-patent privilege when the proceedings are brought by the patient against the physician or mental health professional "including but not limited to malpractice proceedings, and in any license revocation proceeding in which the patient is a complaining witness and in which disclosure is relevant to the claims or defense of the physician."

Similar statutory exceptions to a health care practitioner or provider have been adopted in the following states: **Connecticut**, Conn. Stat. Ann. § 52-1460(b) provides that the "[c]onsent of the patient or his authorized representative shall not be required for the disclosure of such [privileged] communication or information . . . (2) by a physician, surgeon or other licensed health care provider against whom a claim has been made, or there is a reasonable belief will be made, in such action or proceeding, to his attorney or professional liability insurer or such insurer's agent for use in the defense of such action or proceeding"; **Florida**, Fla. Stat. Ann. C. 455, § 455.667(6) provides that "[e]xcept in a medical negligence action or administrative proceeding when a health care practitioner or provider is or reasonably expects to be named as a defendant information disclosed to a health care practitioner by a patient is confidential . . . ."; **Illinois**, 735 Ill. Comp. Stat § 5/8-802(2), in the case of a healthcare practitioner and patient privilege, that there is no privilege under the rule "in actions, civil or criminal, against the healthcare practitioner for malpractice (in which instance the patient shall be deemed to have waived all privileges relating to physical or mental condition)"; **Louisiana**, La. Code Evid. art 510(F) and (b)(2)(j) providing that there is no privilege in a medical malpractice action brought by the patient against a health care provider"; **Minnesota**, Minn. Stat. § 595.02, Subd. (5) provides that "[a] party who commences an action for malpractice, error, mistake or failure to cure, whether based on contract or tort, against a health care provider on the person's own behalf or in a representative capacity, waives in that action any privilege existing under subdivision 1, paragraphs (d) and (g), as to any information or opinion in the possession of the health care provider who has examined or cared for the party or other person whose health or medical condition has been placed in controversy in the action"; **Oklahoma**, Okl. Stat. Ann. Tit. 76 § 19(B) provides that "[I]n cases involving a claim for personal injury or death against any practitioner of the healing arts or a licensed hospital, arising g out of patient care, where any person has placed the physical or mental condition of that person in issue by the commencement of any action, proceeding or suit for damages . . . that person shall be deemed to waive any privilege granted by law concerning any communication made to a physician or health care provider . . . or any knowledge obtained by such physician or health care provider by personal examination of any such patient . . . [if] it is material and relevant to an issue therein, according to existing rules of evidence"; and **Rhode Island**, R.I. Stat. Tit. 5, ch. 37.3 § 5-37.3-49(b) provides that "[n] consent for release or transfer of confidential health care information is required . . . (7) To a malpractice insurance carrier or lawyer if the health care provider has reason to anticipate a medical liability action; or (8) To a

court or lawyer or medical liability insurance carrier if a patient brings a medical liability action against a health care provider."

A broadly defined privilege applying to a physicians, dentists, or licensed psychologists-patient privilege has adopted an exception similar to subdivisions (d)(7) and (8) in the following states: **Mississippi**, Miss. Code § 13-1-21(4) provides: "In any action commenced . . . against a physician, hospital, hospital employee, osteopath, dentist, nurse, pharmacist, podiatrist, optometrist, or chiropractor for professional services rendered or which should have been rendered, the delivery of written notice of such claim or the filing of such an action shall constitute a waiver of the medical privilege and any medical information relevant to the allegation upon which such cause of action or claim is based shall be disclosed upon the request of the defendant, or his or her counsel; and **Ohio**, Ohio Rev. Code §§ 2317.02 and 2732.19 provides that there is no privilege as to any communication between a physician, dentist, or licensed psychologist and patient as to any civil claim, including malpractice, filed against the health provider."

A statutory exception to the licensed social-worker-patient privilege similar to subdivisions (d)(7) and (8) has been adopted in the following states: **Idaho**, Idaho R. Evid. 518 provides, in the case of the licensed social-worker-client privilege, that "the client waives the privilege by bringing charges against the licensee"; **Kansas**, Kan. Stat. Ann. § 65-6315(a) provides that a "person waives the privilege by bringing charges against the licensed social worker, but only to the extent that such information is relevant under the circumstances"; **Oklahoma**, Okla. Stat. Tit. 59 § 1261.6 provides that the social worker privilege is waived when a person brings charges against the licensed person; and **South Carolina**, S.C. Code Ann. tit. 40, c. 55 & c. 75 provides that a licensed social worker, or nurse "may reveal . . . confidences reasonably necessary to establish or collect his fee or to defend himself or his employees against an accusation of wrongful conduct."

In **Hawaii**, a similar exception exists as to a "victim-counselor privilege." Haw. R. Evid. 505.5(d)(3) provides that "[t]here is no privilege under this rule . . . [a]s to a communication relevant to an issue of breach of duty by the victim counselor or victim counseling program to the victim. Haw. R. Evid. 505.5(d)(8) also contains an exception for proceedings against a victim counselor which is virtually identical to the exception in Haw. R. Evid. 504 and 504.1(d)(4) applying to physicians and psychotherapists.

Some states apply an exception comparable to subdivision (d)(3) to waive the physician-patient privilege in medical malpractice actions against physicians. These are: **Arkansas**, *King v. Ahrens, M.D., 798 F.Supp. 1371 (W.C.Ark. 1992)* (interpreting Ark. R. Evid. 503(d)(3) providing that there is no privilege under this rule as to medical records or communications relevant to an issue of the physical, mental or emotional condition in which he relies upon the condition as an element of his claim or defense . . . ."); **New Jersey**, *Stigliano v. Connaught Lab., Inc., 140 N.J. 305, 658 A.2d 715*

(1995) (broadly interpreting the exception to the physician-patient privilege of N.J. R. Evid. 506 and N.J. Stat. Ann. § 2A:84A-22.4 to apply the waiver not only to the subject of the litigation, but in regard to all of the physician's knowledge concerning the patient's physical condition inquired about. *But see, State v. L.J.P., Sr., 270 N.J. Super. 429, 637 A.2d 532 (1994),* giving greater scope and protection to the psychologist-patient privilege of N.J. R. Evid. 505 and N.J. Stat. Ann. § 45:14B-28 by requiring a showing of legitimate need for the shielded evidence, its materiality to a trial issue, and its unavailability from less intrusive sources); **Virginia**, *Fairfax Hospital v. Curtis, 492 S.E.2d 642 (Va. 1997)* (interpreting Va. Code § 8.01-399 providing for a privilege in a civil action as to information acquired by a "duly licensed practitioner of any branch of the healing arts . . . in attending, examining or treating the patient in a professional capacity . . . [except] when the physical or mental condition of the patient is at issue in such action," but only if the medical condition is "manifestly placed at issue" in the civil proceedings); **Texas**, *Horner v. Rowan Companies, Inc., 153 F.R.D. 597 (S.D. Tex. 1994)* and *McGowan v. O'Neil, 750 S.W.2d 884 (Tex. 1988)* (interpreting the predecessor to Tex. R. Evid. 509(e)(4), providing that in civil proceedings there is no privilege "as to a communication relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense"); and **Wisconsin**, *Steinberg v. Jensen, 194 Wis.2d 439, 534 N.W.2d 361 (1995)* (interpreting the exception of Wis. St. Ann. § 905.04(4)(c) providing that "[t]here is no privilege . . . as to communications [that are] relevant to or within the scope of discovery . . . of the physical, mental, or emotional condition of a patient" in any proceedings in which the condition is "an element of the patient's claim or defense."

In contrast, other state jurisdictions exempt privileged communications by judicial decision on grounds of waiver. These include: **Alabama**, *Mull v. State, 448 So.2d 952 (Ala. 1984)* (waiver of patient's cause of action against a physician for breach of fiduciary duty and breach of an implied contract for physician's unauthorized disclosure to a hospital of information acquired during the physician-patient relationship which formed the basis for the patient's malpractice action against the hospital); **Arizona**, *Bain v. Superior Court, 714 P.2d 824 (Ariz. 1986)* (implied waiver of psychologist-patient privilege upon filing a medical malpractice action against a surgeon extends only to privileged communications concerning the particular medical condition placed in issue by the patient) and *Duquette v. Superior Court, 778 P.2d 634 (Ariz. 1989)* (implied waiver in medical malpractice action only of right to object to discovery of relevant medical information sought through formal methods of discovery); **Colorado**, *Colo. Rev. Stat. § 13-90-107(D)(1)*, supra, and *Samms v. District Court, Fourth Judicial District of Colorado, 908 P.2d 520 (1995)* (implied waiver of physician-patient privilege in medical malpractice action as to information obtained by physician in diagnosing and treating patient for myocardial ischemia); **Georgia**, *See Ga. Code Ann. § 38-418* providing that a physician is not required to do so by subpoena, court order, or upon authorization by the patient, interpreted in *Orr v. Stewart, 292 S.E.2d 548 (1982)*

(upon the filing of an action for malpractice against a treating physician the patient waives his qualified right to privacy implicit in the Hippocratic Oath that a physician has a professional and contractual duty to protect the privacy of his patients); **Indiana**, *Becker v. Plemmonsi, 598 N.E.2d 564 (Ind. 1992)* (when a patient places a condition in issue in a medical malpractice action the patient waives the physician-patient privilege only as to all matters historically or causally related to that condition); **Missouri**, *State ex rel. Stecher v. Dowd, 912 S.W.2d 462 (Mo. 1995)* (the physician-patient privilege codified under *Mo. Rev. Stat. § 491.060(5)* is waived only as to the physical condition placed in issue by the patient under the pleadings); **Montana** *Callahan v. Burton, 487 P.2d 515, 157 Mont. 513, 487 P.2d 515 (1971)* (when a patient places a mental or physical condition in issue in a medical malpractice action the patient waives the physician-patient privilege as to the entire transaction, including interviews by counsel for the defendant of other treating physicians without the presence of counsel for the plaintiff. *But see, Japp v. District Court, 191 Mont. 319, 623 P.2d 1389 (1981),* overruling the *Callahan* case by holding that the District Court does not have the power under the rules of discovery to order private interviews between counsel for one party and possible adversary witnesses, including experts, for the other party); **New Hampshire** *Nelson v. Lewis, 130 N.H. 106, 534 A.2d 720 (987)* (a patient waives the right to confidentiality by placing the patient's medical condition in issue, but only as to that information given in the course of treatment which is relevant to the plaintiff's claim); **New York**, *Spratt v. Rochelson, M.D., 164 Misc.2d 535, 625 N.Y.S.2d 827 (1994)* and *Tiborsky v. Martorella, 188 A.D.2d 795, 591 N.Y.S.2d 547 (1992)* (waiver of infant's physician-patient privilege by placing infant's physical condition in issue in a medical malpractice action); **North Carolina**, *Crist v. Moffatt, M.D., 326 N.C. 326, 389 S.E.2d 41 (1990)* (a patient may impliedly waive the physician-patient privilege in a medical malpractice action by the conduct of the patient as determined by the facts and circumstances of the particular case such as calling the physician to testify concerning the patient's physical condition, failing to object when the opposing party calls the physician to testify, or testifying concerning a communication between the patient and the physician); **North Dakota**, *Sagmiller v. Carlsen, M.D., 219 N.W.2d 885 (N.D. 1974)* (waiver of physician-patient privilege when patient puts physical condition in issue by bringing a medical malpractice action); **Ohio**, *Humble v. Dobson, 1996 WL 629535 (Ohio App. 2 Dist.)* (patient waives physician-patient privilege under statutory medical malpractice exception as to communications related causally to physical or mental injuries that are relevant to issues in the medical claim, action for wrongful death, civil action, or other authorized claim); **Pennsylvania**, *Moses v. McWilliams, 379 Pa. Super. 150, 549 A.2d 950 (1988)* (waiver of physician-patient privilege when patient puts physical condition in issue by voluntarily instituting a medical malpractice action); **Rhode Island**, *Lewis v. Roderick, 617 A.2d 119 (R.I. 1992)* (patient waives privilege where patient brings a medical liability action against a health care provider under statutory exception); **Washington**, *Christensen v. Munsen, 123 Wash.2d 234, 867 P.2d 726 (1994)* and *Carson v. Fine, 123 Wash.2d 206, 867 P.2d 610 (1994)* (pursuant to the Rev. Code Wash. § 5.60.060(4)(b) the physician-patient privilege is deemed waived

ninety days after the filing of a medical malpractice action); and **District of Columbia**, *Richbow v. District of Columbia, 600 A.2d 1063 (D.C. Ct. App. 1991)* (there is an implied waiver in a medical malpractice action of the physician-patient privilege of D.C. Code 1981, § 14-307(a) when the patient discloses, or permits disclosure of, information gained by the physician during the physician-patient relationship).

The following State provides for waiver of the physician-patient or psychotherapist-patient privilege through voluntary disclosure of the communication upon the holder of the privilege offering any person as a witness who testifies as to the medical or emotional condition: **Oregon**, *State ex rel. Grimm v. Ashmanskas, 298 Or. 206, 690 P.2d 1063 (1984)* (interpreting Or. Evid. Code § 511). *See also,* **Florida**, *H.J.M. v. B.R.C., 603 So.2d 1331 (Fla. 1st DCA 1992)* (the psychotherapist-patient privilege is waived by the voluntary disclosure by the patient of a communication which is privileged).

In those states where the physician-patient privilege is not recognized disclosure of information relevant to the health and medical history of a patient in a malpractice action is not barred. *See, for example,* **Florida**, *Coralluzzo By and Through Coralluzzo v. Foss, 450 So.2d 858 (Fla. 1984)*; **New Mexico**, *Trujillo v. Puro, M.D., 101 N.M. 408, 683 P.2d 963 (1984)*; **South Carolina**, *Felder v. Wyman, M.D., 139 F.R.D. 85 (D.C. S.C. 1991)*; and **Texas**, *Tex. R. Evid. 509(b)* (there is no physician-patient privilege in criminal proceedings except as to communications to facilitate treatment for alcohol or drug abuse).

RULE 504. HUSBAND-WIFE PRIVILEGE.

(a) Marital communications. An individual has a privilege to refuse to testify ~~or to~~ and prevent ~~his or her~~ 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, conservator, or personal representative. A communication is confidential if it is made privately by an individual to ~~his or her~~ the individual's spouse and is not intended for disclosure to any other person.

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

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

(1) Civil proceedings. ~~in~~ In any civil proceeding in which the spouses are adverse parties~~.~~;

(2) Criminal proceedings. ~~in~~ In any criminal proceeding in which a prima facie showing is made that the spouses acted jointly in the commission of the crime charged~~, or~~;

(3) Crime against another. ~~in~~ In any proceeding in which one spouse is charged with a crime or tort against the person or property of ~~(i)~~ the other, ~~(ii)~~ a minor child of either, ~~(iii)~~ an individual residing in the household of either, or ~~(iv)~~ a third person if the crime or tort is committed in the course of committing a crime or tort against ~~any of the individuals previously named in this sentence~~ the other spouse, a minor child of either spouse, or an individual residing in the household of either spouse; or

(4) Other proceedings. ~~The court may refuse to allow invocation of the privilege in~~ In any other proceeding in the discretion of the court if the interests of a minor child of either spouse may be adversely affected.

Reporter's Note

The **Comment** to Rule 504 reads as follows:

Comment to 1986 Amendment

The previous rule provided for a "marital communication" privilege, as does the new rule. However, it is sometimes difficult to determine the boundaries of what constitutes a communication (e.g., the spouse who merely is present and sees a crime being committed by the

other spouse). Thus, there are times when a privilege against testifying ought to obtain with or without the existence of a marital communication. The new rule reiterates the provision with regard to marital communications. However, a new privilege dealing with spousal testimony in a criminal proceeding has been added. This new rule also works to permit the testifying spouse to assert the marital communication privilege on behalf of an accused spouse, when appropriate, as could be done under the old rule.

Under the marital communication privilege, the communicating spouse holds the privilege. And, the rule is applicable whether or not the communicating spouse is a party to the proceeding. However, this privilege is not limited to criminal cases as under the previous rule. It would also apply in civil cases. The underlying rationale – that of encouraging or at least not discouraging communications between spouses – applies in both types of cases.

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

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

This proposal for amending Rule 504 eliminates the gender-specific language in subdivision (a) and makes recommended stylistic changes. These are technical and no change in substance is intended.

There are no other proposals for amending renumbered Uniform Rule 504.

RULE 505. RELIGIOUS PRIVILEGE.

(a) Definitions. As used in this rule:

(1) Cleric. ~~A "clergyman" is~~ "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 ~~person~~ individual consulting ~~him~~ the cleric.

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

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

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

Reporter's Note

This proposal for amending renumbered Rule 506 eliminates the gender-specific language in subdivisions (b) and (c), substitutes the word "capacity" for "character" and includes recommended stylistic changes. These are technical and no change in substance is intended.

Uniform Rule 505, as did Rule 29 of the *Uniform Rules of Evidence of 1953*, provides that the communicant is the holder of the privilege, and that the cleric can claim the privilege only on behalf of the communicant. The question was raised at the Drafting Committee meeting on October 17-19, 1997 as to whether Uniform Rule 505 should be

amended to provide that both the communicant and the cleric should be a holder of the privilege.

A survey of the state law discloses that almost every State recognizes the religious privilege, usually by statute, but the forms of the privilege do differ from State to State . A number of States, as in the case of Uniform Rule 505, confer the privilege on the communicant, but permit the cleric to claim the privilege on behalf of the communicant. These are: **Alaska**, *Alaska R. Evid. 506*; **Arkansas**, *Ark. R. Evid. 505*; **Delaware**, *Del. R. Evid. 505*; **Florida**, *Fla. Stat. Ann. § 90.505 (West 1979)*; **Hawaii**, *Haw. R. Evid. 506*; **Kansas**, *Kan. Stat. Ann. § 60-429 (1983)*; **Maine**, *Me. R. Evid. 505*; **Mississippi**, *Miss. Code Ann. § 13-1-22 (Supp. 1992)*; **Nebraska**, *Neb. R. Stat. § 27-506 (1989)* and *Neb. R. Evid. 506*; **New Mexico**, *N.M.R. Evid. § 11-506 (Michie 1986)*; **North Dakota**, *N.D.R. Evid. 505*; **Oklahoma**, *Okla. Stat. Ann. Tit. 12, § 2505 (West 1980)*; **South Dakota**, *S.D. Codified Laws Ann. §§ 19-13-16 to -18 (1987)*; **Texas**, *Tex. R. Evid. 505*; **Wisconsin**, *Wis. Stat. Ann. § 905.06 (West Supp. 1992)*; **Utah**, *Utah R. Evid. 503*; and **Virgin Islands**, *V.I.Code Ann. Tit. 5, § 857 (1967)*.

The following States prohibit disclosure by the cleric "without the consent" of the communicant: **Arizona**, *Ariz. Rev. Stat. Ann. § 12-2233 (1982)*; **Colorado**, *Colo. Rev. Stat. § 13-90-107 (Supp. 1992)*; **Idaho**, *Idaho Code § 9-203 (1990)*; **Louisiana**, *La. Rev. Stat. Ann. § 15:477 (West 1992)*; **Massachusetts**, *Mass. Gen. Laws Ann. Ch. 233, § 20A (West 1986)*; **Minnesota**, *Minn. Stat. Ann. § 595.02 (West 1988)*; **Montana**, *Mont. Code Ann. § 26-1-804 (1991)*; **Nevada**, *Nev. Rev. Stat. Ann. § 49.255 (Michie 1986)*; **Oregon**, *Or. Rev. Stat. § 40.260 (1988)*; **Pennsylvania**, *42 Pa. Cons. Stat. Ann. § 5943 (1982)*; **Rhode Island**, *R.I. Gen. Laws § 9-17-23 (1985)*; **Washington**, *Wash. Rev. Code Ann. § 5.60.060 (West Supp. 1992)*; **West Virginia**, *W.Va. Code § 57-3-9 (Supp. 1992)*; and **District of Columbia**, *D.C. Code Ann. § 14-309 (1989)*.

Similarly, the following States prohibit disclosure by the cleric unless the communicant "waives" the privilege: **Connecticut**, *Conn. Gen. Stat. Ann. § 52-146b (West 1991)*; **Iowa**, *Iowa Code Ann. § 622.10 (West Supp. 1992)*; **Kentucky**, *Ky. Rev. Stat. Ann. § 421.210 (Michie 1992)*; **New Hampshire**, *N.H. Rev. Stat. Ann. § 516:35 (Supp. 1991)*; **New York**, *N.Y. Civ. Prac. L. & R. 4505 (McKinney 1992)*; **North Carolina**, *N.C. Gen. Stat. § 8-53.2 (1991)*; **South Carolina**, *S.Car. Code Ann. § 19-11-90 (Law. Co-op. 1985)*; and **Tennessee**, *Tenn. Code Ann. § 24-1-206 (Supp. 1992)*.

In contrast, in the following States the statutes confer the privilege solely upon the cleric: **Georgia**, *Ga. Code Ann. § 24-9-22 (Michie Supp. 1992)*; **Illinois**, *Ill. Ann. Stat. Ch. 110, § 8-803 (Smith-Hurd 1984)*; **Indiana,** *Ind. Code Ann. § 34-1-14-5 (Burns Supp. 1992)*; **Maryland,** *Md. Cts. & Jud. Proc. Code Ann. § 9-111 (1984)*, interpreted in *McLain, 5 Maryland Practice, Maryland Evidence Stateand Federal 506.1 (1984)*, to the effect that the language in the statute, "A minister . . . may not be

compelled . . . .," vests the privilege in the cleric, rather than the communicant, by relying on the Illinois decision in *People v. Pecora, 107 Ill. App.2d 286, 246 N.E.2d 865, 873 (1969)* and the Fourth Circuit decision in *Seidman v. Fishburn-Hudgins Educ. Found., Inc., 724 F.2d 413, 415-416 (4th Cir. 1984)*; **Michigan**, *Mich. Stat. Ann. § 28.945(2) [M.C.L.A. § 767.5a(2)] (Law. Co-op Supp. 1992)*; **New Jersey**, *N.J. R. Evid. 37, N.J. Stat. Ann. 2A:84A-29,* construed in *State v. Szemple, 263 N.J. Super. 98, 622 A.2d 248 (1993)* to confer the privilege solely upon the cleric; **Vermont**, *Vt. Stat. Ann. Tit. 12, § 1607 (1973)*; and **Wyoming**, *Wyo. Stat. § 1-12-101 (1991).* On the other hand, in the following two States, in which the statutes do not expressly refer to the communicant, they have been construed to confer the privilege solely upon the cleric: **Missouri**, *Mo. Ann. Stat. § 491.060 (Vernon Supp. 1992)*, construed in *Eckmann v. Board of Educ. Of Hawthorne School District No. 17, 106 F.R.D. 70, 72-73 (E.D. Mo. 1985)* to confer the privilege solely upon the cleric; and **Virginia**, *Va. Code Ann. § 8.01-400 (Michie 1992)* and *Va. Code Ann. § 19.271.3 (Michie 1992)*, construed in *Seidman v. Fishburn-Hudgins Educ. Found., Inc., 724 F.2d 413, 415-416 (4th Cir. 1984)*, to confer the privilege solely upon the cleric.

Finally, in the following States, the privilege is conferred on both the cleric and the communicant: **Alabama**, *Ala. Code § 12-21-166 (1986)*; **California**, *Cal. Evid. Code, §§ 1030-34 (West 1966)*; and **Puerto Rico,** *P.R. R. Evid. 28.*

See further, State v. Szemple, 263 N.J. Super. 98, 622 A.2d 248 (1993), containing an excellent summary of the status of the law concerning the holder of the religious privilege in the several States. All fifty States recognize the religious privilege, but only a small minority make the cleric a holder of the privilege.

As a result of the foregoing survey of state law, the Drafting Committee does not recommend a revision of Rule 505 to include the cleric as the holder of the religious privilege.

RULE 506. POLITICAL VOTE.

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

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

Reporter's Note

This proposal for amending renumbered Rule 506 eliminates the gender-specific language in subdivision (a) and incorporates recommended stylistic changes. These are technical and no change in substance is intended.

There are no other proposals for amending Uniform Rule 506.

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

Reporter's Note

This proposal for amending Uniform Rule 507 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

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 recognized as created by laws of State. No other governmental privilege is recognized except as created by the ~~Constitution~~ constitution or statutes of this State.

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

Reporter's Note

Headings for subdivisions (a) and (b) of Uniform Rule 508 have been added for consistency with subdivision (c) and a recommended stylistic change has been made.

There are no other proposals for amending Uniform Rule 508.

RULE 509. IDENTITY OF INFORMER.

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

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

(c) Exceptions~~:~~. ~~(1) Voluntary disclosure; informer a witness. No privilege exists under this rule~~ There is no privilege under this rule if the identity of the informer or

~~his~~ the informer's interest in the subject matter of ~~his~~ the informer's communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the government.

(d) Procedures. ~~(2) Testimony on relevant issue.~~ If it appears ~~in the case~~ that an informer may be able to give testimony relevant to any issue in a criminal case, or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the informed public entity invokes the privilege, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply ~~that~~ the testimony. The showing ~~will~~ ordinarily will be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose ~~his~~ 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 ~~him~~ the defendant, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court ~~shall~~ must be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents ~~shall~~ may not otherwise be revealed without consent

of the informed public entity. All counsel and parties ~~are permitted to~~ may be present at every stage of the proceedings under this subdivision except a showing in camera, at which no counsel or party ~~shall~~ may be permitted to be present.

Reporter's Note

This proposal for amending Uniform Rule 509 eliminates the gender-specific language in subdivision (c) of the rule and includes recommended stylistic changes. These are technical and no change in substance is intended.

There are no other proposals for amending Uniform Rule 509.

RULE 510. WAIVER OF PRIVILEGE ~~BY VOLUNTARY DISCLOSURE~~.

(a) Voluntary disclosure. A person upon whom these rules confer a privilege against disclosure waives the privilege if ~~he~~ the person or ~~his~~ 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.

Reporter's Note

This proposal for amending renumbered Rule 510(a) with the heading "Voluntary disclosure" eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

Uniform Rule 510 is also recast to deal with both the voluntary and involuntary waiver of a privilege as a matter of substance in one comprehensive rule by proposing the deletion of existing Uniform Rule 511 as in Tentative Draft #2 and also deleting Rule 512(c) as was also proposed in Tentative Draft #2.

