The original documents are located in Box 19, folder "1975/01/02 HR5463 Rules of Evidence" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

APPROVED
JAN 2 - 1974
11 Statement issued 1/3/75 11

ACTION

THE WHITE HOUSE

WASHINGTON

Last Day: January 4

December 31, 1974

To archives 1/3

MEMORANDUM FOR THE PRESIDENT

FROM: KEN COLE

SUBJECT: Enrolled Bill H.R. 5463
Rules of Evidence

Attached for your consideration is H.R. 5463, sponsored by Representative Hungate and six others, which would establish for the first time a uniform code of evidence for use in Federal courts and make conforming amendments to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

OMB recommends approval and provides additional background information in its enrolled bill report (Tab A).

Max Friedersdorf (Loen) and Phil Areeda both recommend approval. Paul Theis has approved the text of the proposed signing statement.

RECOMMENDATION

That you sign H.R. 5463 (Tab B).

Signing Statement (Tab C)

Approve SIGNED Disapprove _____

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

DEC 26 1974

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 5463 - Rules of Evidence
Sponsors - Rep. Hungate (D) Missouri and six others

Last Day for Action

January 4, 1975

Purpose

To provide a uniform code of evidence for use in Federal courts and to make conforming amendments to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

Agency Recommendations

Office of Management and Budget	Approval
Department of Justice	Approval
Administrative Office of the United States Courts	Approval can not be recommended

Discussion

The enrolled bill would establish for the first time a uniform code of evidence for use in Federal courts and make appropriate conforming amendments to other rules.

In 1963 the Judicial Conference of the United States recommended that the Chief Justice appoint an advisory committee on rules of evidence for use in the Federal courts and such a committee was appointed. After extensive consideration the advisory committee recommended rules which were approved by the Judicial Conference in 1970. The rules were promulgated by the court in November 1972. The promulgated rules were the culmination of 13 years of effort by a distinguished group of judges, lawyers and legal scholars who worked with the Supreme Court on this project.

In 1973 the Chief Justice, pursuant to the Supreme Court order of November 1972, transmitted the proposed rules to the Congress. However, because of the general importance of these rules as well as questions which were raised with respect to certain rules on privilege, and to insure a full opportunity for review, Congress enacted a public law to defer the effectiveness of the rules until they were expressly approved by Congress. Extended hearings were held to consider the proposed rules.

The enrolled bill would codify, in large part, the rules as proposed by the Supreme Court although there were some deletions and changes made during consideration by Congress.

In addition, the enrolled bill would change the method by which rules of evidence are promulgated and it would provide that any further changes in the rules which may be proposed by the Supreme Court and transmitted to the Congress would become effective 180 days after such transmission unless either House of Congress acts to defer the effective date. The one exception is that the law of privilege would be treated as a special case and require affirmative Congressional action.

The Administrative Office of the United States Courts, in its views letter on the enrolled bill, states that the product of the Advisory Committee of the Judicial Conference of the United States was a widely considered product and that:

> ". . . The rules of evidence as incorporated in enrolled bill H.R. 5463 represent a considerable deletion as well as change in the rules as promulgated by the Supreme Court. While it is not possible within the time available for the Judicial Conference to consider the changes made by the Congress, there is no doubt that the rules as promulgated originally by the Supreme Court represent not only the considered judgment of the Advisory Committee but also the views of the Judicial Conference; accordingly, in the circumstances, with all deference, Executive approval of this enrolled bill cannot be recommended by the Judicial Branch."

The Department of Justice, in its letter on the enrolled bill, indicates some concern with certain provisions of the bill but states in conclusion that:

> "Notwithstanding our misgivings about certain of the enacted Rules, however, we are of the view that the bill as a whole is a satisfactory product which will significantly reduce uncertainty in federal trials as to the applicable rule of evidence. We therefore recommend that the bill be signed by the President."

In recommending approval of this bill, we are relying on the Department of Justice's views and conclusions and its expertise in the subject matter.

Wilfred H. Rommel

Assistant Director for
Legislative Reference

Enclosures

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

DEC 23 1974

Honorable Roy L. Ash
Director, Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Ash:

This Department has carefully reviewed H.R. 5463, a bill to enact Federal Rules of Evidence. On the whole, we are satisfied that the Rules represent a fair codification of the principles that should govern the reception of evidence and the weight to be accorded it in federal judicial proceedings.

Certain advances in the law have been made. For example, currently in all but one judicial circuit, prior inconsistent statements are not admissible for their truth but only to impeach the declarant-witness' credibility. Under Rule 801(d)(1)(A), a prior inconsistent statement of a witness, if made under oath and subject to the penalty of perjury in a formal proceeding, will be admissible as substantive evidence, enabling the jury to decide which statement to credit. This will enable justice to be done in those cases where a witness has implicated an accused in grand jury testimony but at trial, because of intervening improper influences or threats, refuses to give adverse testimony.

On the other hand, the Department is disturbed about some of the Rules as changed by Congress from the form submitted by the Supreme Court. For instance, Rule 801(d)(1)(C) as proposed by the Court would have codified existing federal law and rendered admissible prior statements of a witness relating to identification. Such prior statements have been generally recognized as being substantively admissible on the ground that the prior identification, e.g. at a lineup, is more likely to be reliable than the witness' later in-court identification of an accused or other person at a time far removed from the events that are the subject of the trial. Under H.R. 5463, as the result of an unfortunate amendment, this salutary Rule has been deleted, a result which may well have serious adverse consequences with respect to the accuracy of identification evidence in criminal cases. In addition, the Rules as enacted by Congress have added as a prerequisite to a finding that a witness is "unavailable" a requirement that an effort have been made to procure his testimony. We are concerned that this will have the undesirable result of causing more frequent resort by parties to the cumbersome and expensive processes of taking witnesses' depositions or submitting interrogatories, as a precaution against their subsequent absence.

Notwithstanding our misgivings about certain of the enacted Rules, however, we are of the view that the bill as a whole is a satisfactory product which will significantly reduce uncertainty in federal trials as to the applicable rule of evidence. We therefore recommend that the bill be signed by the President.

Sincerely,

VINCENT RAKESTRAW
Assistant Attorney General

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

ROWLAND F. KIRKS
DIRECTOR

WILLIAM E. FOLEY
DEPUTY DIRECTOR

December 23, 1974

W. H. Rommel
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D. C.

Dear Mr. Rommel:

Reference is made to your Enrolled Bill Request of December 20, 1974, transmitting for comment enrolled bill H.R. 5463 establishing rules of evidence for certain courts and proceedings.

The enrolled bill had its origin in proposed Federal Rules of Evidence promulgated by the Supreme Court of the United States on November 20, 1972, pursuant to the authority contained in title 28, United States Code, section 331.

In order to explain the position of the Judiciary on the subject of the enrolled bill, it is important to recite the long history of this project which has its origin in 1958. Prior to that time there had been numerous requests received by the Judicial Conference that a project be undertaken to draft rules of evidence for the federal courts. Upon favorable recommendation of its standing Committee on Rules of Practice and Procedure, the Judicial Conference in March 1961 authorized the appointment of an ad hoc advisory committee to study and report upon the advisability and feasibility of the proposal.

This ad hoc committee made an interim report which was printed and widely circulated to the bench and bar and after considering the comments received from the public this ad hoc committee made its final report in 1963, expressing its view that it was favorable and desirable to formulate uniform rules of evidence to be adopted by the Supreme Court for use in the district courts of the United States.

The Judicial Conference, upon consideration of this report, recommended to the Chief Justice the appointment of an advisory committee on rules of evidence and such a committee was appointed, consisting of approximately fifteen members broadly representative of all segments of the profession with special emphasis on trial lawyers and trial judges. This advisory committee held fourteen sessions, usually of three or more days, between June 18, 1965 and December 14, 1968 at which time members discussed, frequently amended and approved or disapproved the draft rules prepared by its Reporter. A preliminary draft was printed in pamphlet form and widely circulated to the bench and bar and the teaching profession in March of 1969 with a request that comments and suggestions be transmitted to the Judicial Conference committee by April 1, 1970. Many comments and suggestions were received and studied fully and as a result many changes were made in the preliminary draft.

The rules as thus revised and approved were transmitted to the Judicial Conference at its October 1970 session and were in turn approved by the Conference and forwarded to the Supreme Court with a recommendation that they be promulgated. The Court, however, believing that the public should have an opportunity to see and comment upon the rules in their revised form, returned them for republication and further study. This final draft was published in the advance sheets of the Supreme Court Reporter, the Federal Reporter, Federal Supplement and the Federal Rules Decisions. In addition a large number of reprints were distributed.

Comments with respect to the final draft were received from a number of individuals and organizations, including the Department of Justice and the Chairman of the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary. After full consideration by the advisory committee and subsequently by the standing committee of the Conference, a number of additional changes were made. The revised definitive draft was approved by the Judicial Conference of the United States in its October 1971 session and transmitted to the Supreme Court. They were promulgated by the Court on November 20, 1972.

From the foregoing recital the Judicial Conference believes it is apparent that the rules as promulgated by the Supreme Court after eight years of study by a special Advisory Committee of the Judicial Conference of the United States are

in a very real sense the product of the views of the members of the bar, the bench and the legal scholars of the country. The rules of evidence as incorporated in enrolled bill H.R. 5463 represent a considerable deletion as well as change in the rules as promulgated by the Supreme Court. While it is not possible within the time available for the Judicial Conference to consider the changes made by the Congress, there is no doubt that the rules as promulgated originally by the Supreme Court represent not only the considered judgment of the Advisory Committee but also the views of the Judicial Conference; accordingly, in the circumstances, with all deference, Executive approval of this enrolled bill cannot be recommended by the Judicial Branch.

Respectfully,

William E. Foley
Deputy Director

THE WHITE HOUSE

WASHINGTON

December 31, 1974

MEMORANDUM FOR: WARREN HENDRIKS

FROM: Vern Loen for MAX L. FRIEDERSDORF

SUBJECT: Action Memorandum - Log No. 932

The Office of Legislative Affairs concurs with the Agencies that the enrolled bill should be signed. Representatives Hungate and Dave Dennis were prime movers on this.

Attachments

To Jerry Hendricks 12-26-74 1:00 P.M.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

DEC 26 1974

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 5463 - Rules of Evidence
Sponsors - Rep. Hungate (D) Missouri and six others

Last Day for Action

January 4, 1975

Purpose

To provide a uniform code of evidence for use in Federal courts and to make conforming amendments to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

Agency Recommendations

Office of Management and Budget	Approval
Department of Justice	Approval
Administrative Office of the United States Courts	Approval can not be recommended

Discussion

The enrolled bill would establish for the first time a uniform code of evidence for use in Federal courts and make appropriate conforming amendments to other rules.