Subdivision (a) deals with waiver by voluntary disclosure and embraces the substance of existing Uniform Rule 510 which it is suggested be amended to eliminate

the gender-specific language. Subdivision (b) deals with involuntary waiver and is the same in substance as existing Uniform Rule 511 which it is recommended now be deleted.

Proposed Uniform Rule 510 does not address the subject of inadvertent disclosure as a waiver in the black letter of the rule. In contrast, three general approaches have been employed by the courts to determine whether an inadvertent disclosure constitutes a waiver: an objective analysis; a subjective analysis; and a balancing analysis. Under an objective analysis, an inadvertent waiver will result since the court need only confirm that the document was made available to opposing counsel; "the 'confidentiality' of the document has been breached by the disclosure, thereby destroying the basis for the continued existence of the privilege." See *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 851 F.R.D. 204 (N.D. Ill. 1990)*, citing *Underwater Storage, Inc. v. United States Rubber Co., 314 F.Supp 546 (D. D.C. 1970)*. Under a subjective analysis, inadvertent disclosure can never result in a true waiver because "there was no intention to waive the privilege, and one cannot waive the privilege without intending to do so." See *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., supra*, citing *Connecticut Mutual Life Insurance Co. v. Shields, 18 F.R.D. 448 (S.D. N.Y. 1955)*. Under a balancing analysis, the court considers five factors to determine if a party has waived the privilege. These are: "(1) the reasonableness of the precautions taken to prevent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness." See *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., supra*, citing *Bud Antle, Inc. v. Grow Tech, Inc., 131 F.R.D. 179 (N.D. Cal. 1990)*.

First, a majority of the state jurisdictions appear to apply the objective analysis and conclude that an inadvertent disclosure results in a waiver of the privilege. These are: **Alabama**, *Bassett v. Newton, 658 So.2d 398 (Ala. 1995)* (waiver of the attorney-client privilege by conduct, such as a partial disclosure, that would make it unfair for the client to claim the privilege thereafter); **Alaska**, *Houston v. State, 602 P.2d 784 (Alaska 1979)* (waiver of the attorney-client privilege by examining a defense psychiatrist who relied on the report of a psychiatrist who had conducted a pre-trial psychiatric examination at defense counsel's request) and *Lowery v. State, 762 P.2d 457 (Alaska 1988)* (waiver of work-product privilege to reports of an investigator used to impeach one witness and refresh the recollection of another witness); **Arizona**, *State v. Cuffle, 171 Ariz. 49, 828 P.2d 773 (1992)* (waiver of attorney-client privilege to at least as much of what was previously privileged as necessary to enable an attorney to defend himself to a client's claim of the ineffective assistance of counsel); **Arkansas**, *Firestone Tire & Rubber Company v. Little, 276 Ark. 511, 639 S.W.2d 726 (1982)* (waiver of attorney-client privilege through surrender of letter in answer to a discovery motion which defendant inadvertently permitted to fall into the hands of a third party); **California**, *Aerojet-General Corporation v. Transport Indemnity Insurance, 18*

Cal.App.4th 996, 22 Cal. Rptr.2d 862 (1993) ("The attorney-client privilege is a shield against deliberate intrusion; it is not an insurer against inadvertent disclosure.") and *Kanter v. Superior Court, 253 Cal.Rptr. 810 (1988)* ("Even though a communication is made in confidence to an attorney, the privilege may be lost (i.e., impliedly waived) by disclosure of the subject communication or by conduct inconsistent with a claim of privilege."); **Colorado**, *Lanari v. People, 827 P.2d 495 (Colo. 1992)* (waiver of attorney-client privilege through endorsement of a psychiatrist as a witness, failure to object to the prosecution's interview of the witness and failure to request the trial court to enter protective orders with respect to any statements of the defendant obtained during the course of the interview); **Idaho**, *Farr v. Mischler, 923 P.2d 446 (Idaho 1996)* (waiver of attorney-client privilege by seller of business by leaving a letter in files which were among the assets of the business transferred to the buyers upon the sale of the business); **Iowa**, *State v. Randle, 484 N.W.2d 220 (Iowa 1992)* (waiver of physician-patient privilege by sexually abused victim releasing results of MMPI test to Department of Criminal Investigation); **Kentucky**, *Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985)* (waiver of attorney-client privilege by client where the competence of the client's attorney is attacked); **Maine**, *Northup v. State, 272 A.2d 747 (Me. 1971)* (waiver of attorney-client privilege by client where the competence of the client's attorney is attacked); **Minnesota**, *State v. Schneider, 402 N.W.2d 779 (Minn. 1987)* (implied waiver of attorney-client privilege where defendant was required to submit to an examination by a court-appointed psychiatrist to avail himself of the defense of insanity); **Mississippi**, *Alexander v. State, 358 So.2d 379 (Miss. 1979)* (waiver of physician-patient privilege where information given to expert witness for the express purpose of preparing to testify and forming a basis for testimony that the defendant was insane); **Nevada**, *Wardleigh v. Second Judicial Dist. Court of State of Nev. in and for County of Washoe, 111 Nev. 345, 891 P.2d 1180 (1995)* (waiver of attorney-client privilege as it relates to subject matter of privileged communication partially disclosed); **Ohio**, *State v. McDermott, 79 Ohio App.3d 772, 607 N.E.2d 1164 (1992)* (waiver of attorney-client privilege when the client discloses any part of a confidential communication that is inconsistent with the maintenance of the confidential nature of the attorney-client privilege); **Oklahoma**, *Driskell v. State, 659 P.2d 343 (Okl. Cr. 1983)* (waiver of physician-patient privilege when permission given by patient for physician to speak to officers investigating a murder) and *Herbert v. Chicago, Rock Island and Pacific Railroad Company, 544 P.2d 898 (Okl. 1975)* (waiver of physician-patient privilege relating to back injuries where patient testifies at trial concerning nature and treatment of back injuries even though physician not called by the patient as a witness); **Rhode Island**, *State v. von Bulow, 475 A.2d 995 (R.I. 1984)* (waiver of attorney-client privilege where there is a selective disclosure of otherwise privileged communications); **South Carolina**, *Marshall v. Marshall, 282 S.C. 534, 320 S.E.2d 44 (1984)* (waiver of attorney-client privilege not only as to the specific communication voluntarily disclosed, but as to all other communications relating to the same subject matter); **Virginia**, *Clagett v. Commonwealth, 252 Va. 79, 472 S.E.2d 263 (1996)* (attorney-client privilege waived on cross-examination where expert overheard defense counsel's conversation

regarding expert's mistake while testifying on direct examination); and **West Virginia**, *State ex rel. McCormick v. Zakaib, 189 W.Va. 258, 430 S.E.2d 316 (1993)* and *Marano v. Holland, 179 W.Va. 156, 366 S.E.2d 117 (1988)* (waiver of attorney-client privilege not only as to the specific communication voluntarily disclosed, but as to all other communications relating to the same subject matter).

There is at least one jurisdiction where the court has refused to decide the question of whether an inadvertent disclosure of privileged information waives the privilege. In **Florida**, in *Kusch v. Ballard, 645 So.2d 1035 (Dist. Ct. App. 1994)*, the court did suggest a more expansive approach in resolving the issue as follows: ". . . we do not have the kind of fully developed record of facts and law in this common law certiorari case that would allow us to assay whether it is necessary to pronounce a global rule on the subject. It might be enough, if the issue was directly and necessarily presented, to decide that whether the privilege is lost by inadvertent disclosure depends on the totality of the circumstances. If there is no need for a universal rule, then we should not create one."

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

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

Finally, there appear to be nine jurisdictions which employ a balancing analysis in determining whether there is a waiver of the privilege through an inadvertent disclosure. See **Illinois**, *Dalen v. Ozite Corporation, 230 Ill.App.3rd 18, 594 N.E.2d 1365 (1992)* (". . . we adopt the 'balancing test' set forth in Golden Valley [,supra]. The two other approaches, the objective and subjective approaches would appear to result in decisions

based on mere mechanical application rather than a judicial reason and fairness.") and *People v. Knuckles, 165 Ill.2d 125, 650 N.E.2d 974, 209 Ill.Dec. 1 (1995)* (the attorney-client privilege is not waived merely by pleading the insanity defense and employing a psychiatrist to assist in the preparation of the defense); **Montana**, *Pacificorp v. Department of Revenue of the State of Montana, 254 Mont. 387, 838 P.2d 914 (1992)* (the mere inadvertent production of documents is not in itself sufficient to establish a waiver of the attorney-client privilege, but it requires consideration of the elements of implied intention, and fairness and consistency); **Nebraska**, *League v. Vanice, 221 Neb. 34, 374 N.W.2d 849 (1985)* (fairness is an important and fundamental consideration in determining whether the attorney-client privilege has been waived); **New Mexico**, *Hartman v. El Paso Natural Gas Company, 107 N.M. 679, 763 P.2d 1144 (1988)* (waiver of the attorney-client privilege and work-product immunity requires an application of the five factors set forth in Golden Valley Microwave Foods, Inc., supra); **New York**, *Manufacturers and Traders Trust Company v. Servotronics, Inc., 132 A.D.2d 392, 522 N.Y.S.2d 999 (Sup.Ct. App.Div. 1987)* (waiver of the attorney-client privilege involves the client's intent to retain the confidentiality of the privileged materials and taking reasonable steps to prevent disclosure, together with determining whether the party claiming the waiver will suffer prejudice if a waiver is not granted); **North Dakota**, *Farm Credit Bank of St. Paul v. Heuther, 454 N.W.2d 710 (N.D. 1990)* (waiver of the attorney-client privilege requires an application of the five factors set forth in Golden Valley Microwave Foods, Inc., supra); **Oregon**, *Goldsborough v. Eagle Crest Partners, Ltd., 314 O4. 336, 838 P.2d 1069 (1992)* (waiver of the attorney-client privilege involves a consideration of whether the disclosure was inadvertent, an attempt was made to remedy the error promptly and the preservation of the privilege will occasion unfairness to the opponent); **Utah**, *Gold Standard, Inc. v. American Barrick Resources Corporation, 805 P.2d 164 (Utah 1991)* (waiver of attorney-client privilege, as well as work-product protection, requires an application of the five factors set forth in Golden Valley Microwave Foods, Inc., supra); and **Washington**, *State v. Balkin, 48 Wash. App. 1, 737 P.2d 1035 (Wash. App. 1987)* (waiver of privilege involves consideration of elements of implied intention, fairness and consistency).

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

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

For an exhaustive analysis of federal authorities on the issue of inadvertent disclosure, see *Simpson, Reagan Wm., Civil Discovery and Depositions § 3.41 (2d ed. 1994)*.

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

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

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

However, it has been argued that Federal Rule 612:

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

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

~~**RULE 511. PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE.**~~

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

Reporter's Note

The Drafting Committee recommends that this rule be deleted since it has been incorporated as subdivision (b) of the amended proposed Rule 510 without substantive change. *See* **Reporter's Note** to Rule 510.

RULE ~~512~~ 511. COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION.

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

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

Reporter's Note

There are no substantive proposals for amending Uniform Rule 511. Recommended stylistic changes have been made.

Instructing the jury under subdivision (c) that no adverse inference may be drawn from the claim of a privilege includes an admonition to the jury, as well as a formal instruction.

ARTICLE VI

WITNESSES

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

Reporter's Note

The **Comment** to Rule 601 reads as follows:

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

There are no proposals for amending Uniform Rule 601.

RULE 602. LACK OF PERSONAL KNOWLEDGE. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that ~~he~~ the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony ~~of the witness himself~~. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Reporter's Note

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

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

RULE 603. OATH OR AFFIRMATION. Before testifying, ~~every~~ each witness ~~shall~~ must be required to declare that ~~he~~ the witness will testify truthfully, by oath or

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

Reporter's Note

This proposal for amending Rule 603 eliminates the gender-specific language in the rule and makes recommended stylistic changes. These are technical and no change in substance is intended.

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

RULE 604. INTERPRETERS. An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation ~~that he will~~ to make a true ~~translation~~ and complete rendition of all communications made during the interpretive process to the best of the interpreter's knowledge and belief.

Reporter's Note

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

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

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

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

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

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

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

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

RULE 605. COMPETENCY OF JUDGE AS WITNESS. The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Reporter's Note

There are no proposals for amending Uniform Rule 605.

RULE 606. COMPETENCY OF JUROR AS WITNESS.

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

(1) Juror's testimony. ~~a~~ A juror may not testify ~~as to any~~ to:

(A) Matters occurring during deliberation. A matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon ~~his~~ that or any other juror's mind or emotions as influencing ~~him~~ the juror to assent to or dissent from the verdict or indictment or concerning ~~his~~ the juror's mental processes in connection therewith~~, nor may his~~;

(B) Juror's affidavit or statement. A juror's affidavit or evidence of any statement by ~~him~~ the juror concerning a matter about which ~~he~~ the juror would be precluded from testifying be received~~, but a~~.

(2) Testimony regarding extraneous prejudicial information. A juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Reporter's Note

This proposal for amending Rule 606 eliminates the gender-specific language in the rule and makes recommended stylistic changes. These are technical and no change in substance is intended.

There are no other proposals for amending Uniform Rule 606.

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

Reporter's Note

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

There are no other proposals for amending Uniform Rule 607.

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS.

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, ~~but~~ subject to these limitations:

(1) Character for truthfulness or untruthfulness. ~~the~~ The evidence may refer only to character for truthfulness or untruthfulness~~, and~~;

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

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting ~~his~~ the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness ~~(1)~~ (i) concerning ~~his~~ the witness' character for truthfulness or untruthfulness, or ~~(2)~~ (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 ~~his~~ the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Reporter's Note

This proposal for amending Rule 608 eliminates the gender-specific language in the rule, inserts the second paragraph of the existing subdivision (b) as a subdivision (c) with a heading and makes recommended stylistic changes. These are technical and no changes in substance are intended.

There are no other proposals for amending Uniform Rule 608.

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME.

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

(1) Crimes punishable by death or imprisonment. ~~evidence~~ Evidence that ~~he~~ a witness other than an accused has been convicted of a crime ~~shall be admitted but only~~ is admissible, subject to Rule 403, if the crime ~~(1)~~ was punishable by death or imprisonment in excess of one year under the law under which ~~he~~ 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 admitting this evidence substantially outweighs its prejudicial effect to ~~a party or a witness, or (2) involved dishonesty or false statement,~~ the accused.

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

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if ~~(1)~~ the conviction has been:

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

(2) Finding of innocence. ~~the conviction has been the~~ The subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of a juvenile ~~adjudications~~ 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 ~~in~~ 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 ~~therefrom~~ from a conviction does not render evidence of ~~a~~ the conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(f) Procedure governing admissibility of conviction to attack credibility of witness. Before evidence of a conviction to attack the credibility of a witness may be admitted:

(1) Notice. The proponent of the evidence shall give to the adverse party 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, or convictions, the proponent intends to introduce at trial.

(2) Making record. The court shall state on the record the factors it considered in determining the admissibility of evidence offered under subdivision (a)(1).

(3) Proof of conviction. Evidence of the conviction may be offered through the 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.

Reporter's Note

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

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

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

The Drafting Committee also proposes amending Rule 609 by adding for clarification in subdivision (a)(2) the language "evidence that any witness has been convicted of a crime shall be admitted if it," by substituting the words "untruthfulness or

falsification" for the words "dishonesty or false statement" and by making subdivision (a)(2) applicable only to those crimes whose statutory elements necessarily involve untruthfulness or falsification. This proposal is derived from the 1987 recommendation of the ABA Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence to clarify the meaning of the language "dishonesty or false statement" now contained in Rule 609(a)(2) of the *Federal Rules of Evidence*. The rationale for the proposed amendment of Federal Rule 609(a)(2) has been explained as follows:

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

See *Federal Rules of Evidence: A Fresh Review and Evaluation, 120 F.R.D. 299, 356, 359-360 (1987)*. The foregoing rationale for amending Federal Rule 609 also supports the recommendation of the Drafting Committee for amending Uniform Rule 609(a)(2).

The current Uniform Rule 609(a)(2) admitting crimes of "dishonesty or false statement, regardless of the punishment" has been widely adopted throughout the United States and is currently recognized in the following thirty-one jurisdictions and the District of Columbia: **Alabama**, *Ala. R. Evid. 609(a)(2)*; **Alaska**, *Alaska R. Evid. 609(a)* (impeachment by conviction of crime limited to crimes of "dishonesty or false statement"; **Arizona**, *Ariz. R. Evid. 609(a)(2)*; **Arkansas**, *Ark. R. Evid. 609(a)(2)*; **Delaware**, *Del. R. Evid. 609(a)(2)*; **Florida**, *Fla. Stat. § 90.610(1) (1996)*; **Hawaii**, *Haw. R. Evid. 609(a)* (impeachment by conviction of crime limited to crimes of "dishonesty," except that in criminal cases the conviction is inadmissible except where the defendant has placed credibility as a witness); **Illinois**, *See People v. Montgomery, 268 N.E.2d 695 (Ill. 1971)*, approving the application of Fed. R. Evid. 609, providing for impeachment by crimes of "dishonesty and false statement"; **Indiana**, *Ind. R. Evid. 609(a)(2)*; **Iowa**, *Iowa R. Evid. 609(a)(2)*; **Kansas**, *Kan. St. Ann. § 60-421*

(impeachment by conviction of crime limited to crimes of "dishonesty," except that in criminal cases the conviction is inadmissible unless the accused as a witness has first introduced evidence in support of the accused's credibility as a witness); **Louisiana**, *La. Code Evid. Art. 609, 609.1* (impeachment by conviction of crime in civil cases limited to crimes of "dishonesty or false statement," while in criminal cases offenses for which the witness has been convicted are admissible upon the issue of credibility); **Maine**, *Me. R. Evid. 609(A)(2)*; **Michigan**, *Mich. R. Evid. 609(a)(1), (2)* (impeachment by conviction of crime limited to crimes of "dishonesty or false statement" and to crimes containing "an element of theft" providing the theft crime is punishable by imprisonment in excess of one year or death and the conviction has significant probative value on the issue of credibility); **Minnesota**, *Minn. R. Evid. 609(a)(2)*; **Mississippi**, *Miss. R. Evid. 609(a)(2)*; **Nebraska**, *Neb. Rev. Stat. § 27-609(1)(b)*; **New Hampshire**, *N.H. R. Evid. 609(a)(2)*; **New Mexico**, *N.M. R. Evid. 11-609(A)(2)*; **North Dakota**, *N.D. R. Evid. 609(a)(ii)*; **Ohio**, *Ohio R. Evid. 609(A)(3)*; **Oklahoma**, *12 Okla. Stat. Ann. § 2609(A)(2)*; **Oregon**, *Or. Rev. Stat. § 40.355(1)(b)*; **Pennsylvania**, *Allen v. Kaplan, D.P.M., 653 A.2d 1249 (Pa. 1995)* and *Russell v. Hubiez, 624 A.2d 175 (Pa. 1993)*; **Rhode Island**, *R.I. R. Evid. 609(b)* (impeachment by conviction of crime includes crimes of "dishonesty or false statement"); **South Carolina**, *S.C. R. Evid. 609(a)92)*; **South Dakota**, *S.D. Codified Laws § 19-14-12(a)(2)*; **Tennessee**, *Tenn. R. Evid. 609(a)92)*; **Utah**, *Utah R. Evid. 6099a)92)*; **Washington**, *Wash. R. Evid. 6099(a)(2)*; **West Virginia**, *W. Va. R. Evid. 609*, in the case of witnesses other than a criminal defendant; **Wyoming**, *Wyo. R. Evid. 6099(a)(2)*; and **District of Columbia**, *D.C. Code § 14-305(b)(2)(B)*.

At the same time, there is a significant divergence among the several States regarding the inclusion of some crimes as crimes which are embraced within the standard "dishonesty or false statement." For example, the crime of burglary is treated as a crime of dishonesty in the following States: **Alaska**, *Clifton v. State, 751 P.2d 27 (Alaska 1988)*; **Arkansas**, *Coleman v. State, 869 S.W.2d 713 (Ark. 1994)*; **California**, *People v. Rodriquez, 222 Cal. Rptr. 809 (Cal. App. 5th 1986)*; **Connecticut**, *State v. Schroff, 492 A.2d 190 (Conn. App. Ct. 1985)*; **Delaware**, *Harris v. State, 695 A.2d 34 (Del. 1997)*; **Florida**, *Hicks v. State, 666 So.2d 1021 (Fla. Dist. Ct. App. 1996)*; **Idaho**, *State v. Christoferson, 700 P.2d 124 (Idaho Ct. App. 1985)*; **Illinois**, *People v. Burba, 479 N.E.2d 936 (Ill. App. 1985)*; **Kansas**, *State v. Thomas, 551 P.2d 873 (Kan. 1976)*; **Maine**, *State v. Rolls, 599 A.2d 421 (Me. 1991)*; **Massachusetts**, *Commonwealth v. Walker, 516 N.E.2d 1143 (Mass. 1987)*; **New Hampshire**, *State v. Hopps, 465 A.2d 1206 (N.H. 1983)*; **New Jersey**, *State v. Murray, 573 A.2d 488 (N.J. Super Ct. App. 1990)*; **New Mexico**, *State v. Wyman, 632 P.2d 1196 (N.M. Ct. App. 1981)*; **North Carolina**, *State v. Collins, 223 S.E.2d 575 (N.C. Ct. App. 1976)*; **Ohio**, *State v. Goney, 622 N.E.2d 688 (Ohio Ct. App. 1993)*; **Oklahoma**, *Turner v. State, 803 P.2d 1152 (Okl. Cr. 1991)*; **Oregon**, *State v. Simmonds, 692 P.2d 577 (Or. 1984)*; **Pennsylvania**, *Commonwealth v. Gray, 478 A.2d 822 (Pa. Super. Ct. 1984)*; **Rhode Island**, *State v. Taylor, 581 A.2d 1037 (R.I. 1990)*; **South Carolina**, *State v. Sarvis, 450 S.E.2d 606*

(S.Ct. Ct. App. 1994); **South Dakota**, *State v. Cross, 390 N.W.2d 563 (S.D. 1986)*; **Tennessee**, *State v. Dishman, 915 S.W.2d 458 (Tenn. Cr. App. 1995)*; **Texas**, *Simpson v. State, 886 S.W.2d 449 (Tex. Ct. App. 1994)*; **Virginia**, *Hackney v. Commonwealth, 493 S.E.2d 679 (Va. Ct. App. 1997)*; **Washington**, *State v. Rivers, 921 P.2d 495 (Wash. 1996)*; **Wyoming**, *State v. Velsir, 159 P.2d 371 (Wyo. 1995)* and **District of Columbia**, *Bates v. United States, 403 A.2d 1159 (D.C. 1979)*.

Consistently the following States treat the crime of robbery as a crime of dishonesty: **Alabama**, *Huffman v. State, 1997 WL 187109 (Ala. Crim. App. 1997)*; **Alaska**, *Alexander v. State, 611 P.2d 469 (Alaska 1980)*; **Arkansas**, *Floyd v. State, 643 S.W.2d 555 (1982)*; **Connecticut**, *State v. Prutting, 669 A.2d 1228 (Conn. App. Ct. 1996)*, **Delaware**, *Harris v. State, supra*; **Florida**, *State v. Page, 449 So.2d 813 (Fla. 1984)*; **Idaho**, *State v. Christopherson, supra*; **Illinois**, *State v. Burba, supra*; **Iowa**, *State v. Thompkins, 318 N.W.2d (Iowa 1982)*; **Kansas**, *State v. Laughlin, 530 P.2d 1220 (Kan. 1975)*; **Maine**, *State v. Rolls, supra*; **Massachusetts**, *Commonwealth v. Walker, supra*; **New Hampshire**, *State v. Hopps, supra*; **New Jersey**, *State v. Sands, 386 A.2d 378 (N.J. 1977)*; **New York**, *People v. Moody, 645 N.Y.S.2d 375 (N.Y. App. Div. 1996)*; **North Carolina**, *State v. Collins, supra*; **Ohio**, *State v. Goney, supra*; **Oklahoma**, *Turner v. State, supra*; **Oregon**, *State v. Sims, 692 P.2d 577 (Or. 1984)*; **Pennsylvania**, *Commonwealth v. Kyle, 533 A.2d 120 (Pa. Super. Ct. 1987)*; **Rhode Island**, *State v. Taylor, supra*; **South Carolina**, *State v. Sarvis, supra*; **South Dakota**, *State v. Cross, supra*; **Texas**, *Simpson v. State, supra*; **Washington**, *State v. Rivers, supra*; and **District of Columbia**, *Bates v. United States, supra*.

Larceny is admitted for impeachment purposes as a crime of dishonesty in the following jurisdictions: **Alabama**, *Huffman v. State, supra*; **Alaska**, *Alexander v. State, supra*; **Connecticut**, *State v. Dawkins, 681 A.2d 989 (Conn. App. Ct. 1996)*; **Florida**, *Reichman v. State, 581 So.2d 133 (Fla. 1991)*; **Georgia**, *Witherspoon v. State, 339 S.E.2d 737 (Ga. Ct. app. 1986)*, treating larceny as a *crimen falsi* crime; **Illinois**, *People v. Elliott, 654 N.E.2d 636 (Ill. App. 1995)*; **Indiana**, *Geisleman v. State, 410 N.E.2d 1293 (Ind. 1980)* in which the court treats larceny as a crime of dishonesty or false statement under Ind. R. Evid. 609(a)(2) even though burglary and robbery are enumerated crimes which are admissible for impeachment under Indiana Rule 609(a)(1); **Iowa**, *State v. Thompkins, supra*; **Kansas**, *Buck v. Peat Marwick and Main, 799 P.2d 94 (Kan. Ct. App. 1990)*, admitting conviction for larceny because it "shows a lack of integrity"; **Maine**, *State v. Grover, 518 A.2d 1039 (Me. 1986)*, admitting prior conviction for theft since it "reflects adversely on honesty and integrity"; **Maryland**, *Jackson v. State, 668 A.2d 8 (Md. 1995)*, in contrast to earlier Maryland decisions holding burglary and robbery inadmissible for impeachment purposes, admits a larceny conviction for impeachment since it reflects adversely on honesty and integrity; **Massachusetts**, *Commonwealth v. Walker, supra*; **Nebraska**, *State v. Williams, 326 N.W.2d 678 (Neb. 1982)*; **New Hampshire**, *State v. LaRosa, 497 A.2d 1224 (N.H. 1985)*; **Ohio**, *State v. Tolliver, 514 N.E.2d (Ohio Ct. App. 1986)*; **Oklahoma**, *Cline v.*

State, 782 P.2d 399 (Okla. Crim. App. 1989); **Pennsylvania**, *Commonwealth v. Ellis, 549 A.2d 1323 (Pa. Super. Ct. 1988)*; **Rhode Island**, *State v. Shaw, 492 S.E.2d 402 (S.C. Ct. App. 1997)*; **South Carolina**, *State v. Shaw, 492 S.E.2d 402 (S.C. Ct. App. 1997)*; **Tennessee**, *State v. Roberts, 943 S.W.2d 403 (Tenn. Crim. App. 1996)*; **Texas**, *Edwards v. State, 883 S.W.2d 692 (Tex. Ct. App. 1994)* and **District of Columbia**, *Bates v. United States, supra*.

In contrast, the crime of burglary is not a crime of dishonesty in the following States: **Arizona**, *State v. Malloy, 632 P.2d 315 (Ariz. 1982)*; **Maryland**, *Bane v. State, 533 A.2d 309 (Md. Ct. Spec. App. 1987)*; **Minnesota**, *State v. Hoffman, 549 N.W.2d 372 (Minn. Ct. App. 1996*; **Mississippi**, *Townsend v. State, 605 So.2d 767 (Miss. 1992)*; **North Dakota**, *State v. Bohe, 447 N.W.2d 277 (N.D. 1989)*; and **Utah**, *State v. Morrell, 803 P.2d 292 (Utah Ct. App. 1990)*.

Similarly, it has been held that robbery is not a crime of dishonesty in the States of **Maryland** *(Bane v. State, supra)*, **Mississippi** *(Townsend v. State, supra)* and **Utah** *(State v. Morrell, supra)*.

It has also been held that larceny is not a crime of dishonesty in the States of **Hawaii** *(State v. Pudiquet, 922 P.2d 1032 (Haw. Ct. App. 1996))*, **Nebraska** *(State v. Williams, 326 N.W.2d 678 (Nev. 1982))*, **North Dakota** *(State v. Bohe, supra)*, **Oregon** *(State v. Reitz, 705 P.2d 762 (Or. Ct. App. 1985))*, **Utah** *(State v. Johnson, 784 P.2d 1135 (Utah 1989))*, **Washington** *(State v. Burton, 676 P.2d 975 (Wash. 1984))*, and **West Virginia** *(State v. Rahman, 483 S.E.2d 273 (W.Va. 1996))*.

There are also some States which do not adhere to the statutory standards of Uniform Rule 609(a). A few States, within limitations, permit the use of felony convictions generally for the impeachment of witnesses. These are: **California**, *Cal. Evid. Code § 788*; **Colorado**, *Colo. Rev. Stat. § 13-90-101*; **Connecticut**, *See State v. Pinnock, 220 Conn. 765, 601 A.2d 521 (1992)*; **Idaho**, *Idaho R. Evid. 609(a)*; **Kentucky**, *Ky. R. Evid. 609(a)*; and **Nevada**, *Nev. Rev. Stat. § 50.095*.

Other States broadly, although within limitations, admit convictions, including misdemeanors, for impeachment purposes: **Massachusetts**, *Mass. Ann. Laws c. 233 § 21*; **Missouri**, *Vernon's Ann. Mo. Stat. § 491.050*; **New Jersey**, *N.J. R. Evid. 609,* subject to the discretion of the judge to exclude for remoteness or other causes; **New York**, *McKinney's CPLR § 4513*; **North Carolina**, *N.C. Gen. Stat. § 8C-1, Rule 609,* providing the crime is punishable by more than sixty days confinement; and **Wisconsin**, *Wis. Stat. § 906.09*, including adjudications for delinquency.

Two States require that the conviction either be a felony or one of moral turpitude. **Texas**, *Tex. R. Evid. 609(a)* and **Virginia**, *Va. Code Ann. § 19.2-269* and

Lincoln v. Commonwealth, 217 Va. 370, 228 S.E.2d 688 (1976), including character of the witness for veracity.

In **Georgia**, a witness' credibility can be impeached through evidence of bad character which includes convictions of crimes involving "moral turpitude." *(James v. State, 160 Ga. App. 185, 286 S.E.2d 506 (1981)* and *Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698 (1981))*. The misdemeanor offense of issuing a bad check has been held to constitute a crime of "moral turpitude" *(Paradise v. State, 212 Ga. App. 166, 441 S.E.2d 497 (1994))*, while the offense of a simple assault has been held not to constitute a crime of moral turpitude *(Polk v. State, 202 Ga. App. 738, 415 S.E.2d 506 (1992))*.

In **Maryland** a witness' credibility can be impeached by "an infamous crime or other crime relevant to the witness' credibility." *Md. R. Evid. 5-609*. A prior conviction for conspiracy to distribute marijuana is a misdemeanor at common law and is not one of the "infamous crimes" embraced within the rule. *Wallach v. Board of Educ., 99 MD. App. 386, 637 A.2d 859 (1994)*. However, a prior conviction for cocaine distribution is relevant to a witness' credibility and admissible for impeachment purposes. *State v. Woodland, 337 Md. 519, 654 A.2d 1314 (1995)*.

Montana appears to be the only State which does not admit convictions for the purpose of attacking the credibility of a witness. *Mont. Code Ann. c. 10, Rule 609*. The Federal and Uniform Rules 609 have been rejected, not only because Montana constitutional and statutory provisions would severely limit the usefulness of such a rule, "but also and most importantly because of its low probative value in relation to credibility." As further reasoned by the Montana Supreme Court Commission on Evidence,

> The Commission does believe that **conviction** of certain crimes is probative of credibility; however, it is the specific act of misconduct underlying the conviction which is really relevant, not whether it has led to a conviction. Allowing conviction of crime to be proved for the purpose of impeachment merely because it is a convenient method of proving the act of misconduct . . . is not acceptable to the Commission, particularly in light of Rule 608(b) allowing acts of misconduct to be admissible if they relate to credibility.

The Drafting Committee does not recommend adopting a uniform rule, as in the case of Montana, which would prohibit altogether the use of convictions for impeachment purposes.

The Committee does believe that a rule framed along the lines of the following Vermont rule would facilitate greater uniformity throughout the several States in the

types of crimes admissible for impeachment purposes and more nearly focus upon the purpose for which prior convictions are admissible to impeach the testimony of a witness. Accordingly, **Vermont**, the only state jurisdiction to have adopted the standard of "untruthfulness or falsification," and the ABA Criminal Justice Section's proposal, have been followed in proposing the revision of Uniform Rule 609(2) to admit convictions regardless of punishment to impeach the credibility of a witness. Vermont Rule 609(a)(1) provides:

> (1) Involved untruthfulness or falsification regardless of the punishment, unless the court determines that the probative value of admitting this evidence is substantially outweighed by the danger of unfair prejudice. This subsection (1) applies only to those crimes whose statutory elements necessarily involve untruthfulness or falsification;

The rationale for the Vermont rule is explained in the Reporter's Notes as follows:

> The present language establishes a two-tier test of admissibility. If the prior conviction necessarily involved untruthfulness or falsification–that is, if untruthfulness or falsification were one of the essential elements charged–the conviction falls within the class of convictions for which admissibility is preferred. The rule operates on the assumption that such convictions are of the highest relevance in determining credibility. They are to be admitted unless the court determines that their probative value is not just outweighed but "substantially" outweighed by the danger of unfair prejudice. See V.R.E. 403. For example, in a criminal trial for forgery, admission of a prior conviction of the defendant for the same offense could be highly prejudicial. State v. Jarrett, *143 Vt. 191, 465 A.2d 238 (1983)*. In effect, once the proponent of admission satisfies the court that the prior conviction involved untruthfulness or falsification, subdivision (a)(1) shifts the burden to the opponent to show substantial possibility of prejudice.

The Reporter's Note further observes:

> The amended wording is drafted to emphasize the preferred status of offenses involving untruthfulness, an approach similar to that found in Federal Rule of Evidence 609. But the federal wording has been deliberately avoided. The federal rule speaks of "dishonesty or false statement," and the former term in particular has been given a broad interpretation. Some courts have held it to encompass burglary, narcotics offenses, larceny and even shoplifting. 3 J. Weinstein and M. Berger, Weinstein's Evidence ¶ 609[04], at 77-85 (1987). None of

> these offenses would qualify under Vermont Rule of Evidence 609(a)(1). (The falsification of a prescription in order to obtain narcotics would qualify under the Vermont rule, but simple possession of the resulting narcotics would not.) Moreover, the federal rule created substantial uncertainty as to the applicability of the balancing test of Rule 403; some federal courts hold that offenses involving dishonesty are automatically admissible, others hold that such offenses are subject to the test of Rule 403. Weinstein and Berger, supra, at 73-76. The Vermont rule makes explicit the applicability of a balancing test. * * *

As proposed, Uniform Rule 609 would not automatically exclude the crimes of burglary, robbery, or larceny. They would be admissible under subdivision (a)(1) for impeachment purposes if these crimes were punishable by death or imprisonment in excess of one year, but subject to one or the other of the balancing tests set forth in the rule depending upon whether the witness was the accused or a person other than the accused.

The admissibility of convictions under subdivision (a)(2) would be limited to crimes which have historically been described a "*crimen falsi*" crimes, such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense involving an element of deceitfulness, untruthfulness, or falsification. However, unlike the Vermont rule, Uniform Rule 609(a)(2) as presently proposed does not require a balancing of probative value against the danger of unfair prejudice.

The proposal for amending Uniform Rule 609(b) dealing with the admissibility of convictions more than ten years old would bring into the rule the comparable balancing test found in Federal Rule 609(b).

No amendments to subdivisions (c) through (e) are proposed.

A subdivision (f) is proposed to provide for the procedures in the black letter of Rule 609 to be followed in determining the admissibility of convictions to attack the credibility of a witness. Subdivision (f)(1) sets forth a notice requirement and, as mentioned, adopts the notice provision contained in proposed Uniform Rule 404(b) to provide for consistency in the giving of notice under the Uniform Rules when it is required as a condition to the admissibility of evidence. As presently proposed, the notice provision applies to the entirety of proposed Uniform Rule 609 whenever a proponent seeks the admission of a conviction to attack the credibility of a witness. Subdivision (f)(2) requires the making of a record of the factors considered by the court in ruling upon the admissibility of a conviction and subdivision (f)(3) sets forth the methods of proof of a 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 ~~his~~ the witness' credibility is impaired or enhanced.

Reporter's Note

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

There are no other proposals for amending Uniform Rule 610.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION.

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

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court ~~may~~, in the exercise of discretion, 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 ~~may be~~ is necessary to develop ~~his~~ the witness' testimony. Ordinarily leading questions should be permitted on cross-examination.

~~Whenever a~~ A party ~~calls~~ may interrogate a hostile witness, an adverse party, or a witness identified with an adverse party, ~~interrogation may be~~ by leading questions.

Reporter's Note

This proposal for amending Rule 611 eliminates the gender-specific language in the rule and contains recommended stylistic changes. These are technical and no change in substance is intended.

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

There are no other proposals for amending Uniform Rule 611.

RULE 612. ~~WRITING~~ RECORD OR OBJECT USED TO REFRESH MEMORY.

(a) While testifying. If, while testifying, a witness uses a ~~writing~~ record or object to refresh ~~his~~ memory, an adverse party is entitled to have the ~~writing~~ 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 ~~writing~~ record or object to refresh ~~his~~ memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the ~~writing~~ 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 ~~writing~~ record or object produced under this rule is entitled to inspect it, ~~to~~ cross-examine the witness thereon, and ~~to~~ introduce in evidence those portions ~~which~~ that

relate to the testimony of the witness. If production of the ~~writing~~ 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 ~~writing~~ record or object contains matters not related to the subject matter of the testimony, the court shall examine the ~~writing~~ record or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections ~~shall~~ must be preserved and made available to the appellate court in the event of an appeal. If a ~~writing~~ 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 shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Reporter's Note

First, this proposal for amending Rule 612 eliminates the gender-specific language in the rule and contains recommended stylistic changes. These are technical and no change in substance is intended.

Second, it is proposed that Rule 612 be amended to substitute the word "record" for the language "writing" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See* the **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

There are no other proposals for amending Uniform Rule 612.

RULE 613. PRIOR STATEMENTS OF WITNESSES.

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

Reporter's Note

This proposal for amending Rule 613 eliminates the gender-specific language in the rule and incorporates recommended stylistic changes. These are technical and no change in substance is intended.

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

RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT.

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

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

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

Reporter's Note

There are no proposals for amending Uniform Rule 614.

RULE 615. EXCLUSION OF WITNESSES. At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of ~~(1)~~ a party who is ~~a natural person~~ an individual, or ~~(2)~~ an officer or employee of a party that is not ~~a natural person~~ an individual designated as its representative by its attorney, or ~~(3) a person~~ an individual whose presence is shown by a party to be essential to the presentation of ~~his~~ the party's cause.

Reporter's Note

This proposal for amending Rule 615 eliminates the gender-specific language in the rule and makes recommended stylistic changes. These are technical and no change in substance is intended.

There are no other proposals for amending Uniform Rule 615.

RULE 616. BIAS OF WITNESS. For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.

[As added 1986.]

Reporter's Note

The **Comment** to the 1986 Amendment states as follows:

Neither the Federal nor the Uniform Rules of Evidence contain a provision authorizing the introduction of evidence of bias, prejudice, or interest to attack the credibility of a witness. Some confusion has arisen as to the admissibility of this type of evidence. Thus, the committee recommended that the conference adopt such a rule. The rule codifies the holding in *United States v. Abel*, 469 U.S. 45 (1984).

As is the usual format of these rules, the evidence described by Rule 616 is not to be automatically admitted, but is subject to other rules such as Rule 403.

There are no other proposals for amending Uniform Rule 616.

ARTICLE VII

OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES. If ~~the~~ a witness is not testifying as an expert, ~~his~~ the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences ~~which~~ that are ~~(1)~~ (i) rationally based on the perception of the witness, ~~and (2)~~ (ii) helpful to a clear understanding of ~~his~~ the witness' testimony or the determination of a fact in issue and (iii) not based on scientific, technical, or other specialized knowledge.

Reporter's Note

This proposal for amending Rule 701 eliminates the gender-specific language in the Rule and makes recommended stylistic changes. These are technical and no change in substance is intended.

The Drafting Committee also proposes redesignating subdivisions (1) and (2) as (i) and (ii) and adding a new subdivision (iii) to provide expressly that scientific, technical, or other specialized knowledge may not form the basis for the opinions or inferences of lay witnesses under Uniform Rule 701. The phrase "scientific, technical or other specialized knowledge" is intended to have the same meaning as the identical phrase in Uniform Rule 702. However, the language does not embrace the "prototypical example of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences. See *Asplundh Mfg. Div. v. Benton Harbor Eng'g., 57 F.3d 1190, 1196 (3rd Cir. 1995).*

The proposed amendment is based on a similar proposal to amend Rule 701 of the *Federal Rules of Evidence* now approved by the Advisory Committee, and 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 Uniform Rule 701. The proposed 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 proposed 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 Uniform Rule 702.

RULE 702. TESTIMONY BY EXPERTS.

~~If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.~~

(a) General rule. A witness may testify in the form of opinion or otherwise if the following are satisfied:

(1) Basis for testimony. The testimony is based on scientific, technical, or other specialized knowledge.

(2) Assistance to trier of fact. The testimony will assist the trier of fact to understand evidence or determine a fact in issue.

(3) Qualification of witness. The witness is qualified by knowledge, skill, experience, training, or education as an expert in the scientific, technical, or other specialized field.

(4) Reasonable reliability. The testimony is based upon principles or methodology which is reasonably reliable as established under subdivision (b), (c), or (e).

(5) Reliably applied to facts of case. The witness has applied the principles or methodology reliably to the facts of the case.

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

(c) Presumption of reliability. A principle or methodology 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 methodology is not reasonably reliable as provided in subdivision (e).

(d) Presumption of unreliability. A principle or methodology 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 methodology is reasonably reliable as provided in subdivision (e).

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

(1) Testing. The extent to which the principle or methodology has been tested;

(2) Research methods. The adequacy of research methods employed in testing the principle or methodology;

(3) Peer review. The extent to which the principle or methodology has been published and subjected to peer review;

(4) Rate of error. The rate of error in the application of the principle or methodology;

(5) Experience of expert. The experience of the witness as an expert in the application of the principle or methodology; and

(6) Acceptance within the field. The extent to which the field of knowledge has substantial acceptance within the relevant scientific, technical, or specialized community.

Reporter's Note

This proposal of the Drafting Committee for amending Uniform Rule 702 combines the proposals of Alan W. Tamarelli and David L. Faigman, set forth respectively at pages 175 and 169-170, *infra*, of this **Reporter's Note**, with substantive revisions by the Drafting Committee. *See also*, Tamarelli, Jr., Alan W., *Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability–The Questionable Wisdom of Abandoning the Peer Review Standard for Admitting Expert Testimony*, 47 Vand. L. Rev. 1175 (1994), and Faigman, David L., M*aking the Law Safe for Science: A Proposed Rule for the Admission of Expert Testimony*, 35 Washburn L. J. 401 (1996). See further, Gianelli, Paul C., *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half Century Later*, 80 Colum. L. Rev. 1197 (1980).

Subdivision (a) retains the substance of the existing Uniform Rule 702 with the important addition in subdivision (a)(4) by requiring that the principle or methodology upon which the testimony is based be established as reasonably reliable under subdivisions (b), (c), or (e) and can be reliably applied to the facts of the case.

Subdivision (b) provides that "[a] principle or methodology is deemed reasonably reliable if its reliability has been established by controlling legislation or judicial decision." This is intended to foreclose inquiry as to the reliability of a principle or methodology where its reliability has been established by legislation or judicial decision, such as the determination of paternity pursuant to legislation providing for genetic testing to determine paternity (10 Okl. Stat. Ann. §§ 501-506), or the admissibility of DNA profiling evidence pursuant to decisional law. *(Taylor v. State, 889 P.2d 319 (Okl.Cr. 1995))*. Subdivision (b) would not eliminate the requirement for foundational evidence as a condition to admissibility under Rule 702(a).

Subdivisions (c) and (d) embrace the approach of Tamarelli by raising a presumption of either the reliability or unreliability of the principle or methodology upon which the expert testimony is based, depending upon whether the principle or methodology has substantial acceptance within the relevant scientific, technical, or specialized community. The "preponderance of the evidence", or, more accurately, "more probably true than not" standard is embodied in the rule to rebut the presumption of reliability or unreliability. Tamarelli defends this approach as follows:

> Congress should consider an amendment that will produce accurate, consistent results without requiring judges to expend time they do not have playing amateur scientist. To do this while avoiding the pitfalls of *Frye*, any new version of Rule 702 must allow the more qualified scientific community to determine most questions of reliability without automatically excluding ideas merely because they have not been tested universally. A new Rule 702 would do well to establish explicitly a rebuttable presumption that only testimony (whether scientific, technical, or specialized) derived by using methodology that has gained scientific acceptance in the appropriate field is admissible.
>
> An improved Rule 702 might read as follows: If scientific, technical, or other specialized information will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness may testify thereto in the form of an opinion or otherwise only if (1) the information is reasonably reliable, and (2) the witness is qualified as an expert by knowledge, skill, experience, training, or education to provide that testimony.
>
> Information normally will be considered reasonably reliable if it is based on premises, or derived from techniques, having significant support and acceptance within the relevant specialized community. A party seeking to object to a witness testifying thereto must show by a preponderance of the evidence that the information is not reasonably reliable.
>
> Information based on premises or derived from techniques not having significant support and acceptance within the relevant specialized community normally will not be considered reasonably reliable. A party seeking to have an expert base her testimony on this type of evidence must show by a preponderance of the evidence that this information is reasonably reliable.
>
> This amended Rule would serve a number of purposes. First, it would retain a firm emphasis on relevance by requiring that expert

testimony assist the trier of fact. Second, like the Advisory Committee's proposal, it would introduce a requirement that the testimony be reasonably reliable. This proposal, however, would address *Daubert* directly by establishing in the text of Rule 702 that peer review and acceptance should be the primary indicators of reliable expert testimony. Unlike *Frye*, though, it would not work as an absolute bar against admitting theories that are not generally accepted. Rather, it merely would establish a presumption that these theories are not reliable enough to be admitted.

> By placing the burden on the proponent of testimony that is not generally accepted to show its reliability by a preponderance of the evidence, the enactment of a Rule similar to the one proposed in this Recent Development would discourage junk science by making it difficult, but not impossible, to introduce an expert's novel ideas if his theories have not yet gained significant support among his peers. The proposed Rule also would limit the number of objections to accepted theories by requiring the objecting party to make a showing of unreliability by a preponderance of the evidence. [footnotes omitted] *See* Tamarelli, Alan W., *supra*, at pp. 1199-1201.

It is not intended that the modified version in subdivisions (c) and (d) of the historic Frye doctrine constitute a standard of admissibility. Rather, as indicated in the foregoing commentary of Tamarelli, the rule is procedural only by providing presumptively that peer review and acceptance should be the primary indicator of reliability, relieve the trial judge of the initial responsibility of playing "amateur scientist," and impose upon the party who challenges the unreliability or reliability of the principle or methodology, or their application, the burdens of producing evidence and of ultimate persuasion that it is more probable then not that the principle is either unreliable or reliable. Only if the reliability or unreliability of the principle or methodology is challenged, will it be necessary to examine other factors as set forth in subdivision (e) of the proposed rule.

Subdivision (e) incorporates the additional factors, when applicable, which shall be considered by the court for purposes of determining the reasonable reliability of the principles or methodology upon which the expert testimony is based. It carries forward the factors laid down by the Supreme Court in the *Daubert* case, which are also embraced in subdivisions (a)(1) and (2) of the Faigman proposal, but without differentiating between the difficult dichotomy of "scientific" and "non-scientific" expert testimony.

The Drafting Committee believes, first, that the proposal meaningfully avoids the use of the terminology "scientific" and "non-scientific" principles or methodology and

does not mandate that the *Daubert* factors necessarily apply in determining the reliability of scientific, technical, or specialized knowledge. The proposal thus leaves the door open to the admissibility of evidence in social science areas where the falsifiability and potential rate of error factors required by *Daubert* could rarely be met.

Second, arguably, by eliminating the focus on "scientific knowledge" from the proposed rule, the factors set forth in subdivision (e) accommodate the admissibility of expert testimony involving only the application of a principle or methodology as opposed to the determination of the reliability of the principle or methodology in the first instance. See, in this connection, subdivision (a)(4)(B).

Third, with the approach taken in subdivision (e) of the proposed amendments, the rule arguably meets the concerns expressed with respect to whether the *Daubert* criteria apply when the expert is testifying solely on a basis of experience, such as automobile mechanics, or skeletal configurations. See, in this connection, *Burgess v. Friedman & Son, Inc., 637 P.2d 908 (Okl.App. 1981)* and *Commonwealth v. Devlin, 365 Mass. 149, 310 N.E.2d 353 (1974)*.

Fourth, reinstituting a modified *Frye* standard as a procedural rule may promote greater reliability in the evidence offered and admitted 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., 113 S.Ct. 2786, at 2798 (1993)*.

The Drafting Committee's proposal differs significantly from the proposed amendment to Rule 702 of the *Federal Rules of Evidence*, now approved by the Advisory Committee for submission to the Standing Committee of the Judicial Conference of the United States. It provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise~~.~~, provided that (1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The background for the Drafting Committee's proposed amendments to Uniform Rule 702 comes in the wake of *Daubert v. Merrell Dow Pharmaceuticals, Inc., ___U.S.___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)*, holding that the following four factors are to be employed in determining the admissibility of "novel scientific evidence" under Rule 702 of the *Federal Rules of Evidence*:

1. Has the theory or technique been tested or is subject to being tested?

2. Has the theory or technique been subjected to peer review and publication?

3. What is the known or potential rate of error in applying the particular scientific theory or technique?

4. To what extent has the theory or technique received general acceptance in the relevant scientific community?

A number of proposals have been proposed for amending Rule 702 of the *Federal Rules of Evidence* as well as Rule 702 of the *Uniform Rules of Evidence*. The following was suggested by Judge Michael B. Getty as a starting point for discussion in determining whether amendments should be made to Uniform Rule 702 to reflect the criteria established in the *Daubert* case for determining the admissibility of "novel scientific evidence":

Rule 702. [Testimony by Experts].

~~If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.~~

(a) Scientific Expert Testimony. If valid scientific knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by scientific training and education may testify thereto in the form of an opinion or otherwise.

For purposes of this Rule, when making preliminary assessments of validity pursuant to Rule 104(a), judges shall determine the adequacy of the scientific foundation for the testimony and, if applicable, the methodology or technique used to apply that knowledge to the specific case.

(1) The Scientific Foundation for the Testimony. In assessing the validity of the scientific foundation for expert testimony, judges must find that the basis for the expert's testimony has been tested. In addition, in order to determine the validity of those scientific tests, judges should consider, among other things,

(A) the adequacy of the research methods used to conduct these tests;

(B) whether the research supporting the expert's testimony was peer reviewed and published; and

(C) the degree of acceptance in the scientific community of the science supporting the expert's opinion.

(2) Expert Testimony Regarding Case Specific Facts. In assessing the validity of expert testimony on facts specific to the case, judges must find that the methodology or technique used to ascertain the pertinent fact or facts has been tested. In addition, judges should consider, among other things,

(A) the adequacy of the research methods used to conduct these tests;

(B) whether the research validating these methods was peer reviewed and published; and

(C) the error rate associated with the methodology used to ascertain the pertinent fact or facts.

(b) Non-Scientific Testimony. If valid technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, where scientific knowledge is unavailable or unnecessary, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Comment of Judge Getty on the Proposed Amendment to Rule 702

Upon review and after consultation with Professor David L. Faigman who filed the Amicus brief in "Daubert" before the United States Supreme Court on behalf of a group of law professors, it is my opinion that the only rule that need be changed is Rule 702. I am attaching hereto those provisions to the rules as drafted by Professor Faigman at my suggestion . . . . [See Faigman, In Making the Law Safe for Science: A Proposed Rule for the Admission of Expert Testimony, 35 Washburn L. J. 401 (1996)]

I would also like to call to the Committee's attention an essay by Professor Faigman which appeared in the **Hastings Law Journal**, Vol. 46, January 1995 entitled "Mapping the Labyrinth of Scientific Evidence".