In 1963 the Judicial Conference of the United States recommended that the Chief Justice appoint an advisory committee on rules of evidence for use in the Federal courts and such a committee was appointed. After extensive consideration the advisory committee recommended rules which were approved by the Judicial Conference in 1970. The rules were promulgated by the court in November 1972. The promulgated rules were the culmination of 13 years of effort by a distinguished group of judges, lawyers and legal scholars who worked with the Supreme Court on this project.

GERALD R. FORD

In 1973 the Chief Justice, pursuant to the Supreme Court order of November 1972, transmitted the proposed rules to the Congress. However, because of the general importance of these rules as well as questions which were raised with respect to certain rules on privilege, and to insure a full opportunity for review, Congress enacted a public law to defer the effectiveness of the rules until they were expressly approved by Congress. Extended hearings were held to consider the proposed rules.

The enrolled bill would codify, in large part, the rules as proposed by the Supreme Court although there were some deletions and changes made during consideration by Congress.

In addition, the enrolled bill would change the method by which rules of evidence are promulgated and it would provide that any further changes in the rules which may be proposed by the Supreme Court and transmitted to the Congress would become effective 180 days after such transmission unless either House of Congress acts to defer the effective date. The one exception is that the law of privilege would be treated as a special case and require affirmative Congressional action.

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> ". . . The rules of evidence as incorporated in enrolled bill H.R. 5463 represent a considerable deletion as well as change in the rules as promulgated by the Supreme Court. While it is not possible within the time available for the Judicial Conference to consider the changes made by the Congress, there is no doubt that the rules as promulgated originally by the Supreme Court represent not only the considered judgment of the Advisory Committee but also the views of the Judicial Conference; accordingly, in the circumstances, with all deference, Executive approval of this enrolled bill cannot be recommended by the Judicial Branch."

The Department of Justice, in its letter on the enrolled bill, indicates some concern with certain provisions of the bill but states in conclusion that:

> "Notwithstanding our misgivings about certain of the enacted Rules, however, we are of the view that the bill as a whole is a satisfactory product which will significantly reduce uncertainty in federal trials as to the applicable rule of evidence. We therefore recommend that the bill be signed by the President."

In recommending approval of this bill, we are relying on the Department of Justice's views and conclusions and its expertise in the subject matter.

Wilfred H. Rommel

Assistant Director for
Legislative Reference

Enclosures

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 871

Date: December 27, 1974 Time: 8:00 p.m.

FOR ACTION: Geoff Shepard sign
Phil Areeda areeda
Max Friedersdorf ok

cc (for information): Warren Hendriks
Jerry Jones

FROM THE STAFF SECRETARY

DUE: Date: Monday, December 30 Time: 1:00 p.m.

SUBJECT:

Enrolled Bill H.R. 5463 - Rules of Evidence

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

____ For Your Comments ____ Draft Remarks

REMARKS:

P020.Ltr 55

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 871

Date: December 27, 1974 Time: 8:00 p.m.

FOR ACTION: Geoff Shepard
Phil Areeda
Max Friedersdorf

cc (for information): Warren Hendriks
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SUBJECT:

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ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

____ For Your Comments ____ Draft Remarks

REMARKS:

Approval

(no further memo necessary unless Counsel's office disagrees)

K.C.S.

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Warren K. Hendriks
For the President

THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR: WARREN HENDRIKS

FROM: MAX L. FRIEDERSDORF

SUBJECT: Action Memorandum - Log No. 871
Enrolled Bill H.R. 5463

The Office of Legislative Affairs concurs in the attached proposal and has no additional recommendations.

Attachment

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 871

Date: December 27, 1974 Time: 8:00 p.m.

FOR ACTION: Geoff Shepard
Phil Areeda ✓
Max Friedersdorf

cc (for information): Warren Hendriks
Jerry Jones

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DUE: Date: Monday, December 30 Time: 1:00 p.m.

SUBJECT:

Enrolled Bill H.R. 5463 - Rules of Evidence

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

____ For Your Comments ____ Draft Remarks

REMARKS:

1) Sign

2) Draft signing statement suggested & attached.

P. Areeda

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Warren K. Hendriks
For the President

[DRAFT]

STATEMENT BY THE PRESIDENT
UPON THE SIGNING OF H.R. 5463,
THE FEDERAL RULES OF EVIDENCE

I have given my approval to H.R. 5463, a bill to establish for the first time in our history uniform rules of evidence governing the admissibility of proof in proceedings before our Federal courts.

In my Message to the Congress of November 18, I urged final action on this important measure prior to the close of the 93d Congress. Enactment today represents the culmination of some 13 years of study by distinguished judges, lawyers, Members of the Congress and others interested in and affected by the administration of justice in the Federal system. This evidence code will lend greater uniformity, accessibility, and intelligibility ~~and a basis for reform and growth in our evidentiary rules which are sadly lacking in current law.~~ to the Federal rules of evidence.

May I take this occasion to salute the efforts of the Advisory Committee on Rules of Evidence and the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, the Chief Justice and Associate Justices of the Supreme Court, the members of the Senate Committee on the

Judiciary, the members of the House Subcommittee on Criminal Justice, and officials of the Department of Justice. ~~Your~~ Their joint efforts in a healthy spirit of compromise were essential to the completion of ~~our~~ this new Federal code of evidence.

THE WHITE HOUSE

WASHINGTON

December 30, 1974

NOTE TO WALLY SCOTT

FROM Geoff Shepard

We need your approval of the final statement.

Need comments in one hour if possible!

OK WDS

THE WHITE HOUSE

WASHINGTON

December 30, 1974

NOTE TO PAUL THEIS

FROM Geoff Shepard x 2562

We need your approval of the final statement.

1974 DEC 30 PM 3 41

[DRAFT]

STATEMENT BY THE PRESIDENT
UPON THE SIGNING OF H.R. 5463,
THE FEDERAL RULES OF EVIDENCE

I have ~~given my approval to~~ approved H.R. 5463, a bill ~~to establish~~ establishing for the first time in our history uniform rules of evidence ~~governing~~ for the admissibility of proof ~~in proceedings before our~~ in Federal courts proceedings.

~~In my message to the Congress of November [illegible] I urged final action on this important measure prior to the close of the 93d Congress.~~ Enactment ~~today~~ of the Federal Rules of Evidence culminates ~~represents the culmination of~~ some 13 years of study by distinguished ~~judges, lawyers, Members of the Congress and others interested in and affected by the administration of justice~~ in the Federal judicial system. ~~This evidence code~~ It will lend greater uniformity, accessibility and intelligibility ~~and a basis for reform and growth in our evidentiary rules which are sadly lacking in current law.~~ to Federal rules of evidence.

~~May I take this occasion to~~ salute the efforts of the Advisory Committee on Rules of Evidence and the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, the Chief Justice and Associate Justices of the Supreme Court, the members of the Senate Committee on the

Judiciary, the members of the House Subcommittee on Criminal Justice, and officials of the Department of Justice. ~~Your~~ Their joint efforts in a healthy spirit of compromise were essential to the completion of ~~our~~ this new ~~Federal code of evidence~~ legal legislation.

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 932

Date: December 31, 1974 Time: 10:00 a.m.

FOR ACTION: Phil Areeda
Max Friedersdorf

cc (for information): Warren Hendriks

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, December 31 Time: 1:00 p.m.

SUBJECT:

Signing statement for ~~S.~~ H.R. 5463 - Rules of Evidence

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

____ For Your Comments ____ Draft Remarks

REMARKS:

The attached statement has been edited by Paul Theis.
For your approval.

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

THE WHITE HOUSE

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Please return to Judy Johnston, Ground Floor West Wing

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Warren K. Hendriks
For the President

THE WHITE HOUSE

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OK
P Areeda

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Warren K. Hendriks
For the President

STATEMENT BY THE PRESIDENT
UPON THE SIGNING OF H. R. 5463,
THE FEDERAL RULES OF EVIDENCE

I have approved H. R. 5463, a bill establishing for the first time in our history uniform rules of evidence on the admissability of proof in Federal court proceedings.

Enactment of this code culminates some 13 years of study by distinguished experts on the Federal judicial system. It will lend greater uniformity, accessibility and intelligibility to Federal rules of evidence.

I salute the efforts of the Advisory Committee on Rules of Evidence and the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, the Chief Justice and Associate Justices of the Supreme Court, the members of the Senate Committee on the Judiciary, the members of the House Subcommittee on Criminal Justice, and officials of the Department of Justice. Their joint efforts in a healthy spirit of compromise were essential to the completion of this new legal legislation.

STATEMENT BY THE PRESIDENT UPON THE SIGNING OF H. R. 5463, THE FEDERAL RULES OF EVIDENCE

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93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 93-650

FEDERAL RULES OF EVIDENCE

NOVEMBER 15, 1973.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HUNGATE, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND SEPARATE VIEWS

[To accompany H.R. 5463]

The Committee on Judiciary, to whom was referred the bill (H.R. 5463) to establish rules of evidence for certain courts and proceedings, having considered the same, report favorably thereon with an amendment, and recommend that the bill as amended do pass.

The amendment strikes out all after the enacting clause and inserts in lieu thereof a substitute text which appears in italic type in the reported bill.

PURPOSE

The purpose of this legislation is to provide a uniform code of evidence for use in the Federal courts, and to make conforming amendments to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

STATEMENT

Judge Albert B. Maris, then Chairman of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, testified on February 7, 1973. He said: "[T]he adoption of the Federal Rules of Evidence represents, and in the future will be regarded as, a significant milestone on the road to the better administration of justice in the Federal courts, by providing clear, precise, and readily available rules for trial judges and trial lawyers to follow, which will be uniformly applicable throughout the Federal judicial system."

This view was echoed by Mr. Albert E. Jenner, Jr., Chairman of the Advisory Committee on Rules of Evidence, Judicial Conference of the United States. In his words: "I point to my own experience as a

trial lawyer throughout the Nation in the trial of cases, that really this is what brought about the demand of the American Bar Association, its Special Committee on Rules of Evidence that we must have, in order to administer justice in the Federal Courts, uniform rules of evidence that are applicable to all district courts." Mr. Jenner also suggested that the uniform rules would be of particular assistance to judges who are assigned to districts or circuits other than their own to assist with congested calendars, and to the younger members of the bar. As he said, we will for the first time in the history of the nation have a pamphlet of rules in the "hands of the gladiators trying the case in the courtroom" and on the judge's bench.