* * *

There are a number of additional proposals which have been made for amending Rule 702 of the Federal Rules of Evidence which is currently identical to Uniform Rule 702. In the Spring, 1997, S. 79, also known as the Honesty in Evidence Act, was introduced in the United States Senate to amend Federal Rule 702 as follows:

Rule 702. Testimony by Experts

(a) In general. - If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Adequate Basis for Opinion. -

(1) Testimony in the form of an opinion by a witness that is based on scientific, technical, or medical knowledge shall be inadmissible in evidence unless the court determines that such opinion–

(A) is based on scientifically valid reasoning;

(B) is sufficiently reliable so that the probative value of evidence outweighs the dangers specified in Rule 403; and

(C) the techniques, methods, and theories used to formulate that opinion are generally accepted within the relevant scientific, medical, or technical field.

(2) In determining whether an opinion satisfies conditions in paragraph (1), the court shall consider–

(A) whether the opinion and any theory on which it is based have been experimentally tested;

(B) whether the opinion has been published in peer-review literature; and

(C) whether the theory or techniques supporting the opinion are sufficiently reliable and valid to warrant their use as support for the proffered opinion.

(c) Expertise in the field. - Testimony in the form of an opinion by a witness that is based on scientific, technical, or medical knowledge, skill, experience, training, education, or other expertise shall be inadmissible unless the witness's knowledge, skill, experience, training, education, or other expertise lies in the particular field about which such witness is testifying.

(d) Disqualification. - Testimony by a witness who is qualified as described in subsection (a) is inadmissible in evidence if the witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which the testimony is offered.

In March, 1997, the following H.R. 903 was introduced in the United States House of Representatives to amend Federal Rule 702:

Rule 702. Testimony by Experts

(a) In general. - If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Adequate basis for opinion. - Testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible in evidence unless the court determines that such opinion -

(1) is scientifically valid and reliable;

(2) has a valid scientific connection to the fact it is offered to prove; and

(3) is sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403.

(c) Disqualification. - Testimony by a witness who is qualified as described in subdivision (a) is inadmissible in evidence if the witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which the testimony is offered.

(d) Scope. - Subdivision (b) does not apply to criminal proceedings.

Earlier, in 1991 the Standing Committee of the Judicial Conference of the United States recommended the following amendment to Federal Rule 702.

> Testimony providing scientific, technical, or other specialized information, in the form of an opinion or otherwise, may be permitted only if (1) the information is reasonably reliable and will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, and (2) the witness is qualified as an expert by knowledge, skill, experience, training, or education to provide such testimony. [Ends with a notice requirement invoking the pre-amendment Civil Rule 26]

The Advisory Committee Note to the proposed Rule stated:

> "while testimony from experts may be desirable if not crucial in many cases, excesses cannot be doubted and should be curtailed . . . . [and the courts should] reject testimony that is based upon premises lacking any significant support and acceptance within the scientific community.

Further, the Note stated:

> In deciding whether the opinion evidence is reasonably reliable and will substantially assist the trier of fact, as well as in deciding whether the proposed witness has sufficient expertise to express such opinions, the court, as under present Rule 702, is governed by Rule 104(a).

The American University Law School Evidence Project has proposed the following Revised Rules 702 and 703 by amending Federal Rules 702 and 703 to deal with the *Daubert* issues as follows:

Revised Rule 702. ~~Testimony by~~ Qualification of Experts Witnesses

> ~~If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,~~ ~~a~~ A witness is qualified as an expert ~~by~~ if the witness has acquired, by any means, substantial knowledge of scientific, technical, or other specialized areas ~~, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise~~.

Revised Rule 703. ~~Bases of~~ Opinion Testimony by Experts

(a) General rule. Subject to subsections (b) and (c), if expert testimony will help the trier of fact understand the evidence or determine a fact in issue, a qualified witness may testify to specialized knowledge, as well as opinions and inferences drawn therefrom, without personal knowledge of the underlying data.

(b) Principles, methodologies, and applications employed. A proponent of expert testimony must demonstrate, by a preponderance of the evidence, that the scientific, technical, or other bases of the testimony, including all principles, methodologies, and applications employed by the witness in forming opinions and inferences, produce credible results.

(c) Factual basis of opinion. The ~~facts or~~ case specific data ~~in the 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.~~ A proponent of expert testimony must make a demonstration of reliability, pursuant to Rule 803(5), for all otherwise inadmissible hearsay data relied upon by the expert. An expert may not rely upon data that is inadmissible.

A number of other proposals come from academia. A comment in the Buffalo Law Review, entitled *Abandoning New York's "General Acceptance" Requirement: Redesigning Proposed Rule of Evidence 702(b) After Daubert v. Merrell Dow Pharmaceuticals, 43 Buff.L.Rev. 229 (1995)*, proposes the following codification of *Daubert*, applicable to scientific testimony only:

Rule 702. Testimony by Experts

(a) In general. - If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Reliable Scientific Testimony. - Testimony concerning scientific matters, or testimony concerning the result of a scientific procedure, test or experience is admissible provided: (1) the theory or principle underlying the matter, procedure, test or experiment is scientifically valid; (2) the procedure, test, or experiment is reliable and produces accurate results; and (3) the particular test, procedure or

experiment was conducted in such a way as to yield an accurate result. Upon request of a party, a determination pursuant to this subdivision shall be made before the commencement of trial.

Professor Michael Graham, in the supplement to his treatise on Evidence, proposes the following amendment to Rule 702 to account for *Daubert*:

Rule 702. Testimony by Experts

~~If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.~~

Testimony providing scientific, technical or other specialized information, in the form of an opinion, or otherwise, may be permitted only if (1) the information is based upon adequate underlying facts, data or opinions, (2) the information is based upon an explanative theory either (a) established to have gained widespread acceptance in the particular field to which the explanative theory belongs, or (b) shown to possess particularized earmarks of trustworthiness, (3) the witness is qualified as an expert by knowledge, skill, experience, training or education to provide such information, and (4) the information will substantially assist the trier of fact to understand the evidence or to determine a fact in issue.

A comment in the Vanderbilt Law Review contains an interesting proposal to amend Rule 702 so as to establish "general acceptance" as a rebuttable presumption of reliability. See Tamarelli, *Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability*, 47 Vand. L. Rev. 1175 (1994). The proposal reads as follows:

Rule 702. Testimony by Experts

~~If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.~~

A witness may testify, in the form of an opinion or otherwise, concerning scientific, technical, or other specialized information that will assist the trier of fact to understand the evidence or to determine a fact in issue, but only if (1) the information is reasonably reliable, and (2) the

witness is qualified as an expert by knowledge, skill, experience, training, or education to provide that testimony.

Information normally will be considered reasonably reliable if it is based on premises, or derived from techniques, having significant support and acceptance within the relevant specialized community. A party seeking to object to a witness testifying thereto must show by a preponderance of the evidence that the information is not reasonably reliable.

Information based on premises or derived from techniques not having significant support and acceptance within the relevant specialized community normally will not be considered reasonably reliable. A party seeking to have an expert base testimony on this type of information must show by a preponderance of the evidence that this testimony is reasonably reliable.

The Vanderbilt comment states that this proposal has the advantage of addressing *Daubert* directly "by establishing in the text of Rule 702 that peer review and general acceptance should be the primary indicators of reliable expert testimony." Unlike *Frye*, however, the proposal "would not work as an absolute bar against admitting theories that are not generally accepted. Rather, it merely would establish a presumption that these theories are not reliable enough to be admitted."

Professor Starrs participated in a project sponsored by the Science and Technology Section of the ABA, the goal of which was to fashion evidentiary rules for scientific evidence. His proposal, which can be found at 115 F.R.D. 79, was published in 1987, six years before *Daubert*. Nonetheless, it anticipates the decision in that case. Professor Starrs' proposal reads as follows:

Rule 702. Testimony by Experts

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. But expert testimony based upon a scientific theory or technique is not admissible unless the court find that the theory or technique in question is scientifically valid for the purposes for which it is tendered.

Professor Starrs notes that the Rule is designedly general and open-ended: "Just as helpfulness to the jury and the qualifying of an expert are left undefined by the rule, so

too is scientific validity. The sound discretion of the trial court, an oft-touted strength, is once again summoned to the task.

A threshold question considered by the Drafting Committee was whether amendments to Uniform Rule 702 ought to embrace completely the *Daubert* criteria governing the admissibility of "novel scientific evidence" to achieve uniformity among the several States on this issue.

First, there is a significant lack of uniformity among the several States concerning the standard to be applied in determining the admissibility of expert testimony concerning scientific, technical, or specialized knowledge. They appear to fall roughly into five different categories in addressing this issue. These are: (1) States still adhering to the Frye standard; (2) States adhering to a pre-*Daubert* standard of reliability; (3) States adopting the *Daubert* standard for admissibility; (4) States adhering to varying standards of admissibility; and (5) States in which the issue appears to be unsettled.

(1) The States still adhering to the Frye standard are: **Alaska**, *Brodine v. State, 936 P.2d 545 (Alaska Ct. App. 1997)* (admitting PCR and DNA testing), *Clum v. State, No. A-5966, 1996 WL 596945 (Alaska Ct. App. Oct. 9, 1996)* (admitting HGN testing), *Harmon v. State, 908 P.2d 434 (Alaska Ct. App. 1995)* (admitting DNA testing), *Mattox v. State, 875 P.2d 763 (Alaska 1994)* (excluding testimony of hypnosis) and *Contreras v. State, 718 P.2d 129 (Alaska 1986)*; **Arizona**, *State v. Hummert, 933 P.2d 1187 (Ariz. 1997)* (admitting DNA testing), *State v. Johnson, 922 P.2d 294 (Ariz. 1996)* (admitting DNA testing), *States v. Boles, 905 P.2d 572 (Ariz. Ct. App. 1995)* (reversing on grounds that DNA testing was inadmissible), *State v. Bogan, 905 P.2d 515 (Ariz. Ct. App. 1995)* (admitting DNA testing) and *State v. Bible, 858 P.2d 1152 (Ariz. 1993)* (admitting DNA testing); **California**, *People v. Morganti, 43 Cal. App. 4th 643 (Cal. Ct. App. 1996)* (admitting agglutination inhibition testing and DNA testing), *Harris Transp. Co. v. Air Resources Bd., 32 Cal. App. 4th 1472 (Cal. Ct. App. 1995)* (excluding "snap-idle" testing to measure the opacity of vehicle omissions) and *People v. Leahy, 882 P.2d 321 (Cal. 1994)* (excluding admission of horizontal gaze nystagmus testing); **Colorado**, *Tran v. Hilburn, No. 95CA1662, 1997 WL 183993 (Colo. Ct. App. April 17, 1997)* (admitting VF evidence but excluding QEEG evidence), *People v. Fears, No. 93CA0720, 1997 WL 454086 (Colo. Ct. App. Aug. 7, 1997)* (admitting testimony of expert witness of shoe print impression), *Lindsey v. People, 892 P.2d 281 (Colo. 1995)* (admitting DNA testing) and *People v. Lyons, 907 P.2d 708 (Colo. Ct. App. 1995)* (excluding polygraph test results); **Florida**, *Hadden v. State, 690 So.2d 573 (Fla. 1997)* (excluding child sexual abuse accommodation syndrome), *Murray v. State, 692 So.2d 157 (Fla. 1997)* (excluding DNA testing), *J.A.D. v. State, 695 So.2d 445 (Fla. Dist. Ct. App. 1997)* (finding error in admitting post traumatic stress disorder), *Berry v. CSX Transp., Inc., No. 95-3131, 1997 WL 716425 (Fla. Dist. Ct. App. Nov. 19, 1997)* (reversing exclusion of testimony supporting excessive levels of organic solvents caused toxic

encephalopathy), *Jones v. Butterworth, No. 90,231, 1997 WL 652073 (Fla. Oct. 20, 1997)* (admitting testimony that use of electric chair was cruel and unusual punishment), *State v. Santiago, 679 So.2d 861 (Fla. Dist. Ct. App. 1996)* (admitting polygraph test results), *State v. Meador, 674 So.2d 826 (Fla. Dist. Ct. App. 1996)* (excluding horizontal gaze nystagmus testing) and *Flanagan v. State, 625 So.2d 827 (Fla. 1993)* (excluding sex offender profile evidence); **Illinois**, *People v. Miller, 670 N.E.2d 721 (Ill. 1996)* (admitting DNA testing), *People v. Moore, 662 N.E.2d 1215 (Ill. 1996)* (admitting DNA testing), *People v. Watson, 629 N.E.2d 634 (Ill. App. Ct. 1994)* (admitting DNA testing), *People v. Mehlberg, 618 N.E.2d 1168 (Ill. App. Ct. 1993)* (admitting DNA testing) and *People v. Baynes, 430 N.E.2d 1070 (Ill. 1981)* (reversing on grounds that admission of polygraph test results constituted reversible error); **Kansas**, *Armstrong v. City of Wichita, 907 P.2d 923 (Kan. Ct. App. 1995)* (admitting multiple chemical sensitivities testing); **Maryland**, *Hutton v. State, 663 A.2d 1289 (Md. 1995)* (reversing on grounds that post traumatic stress disorder testimony was inadmissible) and *Schultz v. State, 664 A.2d 601 (Md. Ct. Spec. App. 1995)* (finding error in admitting horizontal gaze nystagmus testing because no testing of defendant to establish he consumed alcohol); **Michigan**, *State v. Haywood, 530 N.W.2d 497 (Mich. Ct. App. 1995)* (declining to review applicability of standard in light of Daubert due to narrow ground upon which bloodstain evidence admitted) and *People v. Davis, 72 N.W.2d 269 (Mich. 1955)* (admitting testimony in adopting *Frye* rule in Michigan); **Minnesota**, *State v. Klawitter, 518 N.W.2d 577 (Minn. 1994)* (admitting horizontal gaze nystagmus testing), *State v. Hodgson, 512 N.W.2d 95 (Minn. 1994)* (declining to review applicability of standard in light of *Daubert* due to ground upon which horizontal gaze nystagmus and bitemark evidence admitted) and *State v. Mack, 292 N.W.2d 764 (Minn. 1980)* (excluding hypnotic testimony); **Missouri**, *State v. Payne, 943 S.W.2d 338 (Mo. Ct. App. 1997)* (admitting DNA testing), *Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852 (Mo. 1993)* (admitting testimony while declining to review whether 490.065 RSMo. Supp. 1992 supersedes *Frye* doctrine), *State v. Davis, 814 S.W.2d 593 (Mo. 1991)* (admitting DNA fingerprinting evidence) and *Alsbach v. Bader, 700 S.W.2d 823 (Mo. 1985)* (excluding post-hypnotic testimony); **Nebraska**, *Sheridan v. Catering Management, Inc., 556 N.W.2d 110 (Neb. 1997)* (admitting physician's testimony that exposure to toxic chemicals caused brain injury), *State v. Case, 553 N.W.2d 173 (Neb. Ct. App. 1996)* (excluding expert testimony that defendant's statement made during prepolygraph interview were not voluntary), *State v. Dean, 523 N.W.2d 681 (Neb. 1994)* (admitting laser trajectory testing) and *State v. Carter, 524 N.W.2d 763 (Neb. 1994)* (finding error in admitting DNA testing); **New Hampshire**, *State v. Cavaliere, 663 A.2d 96 (N.H. 1995)* (excluding expert testimony that defendant failed to meet sexual offender profile), *State v. Vandebogart, 652 A.2d 671 (N.H. 1994)* (admitting DNA testing) and *State v. Cressey, 628 A.2d 696 (N.H. 1993)* (finding error in admission of expert testimony that children were sexually abused); **New Jersey**, *State v. Marcus, 683 A.2d 221 (N.J. Super. Ct. App. Div. 1996)* (admitting DNA testing); **New York**, *People v. Rorack, 622 N.Y.S.2d 327 (N.Y. App. Div. 1997)* (finding that admission of FTIR required *Frye* hearing), *People v. Wernick, 651 N.Y.S.2d 392 (N.Y.*

1996) (affirming exclusion of expert's reference to neonaticide syndrome), *People v. White, 645 N.Y.S.2d 562 (N.Y. App. Div. 1996)* (admitting expert testimony on child sexual abuse), *People v. Yates, 637 N.Y.S.2d 625 (N.Y. Sup. Ct. 1995)* (admitting rape trauma syndrome testimony), *People v. Wesley, 633 N.E.2d 451 (N.Y. 1994)* (admitting DNA testing) and *People v. Swamp, 604 N.Y.S.2d 341 (N.Y. App. Div. 1993)* (admitting testimony identifying controlled substances); **North Dakota**, *City of Fargo v. McLaughlin, 512 N.W.2d 700 (N.D. 1994)* (admitting testimony upon *Frye* standard not applicable to determining admissibility of horizontal gaze nystagmus); **Pennsylvania**, *Commonwealth v. Blasioli, 685 A.2d 151 (Pa. Super. Ct. 1996)* (admitting DNA testing), *Commonwealth v. Crews, 640 A.2d 395 (Pa. 1994)* (admitting DNA testing) and *Commonwealth v. Topa, 369 A.2d 1277 (Pa. 1977)* (reversing on grounds of admission of voice print identification); **Utah**, *Dikeou v. Osborn, 881 P.2d 943 (Utah Ct. App. 1994)* (finding emergency room physician not qualified to testify as to standard of care applicable to cardiologist); and **Washington**, *State v. Zeiler, No. 330230301, 1997 WL 88960 (Wash. Ct. App. March 3, 1997)* (admitting testimony of child abuse), *State v. Anderson, No. 15077-1-III, 1997 WL 530705 (Wash. Ct. App. Aug. 26, 1997)* (admitting testimony of child abuse), *State v. Copeland, 922 P.2d 1304 (Wash. 1996)* (admitting RFLP typing), *State v. Jones, 922 P.2d 806 (Wash. 1996)* (admitting DNA testing), *State v. Riker, 869 P.2d 43 (Wash. 1994)* (excluding battered woman's syndrome testimony), *but see, Reese v. Stroh, 907 P.2d 282 (Wash. 1995)* (finding expert opinion as to efficacy of Prolastin therapy admissible).

In **New York**, there is a proposed New York Rule 702(a) similar to Federal Rule 702. Proposed Rule 702(b) specifically deals with scientific testimony, and reads as follows:

> Testimony concerning scientific matters, or testimony concerning the result of a scientific procedure, test or experiment is admissible provided:
>
> 1. There is general acceptance within the scientific community of the validity of the theory or principle underlying the matter, procedure, test, or experiment;
>
> 2. There is general acceptance within the relevant scientific community that the procedure, test or experiment is reliable and produces accurate results; and
>
> 3. The particular test, procedure, or experiment was conducted in such a way as to yield an accurate result.
>
> Upon request of a party, a determination pursuant to this subdivision shall be made before the commencement of trial.

In **Hawaii**, the Frye standard is combined with a reliability standard introduced in the black letter of Rule 702 in 1992 as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert. See 1992 Haw. Sess. L. Act 191, § 2(7) at 410.
>
> See further, State v. Maelega, 80 Haw. 172, 907 P.2d (1995) ("extreme mental or emotional disturbance manslaughter") and State v. Montalbo, 73 Haw. 130, 828 P.2d 1274 (1992) (DNA evidence).

A modified Frye standard of admissibility has been applied in **Alabama** in determining the admissibility of DNA test results. See the pre-pronged test of *Ex parte Perry, 586 So.2d 242 (Ala. 1991), §§ 36-18-20 through 39, Ala. Code 1975* and *Turner v. State, 1996 Ala. Cr. App. LEXIS 118* and *Smith v. State, 1995 Ala. Cr. App. LEXIS 413*.

(2) The States adhering to a pre-*Daubert* standard of reliability are: **Arkansas**, *Moore v. State, 915 S.W.2d 284 (Ark. 1996)* (admitting DNA testing) and *Prater v. State, 820 S.W.2d 429 (Ark. 1991)* (admitting DNA testing); **Delaware**, *State v. Sailer, 684 A.2d 1247 (Del. Super. Ct. 1995)* (excluding polygraph test results), *Nelson v. State, 628 A.2d 69 (Del. 1993)* (finding harmless error in admitting DNA testing) and *State v. Ruthardt, 680 A.2d 349 (Del. Super. Ct. 1996)* (admitting horizontal gaze nystagmus test); **Idaho**, *State v. Parkinson, 909 P.2d 647 (Idaho Ct. App. 1996)* (excluding psychological profile of sex offenders) and *State v. Faught, 908 P.2d 566 (Idaho 1995)* (admitting DNA testing); **Iowa**, *Hutchinson v. Am. Family Ins., 514 N.W.2d 882 (Iowa 1994)* (admitting testimony of neuropsychologist on causation); **Montana**, *Barmeyer v. Montana Power Co., 657 P.2d 594 (Mont. 1983)* (admitting corrosion analysis); **Oregon**, *State v. Brown, 687 P.2d 751 (Or. 1984)* (excluding polygraph testing); **Texas**, *Fowler v. State, No. 10-96-190-CR, 1997 WL 765763 (Tex. Ct. App. Nov. 26, 1997)* (finding harmless error in admitting expert testimony of family violence), *Forte v. State, 935 S.W.2d 172 (Tex. Ct. App. 1996)* (excluding expert testimony), *Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992)* (admitting DNA testing); and **Wyoming**, *Rivera v. State, 840 P.2d 933 (Wyo. 1992)* (admitting DNA testing).

In **Indiana**, see *Steward v. State, 652 N.E.2d 490 (Ind. 1995)* (excluding child sexual abuse accommodation syndrome), interpreting Indiana's Rule 702(b) requiring that "[e]xpert scientific testimony is admissible only if the court is satisfied that scientific

principles upon which the expert testimony rests are reliable" and *Hottinger v. Trugreen Corp., 665 N.E.2d 593 (Ind. Ct. App. 1996)* (admitting testimony explaining chemical injury caused by exposure to Trimec 2-4-D). See further, the Indiana version of Rule 702 which is somewhat like that of Hawaii, in that it adds a new subdivision to deal with the reliability question. But it is different in several respects as follows:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

(3) The States adopting the *Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)* standard for admissibility are: **Georgia**, *Winfield v. State, No. A97A2274, 1997 WL 672438 (Ga. Ct. App. Oct. 30, 1997)* (admitting DNA testing); **Indiana**, *Weinberg v. Geary, No. 45A03-9612-CV-439, 1997 WL 711104 (Ind. Ct. App. 1997)* (excluding expert testimony on physician's standard of care); **Iowa**, *Johnson v. Knoxville Community Sch., No. 95-1686, 1997 WL 732142 (Iowa Nov. 26, 1997)* (admitting testimony explaining CD trait), *Williams v. Hedican, 561 N.W.2d 817 (Iowa 1997)* (admitting expert testimony that administering antibody which destroys chicken pox virus to pregnant woman who has been exposed to the virus can prevent or lessen chicken pox in fetus), *Hutchison v. Am. Family Mut. Ins. Co., 514 N.W.2d 882 (Iowa 1994)* (admitting testimony of neuropsychologist on causation); **Kentucky**, *Stringer v. Commonwealth, No. 94-SC-818-MR (Ky. Nov. 20, 1997)* (admitting expert testimony about child sexual abuse), *Collins v. Commonwealth, 951 S.W.2d 569 (Ky. 1997)* (admitting doctor's expert testimony), *Newkirk v. Commonwealth, 937 S.W.2d 690 (Ky. 1996)* (excluding CSAAS testimony), *Mitchell v. Commonwealth, 908 S.W.2d 100 (Ky. 1995)* (admitting DNA testing) and *Rowland v. Commonwealth, 901 S.W.2d 871 (Ky. 1995)* (admitting hypnotically enhanced testimony); **Louisiana,** *State v. Schmidt, 699 So.2d 448 (La. Ct. App. 1997)* (admitting DNA testing), *Williamson v. Haynes Best Western, 688 So.2d 1201 (La. Ct. App. 1997)* (admitting expert testimony that prior incidents and expert testimony in support of defense theory that accident was staged), *Hickman v. Exide, Inc., 679 So.2d 527 (La. Ct. App. 1996)* (admitting evidence), *State v. Quatrevingt, 670 So.2d 197 (La. 1996)* (finding harmless error to admit DNA testing) and *State v. Foret, 628 So.2d 1116 (La. 1993)* (excluding child sexual abuse accommodation syndrome testimony); **Montana**, *State v. Cline, 909 P.2d 1171 (Mont. 1996)* (admitting expert testimony determining age of fingerprint through use of magnetic powder) and *State v. Moore, 885 P.2d 457 (Mont. 1994)* (admitting DNA testing); **New Mexico**, *Baerwald v. Flores, 930 P.2d 816 (N.M. Ct. App. 1997)* (admitting expert testimony concerning whether accident was capable of producing TMJ

injury), *State v. Anderson, 881 P.2d 29 (N.M. 1994)* (admitting DNA testing) and *State v. Alberico, 861 P.2d 192 (N.M. 1993)* (admitting post traumatic stress disorder testimony); **Ohio**, *State v. Anthony, No. 96APA12-1721, 1997 WL 629983 (Ohio Ct. App. Oct. 9, 1997)* (affirming exclusion of polygraph test results); **Oklahoma**, *Taylor v. State, 889 P.2d 319 (Okla. Crim. App. 1995)* (admitting DNA testing); **Oregon**, *State v. Lyons, 924 P.2d 802 (Or. 1996)* (admitting DNA testing), *State v. O'Key, 899 P.2d 663 (Or. 1995)* (admitting horizontal gaze nystagmus testing to show defendant was intoxicated not to prove his blood alcohol content); **South Dakota**, *State v. Loftus, No. 19731, 1997 WL 745059 (S.D. Dec. 3, 1997)* (admitting DNA testing), *State v. Moeller, 548 N.W.2d 465 (S.D. 1996)* (admitting DNA testing) and *State v. Hofer, 512 N.W.2d 482 (S.D. 1994)* (admitting intoxilyzer testing); **Tennessee**, *McDaniel v. CSX Transp., Inc., 1997 WL 594750 (Tenn. Sept. 29, 1997)*; **Texas**, *E. I .duPont de NeMours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995)* (affirming exclusion of expert testimony on damage to pecan orchard caused by contaminated Benlate 50 DF); **Vermont**, *State v. Streich, 658 A.2d 38 (Vt. 1995)* (admitting DNA testing) and *State v. Brooks, 643 A.2d 226 (Vt. 1993)* (reversing exclusion of Datamaster infrared testing device for DUI); **West Virginia**, *State v. Wyatt, 482 S.E.2d 147 (W. Va. 1996)* (excluding expert testimony concerning BWS), *State v. Beard, 461 S.E.2d 486 (W. Va. 1995)* (excluding polygraph test results) and *Wilt v. Buracker, 443 S.E.2d 196 (W. Va. 1993)* (excluding hedonic damages testimony)*;* and **Wyoming**, *Springfield v. State, 860 P.2d 435 (Wyo. 1993)* (admitting DNA testing).

(4) The States adhering to varying standards of admissibility are: **Georgia**, *Prickett v. State, 469 S.E.2d 371 (Ga. Ct. App. 1996)* (whether the procedure or technique in question has reached a scientific stage of verifiable certainty, or in the words of Professor Irving Younger, whether the procedure rests upon the laws of nature") and *Harper v. State, 292 S.E.2d 389 (Ga. 1982)* (affirming exclusion of testimony explaining defendant's explanation of incident while under influence of sodium amytal); **New Jersey**, *State v. Noel, 697 A.2d 157 (N.J. Super. Ct. App. Div. 1997)* (admitting ICP analysis), *State v. Hishon, 687 A.2d 1074 (N.J. Super. Ct. App. Div. 1996)* (admitting DNA testing), *State v. Fertig, 668 A.2d 1076 (N.J. 1996)* (excluding posthypnotic testimony), *Landrigan v. Celotex Corp., 605 A.2d 1079 (N.J. 1992)* (reversing exclusion of expert's testimony that asbestos caused colon cancer) and *Rubanick v. Witco Chem., 593 A.2d 733 (N.J. 1991)* (remanding case to determine if scientific theory of causation in toxic tort litigation is admissible); and **Wisconsin**, *State v. Perkins, No. 95-1353-CR, 1997 WL 442085 (Wis. Ct. App. Aug. 7, 1996)* (admitting testimony that victim acted consistently with initial reactions of sexual assault victims), *State v. Peters, 534 N.W.2d 867 (Wis. Ct. App. 1995)* (admitting DNA testing), *State v. Walstad, 351 N.W.2d 469 (Wis. 1984)* (admitting testimony discussing breathalyzer test ampoule), and *Watson v. State, 219 N.W.2d 398 (Wis. 1974)* (admitting expert testimony identifying chin hair).

(5) The States in which the issue appears to be unsettled are: **Connecticut**, *State v. Esposito, 670 A.2d 301 (Conn. 1996)* (equivocating on applicability of *Frye* and

Daubert affirming exclusion of polygraph test results), *State v. Hunter, 670 A.2d 1307 (Conn. 1996)* (certification for appeal on issue of whether the Supreme Court should reconsider the applicability of the *Frye* test after excluding polygraph evidence in light of *Daubert*), *State v. Porter, 670 A.2d 1308 (Conn. 1996)* (certification for appeal on issue of whether the Supreme Court should reconsider the applicability of the *Frye* test after excluding polygraph evidence in light of *Daubert*) and *State v. Tevfik, 646 A.2d 169 (Conn. 1994)* (applying *Frye* test to reverse lower court's decision to admit DNA testing); **Massachusetts**, *Commonwealth v. Rosier, 685 N.E.2d 739 (Mass. 1997)* (admitting DNA testing), *Commonwealth v. Lanigan, 641 N.E.2d 1342 (Mass. 1994)* (applying Daubert test to admit DNA testing), but see *Commonwealth v. Smith, 624 N.E.2d 604 (Mass. App. Ct. 1993)* (deferring applicability of *Daubert* test in admitting retrograde extrapolation in determining blood alcohol level); **Ohio**, *State v. Clark, 655 N.E.2d 795 (Ohio Ct. App. 1995)* (admitting evidence of accident reconstruction utilizing computer assisted or electronic drafting techniques, although *Daubert* found inapplicable); and **Rhode Island**, *In re Odell, 672 A.2d 457 (R.I. 1996)* (excluding polygraph evidence).

In 1994, **Ohio** Rule 702 was amended because the previous rule, which was identical to Federal Rule 702, had "proved to be uninformative and, at times, misleading." The amended Ohio Rule 702, insofar as it applies to reliability, reads as follows:

Rule 702. Testimony by Experts

~~If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.~~

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay person or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

> (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
>
> (2) The design of the procedure, test, or experiment reliably implements the theory;
>
> (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

The Rule was intended to codify Ohio law, which had rejected *Frye* as the exclusive test for determining the admissibility of expert testimony.

Second, as the **Reporter** has observed elsewhere,

> [t]he factors delineated by the Supreme Court in the *Daubert* case in determining the admissibility of expert testimony under Rule 702 are not free of difficulty. First, as noted by dissenting Chief Justice Rehnquist, the majority of the Court seizes upon the words "scientific knowledge" in Rule 702 as the basis for identifying the four factors relevant to the admissibility of novel scientific evidence. Do these factors also apply to the expert seeking to testify on the basis of "technical, or other specialized knowledge" to which Rule 702 also applies? Expert testimony relating to such areas of expertise as hypnotically refreshed testimony, the battered woman's syndrome, or the child accommodation syndrome, arguably falls within "technical, or other specialized knowledge," even though in such social science areas it would be rare that such evidence could meet the testability or falsifiability and potential rate of error factors required by the *Daubert* case. At the same time, however, to the extent such gray areas are classified within Rule 702, the holding of the *Daubert* case would appear to require trial courts to evaluate such evidence for reliability-validity as a condition to admissibility.
>
> Second, suppose the proffered evidence involves only an *application* of a scientific theory or technique which concededly meets the minimally required four factors of admissibility enunciated in *Daubert*. Do *applications* of scientific theory or technique fall within the realm of "technical, or otherwise specialized knowledge?" Are these subject to the reliability-validity factors of *Daubert*, or of something else?

Third, as discussed in Section 26.08, suppose the expert is testifying on a basis of experience, such as automobile mechanics or skeletal configurations. It is doubtful that such evidence could be classified as "scientific," although it might very well qualify as "technical" or "specialized" knowledge. In such cases it seems that the *Daubert* factors ought not to govern admissibility, although it is by no means made clear in the decision.

In addition to the interpretive problems created by the Supreme Court's focus in the *Daubert* case on the language "scientific knowledge," the parties and amici also expressed concern that abandonment of the Frye "general acceptance" standard as the exclusive requirement for admissibility "will result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions." In rejecting this concern the majority of the Supreme Court observed that the respondent appeared "overly pessimistic about the capabilities of the jury, and of the adversary system generally." It observed:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

The decision also raises the question of the extent to which trial judges are now required to fulfill the role of "amateur scientists" in ruling on the admissibility of novel scientific evidence. The dissenting Chief Justice, while conceding "that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony," does not believe that "it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role." In contrast, the majority expressed the view that it is "confident that federal judges possess the capacity to undertake this review." This is perhaps problematic and raises the question of whether a majority of the federal judges are either "capable," or "interested," in conducting an inquiry to determine the reliability-validity of novel scientific evidence under the *Daubert* factors governing admissibility. The result may very well be one of the trial judge erring on the side of admissibility through the application of a "liberal" standard in determining reliability-validity without regard to the balancing process mandated by Rule 403 of the *Federal Rules* and placing an undue reliance on cross-examination and the presentation of contrary evidence to expose weaknesses in the proponent's expert evidence. It is one thing

to conclude, as the dissenting Chief Justice Rehnquist did, "that the Frye rule did not survive the enactment of the Federal Rules of Evidence." It is another thing to devise a set of reliability-validity standards which imposes on trial judges "either the obligation or the authority to become amateur scientists in order to perform that role." It would have perhaps been wiser to remove any doubt as to the survival of the Frye rule in Rule 702 of the *Federal Rules*, but leave it to the task of the trial judge on a case-by-case basis to determine whether the proffered evidence would "assist the trier of fact to understand the evidence or determine a fact in issue."

A number of state courts have also adopted a reliability approach to admissibility in lieu of the more rigid *Frye* standard, but with less rigidity than that developed in the *Daubert* case. Most notably, in interpreting Rules 401, 403 and 702 of the *Maine Rules of Evidence* based on the *Federal Rules*, the Supreme Court of Maine has adopted the relevancy-reliability versus unfair prejudice standard. It reasoned, first, the adoption of *Frye* standard "would be at odds with the fundamental philosophy of our Rules of Evidence, as revealed more particularly in Rules 402 and 702, generally favoring the admissibility of expert testimony whenever it is relevant and can be of assistance to the trier of fact." Second, the Court also reasoned that this more flexible approach would obviate the difficulties courts had experienced in applying the *Frye* standard of ascertaining the particular scientific community to which the evidence belongs and of determining its general acceptance within the defined scientific community. The Court concluded as follows:

> On the approach we adopt the presiding Justice will be allowed a latitude, which the Frye rule denies, to hold admissible in a particular case proffered evidence involving newly ascertained, or applied, scientific principles which have not yet achieved general acceptance in whatever might be thought to be the applicable scientific community, if a showing has been made which satisfies the Justice that the proffered evidence is sufficiently reliable to be held relevant.

See 2 Whinery, Oklahoma Evidence, Commentary on the Law of Evidence § 2606, pp. 553-555 (1994). [F ootnotes Omitted]

The proposal of the Drafting Committee is intended to overcome the foregoing perceived deficiencies in the *Daubert* case.

RULE 703. BASIS OF OPINION TESTIMONY BY EXPERTS. The facts or data in ~~the~~ a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to ~~him~~ 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, in order for the opinion or inference to be admissible.

Reporter's Note

This proposal for amending Rule 703 eliminates the gender-specific language in the rule. This change is technical and no change in substance is intended.

The language "in order for the opinion or inference to be admissible" drawn from the tentative amendment to Rule 703 of the *Federal Rules of Evidence* is proposed by the Drafting Committee as helpful clarification to Uniform Rule 703 that the admission of an opinion or inference does not thereby render the underlying facts or data admissible in evidence.

The balance of the tentative draft of Federal Rule 703 was rejected after extensive discussion. The tentative amendment to Rule 703 approved by the Advisory Committee on the *Federal Rules of Evidence*, at its meeting on April 14-15, 1997, subject to later review depending upon how the Committee might deal with Rule 702, reads as follows:

Rule 703. Bases of Opinion Testimony by Experts

> The facts or data in the 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, in order for the opinion or inference to be admissible. The court may apply the principles of Rule 403 to exclude, or limit, the presentation of the underlying facts or data if they are otherwise inadmissible. If the facts or data are disclosed solely to explain or support the expert's opinion or inference, the court must, on request, give a limiting instruction. Nothing in this rule restricts the presentation of underlying facts or data when offered by an adverse party.

The Advisory Committee revisited the amendment of Rule 703 at its meeting April 6 and 7, 1998 and approved the following amendment for submission to the Standing Committee of the Judicial Conference of the United States.

> The facts or data in the 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 <u>in order for the opinion or inference to be admitted. If the facts or data are otherwise inadmissible, they shall not be disclosed to the jury by the proponent of the opinion or inference unless their probative value substantially outweighs their prejudicial effect.</u>

The following States have rules identical to, or substantively the same as, existing Uniform Rule 703: **Alaska**, *Alaska R. Evid. 703*; **Arizona**, *Ariz. R. Evid. 703*; **Arkansas,** *Ark. R. Evid. 703*; **Colorado**, *Colo. R. Evid. 703*; **Delaware**, *Del. R. Evid. 703*; **Florida**, *Fla. Stat. Ann. § 90.704 (West 1997)*; **Idaho**, *Idaho R. Evid. 703*; **Indiana**, *Ind. R. Evid. 703*; **Iowa**, *Iowa R. Evid. 703*; **Louisiana**, *La. Code Evid. Ann. art. 703 (West 1997)*; **Maine**, *Me. R. Evid. 703*; **Maryland**, *Md. Ann. Code of 1957 5-703*; **Michigan**, *Mich. R. Evid. 703*; **Montana**, *Mont. R. Evid. 703*; **Nebraska**, *Neb. R. Evid. 703*; **Nevada**, *Nev. Rev. Stat. § 50.285 (1995)*; **New Jersey**, *N.J. R. Evid. 703*; **New Mexico**, *N.M. R. Evid. 11-703*; **North Carolina**, *N.C. R. Evid. 703*; **North Dakota**, *N.D. R. Evid. 703*; **Oklahoma**, *12 Okla. St. Ann. § 2703*; **Oregon**, *Or. R. Evid. 703*; **Rhode Island**, *R.I. R. Evid. 703*; **South Carolina**, *S.C. R. Evid. 703*; **South Dakota**, *S.D. Codified Laws Ann. § 19-15-3 (1997)*; **Utah**, *Utah R. Evid. 703*; **Vermont**, *Vt. R. Evid. 703*; **Virginia**, *Va. Code Ann. § 8.01-401.1 (Michie 1997)*; **Washington**, *Wash. R. Evid. 703*; **West Virginia**, *W. Va. R. Evid. 703*; and **Wisconsin**, *Wis. Stat. Ann. § 907.03 (West 1997)*.

A few States have promulgated rules to deal with the issues relating to experts relying on otherwise inadmissible evidence under their parallel rules to Federal Rule 703 or 705. In **California**, Cal. R. Evid. 801 provides as follows:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony

relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

In **Hawaii**, Haw. R. Evid. 703 provides as follows:

> The facts or data in the 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. The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

In **Kansas**, Kan R. Evid. 60-457 provides as follows:

> The judge may require that a witness before testifying in terms of opinion or inference be first examined concerning the data upon which the opinion or inference is founded.

In **Kentucky**, Ky. R. Evid. 703 provides as follows:

> (a) The facts or data in the 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.
>
> (b) If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.
>
> (c) Nothing in this rule is intended to limit the right of an opposing party to cross-examine an expert witness or to test the basis of an expert's opinion or inference.

In **Minnesota**, Minn. R. Evid. 703 provides as follows:

> (a) The facts or data in the 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.

(b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.

In **Ohio**, Ohio R. Evid. 703 provides as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing.

In **Tennessee**, Tenn. R. Evid. 703 provides as follows:

> The facts or data in the 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. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

In **Texas**, Tex. R. Evid. Rule 703 provides as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed 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.

Tex. R. Evid. 705 deals further with the issue in subdivision (d) as follows:

> (a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give the expert's reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination,

or be required to disclose on cross-examination, the underlying facts or data, subject to subparagraphs (b) through (d).

(b) Voir Dire. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case or in a civil case may be permitted to conduct a *voir dire* examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(c) Admissibility of Opinion. If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.

(d) Balancing Test; Limiting Instructions. When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

The following state jurisdictions do not deal with the issue statutorily: **Alabama**, **Connecticut**, **Georgia**, **Illinois**, **Massachusetts**, **Mississippi**, **Missour**i, **New Hampshire**, **New York**, and **Pennsylvania**.

The state jurisdictions which have counterparts to Uniform Rule 703 uniformly apply the "reasonable reliance" standard in determining whether data not otherwise admissible in evidence may be relied upon by the expert in forming an opinion or inference on the subject. *See*, for example, *State v. Fierro*, 603 P.2d 74 (Ariz. 1979), in which the court sustained the admission of expert testimony on the subject of the Mexican Mafia, although much of the information received by the expert was hearsay, since the information relied upon was of a type reasonably relied upon by experts in formulating opinions or inferences on the subject. *See further*, *State v. Henze*, 356 N.W.2d 538 (Iowa 1984), sustaining the admissibility of an expert's opinion based upon hearsay data within medical records because the data was of a type reasonably relied upon by doctors in forming opinions. In contrast, *see State v. Ballard*, 855 S.W.2d 557 (Tenn. 1993), in which the court held that the trial court erred in admitting expert testimony on post-traumatic stress syndrome exhibited by victims of sexual abuse because there was no evidence that the facts underlying testimony were of the type reasonably relied upon by experts in the field. *See further* in this connection, *Smith v. Sturm, Ruger & Co.*, 695 P.2d 600 (Wash. Ct. App. 1985), holding that expert

testimony based upon a survey of revolver owners was not data of a type reasonably relied upon by experts in the field.

The ABA Committee on Rules of Criminal Procedure and Evidence proposed in 1987 that Federal Rule 703 be amended as follows:

(a) Bases of Opinion Testimony by Experts

> The facts or data in the 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, in order for the opinion or inference to be admissible.

(b) Admissibility of underlying facts or data.

> Except as provided hereinafter in this Rule, the facts and data underlying an expert's opinion or inference must be independently admissible in order to be received in evidence on behalf of the party offering the expert, and the expert's reliance on facts or data that are not independently admissible does not render those facts or data admissible in that party's behalf.
>
> (1) Exception. Facts or data underlying an expert's opinion or inference that are not independently admissible may be admitted in the discretion of the court on behalf of the party offering the expert, if they are trustworthy, necessary to illuminate the testimony, and not privileged. In such instances, upon request, their use ordinarily shall be confined to showing the expert's basis.
>
> (2) Discretion whether or not independently admissible. Whether underlying facts and data are independently admissible or not, the mere fact that the expert witness has relied upon them does not alone require the court to receive them in evidence on request of the party offering the expert.
>
> (3) Opposing party unrestricted. Nothing in this Rule restricts admissibility of an expert's basis when offered by a party opposing the expert.

Finally, Professor Carlson has recommended that Federal Rule 703 be amended as follows:

(a) The facts or data in the 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.

(b) Nothing in this rule shall require the court to permit the introduction of facts or data into evidence on grounds that the expert relied on them. However, they may be received into evidence when they meet the requirements necessary for admissibility prescribed in other parts of these rules.

See Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 Minn.L.Rev. 859 (1992).

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.

Reporter's Note

There are no proposals at the present time for amending Rule 704.

Rule 704 of the Federal Rules of Evidence was amended in 1984 to include a subdivision (b) as follows:

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

(As amended Pub.L. 998-473, Title II, § 406, Oct. 12, 1984, 98 Stat. 2067).

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION. The expert may testify in terms of opinion or inference and give ~~his~~ reasons

therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Reporter's Note

This proposal for amending Rule 705 eliminates the gender-specific language in Rule 705. This change is technical and no change in substance is intended.

RULE 706. COURT APPOINTED ~~EXPERTS~~ EXPERT WITNESSES.

(a) Appointment. The court, on motion of any party or its own motion, may ~~enter~~ issue an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness ~~shall~~ may not be appointed by the court unless ~~he~~ the witness consents to act. A witness so appointed ~~shall~~ must be informed of ~~his~~ the witness' duties by the court in writing, a copy of which ~~shall~~ must be filed with the clerk, or at a conference in which the parties ~~shall~~ have an opportunity to participate. A witness so appointed shall advise the parties of ~~his~~ the witness' findings, if any; ~~his~~ the witness' deposition may be taken by any party; and ~~he~~ the witness may be called to testify by the court or any party. ~~He shall be~~ The witness is subject to cross-examination by each party, including a party calling ~~him as a~~ the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in ~~whatever~~ the sum the court ~~may allow~~ allows. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil

actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the parties shall pay the compensation ~~shall be paid by the parties~~ in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In ~~the exercise of~~ its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. ~~Nothing in this~~ This rule ~~limits~~ does not limit the parties in calling expert witnesses of their own selection.

Reporter's Note

This proposal for amending Rule 706 eliminates the gender-specific language in Rule 706 and makes recommended stylistic changes. These are technical and no change in substance is intended.

The Drafting Committee recommends that the caption to Rule 706 be changed to "Court Appointed Expert Witnesses" which more nearly reflects 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 gatekeeping function in admitting scientific, technical or specialized knowledge under Uniform Rule 702.

ARTICLE VIII

HEARSAY

RULE 801. DEFINITIONS.

(a) General. ~~As used in~~ In this Article:

~~(a)~~ (1) Statement. "Statement" means (i) an oral ~~or written~~ assertion, or (ii) an assertion in a record, or ~~(ii)~~ (iii) nonverbal conduct of an individual who intends it as an assertion.

~~(b)~~ (2) Declarant. "Declarant" means an individual who makes a statement.

~~(c)~~ (3) Hearsay. "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.

~~(d)~~ (b) Statements that are not hearsay. A statement is not hearsay if~~:~~

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

~~(i)~~ (A) Inconsistent statement. ~~inconsistent~~ Inconsistent with the declarant's testimony and~~, if offered in a criminal proceeding,~~ was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition~~;~~;

~~(ii)~~ (B) Consistent statement. ~~consistent~~ Consistent with the declarant's testimony, ~~and~~ 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

~~(iii)~~ (C) Identification. ~~one~~ One of identification made shortly after perceiving the individual identified.

(2) Admission by party-opponent. The statement is offered against a party and is:

~~(i)~~ (A) Statement of party. ~~the~~ The party's own statement, in either an individual or a representative capacity~~,~~;

~~(ii)~~ (B) Statement adopted by party. ~~a~~ A statement of which the party has manifested adoption or belief in its truth~~,~~;

~~(iii)~~ (C) Statement authorized by party. ~~a~~ A statement by an individual authorized by the party to make a statement concerning the subject~~,~~;

~~(iv)~~ (D) Statement of party's agent. ~~a~~ 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

~~(v)~~ (E) Statement of coconspirator. ~~a~~ A statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Reporter's Note

The **Comment to 1986 Amendment** reads:

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

The Amendments read:

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

Recommended stylistic changes have been made in Rule 801.

The first substantive change proposed by the Drafting Committee is to amend Rule 801(a)(1) to delete the words "or written" and insert the words "(ii) an assertion in a record" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See*, in this connection, the **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

The second substantive change is to strike the phrase ", if offered in a criminal proceeding," in renumbered subdivision (b)(1)(A) to require the oath as a foundational requirement in *both* civil and criminal proceedings for admitting a prior inconsistent statement of a witness. This would bring the Uniform Rule into conformity with the parallel Federal Rule 801(d)(1)(A) and the rule adopted in a majority of the States adopting the Federal Rule. The Drafting Committee believes that there is no significant difference between civil and criminal cases in requiring an oath as a condition to admissibility when a prior inconsistent statement is offered for its substance under renumbered Uniform Rule 801(b)(1)(A).

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

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

> Accordingly, I would hold that that the Federal Rules authorize a district court to allow (where probative in respect to rehabilitation) the use of postmotive prior consistent statements to rebut a charge of recent fabrication, improper influence or motive (subject of course to, for example, Rule 403). Where such statements are admissible for this

rehabilitative purpose, Rule 801(d)(1)(B), as stated above, makes them admissible as substantive evidence as well (provided, of course, that the Rule's other requirements, such as the witness' availability for cross-examination, are satisfied). In most cases, this approach will not yield a different result from a strict adherence to the premotive rule for, in most cases, postmotive statements will not be significantly probative. And, even in cases where the statement is admitted as significantly probative (in respect to rehabilitation), the effect of admission on the trial will be minimal because the prior consistent statements will (by their nature) do no more than repeat in-court testimony.

An examination of state law has disclosed that only two States have enacted statutes that embody the premotive requirement of *Tome v. United States, supra*. These are: **Indiana**, Ind. R. Evid. 801(d)(1)(B) and **South Carolina**, S.C. R. Evid. 801(d)(1)(B). Indiana's rule provides that the statement must be:

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

South Carolina's rule provides:

> the statement is . . . consistent with the declarant's testimony and is with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose . . . .

However, a substantial number of States have adopted the *Tome* pre-motive requirement by judicial decision. These are: **Arizona**, *State v. Jones, 188 Ariz. 534, 937 P.2d 1182 (1996)*, interpreting Ariz. R. Evid. 801(d)(1)(B); **Arkansas**, *Henderson v. State, 311 Ark. 398, 844 S.W.2d 360 (1993)*, interpreting Ark. R. Evid. 801(d)(1)(ii); **Colorado**, *People v. Salazar, 920 P.2d 893 (Colo. 1996)*, interpreting Colo. R. Evid. 801(d)(1)(B); **Florida**, *Rodriquez v. State, 609 So.2d 493 (Fla. 1992)*, interpreting Fla. Stat. Ann. § 90.801(2)(b); **Iowa**, *State v. Johnson, 539 N.W.2d 160 (Iowa 1995)*, relying on the *Tome* case, *supra*, and overruling *State v. Gardner, 490 N.W.2d 838 (Iowa 1992)* to adopt a pre-motive requirement in interpreting Iowa R. Evid. 801(d)(1)(B); **Kentucky**, *Fields v. Commonwealth, 905 S.W.2d 510 (Kyn. 1995)*, appearing to adhere to the pre-motive requirement of the *Tome* case, *supra*, in interpreting Kyn. R. Evid. 801A(a)(2); **Maine**, *State v. Phillipo, 623 A.2d 1265 (Me. 1993)*, interpreting Me. R. Evid. 801(d)(1); **Michigan**, *People v. Rodriquez, 216 Mich. App. 329, 549 N.W.2d 359*

(1995), relying on the *Tome* case, *supra*, in interpreting Mich. R. Evid. 801(d)(1)(B), **Mississippi**, *Owens v. State, 666 So.2d 814 (Miss. 1995)*, relying on the *Tome* case in interpreting Miss. R. Evid. 801(d)(1)(B); **Montana**, *State v. Lunotad, 259 Mont. 512, 857 P.2d 723 (1993)*, interpreting Mont. R. Evid. 801(d)(1)(B); **Nebraska**, *State v. Buechler, 253 Neb. 727, 572 N.W.2d 65 (1998)*, interpreting Neb. R. Evid. 801(4)(a), Neb. Rev. Stat. § 27-801(4)(a); **Nevada**, *Patterson v. State, 111 Nev. 1525, 907 P.2d 984 (1995)*, interpreting Nev. Rev. Stat. § 51.035(2)(b); **New Hampshire**, *State v. McSheehan, 137 N.H. 180, 624 A.2d 560 (1993)*; interpreting N.H. R. Evid. 801(d)(1)(B); **New Mexico**, *State v. Casaus, 121 N.M. 481, 913 P.2d 669 (1996)* and *State v. Salazar, 123 N.M. 778, 945 P.2d 996 (1997)*, relying on the *Tome* case, *supra*, in interpreting N.M.R.A. R. Evid. 11-801(D)(1)(b); **Ohio**, *State v. Smith, 34 Ohio App.3d 180, 517 N.E.2d 933 (1986)*, interpreting Ohio R. Evid. 801(D)(1)(b); **Oklahoma**, *Plotner v. State, 762 P.,2d 936 (Okl.Cr. 1988)*, interpreting 12 Okl. St. § 2801(4)(a)(2); **Rhode Island**, *State v. Haslam, 663 A.2d 902 (R.I. 1995)* and *State v. Kholi, 672 A.2d 429 (R.I. 1996)*, relying on the *Tome* case, *supra*, in interpreting R.I. R. Evid. 801(d)(1)(B); **South Dakota**, *State v. Moriarty, 501 N.W.2d 352 (S.D. 1993)*, interpreting S.D.C.L. § 19-16-2(2); **Texas**, *Dowthitt v. State, 931 S.W.2d 244 (Tex. 1991)*, interpreting Tex. R. Crim. Evid. 801(e)(1)(B); **Vermont**, *State v. Carter, 164 Vt. 545, 674 A.2d 1258 (1996)*, interpreting V.R. Evid. 801(d)(1)(B); **Washington**, *State v. Osborn, 59 Wash. App. 1, 795 P.2d 1174 (1990)*, interpreting Wash. R. Evid. 801(d)(1); **West Virginia**, *200 W.Va. 432, 490 S.E.2d 34 (1997)*, relying on the *Tome* case, *supra*, in interpreting W.V. R. Evid. 801(d)(1)(B); **Wyoming**, *Makinen v. State, 737 P.2d 345 (Wyo. 1987)*, holding that in the absence of an express pre-motive requirement in Wyo. R. Evid. 801(d)(1)(B) the trial court has discretion to determine the admissibility of a prior consistent statement without regard to whether the statement was made before or after the improper motive to fabricate arose.