The case against an evidence code was ably stated by a number of witnesses, including former Supreme Court Justice Arthur J. Goldberg and Chief Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit. Judge Friendly voiced three major objections—there is no need for the proposed rules, evidence is a subject which does not lend itself to codification but is peculiarly apt for case-by-case development, and uniform rules in the Federal courts which may overturn State social policies with respect to inter-personal relationships may well render equal protection of the law impossible.

After six days of hearings, the Subcommittee on Criminal Justice concluded that, on balance, there should be an evidence code.

However, recognizing that rules of evidence are in large measure substantive in their nature or impact, the Subcommittee and the Full Committee concluded they were not within the scope of the enabling acts which authorize the Supreme Court to promulgate rules of "practice and procedure" (18 USC 3771, 3772, 3402; 28 USC 2072, 2075).

H.R. 5463 constitutes the Committee's demonstration of these two conclusions, as well as its view as to what should be the content and scope of a uniform code of evidence.

Within the Subcommittee and the Full Committee there was no dispute with respect to many of the Rules. As a matter of fact, 27 of the Rules were not amended at all. Non-substantive changes were made to another 14. Thus, more than 50% of the Rules are substantively unchanged from those submitted by the Supreme Court.

Historical Background

H.R. 5463 is the culmination of almost thirteen years of study by distinguished judges, Members of Congress, lawyers and others interested in and affected by the administration of justice in the Federal courts.

In 1961, the Judicial Conference of the United States authorized Earl Warren, then Chief Justice of the United States, to appoint an advisory committee to study the advisability and feasibility of uniform rules of evidence for use in the Federal courts. The Conference expressed the view that if uniform rules were found to be advisable and feasible, they should be promulgated.

The Chief Justice decided to move first toward a determination of whether uniform rules were advisable and feasible. He appointed a Special Committee on Evidence to make this initial exploration.

Because of the importance of the project and the fact that matters of evidence and proof cross the jurisdictional and interest lines of all of the Judicial Conference Advisory Committee, Chief Justice Warren designated the chairmen of the Civil, Criminal, Bankruptcy, Admiralty and Appellate Advisory Committees to serve on the Special Committee on Evidence.

By December 11, 1961, the Special Committee on Evidence submitted its preliminary report to the Judicial Conference Standing Committee on Rules of Practice and Procedure. In that report the Special Committee on Evidence concluded that uniform rules of evidence were advisable and feasible, and recommended that such rules should be promulgated promptly.

This preliminary report of the Special Committee was circulated for approximately one year with an invitation to the "bench and bar for consideration and suggestions." Thereafter, at its March, 1963 meeting, the Judicial Conference approved the final report of the Special Committee and recommended the appointment of an Advisory Committee on Rules of Evidence to prepare uniform rules of evidence for adoption and promulgation by the Supreme Court of the United States.

A distinguished Advisory Committee composed of judges, lawyers and teachers was appointed on March 8, 1965, and assigned the monumental task of developing a uniform code of evidence for use in the Federal courts.

Approximately four years later, in March, 1969, the Judicial Conference Standing Committee on Rules of Practice and Procedure printed and circulated widely for comment a preliminary draft of proposed rules of evidence which had been developed by the Advisory Committee. The draft was accompanied by detailed Advisory Committee notes.

After reviewing the numerous comments, suggests, and proposals received on the preliminary draft, the Advisory Committee and, in turn, the Judicial Conference, approved a revised draft which it submitted to the Sureme Court for promulgation in October, 1970.

The Court, however, returned the draft to the Judicial Conference for further public circulation and opportunity to comment, and in March, 1971, that draft was printed and widely circulated. The final work product of the Advisory Committee of the Judicial Conference and the Standing Committee on Rules of Practice and Procedure, was forwarded to the Supreme Court in October, 1971.

On November 20, 1972, the Supreme Court promulgated the Federal Rules of Evidence pursuant to the various enabling acts in title 18 and 28 of the United States Code, to take effect on July 1, 1973.

On February 5, 1973, Chief Justice Warren Burger, acting pursuant to the Supreme Court order of November 20, 1972, transmitted the proposed rules to the Congress. As transmitted, the proposed rules and accompanying Advisory Committee notes occupied 168 closely printed pages.

Congressional Consideration

Recognizing the importance and the enormity of the task before it, and in light of the serious question raised by Mr. Justice Douglas, in

dissenting to the Supreme Court Order, as to the authority of the Supreme Court to promulgate rules of evidence, the Congress promptly enacted Public Law 93–12. This Public Law (which passed the House 399 to 1) deferred the effectiveness of the rules until expressly approved by the Congress.

Two days after receipt of the proposed rules, on February 7, 1973, the Subcommittee on Criminal Justice opened hearings and began to take testimony on the desirability of a uniform code of evidence and the merits of each individual rule. H.R. 5463 was introduced by the Chairman of the Subcommittee, Congressman William L. Hungate, and other Members, so that the proposed rules would be before the Committee in legislative form.

The Subcommittee held six days of hearings, heard twenty-eight witnesses, received numerous written communications, and developed a hearing record of approximately 600 pages. By March 21, the Subcommittee was ready to begin its markup sessions with a view to developing a Subcommittee draft. Between March 21 and June 22, the Subcommittee held 17 markup sessions which culminated in a Committee Print of H.R. 5463 dated June 28, 1973. The Committee Print was circulated nationwide for comment and printed in the Congressional Record to assure the widest distribution. Over the course of the next six weeks, approximately 90 comments were received by the Subcommittee. By and large, the Committee Print was well received, even by those individuals and organizations objecting to the Subcommittee treatment of specific rules and those who objected to having uniform rules of any kind. The American Bar Association House of Delegates, for example, endorsed most of the provisions generally and "concurs in the Hungate Subcommittee's Report . . . insofar as it omits Rules 803 (24), 804(b) (6); all of the rules pertaining to privilege . . .; and the rule on summing up and comment by judges (105)". The American College of Trial Lawyers "approves thoroughly". From the Association of the Bar of the City of New York, "The Committee is to be commended for a most thorough, scholarly revision of the Federal Rules of Evidence". Chief Judge Friendly wrote ". . . if there are to be Federal rules of evidence, I do not see how there could be much better ones than your Subcommittee has proposed". Assistant Attorney General Robert Repasky of Wisconsin advised that "the balance the Committee has arrived at is a most reasonable balance between the rather clear interest of the individual States and the interest of the Federal courts in having some formalized Rules of Evidence to guide their decisions." Similar comments were received from numerous other individuals and organizations in the legal field. Laudatory comments were also received from non-legal groups, for example, the communications media, the American Hospital Association, the National Association of Social Workers, Inc., and others.

All comments were thoroughly considered and the Subcommittee developed a revised Committee Print in the course of five additional markup sessions. This Print, dated October 10, 1973, was approved by the Subcommittee and reported to the full Judiciary Committee for its consideration.

On October 16 and 18 and on November 6, 1973, the full Committee thoroughly debated H.R. 5463, amended it in several respects, and ordered it favorably reported.

Committee Amendments

In some instances, the Committee has deleted entire rules or parts of rules proposed by the Supreme Court; in other instances, rules have been retained but significantly amended. The following explanatory information reflects the Committee views in taking each individual action.

PROPOSED RULES DELETED BY COMMITTEE

Proposed Rule 105

Rule 105 as submitted by the Supreme Court concerned the issue of summing up and comment by the judge. It provided that after the close of the evidence and the arguments of counsel, the presiding judge could fairly and impartially sum up the evidence and comment to the jury upon its weight and the credibility of the witnesses, if he also instructed the jury that it was not bound thereby and must make its own determination of those matters. The Committee recognized that the Rule as submitted is consistent with long standing and current federal practice. However, the aspect of the Rule dealing with the authority of a judge to comment on the weight of the evidence and the credibility of witnesses—an authority not granted to judges in most State courts—was highly controversial. After much debate the Committee determined to delete the entire Rule, intending that its action be understood as reflecting no conclusion as to the merits of the proposed Rule and that the subject should be left for separate consideration at another time.

Proposed Rule 303

Rule 303, as submitted by the Supreme Court was directed to the issues of when, in criminal cases, a court may submit a presumption to a jury and the type of instruction it should give. The Committee deleted this Rule since the subject of presumptions in criminal cases is addressed in detail in bills now pending before the Committee to revise the federal criminal code. The Committee determined to consider this question in the course of its study of these proposals.

Proposed Rule 406(b)

Rule 406 as submitted to Congress contained a subdivision (b) providing that the method of proof of habit or routine practice could be "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." The Committee deleted this subdivision believing that the method of proof of habit and routine practice should be left to the courts to deal with on a case-by-case basis. At the same time, the Committee does not intend that its action be construed as sanctioning a general authorization of opinion evidence in this area.

Proposed Rules 803(24) and 804(b)(6)

The proposed Rules of Evidence submitted to Congress contained identical provisions in Rules 803 and 804 (which set forth the various hearsay exceptions), to the effect that the federal courts could admit any hearsay statement not specifically covered by any of the stated exceptions, if the hearsay statement was found to have "comparable circumstantial guarantees of trustworthiness."

The Committee deleted these provisions (proposed Rules 803(24) and 804(b)(6)) as injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial. It was noted that Rule 102 directs the courts to construe the Rules of Evidence so as to promote "growth and development." The Committee believed that if additional hearsay exceptions are to be created, they should be by amendments to the Rules, not on a case-by-case basis.

Proposed Rule 804(b)(2)

Rule 804(b)(2), a hearsay exception submitted by the Court, titled "Statement of recent perception", read as follows:

> 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 he was interested, and while his recollection was clear.

The Committee eliminated this Rule as creating a new and unwarranted hearsay exception of great potential breadth. The Committee did not believe that statements of the type referred to bore sufficient guarantees of trustworthiness to justify admissibility.

RULES SIGNIFICANTLY AMENDED

Rule 104(c)

Rule 104(c) as submitted to the Congress provided that hearings on the admissibility of confessions shall be conducted outside the presence of the jury and hearings on all other preliminary matters should be so conducted when the interests of justice require. The Committee amended the Rule to provide that where an accused is a witness as to a preliminary matter, he has the right, upon his request, to be heard outside the jury's presence. Although recognizing that in some cases duplication of evidence would occur and that the procedure could be subject to abuse, the Committee believed that a proper regard for the right of an accused not to testify generally in the case dictates that he be given an option to testify out of the presence of the jury on preliminary matters.

The Committee construes the second sentence of subdivision (c) as applying to civil actions and proceedings as well as to criminal cases, and on this assumption has left the sentence unamended.

Rule 106

Rule 106 as submitted by the Supreme Court (now Rule 105 in the bill) dealt with the subject of evidence which is admissible as to one party or for one purpose but is not admissible against another party or for another purpose. The Committee adopted this Rule without change on the understanding that it does not affect the authority of a court to order a severence in a multi-defendant case.

Rule 201(g)

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.

Rule 301

Rule 301 as submitted by the Supreme Court provided that in all cases 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. The Committee limited the scope of Rule 301 to "civil actions and proceedings" to effectuate its decision not to deal with the question of presumptions in criminal cases. (See note on Rule 303 in discussion of Rules deleted). With respect to the weight to be given a presumption in a civil case, the Committee agreed with the judgment implicit in the Court's version that the so-called "bursting bubble" theory of presumptions, whereby a presumption vanishes upon the appearance of any contradicting evidence by the other party, gives to presumptions too slight an effect. On the other hand, the Committee believed that the Rule proposed by the Court, whereby a presumption permanently alters the burden of persuasion, no matter how much contradicting evidence is introduced—a view shared by only a few courts—lends too great a force to presumptions. Accordingly, the Committee amended the Rule to adopt an intermediate position under which a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion; instead it is merely deemed sufficient evidence of the fact presumed, to be considered by the jury or other finder of fact.

Rule 402

Rule 402 as submitted to the Congress contained the phrase "or by other rules adopted by the Supreme Court". To accommodate the view that the Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence, the Committee amended the above phrase to read "or by other rules prescribed by the Supreme Court pursuant to statutory authority" in this and other Rules where the reference appears.

Rule 404(b)

The second sentence of Rule 404(b) as submitted to the Congress began with the words "This subdivision does not exclude the evidence when offered". The Committee amended this language to read "It may, however, be admissible", the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

Rule 405(a)

Rule 405(a) as submitted proposed to change existing law by allowing evidence of character in the form of opinion as well as reputation testimony. Fearing, among other reasons, that wholesale allowance of opinion testimony might tend to turn a trial into a swearing contest between conflicting character witnesses, the Committee decided to delete from this Rule, as well as from Rule 608(a) which involves a related problem, reference to opinion testimony.

Rule 408

Under existing federal law evidence of conduct and statements made in compromise negotiations is admissible in subsequent litigation between the parties. The second sentence of Rule 408 as submitted by the Supreme Court proposed to reverse that doctrine in the interest of further promoting non-judicial settlement of disputes. Some agencies of government expressed the view that the Court formulation was likely to impede rather than assist efforts to achieve settlement of disputes. For one thing, it is not always easy to tell when compromise negotiations begin, and informal dealings end. Also, parties dealing with government agencies would be reluctant to furnish factual information at preliminary meetings; they would wait until "compromise negotiations" began and thus hopefully effect an immunity for themselves with respect to the evidence supplied. In light of these considerations, the Committee recast the Rule so that admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of unqualified factual assertions is admissible. The latter aspect of the Rule is drafted, however, so as to preserve other possible objections to the introduction of such evidence. The Committee intends no modification of current law whereby a party may protect himself from future use of his statements by couching them in hypothetical conditional form.

Rule 410

The Committee added the phrase "Except as otherwise provided by Act of Congress" to Rule 410 as submitted by the Court in order to preserve particular congressional policy judgments as to the effect of a plea of guilty or of nolo contendere. See 15 U.S.C. 16(a). The Committee intends that its amendment refers to both present statutes and statutes subsequently enacted.

Article V

Article V as submitted to Congress contained thirteen Rules. Nine of those Rules defined specific non-constitutional privileges which the federal courts must recognize (i.e. required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Another Rule provided that only those privileges set forth in Article V or in some other Act of Congress could be recognized by the federal courts. The three remaining Rules addressed collateral problems as to waiver of privilege by voluntary disclosure, privileged matter disclosed under compulsion or without opportunity to claim privilege, comment upon or inference from a claim of privilege, and jury instruction with regard thereto.

The Committee amended Article V to eliminate all of the Court's specific Rules on privileges. Instead, the Committee, through a single Rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases. That standard, derived from Rule 26 of the Federal Rules of Criminal Procedure, mandates the application of the principles of the common law as interpreted by the courts of the United States in the light of reason and experience. The words "person, gov-

ernment, State, or political subdivision thereof" were added by the Committee to the lone term "witnesses" used in Rule 26 to make clear that, as under present law, not only witnesses may have privileges. The Committee also included in its amendment a proviso modeled after Rule 302 and similar to language added by the Committee to Rule 601 relating to the competency of witnesses. The proviso is designed to require the application of State privilege law in civil actions and proceedings governed by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), a result in accord with current federal court decisions. See *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F2d 551, 555–556 n.2 (2nd Cir. 1967). The Committee deemed the proviso to be necessary in the light of the Advisory Committee's view (see its note to Court Rule 501) that this result is not mandated under *Erie*.

The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy. In addition, the Committee considered that the Court's proposed Article V would have promoted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and federal courts. The Committee's proviso, on the other hand, under which the federal courts are bound to apply the State's privilege law in actions founded upon a State-created right or defense, removes the incentive to "shop".

Rule 601

Rule 601 as submitted to the Congress provided that "Every person is competent to be a witness except as otherwise provided in these rules." One effect of the Rule as proposed would have been to abolish age, mental capacity, and other grounds recognized in some State jurisdictions as making a person incompetent as a witness. The greatest controversy centered around the Rule's rendering inapplicable in the federal courts the so-called Dead Man's Statutes which exist in some States. Acknowledging that there is substantial disagreement as to the merit of Dead Man's Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest The Committee therefore amended the Rule to make competency in civil actions determinable in accordance with State law with respect to elements of claims or defenses as to which State law supplies the rule of decision. Cf. *Courtland* v. *Walston & Co., Inc.*, 340 F. Supp. 1076, 1087–1092 (S.D.N.Y. 1972).

Rule 606(b)

As proposed by he Court, Rule 606(b) limited testimony by a juror in the course of an inquiry into the validity of a verdict or indictment. He could testify as to the influence of extraneous prejudicial information brought to the jury's attention (e.g. a radio newscast or a newspaper account) or an outside influence which improperly had been brought to bear upon a juror (e.g. a threat to the safety of a member

of his family), but he could not testify as to other irregularities which occurred in the jury room. Under this formulation a quotient verdict could not be attacked through the testimony of a juror, nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations.

The 1969 and 1971 Advisory Committee drafts would have permitted a member of the jury to testify concerning these kinds of irregularities in the jury room. The Advisory Committee note in the 1971 draft stated that "* * * the door of the jury room is not a satisfactory dividing point, and the Supreme Court has refused to accept it." The Advisory Committee further commented that—

> The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room. * * * The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

Objective jury misconduct may be testified to in California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington.

Persuaded that the better practice is that provided for in the earlier drafts, the Committee amended subdivision (b) to read in the text of those drafts.

Rule 608(a)

Rule 608(a) as submitted by the Court permitted attack to be made upon the character for truthfulness or untruthfulness of a witness either by reputation or opinion testimony. For the same reasons underlying its decision to eliminate the admissibility of opinion testimony in Rule 405(a), the Commttee amended Rule 608(a) to delete the reference to opinion testimony.

Rule 608(b)

The second sentence of Rule 608(b) as submitted by the Court permitted specific instances of misconduct of a witness to be inquired into on cross-examination for the purpose of attacking his credibility, if probative of truthfulness or untruthfulness, "and not remote in time". Such cross-examination could be of the witness himself or of another witness who testifies as to "his" character for truthfulness or untruthfulness.

The Committee amended the Rule to emphasize the discretionary power of the court in permitting such testimony and deleted the reference to remoteness in time as being unnecessary and confusing (remoteness from time of trial or remoteness from the incident involved?). As recast, the Committee amendment also makes clear the antecedent of "his" in the original Court proposal.

Rule 609(a)

Rule 609(a) as submitted by the Court was modeled after Section 133(a) of Public Law 91–358. 14 D.C. Code 305(b)(1), enacted in 1970. The Rule provided that:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.

As reported to the Committee by the Subcommittee, Rule 609(a) was amended to read as follows:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime (1) was punishable by death or imprisonment in excess of one year, unless the court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement.

In full committee, the provision was amended to permit attack upon the credibility of a witness by prior conviction only if the prior crime involved dishonesty or false statement. While recognizing that the prevailing doctrine in the federal courts and in most States allows a witness to be impeached by evidence of prior felony convictions without restriction as to type, the Committee was of the view that, because of the danger of unfair prejudice in such practice and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused, cross-examination by evidence of prior conviction should be limited to those kinds of convictions bearing directly on credibility, *i.e.*, crimes involving dishonesty or false statement.

Rule 609(b)

Rule 609(b) as submitted by the Court was modeled after Section 133(a) of Public Law 91–358, 14 D.C. Code 305(b)(2)(B), enacted in 1970. The Rule provided:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date.

Under this formulation, a witness' entire past record of criminal convictions could be used for impeachment (provided the conviction met the standard of subdivision (a), if the witness had been most recently released from confinement, or the period of his parole or probation had expired, within ten years of the conviction.

The Committee amended the Rule to read in the text of the 1971 Advisory Committee version to provide that upon the expiration of

ten years from the date of a conviction of a witness, or of his release from confinement for that offense, that conviction may no longer be used for impeachment. The Committee was of the view that after ten years following a person's release from confinement (or from the date of his conviction) the probative value of the conviction with respect to that person's credibility diminished to a point where it should no longer be admissible.

Rule 609(c)

Rule 609(c) as submitted by the Court provided in part that evidence of a witness' prior conviction is not admissible to attack his credibility if the conviction was the subject of a pardon, annulment, or other equivalent procedure, based on a showing of rehabilitation, and the witness has not been convicted of a subsequent crime. The Committee amended the Rule to provide that the "subsequent crime" must have been "punishable by death or imprisonment in excess of one year", on the ground that a subsequent conviction of an offense not a felony is insufficient to rebut the finding that the witness has been rehabilitated. The Committee also intends that the words "based on a finding of the rehabilitation of the person convicted" apply not only to "certificate of rehabilitation, or other equivalent procedure", but also to "pardon" and "annulment."