A fourth substantive change considered, but rejected by the Drafting Committee, was to amend renumbered Uniform Rule 801(b)(2)(E) to conform the rule to amended Federal Rule 801(d)(2)(E) which took effect on December 1, 1997 and responded to the three issues raised by *Bourjaily v. United States, 483 U.S. 171 (1987)*. The amended Federal Rule 801(d)(2)(E) provides as follows:

> (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

The rationale for the amendment is set forth in the Advisory Committee's Note to Rule 801(2)(d) as follows:

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

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

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

There are fourteen States that adhere to that part of the amendment permitting the court to consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." These are: **Arkansas**, *Lopez v. State, 29 Ark.*

App. 145, 778 S.W.2d 641 (Ct. App. 1989); **Colorado**, *People v. Mayfield-Ulloa , 817 P.2d 603 (Colo. App. 1991)*; **Delaware**, *Lloyd v. State, 534 A.2d 1262 (Del. 1987);* **Hawaii**, *State v. McGriff, 76 Hawaii 148, 871 P.2d 782 (1994)*; **Idaho**, *State v. Jones, 125 Idaho 477, 873 P.2d 122 (1994)*; **Iowa**, *State v. Florie, 411 N.W.2d 689 (Iowa 1987)*; **Louisiana**, *State v. Matthews, 26,550 (La. App. 2 Cir. 1/19/95, 649 So.2d 1022 (La. App. 2 Cir., 1994); State v. Lobato, 603 So.2d 739 (La. 1992)*; **Michigan**, *People v. Slattery, 448 Mich. 935, 531 N.W.2d 713 (1995)*; **Minnesota**, *State v. Hines, 458 N.W.2d 721 (Minn. 1990)* and *State v. Brown, 455 N.W.2d 65 (Minn. 1990)*; **Nevada**, *McDowell v. State, 103 Nev. 527, 746 P.2d 149 (1987)*; **New Mexico**, *State v. Zim, 106 N.M. 544, 746 P.2d 650 (1987)*; **Oklahoma**, *Harjo v. State, 797 P.2d 338 (Okl. Cr. 1990)*; **Oregon**, *State v. Cornell, 109 Or. App. 396, 820 P.2d 11 (1992)*; **Tennessee**, *State v. Mitchell, 1989 WL 111210 (Tenn.Cr. App. 1989)* and *State v. Gaylor, 862 S.W.2d 546 (Tenn. Cr. App. 1992)*; **Texas**, *Howard v. State, 1997 WL 751410 (Tex. App. 1997)*; **West Virginia**; *State v. Miller, 195 W.Va. 656, 466 S.E.2d 507 (1995)*; and **Wisconsin**, *State v. Whitaker, 167 Wis.2d 247, 481 N.W.2d 649 (Wis. App. 1992)*. The issue has been raised but left undecided in one State. This is: **Kentucky**, *Commonwealth v. King, 950 S.W.2d 807 (Kyn. 1997)* (Dissenting Opinion).

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

> The *Bourjaily* Court specifically declined to decide whether a court could rely solely on hearsay to determine that a conspiracy has been established by a preponderance of the evidence. *Bourjaily*, 483 U.S. at 176, 107 S.Ct. at 1781-82. While we adopt the new standard announced therein, it is the opinion of this Court that the need for some quantum of independent evidence has not been eliminated. Simply stated we hold that hearsay evidence alone cannot provide the sole basis for establishing the foundational requirements of § 2801(4)(b)(5).

There are five other state jurisdictions which have definitively followed this approach. These are: **Arkansas**, *Lopez v. State, supra*; **Colorado**, *People v. Mayfield-Ulloa, supra*; **Hawaii**, *State v. McGriff, supra*; **Idaho**, *State v. Jones, supra*; and **Louisiana**, *State v. Matthews, supra* and *State v. Lobato, supra*. **Michigan** appears to be the only State in which it has been held that the statement alone will suffice to establish the existence of the conspiracy. See *People v. Slattery, supra*.

A majority of the States still adhere to the rule that the court must determine the existence of the conspiracy independent of the hearsay statements themselves. These are: **Alabama**, *Deutcsh v. State, 610 So.2d 1212 (Ala.Cr. App. 1992)*; **Alaska**, *Amidon*

v. State, 565 P.2d 1248 (Sup.Ct. 1977); **Arizona**, *State v. Savant, 146 Ariz. 306, 705 P.2d 1357 (Ariz. Ct. App. 1985)*; **California**, *People v. Longines, 34 Cal.App.4th 621, 40 Cal. Rptr.2d 356 (Cal.App. l Dist. 1995)*; **Connecticut**, *State v. Headley, 26 Conn.App.94, 598 A.2d 655 (Conn. App. 1991)*; **District of Columbia**, *Butler v. United States, 481 A.2d 431 (D.C.App. 1984)*; **Florida**, *Foster v. State, 1996 WL 399853 (Fla.). Romani v. State, 542 So.2d 984 (Fla 1989)*, expressly refusing to follow the Bourjaily case; **Georgia**, *Robertson v. State, 493 S.E.2d 697 (Ga. 1997)*; **Illinois**, *People v. Jackson, 666 N.E.2d 854, 217 Ill.Dec. 185 (Ill. App. 1 Dist. 1996)*; **Indiana**, *Simpson v. State, 628 N.E.2d 1215 (Ind. App. 1 Dist. 1994)*; **Maryland**, *State v. Baxter, 92 Md. App. 213, 607 A.2d 120 (1991)* and *Ezeneva v. State, 82 Md. App. 489, 572 A.2d 1101 (1990)*; **Massachusetts**, *Commonwealth v. Collado, 426 Mass. 675, 690 N.E.2d 424 (1998)*; **Missouri**, see for example, *State v. Smith, 926 S.W.2d 174 (Mo. App. 1996)*; **Montana**, *State v. Stever, 225 Mont. 336, 732 P.2d 853 (1987)*; **Nebraska**, *State v. Copple, 224 Neb. 672, 401 N.W.2d 141 (1987)*; **New Hampshire**, *State v. Gibney, 133 N.H. 890, 587 A.2d 607 (1991)*; **New Jersey**, *State v. Phelps, 96 N.J. 500, 476 A.2d 1199 (1984)*; **New York**; *People v. Elias, 163 A.D.2d 230, 558 N.Y.S.2d 64 (1990)* and *People v. Tai, 145 Misc.2d 599, 547 N.Y.S.2d 989 (1989)*; **North Carolina**, *State v. Williams, 345 N.C. 137, 478 S.E.2d 782 (1996)* and *State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992)*; **Ohio**, *State v. Carter, 72 Ohio St.3d 545, 651 N.E.2d 965 (1995)*, interpreting Ohio R. Evid. 801(D)(2)(e) and the black letter phrase "upon independent proof of the conspiracy"; **Pennsylvania**, *Commonwealth v. Moyers, 391 Pa. Super. 262, 570 A.2d 1323 (1990)*; **Utah**, *State v. Johnson, 774 P.2d 1141 (Utah 1989)*; **Virginia**, *Rabeira v. Com., 10 Va. App. 61, 389 S.E.2d 731 (1990)*; **Washington**, *State v. Atkinson, 75 Wash.App. 515, 878 P.2d 505 (Wash. App. Div. 1 1994)*; and **Wyoming**, *Jandro v. State, 781 P.2d 512 (Wyo. 1989)*.

The eight reported public comments on the amendment of Federal Rule 801(d)(2) were varied, but with a majority expressing concerns as to whether the amendment provides any meaningful assurance of reliability by abandoning the pre-*Bourjaily* requirement of evidence other than the hearsay statement of the coconspirator to determine the existence of the conspiracy. *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)*. In *Glasser* the Supreme Court concluded:

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

This view was later reaffirmed in the *Nixon* case, but, of course, rejected by the Supreme Court in *Bourjaily* on the ground that "[t]o the extent that Glasser meant that courts

could not look to the hearsay statements themselves for any purpose, it has clearly been superseded by Rule 104(a)" which "on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege" in determining the existence of a conspiracy.

The Drafting Committee has decided not to recommend the amended Federal Rule 801(d)(2)(E) at this time based upon the reasoning of the Supreme Court in the earlier *Glasser* and *Nixon* cases and the division of authority that currently exists among the several States, including the majority rule among the States that the existence of the conspiracy must be determined by evidence independent of the hearsay statements themselves.

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

Reporter's Note

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

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL. The following are not excluded by the hearsay rule, even ~~though~~ 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.

Reporter's Note

There are no proposals at the present time for amending Rule 803(1). A recommended stylistic change has been made in the introductory language to Rule 803.

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

Reporter's Note

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

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

Reporter's Note

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

The question has been raised in Drafting Committee deliberations whether the statements of a declarant's intent should be admissible not only to prove the future conduct of the declarant, but also the future conduct of other persons when the declarant's intention requires the action of third persons if it is to be fulfilled. In *Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892)*, the Supreme Court answered in the affirmative. However, when the statement of state of mind exception of Rule 803(3) of the *Federal Rules of Evidence* was submitted to Congress for approval, the House Committee on the Judiciary reported the following statement of intent in the interpretation of the rule:

> Rule 803(3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed to limit the doctrine of Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 295-300 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person. See House Comm. on Judiciary, Fed.Rules of Evidence, H.R.Rep. No. 650, 93d Cong. & Ad.News 7075, 7087.

In spite of the admonition of the House Judiciary Committee, the federal courts are split on the question of whether a statement of the declarant is admissible to prove the future conduct of another person. The Second and Fourth Circuits hold that such statements are admissible only when they are linked with independent evidence that corroborates the declaration. See *United States v. Nersesian, 824 F.2d 1294 (2d Cir. 1987)* and *United States v. Jenkins, 579 F.2d 840 (4th Cir. 1978)*. In contrast, the Ninth Circuit has held that statements of a declarant's intent to prove the subsequent conduct of a third person are admissible without corroborating evidence. See *United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976)*, in which the court acknowledged the unreliability of statements of a declarant as to the future conduct of a third person, but reasoned as follows:

> [t]he inference from a statement of present intention that the act intended was in fact performed is nothing more than an inference . . . . The possible unreliability of the inference to be drawn from the present intention [of the declarant] is a matter going to the weight of the evidence which might be argued to the trier of fact, but it should not be a ground for completely excluding the admittedly relevant evidence.

The Ninth Circuit then concluded that the Hillmon doctrine, allowing use of such testimony, remains undisturbed (1) because the text of the statute does not explicitly prohibit the use of declarant's statements of intent to prove the conduct of third persons, and (2) because of the contradictory nature of the legislative history of the rule.

Differing results on the issue have also been reached among the several States. Some exclude the statements of intent as to the conduct of third parties by black letter statutory or rule provisions. These include: **Alaska**, *Alaska R. Evid. 803(3)*; **California**, *Ann. Cal. Evid. Code § 1250*; **Florida**, *Fla. Stat. Ann. § 90.803(3)*; **Louisiana**, *La. R. Evid. 803(3)*; and **Maryland**, *Maryland R. Evid. 5-803(b)(3)*.

Other jurisdictions reach the same result by judicial decision. These include: **Arizona** *State v. Krone, 182 Ariz. 319, 897 P.2d 621 (1995)*; **Colorado**, *People v. Franklin, 782 P.2d 1202 (Colo. 1989)*; **Connecticut**, *State v. Perelli, 125 Conn. 321, 5 A.2d 705 (1939)*; **Illinois**, *People v. Lawler, 142 Ill.2d 548, 568 N.E.2d 895 (1991)*; **North Carolina**, *State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971)*; **Ohio**, *State v. Meyers, 1984 WL 3306 (Ohio App. 12 Dist)*; **Oregon**, *State v. Engweiler, 118 Or. App. 132, 846 P.2d 1163 (1993)*; and **West Virginia**, *State v. Phillips, 194 W.Va. 569, 461 S.E.2d 75 (1995)*.

There is interpretative commentary in **Tennessee** that statements of the declarant are inadmissible to prove the conduct of third persons. The Advisory Commission Comment to Tenn. R. Evid. 803(3) states:

The Commission contemplates that only the declarant's conduct, not some third party's conduct, is provable by this hearsay exception. It views decisions such as Ford v. State, 184 Tenn. 443, 201 S.W.2d 539 (1945), as based on faulty analysis.

Some States extend the rule by judicial decision to include statements of intent as to the future conduct of third persons. These are: **Arkansas**, *State v. Abernathy, 265 Ark. 218, 577 S.W.2d 591 (1979)*; **Delaware**, *State v. MacDonald, 598 A.2d 1134 (De. 1991)*; **New York**, *People v. Malizia, 92 A.D.2d 154, 460 N.Y.S.2d 23 (1983)*; **South Dakota**, *Johnson v. Skelly Oil Co., 288 N.W.2d 493 (S.D. 1980)*; and **Washington**, *State v. Terrovona, 716 P.2d 295 (Wash. 1986)*.

There is interpretative commentary in the following two States that statements of the declarant are admissible to prove the conduct of third persons: **New Jersey** and **Vermont**.

In **New Jersey**, the Comments to N.J. Evid. R. 803(c)(3), state expressly that "[t]he New Jersey law, as pronounced in Hunter v. State, 40 N.J.L. 495, 534-540 (E & A 1878), is the same as the Hillmon doctrine; in fact, the United States Supreme Court relied on *Hunter* in the Hillmon decision." *See also, Brown v. Tard*, 552 F.Supp. 1341 (D. N.J. 1982).

In **Vermont**, the Reporter's Notes state:

> The rule leaves untouched the basic doctrine of Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295-300 [12 S.Ct. 909, 912-14] (1892), which allows hearsay evidence of intention to be admitted on the question whether the intended act was done. See Federal Advisory Committee's Note to Rule 803(3). The issue is really one of relevance. See McCormick, supra § 295 at 697. The House Judiciary Committee stated its intent that the identical Federal Rule be construed to reject Hillmon's further point that a hearsay declaration of the declarant's intention to act with another person may also be admitted on the question whether the other did the act. House Judiciary Committee Report, H.R.Rep. No. 650, 93d Cong., 2d Sess., reprinted in 1974 U.S.Code Cong. & Ad.News 7075, 7087. Consistent with an early Vermont case, State v. Howard, 32 Vt. At 404, however, such declarations should be viewed as assertions of the declarant's intention to act with the other person, not as implied assertions of the other's state of mind. The question then is the validity, in light of all the evidence, of the inference from the declarant's intention that the other acted. This is a question of weight, or a question of admissibility under Rules 401 and 403 and the efficacy of a limiting instruction. See McCormick, supra

§ 295 at 698-699; United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976).

The following States appear not to have addressed the issue: **Alabama**; **Georgia**; **Hawaii**; **Idaho**; **Iowa**; **Maine**; **Massachusetts**; **Michigan**; **Minnesota**; **Mississippi**; **Missouri**; **Montana**; **Nebraska**; **Nevada**; **New Hampshire**; **New Mexico**; **North Dakota**; **Oklahoma**; **Pennsylvania**; **Rhode Island**; **South Carolina**; **Utah**; **Virginia**; **Wisconsin**; and **Wyoming**.

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

Reporter's Note

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

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

Reporter's Note

A minor recommended stylistic change is made in Uniform Rule 803(5).

The Drafting Committee also proposes that Rule 803(5) be amended to delete the words "memorandum or" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on

Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See* **Reporter's Note** to Uniform Rules 106, *supra*, and 1001, *infra*.

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

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

Reporter's Note

First, the Drafting Committee proposes that Rule 803(6) be amended to delete the words "memorandum," "report" and "data compilation" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

Second, it is proposed that Rule 803(6) be amended to provide for satisfying through certification the foundational requirements for the admissibility of a business record as an alternative to the expense and inconvenience of producing a time-consuming foundation witness. The language of the amendment is drawn from a proposed amendment to Rule 803(6) of the *Federal Rules of Evidence* which was adopted by the Advisory Committee at its meeting on October 20-21, 1997 and recently approved by the Standing Committee of the Judicial Conference of the United States for

publication for official comment. A uniform rule of evidence providing for satisfying the foundational requirements for admissibility of business records would appear to be compatible with a federal rule on the subject. It is also recommended that Uniform Rule 902 be amended to provide for the self-authentication of domestic and foreign records to provide adequate protection for the admissibility of business records under the certification procedure provided for in Uniform Rule 803(6). *See* the proposed amendments to Uniform Rules 902(11) and 902(12), *infra*.

There are a respectable number of state jurisdictions which have a comparable procedure to the proposed amendment of Uniform Rule 803(6) to permit the introduction of a business record through certification. These are: **Alaska**, *Alaska R. Evid. 803(6)* and *902(11)*; **Idaho** ,*Idaho R. Evid. 803(6)* and *902(11)*; **Indiana** ,*Ind. R. Evid. 803(6), 902(9)* and *902(10)*; **Kansas**, *Kan. R. Evid. 60-460(m)*; **Kentucky**, *Ky. R. Evid. 803(6)(A)* and *902(11)*; **Mississippi**, *Miss. R. Evid. 803(6)* and *902(11)*; **Missouri**, *Rev. Stat. Mo. §§ 490.680, 490.692*; **New Jersey**, *N.J. Stat. Ann. 2A:84A, Rules 8(1)* and *63(13)*; **Nevada**, *Nev. Rev. Stat. Ann. § 51.135*; and **Texas**, *Tx. R. Evid. 802(6)* and *902(10)*.

The following jurisdictions appear to permit the introduction of business records through affidavit or certification under particular circumstances: **Georgia**, *Ga. R. Evid. Code § 40-6-392(F)* and *Vincent v. State, 492 S.E.2d 604 (Ga. Ct. App. 1998)* (certification of intoxilyzer report); **New York**, *N.Y.C.P.L.R. Rule 4518* (medical records), *N.Y.C.P.L.R. Rule 4518(c)* (governmental housing records); **Ohio**, *Ohio R. Evid. 803(6), 901(b)(10)* and *Ohio Rev. Code §§ 2317.40, 2317.422* (medical records); **Wisconsin**, *Wis. Stat. Ann. § 902.02(11)* (health care provider records); and **Wyoming**, *Wyo. R. Evid. 803(6), (7), (8), (10) and Wyo. Stat. 1977 §§ 16-3-108, 16-4-204(a) and § 31-7-120 (1989)* (certified abstract of driver's record maintained in electronic database).

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

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

Reporter's Note

The Drafting Committee proposes that Rule 803(7) be amended to delete the words "memoranda," "reports," "data compilations," and "data compilation" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

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

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

~~(i)~~ (A) Law enforcement reports. ~~investigative~~ Investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case~~;~~.

~~(ii)~~ (B) Government reports. ~~investigative~~ Investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party~~;~~.

~~(iii)~~ (C) Factual findings in criminal cases. ~~factual~~ Factual findings offered by the government in criminal cases~~; and~~.

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

Reporter's Note

First, minor recommended stylistic changes have been made in Rule 803(8).

Second, it is proposed that Rule 803(8) be amended to delete the words "reports," "statements" and "data compilations" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

An issue yet to be addressed by the Drafting Committee concerns any revision that might be required in the introductory clause to the exception of Uniform Rule 803(8) stating "[t]he following are *not within this exception* to the hearsay rule." (Emphasis added) The issue arises out of the decision in *United States v. Oates, 560 F.2d 45 (2d Cir. 1977)* in which the court was faced with the question of whether a chemist's report found to be inadmissible under Rule 803(8)(B) of the *Federal Rules of Evidence* was nevertheless admissible under the business records exception of Rule 803(6). However, the foregoing restrictive language in Uniform Rule 803(8) is not contained in Federal Rule 803(8).

Federal Rule 803(8) provides:

> **(8) Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Twelve States have adopted Uniform Rule 803(8). These are: **Alaska**, **Arkansas**, **Delaware**, **Idaho**, **Indiana**, **Iowa**, **Kentucky**, **Louisiana**, **Maine**, **Montana**, **Oklahoma** and **Vermont**.

Twenty-three States have adopted Federal Rule 803(8). These are: **Alabama**, **Arizona**, **Colorado**, **Connecticut**, **Hawaii**, **Maryland**, **Minnesota**, **Michigan**, **Mississippi**, **Nevada**, **New Hampshire**, **New Jersey**, **New Mexico**, **North Carolina**, **North Dakota**, **Ohio**, **Oregon**, **Rhode Island**, **South Carolina**, **Tennessee**, **Texas**, **Vermont** and **Wyoming**.

The Delaware Superior Court has had occasion to interpret the narrowing language in Uniform Rule 803(8) and concluded that it "does not open a back door" for the admission of a record under another exception, such as the business record exception of Uniform Rule 803(6), for evidence excluded by Rule 803(8). See *State v. Rivera, 515 A.2d 182 (Del. 1986)*, relying on *United States v. Oates, supra*.

In **Louisiana**, the Comment to the La. Code Evid. 803(8) argues in general, for a restrictive interpretation of the rule as follows:

> (k) The objectives of insuring trustworthiness and protecting the right to confrontation, which are advanced by Subparagraph (b), should not be circumvented by resort to another record-based exception to the hearsay rule. Thus, Paragraph (6) of this Article and Article 804(B)(5) may not be used as a basis for admitting evidence that is expressly excluded under Subparagraph (b) of this exception. Some federal courts, in determining the relationship between the business records and public records exceptions, have held that it would be inappropriate to admit evidence under the business records exception that Congress specifically intended to exclude under the public records exception. United States v. Oates, 560 F.2d 45 (2d Cir. 1977). Other courts have held to the contrary. The same result should be reached in the application of this Paragraph, and Article 803(6) and 804(B)(5) so provide. When public records or reports are not specifically excluded under Subparagraph (b), however, there may be circumstances in which they can be admitted under the business records exception, for example, when they are the records of a proprietary activity engaged in by an agency, such as the operation of a transportation system, the operation of a golf course, or the like. It is also possible that a governmental record or report not admissible under the public records exception may be admitted under a non-record based exception such as recorded recollection, or an non-hearsay such as admissions by a party-opponent.

In contrast, in **Maine**, in a prosecution of the defendant for rape, the Supreme Judicial Court, with three justices dissenting, held that an investigative police report setting forth the results of laboratory examination of samples of fingernail scrapings, hair samples and vaginal, rectal and saliva swabs was admissible under Maine's Rule 803(6)

business record exception. The Court noted that "merely because evidence is not admissible under one exception to the hearsay rule, exclusion is not mandated if it is admissible under some other exception."

The dissenting justices reasoned more elaborately as follows:

> We have not previously addressed the interrelationship between the hearsay exceptions for public records, M.R.Evid. 803(8), and business records, M.R.Evid. 803(6). Although the two rules may overlap to some extent, it is apparent that the rules are neither coextensive in rationale nor scope. Rule 803(6) premises reliability on the systematic, businesslike way in which records are kept as part of a regularly conducted business. Rule 803(8) relies less on regularity and recognizes the inherent impartiality and reliability of records made by public officials. The business records exception is directed toward documents generated as a regular practice in the course of a regularly conducted business. The public records exception, on the other hand, refers to reports of "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." Unlike the business records provision, Rule 803(8) contains no requirement of contemporaneousness nor does it require foundation testimony by the custodian. Significiantly, Rule 803(8) specifically excludes "investigative reports by police and other law enforcement personnel." The opinion in United States v. Oates, 560 F.2d 45 (2d Cir. 1977) is instructive with respect the relationship between the federal equivalent to Rule 803(8) and the remaining hearsay exceptions. In Oates, the prosecution offered, and the trial court admitted as a business record, the official report and worksheet of the United States Customs Service chemist who analyzed a white powdery substance seized from the defendant. The Second Circuit read into the federal business records provision an implied exception for investigative reports and reversed the evidentiary ruling of the trial court. See id. At 78. [FN1]
>
> > FN1. The Oates court held on the basis of federal legislative history that an investigative report "cannot satisfy standards of any hearsay exception if those reports are sought to be introduced against the accused." Id. At 84. M.R.Evid. 803(8) and the official commentary does not distinguish between evidence offered by the state or the defendant.

> It is beyond dispute that the record involved in the present case is not admissible as a public record. This Court, however, on the basis of a conclusory offer of proof, treats the investigative report as a business record and disregards the language of Rule 803(8). It is clear that unless this Court accepts the interrelation between the two rules provisions, the specific exception for investigative reports in Rule 803(8) will become a virtual nullity. If an investigative report is admissible as a business record, the rule would authorize its admission when offered by the state as well as the defendant. If such a result occurs, the potentially alarming aspects of the rules would be realized rather than avoided. See Field and Murray, Maine Evidence § 803.8 at 219.
>
> I would decline to accept the report as a business record. In the present case the presiding judge committed no error in excluding the investigative report. I would affirm the conviction.