Rule 611(b)

As submitted by the Court, Rule 611(b) provided:

> A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

The Committee amended this provision to return to the rule which prevails in the federal courts and thirty-nine State jurisdictions. As amended, the Rule is in the text of the 1969 Advisory Committee draft. It limits cross-examination to credibility and to matters testified to on direct examination, unless the judge permits more, in which event the cross-examiner must proceed as if on direct examination. This traditional rule facilitates orderly presentation by each party at trial. Further, in light of existing discovery procedures, there appears to be no need to abandon the traditional rule.

Rule 611(c)

The third sentence of Rule 611(c) as submitted by the Court provided that:

> In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions.

The Committee amended this Rule to permit leading questions to be used with respect to any hostile witness, not only an adverse party or person identified with such adverse party. The Committee also substituted the word "When" for the phrase "In civil cases" to reflect the possibility that in criminal cases a defendant may be entitled to call witnesses identified with the government, in which event the Committee believed the defendant should be permitted to inquire with leading questions.

Rule 612

As submitted to Congress, Rule 612 provided that except as set forth in 18 U.S.C. 3500, if a witness uses a writing to refresh his memory for the purpose of testifying, "either before or while testifying," an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness on it, and to introduce in evidence those portions relating to the witness' testimony. The Committee amended the Rule so as still to require the production of writings used by a witness while testifying, but to render the production of writings used by a witness to refresh his memory before testifying discretionary with the court in the interests of justice, as is the case under existing federal law. See *Goldman* v. *United States*, 316 U.S. 129 (1942). The Committee considered that permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial.

The Committee intends that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory.

Rule 801(d)(1)

Present federal law, except in the Second Circuit, permits the use of prior inconsistent statements of a witness for impeachment only. Rule 801(d)(1) as proposed by the Court would have permitted all such statements to be admissible as substantive evidence, an approach followed by a small but growing number of State jurisdictions and recently held constitutional in *California* v. *Green*, 399 U.S. 149 (1970). Although there was some support expressed for the Court Rule, based largely on the need to counteract the effect of witness intimidation in criminal cases, the Committee decided to adopt a compromise version of the Rule similar to the position of the Second Circuit. The Rule as amended draws a distinction between types of prior inconsistent statements (other than statements of identification of a person made after perceiving him which are currently admissible, see *United States* v. *Anderson*, 406 F.2d 719, 720 (4th Cir.), cert. denied, 395 U.S. 967 (1969)) and allows only those made while the declarant was subject to cross-examination at a trail or hearing or in a deposition, to be admissible for their truth. Compare *United States* v. *DeSisto*, 329 F.2d 929 (2nd Cir.), cert. denied, 377 U.S. 979 (1964); *United States* v. *Cunningham*, 446 F.2d 194 (2nd Cir. 1971) (restricting the admissibility of prior inconsistent statements as substantive evidence to those made under oath in a formal proceeding, but not requiring that there have been an opportunity for cross-examination). The rationale for the Committee's decision is that (1) unlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding, an oath, and the opportunity for cross-examination provide firm additional assurances of the reliability of the prior statement.

Rule 803(3)

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.

Rule 803(4)

After giving particular attention to the question of physical examination made solely to enable a physician to testify, the Committee approved Rule 803(4) as submitted to Congress, with the understanding that it is not intended in any way to adversely affect present privilege rules or those subsequently adopted.

Rule 803(5)

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The Committee amended this Rule to add the words "or adopted by the witness" after the phrase "shown to have been made", a treatment consistent with the definition of "statement" in the Jencks Act, 18 U.S.C. 3500. Moreover, it is the Committee's understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. This last stated principle is deemed applicable to all the hearsay rules.

Rule 803(6)

Rule 803(6) as submitted by the Court permitted a record made "in the course of a regularly conducted activity" to be admissible in certain circumstances. The Committee believed there were insufficient guarantees of reliability in records made in the course of activities falling outside the scope of "business" activities as that term is broadly defined in 28 U.S.C. 1732. Moreover, the Committee concluded that the additional requirement of Section 1732 that it must have been the regular practice of a business to make the record is a necessary further assurance of its trustworthiness. The Committee accordingly amended the Rule to incorporate these limitations.

Rule 803(7)

Rule 803(7) as submitted by the Court concerned the *absence* of entry in the records of a "regularly conducted activity." The Committee amended this Rule to conform with its action with respect to Rule 803(6).

Rule 803(8)

The Committee approved Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase "factual findings" be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.

Rule 803(13)

The Committee approved this Rule in the form submitted by the Court, intending that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in Rule 803(11).

Rule 804(a)(3)

Rule 804(a)(3) was approved in the form submitted by the Court. However, the Committee intends no change in existing federal law under which the court may choose to disbelieve the declarant's testimony as to his lack of memory. See *United States* v. *Insana*, 423 F. 2d 1165, 1169–1170 (2nd Cir.), cert. denied, 400 U.S. 841 (1970).

Rule 804(a)(5)

Rule 804(a)(5) as submitted to the Congress provided, as one type of situation in which a declarant would be deemed "unavailable", that he be "absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means." The Committee amended the Rule to insert after the word "attendance" the parenthetical expression" (or, in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony)". The amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable. The Committee, however, recognized the propriety of an exception to this additional requirement when it is the declarant's former testimony that is sought to be admitted under subdivision (b)(1).

Rule 804(b)(1)

Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the Rule to reflect these policy determinations.

Rule 804(b)(2)

Rule 804(b)(3) as submitted by the Court (now Rule 804(b)(2) in the bill) proposed to expand the traditional scope of the dying declaration exception (i.e. a statement of the victim in a homicide case as to the cause or circumstances of his believed imminent death) to allow such statements in all criminal and civil cases. The Committee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the provision to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present. This is existing law. At the same time, the

Committee approved the expansion to civil actions and proceedings where the stakes do not involve possible imprisonment, although noting that this could lead to forum shopping in some instances.

Rule 804(b)(3)

Rule 804(b)(4) as submitted by the Court (now Rule 804(b)(3) in the bill) provided as follows:

> *Statement against interest.*—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to exculpate the accused is not admissible unless corroborated.

The Committee determined to retain the traditional hearsay exception for statements against pecuniary or proprietary interest. However, it deemed the Court's additional references to statements tending to subject a declarant to civil liability or to render invalid a claim by him against another to be redundant as included within the scope of the reference to statements against pecuniary or proprietary interest. See *Gichner* v. *Antonio Triano Tile and Marble Co.*, 410 F. 2d 238 (D.C. Cir. 1968). Those additional references were accordingly deleted.

The Court's Rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to criminal liability and statements tending to make him an object of hatred, ridicule, or disgrace. The Committee eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. See *United States* v. *Dovico*, 380 F. 2d 325, 327nn.2,4 (2nd Cir.), cert. denied, 389 U.S. 944 (1967). As for statements against penal interest, the Committee shared the view of the Court that some such statements do possess adequate assurances of reliability and should be admissible. It believed, however, as did the Court, that statements of this type tending to exculpate the accused are more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness. The proposal in the Court Rule to add a requirement of simple corrobation was, however, deemed ineffective to accomplish this purpose since the accused's own testimony might suffice while not necessarily increasing the reliability of the hearsay statement. The Committee settled upon the language "unless corroborating circumstances clearly indicate the trustworthiness of the statement" as affording a proper standard and degree of discretion. It was contemplated that the result in such cases as *Donnelly* v. *United States*, 228 U.S. 243 (1912), where the circumstances plainly indicated reliability, would be changed. The Committee also added to the Rule the final sentence from the 1971 Advisory Committee draft, designed to codify the doctrine of *Bruton* v. *United States*, 391 U.S. 123 (1968). The Committee does not intend to affect the existing exception to the *Bruton* principle where the codefendant takes the stand and is subject to cross-examination, but believed there was no need to make specific

provision for this situation in the Rule, since in that even the declarant would not be "unavailable".

Rule 902(8)

Rule 902(8) as submitted by the Court referred to certificates of acknowledgment "under the hand and seal of" a notary public or other officer authorized by law to take acknowledgments. The Committee amended the Rule to eliminate the requirement, believed to be inconsistent with the law in some States, that a notary public must affix a seal to a document acknowledged before him. As amended the Rule merely requires that the document be executed in the manner prescribed by State law.

Rule 902(9)

The Committee approved Rule 902(9) as submitted by the Court. With respect to the meaning of the phrase "general commercial law", the Committee intends that the Uniform Commercial Code, which has been adopted in virtually every State, will be followed generally, but that federal commercial law will apply where federal commercial paper is involved. See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). Further, in those instances in which the issues are governed by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), State law will apply irrespective of whether it is the Uniform Commercial Code.

Rule 1001(2)

The Committee amended this Rule expressly to include "video tapes" in the definition of "photographs."

Rule 1003

The Committee approved this Rule in the form submitted by the Court, with the expectation that the courts would be liberal in deciding that a "genuine question is raised as to the authenticity of the original."

Rule 1004(1)

The Committee approved Rule 1004(1) in the form submitted to Congress. However, the Committee intends that loss or destruction of an original by another person at the instigation of the proponent should be considered as tantamount to loss or destruction in bad faith by the proponent himself.

Rule 1101

Subdivision (a) as submitted to the Congress, in stating the courts and judges to which the Rules of Evidence apply, omitted the Court of Claims and commissioners of that Court. At the request of the Court of Claims, the Committee amended the Rule to include the Court and its commissioners within the purview of the Rules.

Subdivision (b) was amended merely to substitute positive law citations for those which were not.

Analysis of Sections 2 and 3 of the Bill

Section 2

Subsection (a) sets forth the method by which future amendments may be made to the Rules of Evidence. The present Rules Enabling

Acts (18 U.S.C. 3771, 3772, 3402; 28 U.S.C. 2072, 2075), which the Supreme Court invoked as the authority pursuant to which it promulgated the Rules of Evidence, provide that the Court may prescribe rules of "practice and procedure" and submit them to Congress. The rules then take effect automatically either at such time as the Court directs, or after ninety days following their submission. An Act of Congress is necessary to prevent any rule so submitted from taking effect.

The Committee believed that many of the Rules of Evidence, particularly in the privilege and hearsay fields, involve substantive policy judgments as to which it is appropriate that the Congress play a greater role than that provided for in the present Enabling Acts. Accordingly, the Committee concluded that it should provide for a new statutory procedure by which amendments to the Rules of Evidence may be made, designed to insure adequate congressional participation in the evidence rule-making process. Section 2(a) as adopted by the Committee adds a new section, 2076, to title 28, United States Code, permitting the Court to prescribe amendments to the Rules of Evidence, which amendments must be reported to the Congress. However, unlike the situation under the present Rules Enabling Acts, either House of Congress may, by resolution, prevent a rule from becoming operative. Moreover, rather than the ninety-day period allowed in the existing Rules Enabling Acts, a one hundred and eighty day period is prescribed for Congressional action.

The committee considered the possibility of requiring congressional approval of any rule of evidence submitted to it by the Court, and recognized that a similar judgment inhered in Public Law 93–12, pursuant to which the Court's proposed Rules of Evidence were barred from taking effect until approved by Congress. However, the Committee determined that requiring affirmative congressional action was appropriate to this first effort at codifying the Rules of Evidence, but was not needed with respect to subsequent amendments which would likely be of more modest dimension. Indeed, it believed that to require affirmative congressional action with respect to amendments might well result in some worthwhile amendments not being approved because of other pressing demands on the Congress. The Committee thus concluded that the system of allowing Court-proposed amendments to the Rules of Evidence to take effect automatically unless disapproved by either House strikes a sound balance between the proper role of Congress in the amendatory process and the dictates of convenience and legislative priorities.

Subsection (b) strikes out Section 1732(a) of title 28, United States Code, since its subject matter is covered in Rule 803(6) relating to records of a regularly conducted business activity.

Subsection (c) amends Section 1733 of title 28, United States Code, since that section is largely, if not entirely, encompassed by Rule 803 (8) relating to public records and reports. Because of the possibility that Section 1733 may reach some matters not touched by Rule 803(8), subsection (c) does not repeal Section 1733 but merely provides that the Section does not apply to actions, cases, and proceedings to which the Rules of Evidence are applicable.

Section 3

Section 3 affirmatively approves conforming amendments, proposed by the Court to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, which will be necessitated by the enactment into law of the Federal Rules of Evidence. These amendments were submitted by the Court to Congress along with the proposed Rules of Evidence. Affirmative congressional approval of them in order to render them effective is required by the terms of Public Law 93–12.

COST

Enactment of H.R. 5463 will entail no cost to the Government of the United States.

COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., February 5, 1973.

To the Senate and House of Representatives of the United States of America in Congress assembled:

By direction of the Supreme Court, I have the honor to submit to the Congress the Rules of Evidence [1] of the United States Courts and Magistrates, amendments and further amendments to the Federal Rules of Civil Procedure and amendments to the Federal Rules of Criminal Procedure which have been adopted by the Supreme Court, pursuant to Title 28, United States Code, Sections 2072 and 2075 and Title 18, United States Code, Sections 3402, 3771 and 3772. Mr. Justice Douglas dissents from the adoption of these rules and amendments.

Accompanying these amendments is the report of the Judicial Conference of the United States submitted tothe Court for its consideration, pursuant to Title 28, United States Code, Section 331.

Respectfully.

WARREN E. BURGER,
Chief Justice of the United States.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

TITLE 28, UNITED STATES CODE

* * * * * * *

§ 1732. Record made in regular course of business; photographic copies.

[(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an

[1] The Rules of Evidence to which the Chief Justice refers have been printed as H. Doc. 93–46.

entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

[All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

[The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.]

[(b)] If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

§ 1733. Government records and papers; copies.

(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.

(c) This section does not apply to cases, actions, and proceedings to which the Federal Rules of Evidence apply.

* * * * * * *

Chapter 131.—RULES OF COURTS

Sec.

* * * * * * *

§ 2076. *Rules of evidence*

The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so reported it shall not take effect. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect.

* * * * * * *

ADDITIONAL VIEWS OF HON. LAWRENCE J. HOGAN

While I consider codification of the Proposed Federal Rules of Evidence of highest importance, I nonetheless feel compelled to set forth in these dissenting views my strenuous objection to the majority of the Judiciary Committee's reformulation of Rule 609.

There are, of course, some other proposed rules which, in my opinion, might have been improved upon but I want to focus in these dissenting views on my objection to Rule 609—Impeachment by Evidence of Conviction of Crime. My objection extends not only to the fact that the rule as drafted by the Judiciary Committee not only rejects the version of the Rule recommended by the Advisory Committee on Rules of Evidence of the Judicial Conference of the United States, but also abrogates the prevailing view in the Federal and State courts, but I object even more to the Judiciary Committee's clear disavowal of the Congressional mandate expressed as recently as 1970 on the principle underlying this rule.

I offered an amendment before the Subcommittee and full Committee to restore the version of the rule recommended by the Advisory Committee on the Rules of Evidence of the Judicial Conference of the United States. I believe it important to look at the policy behind the formulations and reformulations which this impeachment rule has undergone throughout the course of consideration of these Proposed Federal Rules. There is set forth below the precise language of each of these formulations:

> March 1969 Draft: Rule 609(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime, (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (2) involved dishonesty or false statement regardless of the punishment.
>
> March 1971 Draft: Rule 609(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime, except on a plea of *nolo contendere*, is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment, unless (3), in either case, the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.
>
> December 1972 Draft: Identical with March 1969 Draft.
>
> Subcommittee Draft: Rule 609(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime (1) was punishable by death or imprisonment in excess of one year, unless the court determines that the danger of unfair prejudice out-

weighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement.

Judiciary Committee Draft: Rule 609(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissable only if the crime involved dishonesty or false statement.

The conventional and majority judicial view of the impeachment rule has been that an accused who elects to take the stand is subject to impeachment as any other witnesses, including impeachment by proof of conviction. The raging debate over impeachment of the accused's credibility by conviction of crime exemplifies the continual attempt by all involved with the judicial system to balance the scales of justice between the rights of the individual and the rights of society.

It is for this very reason that the draftsmen of the March 1969 draft of the Proposed Rules specifically undertook to study and evaluate every formulation of the impeachment rule brought to their attention. Reduced to their essentials, these included the following six alternatives:

(1) Allow *no* impeachment by conviction when the witness is the accused.

(2) Allow only *crimen falsi.*

(3) Exclude if the crime is similar.

(4) Allow conviction evidence only if the accused first introduces evidence of character for truthfulness.

(5) Leave the matter to the discretion of the trial judge.

(6) Allow impeachment by conviction when the witness is the accused—the traditional and majority rule among the State and Federal Courts.

After giving consideration to each of these six proposals, and concluding that each was only a partial solution or, at the least, no clear improvement, the Advisory Committee chose to promulgate the sixth possibility, thereby retaining the rule of the overwhelming majority of Federal and State courts as well as the views unhesitatingly exposused by Dean Wigmore, renowned expert on evidence (See 3 Wigmore, § 889–891). This formulation adopts the prevailing prosecutorial view that it would be misleading to permit the accused to appear as a witness of blameless life on those occasions when the accused chooses to take the stand.

The first alternative above, that of excluding all convictions of the accused for impeachment purposes, has been given short shrift because there is little dissent from the proposition that at least some crimes are relevant to credibility. (See McCormick § 43 (2nd ed. (1972); 2 Wright, *Federal Practice and Procedure:* Criminal § 416 (1969).

In the second draft disseminated in March 1971, the Advisory Committee on the Rules of Evidence, totally without explanation, reversed its earlier position adopting the majority rule of Courts throughout the country and instead adopted the fifth alternative above. In effect, this was a particularized application of the *Luck* rule, expounded by the United States Court of Appeals for the District of Columbia in *Luck* v. *U.S.*, (121 U.S. App. D.C. 151, 348 F.2d 763) in 1965. The most

significant feature of the rule is the requirement that the evidence of conviction be excluded if the judge determines that its probative value is outweighed by the danger of unfair prejudice. In July, 1969, the Congress specifically repudiated the *Luck* rule when it enacted the traditional rule as the impeachment rule to be followed in all criminal trials in the District of Columbia. The D.C. Court Reorganization and Criminal Procedure Act of 1970, incorporating the traditional impeachment rule, was approved by the House by a vote of 294–47.

The Advisory Committee took note of the 1969 Congressional pronouncement on the impeachment question and returned to its original position in endorsing the traditional rule in the third and final version which was submitted to this Congress for our consideration and enactment in December 1972.

In spite of the fact that the eminent members of the Bench and Bar who made up the Advisory Committee on the Rules of Evidence made their position clear, the majority of the House Committee on the Judiciary rejected the majority rule in the State and Federal courts and have changed the rule once again. But with this change the dimensions of the rule are totally immeasurable either from a prosecutorial or from a defense viewpoint. The Judiciary Committee has seen fit not only to renounce the traditional rule which is that under which their fellow members of the Bar labor in the majority of their Federal courts and in 90% of their State courts but the majority of the full Judiciary Committee has also defeated the compromise effected by the Subcommittee on Criminal Justice after many hours of arguing the merits and demerits of the various alternative formulations.

The rule which the majority has now settled upon is, of all the alternatives set out above, the most unsettling. Allowing only evidence of the *crimen falsi* to impeach the credibility of the accused adopts only the worst feature of the *Luck* rule, i.e., unpredictability, without bestowing upon the Bench and Bar any useful new tool for coping with the evidentiary problem which is at the heart of this debate.

When the draftsmen of the Advisory Committee on the Rules of Evidence originally rejected the *crimen falsi* alternative for Rule 609, they did so because most of the crimes regarded as having a substantial impeaching effect would be excluded, resulting in virtually the same effect as if the alternative allowing no prior convictions for impeachment purposes were adopted.

In the commentaries to the first draft, the Advisory Committee on the Rules of Evidence noted:

"While it may be argued that considerations of relevancy should limit provable convictions to those of crimes of untruthfulness, acts are constituted major crimes because they entail substantial injury to and disregard of the rights of other persons or the public. A demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into willingness to give false testimony.

A further argument against adoption of the *crimen falsi* alternative, as noted above, is that of its unpredictability and its uneven application to criminal defendants across the board. One of the major objections to the *Luck* rule in the District of Columbia, and one of the major reasons that it has failed to be adopted in most of the other

Federal circuit courts, is that the discretionary authority which *Luck* vests in the trial judge imposes another discriminatory element into an already overly-criticized criminal justice system in this country.

Even more so is this true of the *crimen falsi* alternative. What, really, is dishonesty or false statement in judicial or legal terms? Unless one practices in a jurisdiction which has statutorily defined *crimen falsi*, the common law definition of "any crime which may injuriously affect the administration of justice, by the introduction of falsehood and fraud" is applicable. This definition has been held to include forgery, perjury, subornation of perjury, suppression of testimony by bribery, conspiracy to procure the absence of a witness or to accuse of crime, obtaining money under false pretenses, stealing, moral turpitude, shoplifting, intoxication, petit larceny, jury tampering, embezzlement and filing a false estate tax return. In other jurisdictions, some of these same offenses have been found not to fit the *crimen falsi* definition.