The federal courts have reached varying results in determining whether records found to be inadmissible under Rule 803(8) of the *Federal Rules of Evidence* which does not contain the restrictive language found in Uniform Rule 803(8) are nevertheless admissible under other exceptions. As earlier observed, the Second Circuit court in *United States v. Oates, supra*, broadly held that public reports found to be inadmissible against a criminal defendant under Rule 803(8) precluded their admission under Rule 803(6). See also, *United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978)* and *United States v. Caiss, 615 F.2d 380 (5th Cir. 1980)*.

In contrast, in *United States v. Sokolow, 81 F.3d 397 (3rd Cir. 1996)*, a prosecution for mail fraud, the defendant claimed that a summary of unpaid insurance claims inadmissible under Rule 803(8)(C) was also inadmissible under Rule 803(6) under the rationale of the *Oates* case, *supra*. The court rejected the contention because the investigator who audited the claims had testified in the case, was cross-examined at length concerning the circumstances surrounding the preparation of the claims and there was no loss of confrontation rights. See also, *United States v. Hayes, 861 F.2d 1225 (10th Cir. 1988)* and *United States v. King, 613 F.2d 670 (7th Cir. 1980)*.

Similarly, in *United States v. Yakobov, 712 F.2d 20 (2d Cir. 1983)*, the court addressed the defendant's contention that Rule 803(8) foreclosed the admissions of an ATF certificate under Rule 803(10) since it was inadmissible under 803(8). However, the court rejected the contention, first, on the ground that 803(8) deals with statements that are direct affirmative assertions as to the elements of the offense charged, while 803(10) is a statement that a record has not been found which is an inferential step away from any element of the offense charged. Second, a statement offered under 803(10) does not have any evaluative aspects since it merely states that a certain datum has not been located in records regularly made and preserved. Accordingly, there is not the

same need to cross-examine the maker of the statement as might exist with respect to a statement excluded under 803(8). See also, *United States v. Harris, 551 F.2d 621 (5th Cir. 1977).*

Finally, in *United States v. Sawyer, 607 F.2d 1190 (7th Cir. 1979),* the court held that statements excluded under Rule 803(8) did not bar their admission under the recorded recollection of a testifying law enforcement officer when such recollections would otherwise be admissible under the recorded recollection exception of 803(5). See also, *United States v. Cambindo Valencia, 609 F.2d 603 (2d Cir. 1979).*

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

Reporter's Note

It is proposed that Rule 803(9) be amended to delete the words "or data compilations, in any form" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra.*

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

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

Reporter's Note

The Drafting Committee proposes that Rule 803(10) be amended to delete the words "report," "statement," or "data compilation, in any form" to conform the rule to

the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

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

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

Reporter's Note

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

(12) Marriage, baptismal, and similar ~~certificates~~ certified records. Statements of fact contained in a ~~certificate~~ certified record that the maker performed a marriage or other ceremony or administered a sacrament, made by a ~~clergyman~~ 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.

Reporter's Note

The Drafting Committee proposes that the words "certified records" be substituted for the word "certificates" in the heading of Rule 803(12) and that the language, "certified record" be added in the body of the rule to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

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

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

Reporter's Note

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

(14) ~~Records of documents~~ Reports of records affecting an interest in property. ~~The~~ A public record ~~of a document~~ purporting to establish or affect an interest in property, as proof of the content of ~~the original recorded document~~ another or duplicate record and its execution and delivery by each person by whom it purports to have been executed and delivered~~, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.~~ A "public record" means a record of a public office in which office an applicable statute authorizes the filing or recording of documents of that kind.

Reporter's Note

The Drafting Committee proposes that Rule 803(14) be amended as indicated to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

The recommendation of the Task Force that a "public record" be separately defined now contained in the last three lines of 803(14) is defined separately in a second sentence of Rule 803(14).

(15) Statements in ~~documents~~ records affecting an interest in property. A statement contained in a ~~document~~ record purporting to establish or affect an interest in

property if the matter stated was relevant to the purpose of the ~~document~~ record, unless dealing with the property since the ~~document~~ record was made have been inconsistent with the truth of the statement or the purport of the ~~document~~ record.

Reporter's Note

The Drafting Committee proposes that Rule 803(15) be amended to delete the words "documents," and "document" and, in lieu thereof substitute the word "record" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

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

(16) Statements in ancient ~~documents~~ records. Statements in a ~~document~~ record in existence ~~twenty~~ 20 years or more the authenticity of which is established.

Reporter's Note

The Drafting Committee proposes that Rule 803(16) be amended to delete the words "documents," and "document" and add the word "record" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

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

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

Reporter's Note

It is proposed that Rule 803(17) be amended to add the words "or publicly recorded" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in

Cyberspace, Section on Business Law of the American Bar Association. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

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

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

Reporter's Note

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

(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.

Reporter's Note

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

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting

lands in the community, and reputation as to events of general history important to the community or ~~state~~ State or ~~nation~~ country in which located.

Reporter's Note

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

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

Reporter's Note

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

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

Reporter's Note

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

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

Reporter's Note

There are no proposals at the present time for amending Rule 803(23) other than the recommended stylistic changes.

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

~~*[As amended 1986.]*~~

Reporter's Note

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

RULE 804. HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE.

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

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

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

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

~~(3)~~ (C) Loss of memory. ~~testifies~~ Testifies to a lack of memory of the subject matter of ~~his~~ the declarant's statement;

~~(4)~~ (D) Absence due to death, illness, or infirmity. ~~is~~ Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

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

(2) Unavailability procured by proponent. A declarant is not unavailable as a witness if ~~his~~ the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of ~~his~~ the declarant's

statement for the purpose of preventing the ~~witness~~ declarant from attending or testifying.

Reporter's Note

The proposed amendments eliminate the gender-specific language in the existing rule and modify the format of the rule upon recommendation. There are no changes in substance.

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

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

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

Reporter's Note

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

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

Reporter's Note

The proposed amendments eliminate the gender-specific language in the existing rule. There are no other proposals at the present time for amending Rule 804(b)(2).

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

Reporter's Note

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

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

> In Williamson v. United States, the Court held that "the most faithful reading of Rule 803(b)(3) is that it does not allow admission of non-self-

> inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." It may be assumed, the Court reasoned, "that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else." Accordingly, the Court concluded that a determination of whether the statements in the declarant's confession are "truly self-inculpatory" requires a fact intensive inquiry of all the circumstances surrounding the criminal activity and the making of the statement. (Footnotes Omitted)

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

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

(A) Declarant's personal history. The declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated~~;~~ or ~~(ii) a statement concerning the foregoing~~

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

Reporter's Note

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

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

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

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

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

Reporter's Note

This exception dealing with statements of recent perception was added to the *Uniform Rules of Evidence* in 1986 and was based upon a comparable *Federal Rule of Evidence* which the United States Supreme Court had recommended for adoption, but which was rejected by Congress.

The **Comment** to Uniform Rule 804(b)(5) reads as follows:

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

The statement of recent perception exception contained in Uniform Rule 804(b)(5) has been adopted in the following three States: **Hawaii**, *Haw. R. Evid. 804(b)(5)*; **Wisconsin**, *Wis. Stat. § 908.045(2)*; and **Wyoming**, *Wyo. R. Evid. 804(b)(5)*. The rule in **Hawaii** and **Wisconsin** differs from Uniform Rule 804(b)(5) only in the omission of the introductory phrase "In a civil action or proceeding . . ." thereby making the exception in these two states applicable to both civil and criminal proceedings.

A modified version of the exception has been adopted in **Kansas**, *Kan. Stat. Ann. § 60-460* as follows:

> (d) Contemporaneous statements and statements admissible on ground of necessity generally. A statement which the judge finds was made . . . (3) if the declarant is unavailable as a witness, by the declarant

> at a time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort.

A modified and somewhat narrower version of the exception has been adopted in **Oregon**, *Or. Rev. Stat. § 40.465, Rule 804(3)(B)* as follows:

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

The Supreme Court of New Mexico promulgated a recent perception exception effective April 26, 1973, but it was repealed by the Supreme Court effective January 1, 1995. See Order No. 94-8300 (N.M. Sup. Ct. Oct. 12, 1994).

The rationale for a recent perception exception is perhaps best explained in the **Wisconsin** case of *Kleuver v. Evangelical Reformed Immanuels Congregation, 422 N.W.2d 874 (Wis. 1988)*. In this case, a statement of an injured worker made eight weeks after the accident who was periodically unconscious during this period was admitted under the recent perception exception. The court explained its purpose as follows:

> Wisconsin is among a small number of states, however, that have adopted the recent perception exception, after adding limitations to assure accuracy and trustworthiness. Judicial Council Committee's Note–1974, Wis.Stat.Ann. sec. 908.045 (West 1975); see also Weinstein's Evidence at 202-03. The exception is based on the premise that probative evidence in the form of a noncontemporaneous, unexcited statement which fails to satisfy the present sense impression or excited utterance exceptions would otherwise be lost if the recently perceived statement of an unavailable declarant is excluded. Comment, Exception, supra, at 1533.
>
> The exception's purpose, therefore, is to admit probative evidence which in most cases could not be admitted under other exceptions due to the passage of time, see id. At 1543, on the ground that no evidence might otherwise be available, Weinstein's Evidence at 197. As such, the exception deals with the problem: "how can a litigant establish his claim or defense if the only witness with knowledge of what occurred is unavailable?" Id. At 194.

However, the Drafting Committee recommends deleting Uniform Rule 804(b)(5) due to the rejection of a comparable proposed federal rule by Congress, the relatively few States which have adopted the Uniform rule since it was adopted by the Conference and that statements of recent perception would be admissible in appropriate circumstances under the residual exception of proposed Uniform Rule 808.

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

~~*[As amended 1986.]*~~

Reporter's Note

It is proposed that Uniform Rule 804(b)(6) be 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 a residual exception to the hearsay rule. This would make the *Uniform Rules of Evidence* consistent with the combining of Rules 803(24) and 804(b)(5) into one Rule 807 of the *Federal Rules of Evidence* which took effect on December 1, 1997. All of the public comments, with one exception, approved the combining of the two residual exceptions into a new Rule 807. Comments addressed to the substance of a residual exception are discussed in the **Reporter's Note** to proposed Uniform Rule 808.

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

Reporter's Note

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

> Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *on remand*, 561 F. Supp. 1114 (E.D. N.Y.), *aff'd*, 722 F.2d 13 (2d Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).
>
> Every circuit that has resolved the question has recognized the principle of waiver by misconduct, although the tests for determining whether there is a waiver have varied. *See, e.g., United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992); *United States v. Potamitis*, 739 F.2d 784, 789 (2d Cir.), *cert. denied*, 469 U.S. 918 (1984); *Steele v. Taylor*, 684 F.2d 1193, 1199 (6th Cir. 1982), *cert. denied*, 460 U.S. 1053 (1983); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980). *United States v. Carlson*, 547 F.2d 1346. 1358-59 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). The foregoing cases apply a preponderance of the evidence standard. *Contra, United States v. Thevis*, 665 F.2d 616, 631 (5th Cir.) (clear and convincing standard), *cert. denied*, 459 U.S. 825 (1982). The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.

Public Comments on Rule 804(b)(6) of the *Federal Rules of Evidence* ranged from outright opposition to the adoption of the rule, to concerns relating to vagueness in the wording of the exception, to applying a "preponderance of evidence" standard in lieu of the more stringent "clear and convincing evidence" standard, and to the absence of an advance notice requirement for invoking the exception. *See* West Group, *Federal Rules of Evidence 179-180 (1997-98 Edition)*. In response, the title of the rule was changed from "Waiver by misconduct" to "Forfeiture by wrongdoing" as in line 1 and the word

"who" was changed to "that" as in line 2 to indicate that the rule is potentially applicable against the government. No other changes were made in the rule as enacted.

The following State is the only State which statutorily recognizes a "forfeiture by wrongdoing" exception to the hearsay rule: **California**, *Ann. Cal. Evid. Code § 1350*.

Other States recognize such an exception by judicial decision, either through the interpretation of a statutory rule or by judicial adoption of a common law exception. These are: **Alabama**, *Stewart v. State, 398 So.2d 369 (Ala. Crim. App. 1981)*; **Kansas**, *State v. Gettings, 244 Kan. 236, 769 P.2d 25 (1989)*; **Minnesota**, *State v. Keeton, 1997 WL 792974 (Minn. Ct. App. 1997)*; **New York**, *People v. Maher, 677 N.E.2d 728 (N.Y. 1997)*; and **Ohio**, *State v. Frazier, 1991 WL 200230 (Ohio Ct. App. 1983)*. Some States require only proof by a preponderance of the evidence (*State v. Gettings, supra*), while others require proof by clear and convincing evidence (*People v. Maher, supra*) that the unavailability of the declarant was procured by wrongdoing.

At the federal level the majority require only proof by a preponderance of the evidence. See *United States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996), United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982)* and *Steele v. Taylor, 684 F.2d 1193 (6th Cir. 1982)*.

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.

Reporter's Note

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

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT. If a hearsay statement, or a statement defined in Rule ~~801(d)(2)(iii)~~ 801(b)(2)(C), ~~(iv)~~ (D), or ~~(v)~~ (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence ~~which~~ that would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant ~~at any time,~~ inconsistent with the

declarant's hearsay statement~~,~~ is not subject to ~~any~~ a requirement that the declarant may have 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 is entitled to examine the declarant on the statement as if under cross-examination.

Reporter's Note

The **Comment to 1986 Amendment** reads:

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

The amendments have now been changed to conform to the stylistic format of Uniform Rule 801(b)(2) and to make certain technical amendments to conform the rule to the amendments of Rule 806 of the *Federal Rules of Evidence* which took effect on December 1, 1997 and to make recommended stylistic changes.

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

~~**RULE 807. CHILD VICTIMS OR WITNESSES.**~~

~~(a) A hearsay statement made by a minor who is under the age of [12] years at the time of trial describing an act of sexual conduct or physical violence performed by or with another on or with that minor or any [other individual] [parent, sibling or member of the familial household of the minor] is not excluded by the hearsay rule if, on motion of a party, the minor, or the court and following a hearing [in camera], the court finds that (i) there is a substantial likelihood that the minor will suffer severe emotional or psychological harm if required to testify in open court; (ii) the time, content, and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; (iii) the statement was accurately recorded by audio-visual means as~~

~~may be provided by statute; (iv) the audio-visual record discloses the identity and at all times includes the images and voices of all individuals present during the interview of the minor; (v) the statement was not made in response to questioning calculated to lead the minor to make a particular statement or is clearly shown to be the minor's statement and not the product of improper suggestion; (vi) the individual conducting the interview of the minor is available at trial for examination or cross-examination by any party; and (vii) before the recording is offered into evidence, all parties are afforded an opportunity to view it and are furnished a copy of a written transcript of it.~~

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

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

~~(d) In any proceeding in which a minor under the age of [12] years may be called as a witness to testify concerning an act of sexual conduct or physical violence performed by or with another on or with that minor or any [other individual] [parent, sibling or member of the familial household of the minor], if the court finds that there is a substantial likelihood that the minor will suffer severe emotional or psychological harm if required to testify in open court, the court may, on motion of a party, the minor or the~~

~~court, order that the testimony of the minor be taken by deposition recorded by audio-visual means or by contemporaneous examination and cross-examination in another place under the supervision of the trial judge and communicated to the courtroom by closed-circuit television. Only the judge, the attorneys for the parties, the parties, individuals necessary to operate the equipment and any individual the court finds would contribute to the welfare and well-being of the minor may be present during the minor's testimony. If the court finds that placing the minor and one or more of the parties in the same room during the testimony of the minor would contribute to the likelihood that the minor will suffer severe emotional or psychological harm, the court shall order that the parties be situated so that they may observe and hear the testimony of the minor and may consult with their attorneys, but the court shall ensure that the minor cannot see or hear them, except, within the discretion of the court, for purposes of identification.~~

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

~~*[As added 1986.]*~~

RULE 807. STATEMENT OF CHILD VICTIM.

(a) Statement of child not excluded. A statement made by a child under (13) years of age describing any 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 the following conditions are satisfied:

(1) Hearing to determine trustworthiness of statement. The court, after a hearing conducted outside the presence of the jury, finds that the statement concerns an event within the child's personal knowledge and is inherently trustworthy. In determining trustworthiness, the court must consider all of the circumstances surrounding the making of the statement, including the following:

(A) Personal knowledge. The child's ability to observe, remember, and relate the details of the event;

(B) Maturity of child. The age, and mental and physical maturity of the child;

(C) Terminology used. The child's use of terminology not reasonably expected of a child of similar age, mental and physical maturity, and similar socioeconomic circumstances;

(D) Relationship to offender. The relationship of the child to the alleged offender;

(E) Nature and duration of neglect, abuse, or contact. The nature and duration of the alleged neglect, physical or sexual abuse, or sexual contact;

(F) Spontaneity and consistency The spontaneous making of the statement and the consistency in the repetitions of the statement by the child;

(G) Responses to questions. The making of the statement by the child in response to suggestive or leading questions; and

(H) Motivation. The lack of a motive by the child to fabricate the statement.

(2) Testimony of child or corroboration. 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), but only if there is corroborative evidence of the statement relating to the alleged act of neglect, physical or sexual abuse, or sexual contact.

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

Reporter's Note

The **Comment to 1986 Amendment** of the *Uniform Rules of Evidence* reads, in part, as follows:

> This new rule creates a limited hearsay exception permitting the introduction of extrajudicial statements and prerecorded and closed-circuit televised testimony of children who have been the victims of, or witnesses to, acts of sexual conduct or physical violence. It is not intended that this new hearsay exception should preclude resort to any other hearsay exception, when applicable, or, that any other hearsay exception should preclude resort to this new hearsay exception, when applicable.
>
> * * *
>
> *Judicial Determination of Minor's Emotional/Psychological Harm.* The rule requires that the court make an antecedent finding of a substantial likelihood that the minor will suffer severe emotional or psychological harm if required to testify in open court before an

extrajudicial statement made be admitted or alternative means of testifying employed. This standard is intended to require more than a showing of mere distress on the part of a child who is faced with the prospect of testifying. It is a strict standard, which is imposed in recognition of the fact that life testimony and cross-examination is the preferred mode of proof. It is not contemplated that the court will necessarily receive expert testimony concerning the minor's emotional state in making this determination. The court is in an adequate position to assess the surrounding circumstances and to form a judgment concerning the likely effect of live testimony in open court on the minor without expert assistance. *See Washington v. State, 452 So.2d 82, 82 (Fla. App. 1984); Chappell v. State, 710 S.W.2d 214, 217 (Ark. App. 1986).*

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

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

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

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

Subdivision (a)

Audio-visual Recording. The hearsay exception for a minor's extrajudicial statement requires that the statement be audio-visually recorded (e.g., videotaped or filmed). The purpose of this requirement is to permit the court and jury to observe the demeanor of the minor witness and to assess the surrounding circumstances. It reflects concern about the susceptibility of minors to suggestion and outside influence. The same concern underlies the rule's requirement that the audio- visual recording include the images and voices of all those who are present when the minor's statement is made.

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

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

whether there exists any evidence of undue influence or pressure on the minor at or before the time of the recording.

Subdivision (b)

The rule generally endows the trial judge with discretion to determine whether to permit additional testimony to be elicited from the minor and, if so, whether that testimony should be taken live in open court or by means of videotaped deposition or closed-circuit television . . . . If, however, in a criminal case, the court admits an extrajudicial statement under subdivision (a), the defendant is entitled to put further questions to the minor in such fashion as the court may direct. This further questioning may, in the court's discretion, take the form of videotaped or closed-circuit testimony . . . , written questions submitted to the court for the court either to put orally to the minor or to transmit to the minor for written response, or any other form of questioning ordered by the court. The court may take other precautionary measures too, such as appointing a guardian ad litem for the minor. It is contemplated that the issues of admissibility of the statement and of any further questioning of the minor will be resolved in pretrial proceedings.

Subdivision (c)

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

* * *

The substance of the existing Rule 807 has been rejected by the Drafting Committee to recommend a new child victim or witness exception to account for intervening developments in the law since Rule 807 was adopted by the Conference in 1986, in particular, the right of confrontation.

First, as in the case of existing Rule 807, the exception applies to children under 13 years of age.

Second, the scope of the recommended 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 the proposed amendment of Rule 101(a).

Fourth, the recommended rule focuses on the requirement of trustworthiness and the criteria to be considered in making this determination. As recommended, the Drafting Committee believes that the rule more nearly comports with the decision of the Supreme Court of the United States in *Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)*. In *Idaho v. Wright*, the Supreme Court held, in effect, that a child's hearsay statements admitted under Idaho's residual exception to the hearsay rule violated the Confrontation Clause because they did not meet the "indicia of reliability" test of *Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)* which could only be met in either of two circumstances. These were that the hearsay statement must fall "within a firmly rooted hearsay exception" or be supported by "a showing of particularized guarantees of trustworthiness." Rule 807, like the Idaho residual exception, or existing Uniform Rules 803(24) and 804(b)(5) accommodates only ad hoc instances in which statements not otherwise falling within a recognized hearsay exception in Rules 803(1) through (23) and 804(b)(1) through (4) of the *Uniform Rules of Evidence*, might nevertheless be sufficiently reliable to be admissible at trial without additional guarantees of trustworthiness. However, since existing Rule 807, like Idaho's residual exception, does not share the same *tradition* of reliability that supports the admissibility of statements falling within these traditional exceptions to the hearsay rule, Rule 807 cannot be deemed a firmly rooted hearsay exception within the meaning of *Ohio v. Roberts* and *Idaho v. Wright, supra*. The "indicia of reliability" requirement can nevertheless still be met if there is "a showing of trustworthiness." Accordingly, by incorporating the enumerated criteria in the recommended Rule 807 which the Supreme Court of the United States found in *Idaho v. Wright* to relate to the reliability of the statements and therefore bear "particularized guarantees of trustworthiness," it is believed that statements admitted in accordance with the recommended Rule 807 will survive constitutional attack under the Confrontation Clause.

Fifth, in lieu of providing within the recommended exception for the admissibility of recorded statements or the methods of taking the testimony of children, recommended 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 or a videotape recording of the child's testimony. If the child is unavailable to testify then the statement is admissible only if there is corroborating evidence of the statement.

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

Finally, notice is required in 807(c) by a rule consistent with the other recommended notice provisions in the Uniform Rules.

The substance of Uniform Rule 807 creating an exception to the hearsay rule to permit the introduction of extrajudicial statements of children in various types of proceedings has received overwhelming approval in the several States. To date, a hearsay exception for statements of children has been adopted in 40 States. These are: **Alabama**, *Ala. Code § 15-25-31 & 32 (West 1996)* (statement of child under 12 years of age involving physical or sexual abuse and exploitation admissible in criminal proceedings); **Alaska**, *Alaska Stat. § 12.40.110 (West 1996)* (statement of child under 10 years of age involving sexual assault or sexual abuse of minor); **Arizona**, *Ariz. Rev. Stat. Ann. § 13-1416 (West 1996)* (statement of child under 10 years of age involving sexual or physical abuse); **Arkansas**, *Ark. Code § 16-41-101 (West 1995), Ark Code Rule 803(25) (West 1993)* (statement of child under 10 years of age involving sexual or physical abuse); **California**, *Cal. Evid. Code § 1360 (West 1995-96)* (statement of child under 12 years of age involving child abuse or neglect); **Colorado**, *Colo. Rev. Stat. § 13-25-129* (statement of child who is victim of unlawful sexual offense or child abuse); **Connecticut**, *Conn. Gen. Stat. Ann. § 54-86(g) (West 1997)* (statement of child under 12 years of age involving sexual abuse); **Delaware**, *Del. Code Ann. tit. 11 § 3513 (West 1996)* (statement of child under 11 years of age involving sexual or physical abuse); **Florida**, *Fla. Stat. Ann. § 90.803 (West 1996)* (statement of child under 11 years of age involving sexual abuse, child abuse, or neglect); **Georgia**, *Ga. Code Ann. § 24-3-16 (West 1997)* (statement of child under 14 years of age involving sexual contact or physical abuse); **Hawaii**, *Haw. Rev. Stat. Rule 804 (West 1997)* (statement of child under 16 years of age involving sexual abuse or physical violence); **Idaho**, *Idaho Code § 19-3024 (West 1997)* (statement of child under 10 years of age involving sexual or physical abuse or other criminal conduct); **Illinois**, *Ill. Ann. Stat. ch. 725, ¶ 5/115-10 & ch. 735, ¶ 5/8-2601 (Smith-Hurd 1997)* (statement of child under 13 years of age involving child abuse or unlawful sexual act); **Indiana**, *Ind. Code Ann. §§ 35-37-4-6, 35-37-4-8, 31-6-15-2, 31-6-15-3 (West 1996)* (statement of child under 14 years involving closed circuit television or videotapes); **Iowa**, *Iowa Code § 239.96 (West 1997)* (statement of child in proceeding to support a finding that the child is in need of assistance); **Kansas**, *Kan. Stat. Ann. § 60-460 (West 1996)* (statement of child in criminal actions involving children); **Louisiana**, *La. Children's Code Ann. art. 322 (West 1996)* (statement of child involving physical or sexual abuse); **Maine**, *Me. Rev. Stat. Ann. tit. 14, § 1205 (West 1996)* (statement of child under 16 years of age involving sexual act or sexual conduct); **Maryland**, *Md. Ann. Code of 1957 § 775 (West 1996)* (statement of child under 12 years of age involving child abuse, rape or sexual offense); **Massachusetts**, *Mass. Gen. Laws Ann. ch. 233, §§ 81-83 (West 1996)* (statement of child under 10 years of age involving sexual contact); **Michigan**, *Mich. Rules of Court*

Rule 5.972 (West 1997) (statement of child under 10 years of age involving child abuse); **Minnesota**, *Minn. Stat. Ann. § 260.156 (West 1996)* (statement of child under 10 years of age involving physical abuse or neglect); **Missouri**, *Mo. Ann. Stat. § 491.075 (Vernon 1996)* (statement of child under 12 years of age involving offense under chapter 565, 566, or 568, RSMo); **Nevada**, *Nev. Rev. Stat. § 51.385 (West 1996)* (statement of child under 10 years of age involving any act of sexual conduct); **New Hampshire**, *N.H. Rev. Stat. § 516:24-a, Rule 803 (West 1995)* (statement of child involving sexual abuse or assault); **New Jersey**, *N.J. Stat. Rev. Rule 63(33) and Rule 803 (West 1997)* (statement of child under 12 years of age involving sexual abuse); **New Mexico**, *N.M. Stat. Child Ct. Rule 10-217 & N.M. Stat. Dist. Ct. Rule of Crim. Proc. Rule 5-504 (West 1996)* (statement of child under 13 years of age involving sexual abuse and the use of videotaped deposition); **North Dakota**, *N.D. Rules of Evid. Rule 803 (West 1992)* (statement of child under 12 years of age involving sexual abuse); **Ohio**, *Ohio Rev. Rules of Evid. Rule 807 (Baldwin 1997)* (statement of child under 12 years of age involving sexual abuse); **Oklahoma**, *Okla. Stat. Ann. tit. 12, § 2803.1 (West 1996)* (statement of child under 12 years of age involving physical abuse or sexual contact); **Oregon**, *Or. Rev. Stat. § 44.460 (West 1995)* (statement of child under 12 years of age involving abuse or sexual conduct); **Pennsylvania**, *42 Pa. Cons. Stat. § 5984 (West 1996)* (statement of child involving videotaped deposition); **South Carolina**, *S.C. Code Ann. § 19-1-180 (Law. Co-op. 1996)* (statement of child under 12 years of age involving abuse or neglect); **South Dakota**, *S.D. Codified Laws Ann. § 19-16-38 (West 1997)* (statement of child under 10 years of age involving sex crime, physical abuse, or neglect); **Tennessee**, *Tenn. Rules of Evid. Rule 803 (Michie 1996)* (statement of child under 13 years of age involving physical, sexual, or psychological abuse or neglect); **Texas**, *Tex. Fam. Code Ann. § 54.031 & Tex. Crim. Proc. Code Ann. Art. 38.072 (West 1995)* (statement of child under 12 years of age involving sexual and assaultive offenses); **Utah**, *Utah Code Ann. § 76-5-411 (West 1997)* (statement of child under 14 years of age involving sexual abuse); **Vermont**, *Vt. Rules of Evid. Rule 804(a) (West 1996)* (statement of child under 10 years of age involving sexual assault, lewd or lascivious conduct, incest, abuse, neglect, or exploitation); **Virginia**, *Va. Code Ann. § 63.1-248.13:2 (West 1997)* (statement of child under 12 years of age involving sexual abuse); **Washington**, *Wash. Rev. Code Ann. § 9A.44.120 (West 1996)* (statement of child under 10 years of age involving sexual or physical abuse); and **Wisconsin**, *Wis. Stat. Ann. § 908.08 (West 1997)* (statement of child involving videotaped statements).