From the foregoing analyses undertaken by the eminent professors, jurists and lawyers of the Advisory Committee, as well as by my colleagues on the Committee on the Judiciary, I am convinced that the only viable alternative is that which has stood the test of time. If for no other reason than that the other considered alternatives are no improvement over the shortcomings of the traditional, I shall offer an amendment on the floor to reinstate the traditional, majority rule as promulgated by the Advisory Committee on the Rules of Evidence of the Judicial Conferences of the United States, and as it is known in the majority of our American courts. I am hopeful that this amendment will receive the support of the House as it did in 1970 when the *crimen falsi* alternative was specifically voted down in the D.C. Court Reorganization and Criminal Procedure Act of 1970.

LAWRENCE J. HOGAN.

SEPARATE VIEWS OF HON. ELIZABETH HOLTZMAN

The code of evidence proposed by the Judiciary Committee marks a substantial improvement over the rules initially promulgated by the Supreme Court—a fact attributable to the excellent and conscientious work done by the Subcommittee on Criminal Justice chaired by Congressman Hungate.

Although the Subcommittee did an extremely commendable job, I still have substantial reservations about the final product.

1. IS THERE A NEED TO CODIFY RULES OF EVIDENCE?

At the present time, the rules of evidence in the federal courts are not codified. Evidentiary matters are governed essentially by the common law, with a few exceptions, and rules have been developed on a case-by-case basis.

Eminent jurists and lawyers have objected to any codification of rules of evidence—or freezing them into black letter law. Judge Friendly, former Chief Judge of the Court of Appeals for the Second Circuit stated:

"Evidence to me seems just not the kind of subject that lends itself very well to codification."

His position was supported by the Chairman of the Association of Trial Lawyers of America and representatives of the American College of Trial Lawyers.

I think it is fair to say that the testimony as a whole before the subcommittee showed no overwhelming need to codify the rules. Instead, the dangers of codification became apparent.

Black letter rules will make evidentiary points high profile. Presently, evidentiary rulings are generally not considered critical at a trial. Once we adopt a "black letter" code, lawyers will have a field day determining how many evidentiary angels can dance on the top of a pin. A number of witnesses testified that the rules will generate appeals and increase reversals on evidentiary rulings. (This is especially true with the highly confused legislative history of these rules: three advisory committee drafts, two subcommittee drafts, comments on subcommittee drafts, etc.).

Another thorny problem this codification will produce is forum shopping. Because this code substantially liberalizes the hearsay rules, federal courts may become a more attractive forum for litigation. This is not, however, a time to increase the work load of the already congested federal courts. Nor is there any substantial justification on a hearsay issue for a different outcome in a federal court when state law is involved.

In short, many have argued that adoption of a rigid black letter evidentiary code might constitute a step backwards. Problems might

include prolongation of trials, an increase in appellate reversals, the denial to trial judges of flexibility, the difficulty of dealing with evidentiary issues by black letter law and the disadvantage of cutting off the development of the law in many areas where such development on a case basis was presently desirable.

2. OBJECTIONS TO PARTICULAR RULES

The Committee's action on most of the controversial rules—privileges, impeachment by prior convictions, use of opinion evidence and the like—was in my opinion eminently correct. Part of the reason for this was the fact that most of the comments we received were directed to these rules.

Unfortunately, however, many of the other "minor" rules did not receive very much attention from commentators or witnesses and Committee action on these was, in my opinion, much less persuasive.

I will cite a few examples.

Rule 803 (8) (b) permits an exception to the hearsay rule for records of public officers or agencies "setting forth matters observed pursuant to duty imposed by law." It would allow *reports* by police officers, social workers, building inspectors and the like—instead of direct testimony—as substantive evidence in criminal or civil trials. Thus, a social worker's report of a random observation of a marital relationship could be introduced in a criminal case against one of the spouses. Similarly, a policeman's report containing an observation of an alleged criminal offense could be used in the criminal trial instead of having the police officer himself testify. This represents an extraordinary departure from existing law. It gives more credibility to the observations of government employees than are given to observations of private citizens.

There are also problems with rules concerning the admission of unfairly prejudicial evidence (Rule 403), best evidence rule (Article 10), use of accused is testimony on preliminary matters (Rule 104(d)), statements in documents affecting an interest in property (Rule 803 (15)), authenticity of commercial paper (Rule 902 (9)), authenticity of handwriting (Rule 901), hearsay use of telephone directories and similar publications (Rule 803 (17)), and use of court appointed expert witnesses (Rule 706).

3. THE PROCEDURE FOR AMENDING THESE RULES IS UNWISE

Under the committee bill, the Supreme Court may propose an amendment which becomes law unless the House or Senate vetoes that amendment.

The dangers in this procedure are particularly apparent with respect to evidentiary privileges: husband-wife, lawyer-client, doctor-patient privilege. Decisions regarding privileges necessarily entail policy considerations because, unlike most evidentiary rules, privileges protect interpersonal relationships outside of the courtroom. Clearly, by creating a newspaperman's privilege or defining the limits of confidential communications, we are expressing a desire to promote a social objective: e.g., promoting a free press, encouraging clients to be candid with their lawyers, etc.

Rules creating, abolishing or limiting privileges are legislative. Nonetheless, under the committee bill we would be allowing the Supreme Court to legislate in the area of privilege subject only to a congressional veto. This procedure is unwise since rules concerning privilege, if enacted, should be done through an affirmative vote by Congress.

The process is, I submit, unconstitutional as well. The Supreme Court is not given the power under Article III of the Constitution to legislate rules on substantive matters. It can pass such judgments only in the context of a particular case or controversy. Yet, H.R. 5453 allows the Court to promulgate a rule in a substantive policy area without the benefit of an adversary proceeding. We cannot (and should not) delegate such rule-making power to the Supreme Court.

CONCLUSION

Unquestionably if we enact these rules of evidence we will be enacting a code substantially better than the one confronting Congress earlier this year. Yet, we must balance the fine work done by the subcommittee and the proported benefits of a uniform federal code of evidence against the dangers of codification and the problems outlined above.

In making our decision we should bear in mind the testimony of Judge Friendly:

"(T)here is no need for [the proposed Rules]. Someone once said that, in legal matters, when it is not necessary to do anything, it is necessary to do nothing. I find that a profoundly wise remark. We know we are now having almost no serious problems with respect to evidence; we cannot tell how many the Proposed Rules will bring."

ELIZABETH HOLTZMAN.

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Calendar No. 1211

93D CONGRESS
2d Session

SENATE

REPORT
No. 93-1277

FEDERAL RULES OF EVIDENCE

OCTOBER 18, 1974.—Ordered to be printed
Filed under authority of the order of the Senate of October 11, 1974

Mr. HRUSKA, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 5463]

The Committee on the Judiciary, to which was referred the bill (H.R. 5463) to establish rules of evidence for certain courts and proceedings, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

AMENDMENTS

Amendments made by the committee to the subject bill, other than those of strictly technical and conforming nature, may be summarized as follows:

(1) On page 10, line 18, after the word "evidence" delete the remainder of the line and lines 19 through 21, inserting in lieu thereof the following:

> to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

(2) (a) On page 14, beginning on line 7, delete the words "admissions of liability or opinions given during", inserting in lieu thereof the words "conduct or statements made in".

(b) On page 14, beginning at line 9, delete the sentence beginning with the word "Evidence" through line 11.

(c) On page 14, line 12, before the beginning of the sentence, insert a new sentence to read as follows:

> This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

(d) On page 14, line 12, after the word "rule" insert the word "also;" after the word "when" insert the word "the"; and delete on lines 12 and 13, the words "conduct or statements made in compromise negotiations".

(3) On page 15, at the end of line 6, add the following:

> This 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.

(4) (a) On page 15, strike line 24 and that portion of line 25 to and including the comma following the word "decision", inserting in lieu thereof the following:

> arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and removed under 28 U.S.C. § 1441(b).

(b) On page 16, line 2, delete the words "shall be", inserting in lieu thereof the word "is".

(c) On page 16, at the end of line 2, delete the period and insert the following:

> , unless with respect to the particular claim or defense, Federal law supplies the rule of decision.

(5) (a) On page 16, beginning at line 7, strike the words appearing after the word "proceedings" through line 8, inserting in lieu thereof the following:

> arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and removed under 28 U.S.C. § 1441(b).

(b) On page 16, line 9, delete the words "shall be", inserting in lieu thereof the word "is".

(c) On page 16, at the end of line 10, delete the period and insert the following:

> , unless with respect to the particular claim or defense, Federal law supplies the rule of decision.

(6) (a) On page 17, line 17, delete the word "concerning", inserting in lieu thereof the following:

> as to any matter or statement occurring during the course of the jury's deliberations or to.

(b) On page 17, line 21, delete the period, inserting in lieu thereof the following:

> , except that a juror may testify on the question 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.

(c) On page 17, line 22, delete the words "indicating an effect of this kind be received for", inserting in lieu thereof the words "concerning

a matter about which he would be precluded from testifying be received for".

(7) (a) On page 19, line 7, delete the words "is admissible", inserting in lieu thereof the words "may be elicited from him or established by public record during cross-examination but".

(b) On page 19, line 7, after the word "crime", insert the number "(1)"

(c) On page 19, at the end of line 8, delete the period, inserting in lieu thereof the following:

> or (2) in the case of witnesses other than the accused, was punishable by death or imprisonment in excess of one year under the law under which he was convicted, unless the court determines that the prejudicial effect of admitting this evidence outweighs its probative value in which case the evidence shall be excluded.

(8) On page 19, at the end of line 13, delete the period, inserting in lieu thereof the following:

> , unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweigh its prejudicial effect."

(9) On page 27, beginning with the word "and" on line 1, delete all words through and including the word "deposition" on line 4.

(10) (a) On page 27, line 6, after the word "motive" delete the comma and insert in lieu thereof a semicolon and the word "or."

(b) On page 27, line 7, delete all words through and including the word "or" on line 8.

(11) (a) On page 29, line 18 delete the word "business."

(b) On page 29, line 19 delete the word "business."

(c) On page 29, delete the sentence beginning on line 24 and concluding on line 2 of page 30.

(12) On page 30, line 29, insert after the comma, the words "unless admissible under Rlue 804(b)(5)."