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

RULE 808. RESIDUAL EXCEPTION.

(a) ~~A~~ In exceptional circumstances a statement not ~~specifically~~ covered by ~~any of the foregoing exceptions~~ Rule 803 or 804 but ~~having~~ possessing equivalent, though not identical, circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the court determines that all of the following are satisfied:

~~(i) the~~ (1) Material fact. The statement is offered as evidence of a material fact;

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

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

(b) A statement ~~may~~ is not ~~be admitted~~ admissible under this exception unless the proponent ~~of it makes known~~ gives to the adverse party ~~sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant~~ reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence the proponent intends to introduce at trial.

Reporter's Note

This Rule 808 combines the recommended abrogated Rules 803(24) and 804(b)(5) named "Other exceptions" and renames the rule "Residual exception." Minor format changes have been made and substantive changes in subdivision (1) are recommended to restrict the circumstances under which statements would be admissible under Rule 808. Subdivision (2) contains the notice provision adopted for Rule 404(b) and thereby provides the consistency desired by the Drafting Committee in the giving of

notice under the Uniform Rules of Evidence. Rule 807 of the *Federal Rules of Evidence* which took effect on December 1, 1997 provides as follows:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The following States presently recognize a residual exception as provided in Rules 803(24) and 804(b)(5) of the *Uniform Rules of Evidence*: **Alaska**, *Alaska R. Evid. 803(23)* and *804(b)(5)*; **Arizona**, *Ariz. R. Evid. 803(24)* and *804(b)(5)*; **Arkansas**, *Ark. R. Evid. 803(24)* and *804(b)(5)*; **Colorado**, *Colo. R. Evid. 803(24)* and *804(b)(5)*; **Hawaii**, *Haw. Code Ann. tit.33, §§ 803(b)(24)* and *804(b)(7)*; **Idaho**, *Idaho R. Evid. 803(24)* and *804(b)(5)*; **Iowa**, *Iowa R. Evid. 803(24)* and *804(b)(5)*; **Maryland**, *Md. R. Evid. 5-803(24)* and *5-804(b)(5)* (rule expressly applicable only "Under exceptional circumstances . . . ."), **Michigan**, *Mich. R. Evid. 803(24)* and *804(b)(5)*; **Minnesota**, *Minn. R. Evid. 803(24)* and *804(b)(5)*; **Mississippi**, *Miss. R. Evid. 803(24)* and *804(b)(5)*; **Montana**, *Mont. Code Ann. tit. 26, c. 10, Rules 803(24) and 804(b)(5)* (authorizing the admission of "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."); **Nebraska**, *Neb. Rev. Stat. Ann. §§ 27-803(22)* and *27-804(2)(e)*; **New Hampshire**, *N.H. R. Evid. 803(24)* (omitting notice requirement) and *804(b)(6)* (including notice requirement); **Nevada**, *Nev. Rev. Stat. § 51-315* (authorizing the admission of a statement if it possesses "strong assurances of accuracy" even though the declarant is unavailable as a witness); **New Mexico**; *N.M. R. Evid. 11-803(X)* and *11-804(B)(5)*; **North Carolina**, *N.C. Gen. Stat. § 8C-1, 803(24)* and *804(b)(5)*; **North Dakota**, *N.D. R. Evid. 803(25)* and *804(b)(5)*; **Oklahoma**, *Okla. Stat. tit. 12, §§ 2803(24)* and *2804(B)(5)*; **Oregon**, *Or. Rev. Stat. §§ 40.460, Rule 803(26)* and *40.465, Rule 804(3)(f)*; **Rhode Island**, *R.I. R. Evid. 803(24)* and *804(b)(5);* **South Dakota**, *S.D. Codified Laws §§ 19-16-28, Rule 803(24)* and *19-16-35, Rule 804(b)(6)*; **Utah**, *Utah R. Evid. 803(24)* and *804(b)(5)*; **West Virginia**, *W. Va. R. Evid. 803(24)* and *804(b)(5)*; **Wisconsin**, *Wis. Stat. § 908.03(24)* and *908.04(5)*; and **Wyoming**, *Wyo. R. Evid. 803(24)* and *804(b)(6)*.

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

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

There are two difficult and recurring issues that arise in both the federal and state jurisdictions in determining the admissibility of statements under the residual exception. The first arises out of the language of the proposed amended rule "[a] statement not specifically covered by Rule 803 or 804" and the second out of the language "having equivalent circumstantial guarantees of trustworthiness."

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

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

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

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

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

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

The so-called "near-miss doctrine" appears to have been rejected in the following States: **Alaska**, *Shakespeare v. State, supra*; **Arizona**, *State v. Luzanilla*; **Nebraska**, *Estate of Schock v. Kail, supra*; **New Mexico**, *In the Matter of Esparanza M., 1998 WL 91082 (N.M. Ct. App. 1998)*; **Oregon**, *State v. Apperson, 85 Or. App. 429, 736 P.2d 1026 (1987)*; **Rhode Island**, *Estate of Sweeney v. Charpentier, 675 A.2d 824 (R.I. 1986)*; and **South Dakota**, *State v. Davi, 504 N.W.2d 844 (S.D. 1992)*.

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

The following States appear to apply the "near-miss doctrine": **Arkansas**, *Foreman v. State, 321 Ark. 167, 901 S.W.2d 802 (1995)*; **Delaware**, *695 A.2d 1152 (Del. 1997)*; **Idaho**, *State v. Gray, 129 Idaho 784, 932 P.2d 907 (1997)*; **Maryland**, *State v. Walker, 345 Md. 293, 691 A.2d 1341 (1996)*; **Minnesota**, *State v. Ortlepp, 363 N.W.2d 39 (Minn. 1985)*; **Mississippi**, *Parker v. State, 606 So.2d 1132 (Miss. 1992)*; **Nevada**, *Johnstone v. State, 92 Nev. 241, 548 P.2d 1362 (1976)* and *Emmons v. State, 107 Nev. 53, 807 P.2d 718 (1991)*; **West Virginia**, *TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 419 S.E.2d 870 (1992)*; **Wisconsin**, *Mitchell v. State, supra*; **Wyoming**, *Tennant v. State, 786 P.2d 339 (Wyo. 1990).*

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

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

Among the state jurisdictions, generally speaking, whether the statement has "equivalent circumstantial guarantees of trustworthiness" is also a fact-intensive inquiry. See *People v. Bowers, 773 P.2d 1093, 1096 (Colo. App. 1988), affirmed, 801 P.2d 511*

(1990). In **Nebraska**, the following factors have been identified for determining the trustworthiness of the statement: (1) the personal knowledge of the declarant regarding the subject matter of the statement; (2) the oral or written nature of the statement; (3) the partiality of the declarant and the relationship between the declarant and the witness; (4) the declarant's motive to speak truthfully or untruthfully; (5) the spontaneity of the statement, as opposed to its being made in response to a leading question or questions; (6) the making of the statement under oath; (7) the declarant being subject to cross-examination at the time the statement was made; and (8) the declarant's recantation or repudiation of the statement after it was made. See *State v. Toney, 243 Neb. 237, 498 N.W.2d 544, 550-551 (1993)*. Other factors which have been considered in the state jurisdictions are (1) the age, education, experience and condition of declarant (**Maryland**, *State v. Walker, 691 A.2d 1341 (Md. 1997)*); (2) the mental state of the declarant (**Arizona**, *State v. Valeucia, 924 P.2d 497 (Ariz. Ct. App. 1996)*); (3) the consistent repetition of the statement (**Idaho**, *Gray v. State, 932 P.2d 907 (Idaho Ct. App. 1997)*); (4) the existence of corroborating evidence (**Iowa**, *State v. Weaver, 554 N.W.2d 240 (Iowa 1996)*); (5) the ambiguity of the statement (**New Mexico**, *State v. Williams, 874 P.2d 12 (N.M. 1994)*); and (6) the time lapse between the event and the making of the statement (**Arkansas**, *Foreman v. State, 901 S.W.2d 802 (Ark. 1995)*).

Public Comments on the parallel Rule 807 of the *Federal Rules of Evidence* which took effect on December 1, 1997, applauded the combining of the two residual exceptions into one. At the same time, the Comments called for redrafting the notice requirement "to unify the circuits and promote more flexibility"; criticized the standard in the current federal rule requiring "equivalent guarantees of trustworthiness" to the aggregate of the exceptions of Rules 803 and 804 on the ground that it "is a meaningless standard"; suggested that the wording in the rule should be narrowed to prevent the rule from affording a safe haven for "'near miss' hearsay evidence that does not satisfy traditional hearsay exceptions"; and urged a tightening of the rule in criminal cases due to different standards of admissibility that arguably should prevail in civil and criminal cases and avoid the confusion concerning the standards of trustworthiness for evidentiary and confrontation clause purposes, particularly in view of flexibility now accorded prosecutors in admitting hearsay under the new forfeiture exception of Rule 804(b)(6).

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

> The most radical revision would be to prohibit the catch-alls from being used against a criminal defendant, a result that offers no flexibility in truly exceptional cases. A less dramatic revision would prohibit the catch-alls from being used against a criminal defendant when the declarant does not testify. This would eliminate confrontation conflicts, but would not offer any relief to prosecutors in exceptional circumstances.

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

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

The Drafting Committee recommends for Conference consideration amending the combined Uniform Rules 803(24) and 804(b)(5) in this Rule 808 to provide that only in exceptional circumstances will a statement which does not meet the foundational requirements for admissibility under Rule 803 or 804 be admissible under Rule 808 and then only if the statement possesses equivalent, but not identical, circumstantial guarantees of trustworthiness and meets the foundational requirements set forth in subdivisions (a)(1)(A), (B), and (C). It is therefore intended to express the rationale of the Alaska court in its interpretation of Alaska R. Evid. 804(b)(5) that the residual exception "is one of rare application and is not meant to be used as a catch-all for the admission of statements falling just outside the borders of recognized exceptions. See *Shakespeare v. State, supra*.

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.

Reporter's Note

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

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

Reporter's Note

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

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

Reporter's Note

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

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

Reporter's Note

Recommended stylistic changes have been made in Rule 901(b)(3).

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

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

Reporter's Note

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

(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 ~~at any time~~ under circumstances connecting it with the alleged speaker.

Reporter's Note

Recommended stylistic changes have been made in Rule 901(b)(5).

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

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

~~(i) in~~ (A) Individual. In the case of ~~a person~~ an individual, circumstances, including self-identification, ~~show~~ which show that the ~~person answering to be~~ individual who answered was the one called~~,~~; or

~~(ii) in~~ (B) Persons. In the case of a ~~business~~ 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.

Reporter's Note

Recommended stylistic changes have been made in Rule 901(b)(6).

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

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

Reporter's Note

It is proposed that Rule 901(b)(7) be amended to add the words "public record" and delete the words "writing authorized by law to be recorded or filed and in fact recorded or filed in a public office" and "report, statement, or data compilation, in any form" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

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

(8) Ancient ~~documents or data compilation~~ records. Evidence that a ~~document or data compilation, in any form, (i)~~ record is in such condition as to create no

suspicion concerning its authenticity, ~~(ii)~~ was in a place where it, if authentic, would likely be, and ~~(iii)~~ has been in existence 20 years or more at the time it is offered.

Reporter's Note

It is proposed that Rule 901(b)(8) be amended to add the word "record" and delete the words "document or data compilation, in any form" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

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

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

Reporter's Note

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

(10) Methods 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~~ constitution of this State.

Reporter's Note

There are no proposals at the present time for amending Rule 901(b)(10) other than for making the recommended stylistic change.

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 documents under seal. A document bearing a seal purporting to be that of the United States, or of any ~~state~~ State, district, commonwealth,

territory, or insular possession thereof, or of the Panama Canal Zone~~,~~ or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency ~~thereof~~ of one of the foregoing, and a signature purporting to be an attestation or execution.

Reporter's Note

Recommended stylistic changes have been made in Rule 902(a).

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

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

Reporter's Note

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

(3) Foreign public documents. A document purporting to be executed or attested in the official capacity of an individual authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the executing or attesting individual, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A

final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may for good cause shown order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

Reporter's Note

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

(4) Certified copies of public records. A copy of an official 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, ~~including data compilations in any form,~~ certified as correct by the custodian or other authorized person ~~authorized to make the certification,~~ by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.

Reporter's Note

Recommended stylistic changes have been made in Rule 902(4).

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

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

Reporter's Note

It is proposed that Rule 902(5) be amended to delete the words "or other" and add the words "or other publicly issued records, in the form of a writing or other record, if in a form indicative of the genuineness of such a record" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra.*

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

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

Reporter's Note

It is proposed that Rule 902(6) be amended to add the words "Publicly distributed" and delete the word "printed" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. These changes will reflect publicly distributed material in non-written formats. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

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

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

Reporter's Note

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

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

Reporter's Note

It is proposed that Rule 902(8) be amended to delete the words "documents" and add the words "records" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. These changes will reflect publicly distributed material in non-written formats. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

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

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

Reporter's Note

It is proposed that Rule 902(9) be amended by deleting the word "documents" and adding the words "records" and "or having the same legal effect as commercial paper" to conform the rule to the recommendations of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association. These changes will facilitate the authentication of commercial paper in non-written formats. *See* **Reporter's Note** to Uniform Rules 106, *supra* and 1001, *infra*.

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

(10) Presumptions created by law. ~~Any~~ 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.

Reporter's Note

There are no proposals at the present time for amending Rule 902(10) other than making the recommended stylistic change.

(11) Certified domestic records of regularly conducted activity.

(A) Certified record. The original or a duplicate of a domestic record of regularly conducted activity, ~~within the scope of~~ which would be admissible under Rule 803(6) if introduced under the testimony of the custodian, and which the custodian thereof or another qualified individual certifies under oath was prepared and kept under the following circumstances:

(i) When and how made. It was made, at or near the time of the occurrence of the matters set forth, by, ~~(~~or from information transmitted by~~),~~ a person with knowledge of those matters~~,~~

(ii) Regular business activity. ~~is~~ It was kept in the course of the regularly conducted activity, and

(iii) Regular practice. It was made ~~by~~ pursuant to the regularly conducted activity as a regular practice~~, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness; but a record so certified is not self-authenticating under this subsection unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it. As used in this subsection, "certifies" means, with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a foreign record, a written declaration signed in a foreign country which,~~

~~if falsely made, would subject the maker to criminal penalty under the laws of that country. The certificate relating to a foreign record must be accompanied by a final certification as to the genuineness of the signature and official position (i) of the individual executing the certificate or (ii) of any foreign official who certifies the genuineness of signature and official position of the executing individual or is the last in a chain of certificates that collectively certify the genuineness of signature and official position of the executing official. A final certification must 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 who is assigned or accredited to the United States.~~

(B) Testimony of foundation witness. The testimony of a foundation witness is required if a genuine question is raised as to either the trustworthiness or the authenticity of the record.

(C) Notice. A party intending to offer a record in evidence under this rule shall provide notice of that intention to each adverse party and must make the record available for inspection sufficiently in advance of the offer to provide the party with a fair opportunity to challenge the record.

Reporter's Note

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

> Subsection 11 is new and embodies a revised version of the recently enacted federal statute dealing with foreign records of regularly conducted activity. 18 U.S.C. § 3505. Under the federal statute, authentication by certification is limited to foreign business records and to use in criminal proceedings. This subsection broadens the federal

> provision so that it includes domestic as well as foreign records and is applicable in civil as well as criminal cases. Domestic records are presumably no less trustworthy and the certification of such records can more easily be challenged if the opponent of the evidence chooses to do so. As to the federal statute's limitation to criminal matters, ordinarily the rules are more strictly applied in such cases, and the rationale of trustworthiness is equally applicable in civil matters. Moreover, the absence of confrontation concerns in civil actions militates in favor of extending the rule of the civil side as well.
>
> The rule requires that the certified record be made available for inspection by the adverse party sufficiently in advance of the offer to permit the opponent a fair opportunity to challenge it. A fair opportunity to challenge the offer may require that the proponent furnish the opponent with a copy of the record in advance of its introduction and that the opponent have an opportunity to examine, not only the record offered, but any other records or documents from which the offered record was procured or to which the offered record relates. That is a matter not addressed by the rule but left to the discretion of the trial judge.

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

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

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

Finally, it should be noted that the notice requirement in Uniform Rule 902(11)(b) differs from the other notice requirements set forth in the *Uniform Rules of Evidence*. *See*, for example, Uniform Rule 404(b) and the **Reporter's Note** to the effect that the Drafting Committee recommends that the notice requirements throughout the *Uniform Rules of Evidence* be uniform. However, the Drafting Committee believes a notice provision drafted to require inspection of the record by the adversary prior to its offer in evidence is necessary in the case of certified domestic records.

(12) Certified foreign records of regularly conducted activity.

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

(i) When and how made. It 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.

(ii) Regular business activity. It was kept in the course of the regularly conducted activity.

(iii) Regular practice. It was made by the regularly conducted activity as a regular practice.

(iv) Certification. It was signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the record is signed.

(B) Testimony of foundation witness. The testimony of a foundation witness is required if a genuine question is raised as to either the trustworthiness or the authenticity of the record.

(C) Notice. A party intending to offer a record in evidence under this rule shall give notice of that intention to each adverse party, and must make the record available for inspection sufficiently in advance of the offer to provide an adverse party with a fair opportunity to challenge the record.

Reporter's Note

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

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

The Rule applies only to civil cases. Certification of foreign records of regularly conducted activity in criminal cases is currently provided for by statute. See 18 U.S.C. § 3505.

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

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

RULE 903. SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY.

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

Reporter's Note

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

ARTICLE X

CONTENTS OF RECORDS, WRITINGS, RECORDINGS, ~~AND~~ PHOTOGRAPHS AND IMAGES

RULE 1001. DEFINITIONS. ~~For purposes of this Article the following definitions are applicable~~ In these Uniform Rules:

(1) Record. "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. The term includes all writings, recordings, photographs and images.

~~(1)~~ (2) Writings and recordings. "Writings" and "recordings" ~~consist of~~ mean letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, ~~magnetic impulse,~~ mechanical or electronic recording, ~~or other form of data compilation~~ or other technology in perceivable form.

~~(2)~~ (3) Photographs. "Photographs" ~~include~~ mean a form of a record which consist of still photographs, X-ray films, video tapes, and motion pictures.

(4) Images. "Images" mean forms of a record which consist of digitized copies or images of information.

~~(3)~~ (5) Original. An "original" of a record, writing, or recording ~~is~~ means the record, writing, or recording itself, or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, including by

stored images, any printout of a record or other perceivable output readable by sight, shown to reflect the data accurately, is an "original."

~~(4)~~ (6) Duplicate. A "duplicate" ~~is~~ means a counterpart reproduced by any technique that reproduces the original in perceivable form or that is produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques ~~which~~ that accurately reproduces the original.

Reporter's Note

The proposed amendments to Uniform Rule 1001, as well as the amendments to the following Uniform Rules 1002 through 1008 in Article X, define and embellish on the term "record" which has been substituted for the word "writing" appearing throughout the existing Articles I through IX of the *Uniform Rules of Evidence of 1974, As Amended*. Although both the *Federal Rules of Evidence* and the Uniform Rules of Evidence presently include specific reference, when appropriate, 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, records are kept in a variety of mediums other than in just data compilations. "Records" may include items created, or originated, on a computer, such as through word processing or spreadsheet programs; records sent and received through electronic communications, 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 records should be admissible when they are relevant if reasonable thresholds of evidentiary reliability are satisfied. The amendments to the Uniform Rules in Articles I through IX, as well as in Article X, are intended to accommodate these innovations in record keeping, as well as to continue to accommodate more traditional forms of record keeping, such as writings, recordings and photographs. *See,* in this connection, Fry, Patricia Brumfield, *X Marks the Spot: New Technologies Compel New Concepts for Commercial Law*, 26 Loyola of Los Angeles L. Rev. 607 (1993).

The proposed amendments to Rules 1001 through 1008 are based in part on recommendations of Commissioner Patricia Brumfield Fry of North Dakota, the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on

Law of Commerce in Cyberspace, Section on Business Law of the American Bar Association and the definition of "record" derived from § 5-102(a)(14) of the Uniform Commercial Code. The proposed amendments thus carry forward established policy of the Conference to accommodate the use of electronic evidence in business and governmental transactions. *See* **Reporter's Note** to Rule 103, *supra*. *See also*, in this connection, the Memorandum of the Reporter to the Evidence Subcommittee, *Admissibility of Evidence of Electronically Based Communications and Transactions Under the Uniform Rules* (April 17, 1995) and the Memorandum of Patricia Brumfield Fry to the Reporter, *Evidence Rules and Record* (April 11, 1995).

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

Reporter's Note

The amendments to Rule 1002 are proposed to incorporate the term "record" as defined in the proposed amendments to Rule 1001.

RULE 1003. ADMISSIBILITY OF DUPLICATES. A duplicate is admissible to the same extent as an original unless ~~(1)~~ a genuine question is raised as to the authenticity or continuing effectiveness of the original or ~~(2)~~ in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Reporter's Note

There are no proposals at the present time for amending Rule 1003.

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

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

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure;

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

(4) Collateral matters. The record, writing, recording, or photograph is not closely related to a controlling issue.

Reporter's Note

The amendments to Rule 1004 are proposed to eliminate the gender-specific language and incorporate the term "record" in the rule as defined in the proposed amendments to Rule 1001.

RULE 1005. PUBLIC RECORDS. The contents of an official record, or of a ~~document~~ private record authorized to be recorded or filed in the public records and actually recorded or filed, ~~including data compilations in any form,~~ 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 in perceivable form complying with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be admitted.

Reporter's Note

The amendments to Rule 1005 are proposed to incorporate the term "record" as defined in the proposed amendments to Rule 1001.

RULE 1006. SUMMARIES. The contents of voluminous records, writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, ~~or~~ calculation, or other perceivable presentation. The originals, or duplicates, ~~shall~~ 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.

Reporter's Note

The amendments to Rule 1006 are proposed to incorporate the term "record" as defined in the proposed amendments to Rule 1001.

RULE 1007. TESTIMONY OR ~~WRITTEN~~ RECORDED ADMISSION OF PARTY. Contents of records, writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by ~~his~~ that party's written admission, without accounting for the nonproduction of the original.

Reporter's Note

This proposal for amending Rule 1007 eliminates the gender-specific language in Rule 1007. This change is technical and no change in substance is intended.

In addition, amendments to Rule 1007 are proposed to incorporate the term "record" as defined in the proposed amendments to Rule 1001.

RULE 1008. FUNCTIONS OF COURT AND JURY. ~~Whenever~~ If the admissibility of other evidence of contents of records, writings, recordings, or

photographs under these rules 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 the provisions of Rule 104. However, ~~when~~ if an issue is raised as to whether ~~(1)~~ the asserted record or writing ever existed, or ~~(2)~~ another record, writing, recording, or photograph produced at the trial is the original, or ~~(3)~~ other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Reporter's Note

The amendments to Rule 1008 are proposed to incorporate the term "record" as defined in the proposed amendments to Rule 1001 and make recommended stylistic changes.

~~ARTICLE XI~~

~~MISCELLANEOUS RULES~~

~~RULE 1101. RULES APPLICABLE.~~

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

~~(b) Rules inapplicable. The rules other than those with respect to privileges do not apply in the following situations:~~

~~(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).~~

~~(2) Grand jury. Proceedings before grand juries.~~

~~(3) Miscellaneous proceedings. Proceedings for extradition or rendition; [preliminary examination] detention hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.~~

~~(4)~~ **Contempt proceedings** ~~in which the court may act summarily.~~

Reporter's Note

The **Comment** reads:

> The Uniform Rules of Criminal Procedure change the preliminary examination to a detention hearing. This terminology is used in subdivision (b)(3).

The Drafting Committee recommends that Article XI be deleted since the substance of the Article, including Rule 1101, is now contained in Uniform Rule 101. *See* the **Reporter's Note** to Uniform Rule 101, *supra*.