(13) On page 34, after line 22, insert the following new subsection:

> (24) OTHER EXCEPTIONS.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

(14) On page 35, at line 14, delete the parenthetical reference beginning with the word "or" through the word "testimony" concluding on line 16.

(15) (a) On page 36, line 17, before the word "criminal", insert the words "civil or".

(b) On page 36, line 17, after the comma immediately following the word "liability", insert the following:

or to render invalid a claim by him against another,".

(c) On page 36, delete the sentence beginning on line 23 and ending on page 37, line 2.

(16) On page 37, after line 14, insert the following new subsection:

(5) CRIMINAL LAW ENFORCEMENT RECORDS AND REPORTS.—Records, reports, statements, or data, compilations, in any form, of police officers and other law enforcement personnel where such officer or person is unavailable, as unavailability is defined in subparts (a)(4) and (a)(5) of this Rule.

(17) On page 37, after the new subsection (5) referred to immediately above, insert the following new subsection:

(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.

(18) On page 37, line 21, after the word statement insert the words "or a statement defined in Rule 801(d)(2)"

(19) (a) On page 51, lines 5 and 6 strike the words "one hundred and eighty" and insert in lieu thereof "three hundred and sixty-five."

(b) On page 51, line 9, following the sentence ending with the word "effect", insert the following new sentences:

The effective date of any amendment so reported may be deferred by either House of Congress to a later date or until approved by act of Congress. Any rule whether proposed or in force may be amended by Act of Congress.

(c) On page 51, line 12, beginning with the word "Any", delete those words through and including the word "Congress" on line 15.

BACKGROUND

H.R. 5463 is the culmination of 13 years of study by distinguished judges, Members of Congress, lawyers, and others interested in and affected by the administration of justice in the Federal courts.

In 1961, the Judicial Conference of the United States authorized the Honorable Earl Warren, then Chief Justice of the United States, to appoint an advisory committee to study the advisability and feasibility of uniform rules of evidence for use in the Federal courts. The Conference expressed the view that if uniform rules were found to be advisable and feasible, they should be promulgated.

The Chief Justice decided to move first toward a determination of whether uniform rules were advisable and feasible. He appointed a Special Committee on Evidence to make this initial exploration.

Because of the importance of the project and the fact that matters of evidence and proof cross the jurisdictional and interest lines of all of the Judicial Conference Advisory Committees, Chief Justice Warren designated the chairmen of the Civil, Criminal, Bankruptcy, Admiralty and Appellate Advisory Committees to serve on the Special Committee on Evidence.

By December 11, 1961, the Special Committee on Evidence submitted its preliminary report to the Judicial Conference Standing Committee on Rules of Practice and Procedure. In that report the Special Committee on Evidence concluded that uniform rules of evidence were advisable and feasible, and recommended that such rules should be promulgated promptly.

This preliminary report of the Special Committee was circulated for approximately one year with an invitation to the "bench and bar for consideration and suggestions." Thereafter, at its March, 1963, meeting, the Judicial Conference approved the final report of the Special Committee and recommended the appointment of an Advisory Committee on Rules of Evidence to prepare uniform rules of evidence for adoption and promulgation by the Supreme Court of the United States.

A distinguished Advisory Committee composed of judges, lawyers and teachers was appointed on March 8, 1965, and assigned the monumental task of developing a uniform code of evidence for use in the Federal courts.

Approximately 4 years later, in March, 1969, the Judicial Conference Standing Committee on Rules of Practice and Procedure printed and circulated widely for comment a preliminary draft of proposed rules of evidence which had been developed by the Advisory Committee. The draft was accompanied by detailed Advisory Committee notes.

After reviewing the numerous comments, suggestions and proposals received on the preliminary draft, the Advisory Committee and, in turn, the Judicial Conference, approved a revised draft which it submitted to the Supreme Court for promulgation in October, 1970.

The Court, however, returned the draft to the Judicial Conference for further public circulation and opportunity to comment, and in March, 1971, that draft was printed and widely circulated. The final work product of the Advisory Committee of the Judicial Conference and the Standing Committee on Rules of Practice and Procedure, was forwarded to the Supreme Court in October, 1971.

On November 20, 1972, the Supreme Court promulgated the Federal Rules of Evidence pursuant to the various enabling acts in the United States Code (18 U.S.C., 3402, 3771, 3772; 28 U.S.C. 2072, 2075) to take effect on July 1, 1973.

On February 5, 1973, Chief Justice Warren Burger, acting pursuant to the Supreme Court order of November 20, 1972, transmitted the proposed rules to the Congress.

Because of the general importance of these Rules as well as serious questions which were raised with respect to certain Rules of Privilege in particular, the Congress enacted Public Law 93–12 to insure that Congress had a full opportunity to review them. This law deferred the effectiveness of the Rules until expressly approved by Congress.

The Subcommittee on Criminal Justice of the House Judiciary Committee held 6 days of hearings on the proposed rules and after exten-

sive consideration in executive session published a committee print of H.R. 5463, the legislative embodiment of the proposed rules, in June of 1973. The subcommittee exerted extensive efforts to circulate widely its subcommittee print to the bench and bar for consideration and suggestions. After receiving further comments which were carefully evaluated by the subcommittee, H.R. 5463 was approved by the full committee and subsequently passed by the House on February 6, 1974.

Note on Privilege

Clearly, the most far-reaching House change in the rules as promulgated, was the elimination of the Court's proposed rules on privilege contained in article V. Article V purported to define the privileges to be recognized in the Federal courts in all actions, cases, and proceedings; any alleged privilege not enumerated in article V (e.g., that of a news reporter) was deemed not to exist and could not be given effect unless of constitutional dimension. The privileges recognized included trade secret, lawyer-client, husband-wife, doctor-patient (but applicable only to psychotherapists), identity of informer, secrets of state, and official information.

From the outset, it was clear that the content of the proposed privilege provisions was extremely controversial. Critics attacked, and proponents defended, the secrets of state and official information privileges, with the nub of the disagreement being whether the rule defining them was merely codifying existing law. In addition, the husband-wife privilege drew fire as a result of the conscious decision of the Court to narrow its scope from that recognized under present Federal decisions. The partial doctor-patient privilege seemed to satisfy no one, either doctors or patients; and even the attorney-client privilege as drafted came in for its share of criticism because of its failure to define representative of the client, a critical issue for corporations and organizations. Much controversy also attended the failure to include a newsman's privilege. Further, there was dissatisfaction with the policy of the Court's rule not to require application of State privilege in civil actions where the underlying issues were governed by substantive State law, a result which many legal scholars deemed mandated by *Erie R. Co.* v. *Tompkins*.[1] Finally, some commentators questioned the wisdom of promulgating rules of privilege under the rules Enabling Act, on the ground that in their view, the codification of the law of privilege should be left to the regular legislative process.

Since it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and since the inability to agree threatened to forestall or prevent passage of an entire rules package, the determination was made that the specific privilege rules proposed by the Court should be eliminated and a single rule (rule 501) substituted, leaving the law in its current condition to be developed by the courts of the United States utilizing the principles of the common law. In addition, a proviso was approved requiring Federal courts to recognize and apply state privilege law in civil cases governed by *Erie R. Co.* v. *Tompkins*, supra, as under present Federal case law.[2]

[1] 304 U.S. 64 (1938).
[2] See *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F. 2d 551, 555–556 n. 2 (2d Cir. 1967).

The rationale underlying the proviso as passed by the House is that Federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. This reflects the view that in civil cases in the Federal courts, where a claim or defense asserted is not grounded upon a Federal question, there is no Federal interest in the application, or in its resolution, of a uniform law of Federal privilege strong enough to justify departure from State policy.[3] Another rationale for the proviso is that the Court's proposal would have prompted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and Federal courts. The House provision, on the other hand, under which the Federal court is bound to apply the State's privilege law in actions founded on a State-created right, might limit the incentive to shop.

Your committee is in accord with the approach of the House with respect to article V. Therefore, save for a technical amendment which is discussed infra., rule 501, as passed by the House, was left undisturbed.

Overview

On February 7, H.R. 5463 was referred to the Committee on the Judiciary. In order to allow several interested subcommittees to participate in the processing of the Rules, an agreement was reached to retain the bill in full committee. Additionally, it was thought that this approach would likely serve to expedite the measure.

Hearings on the subject bill were held by your committee on June 4 and 5, during which testimony and statements were presented by a score of interested organizations and individuals.[4]

At the outset, it was evident that the members of the committee viewed with general favor efforts of the House with respect to the subject bill. In this regard, Senator Ervin, at the opening of the hearings, noted:

* * * * *

> While I have not as yet studied H.R. 5463 sufficiently to have reached a final conclusion as to the wisdom of each particular rule, I am familiar enough with the bill to suggest that the House Judiciary Committee has drafted a set of rules, which, in my judgment, is greatly improved over what was originally promulgated by the Supreme Court.[5]

* * * * *

This view was echoed by Senator Hruska who observed:

* * * * *

> This Senator is hopeful that this Committee will act promptly on . . . [H.R. 5463] . . . to ensure the emergence of a public law codifying Federal rules of evidence prior to the close of the 93d Congress. Towards this end, I would hope that our hearings . . . will logically build upon the substantial efforts of the House . . .[6]

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[3] Just the reverse is, of course, true in Federal criminal cases, all of which are of necessity grounded upon Federal statutes.

[4] "Rules of Evidence." Hearings Before the Committee on the Judiciary, U.S. Senate, 93d Cong., 2d Sess. (1974) (Hereinafter cited as Hearings.).

[5] See Opening Statement of Senator Sam J. Ervin, Hearings at p. 2.

[6] See Opening Statement of Senator Roman L. Hruska, Hearings at p. 3.

Therefore, rather than returning to the Rules as promulgated as a work basis for Senate action, your committee focused upon the subject bill as passed by the House.

Although arguments to the contrary have been heard,[7] the committee is of the view that there is a real need for a comprehensive code of evidence intended to govern the admissibility of proof in all trials before the Federal courts because of the lack of uniformity and clarity in the present law of evidence on the Federal level.

In criminal cases and civil cases based on Federal question jurisdiction, the Federal courts now apply Federal statutes, rulings on evidence previously decided in suits in equity or general common law as interpreted by the Federal courts.

In civil cases based on diversity of citizenship, the courts apply State rules of evidence contained in State statutes, and sometimes State decisional law, unless there is an overriding Federal policy to the contrary.

Consequently, the law of evidence varies from case to case, court to court, and circuit to circuit.

Rules would provide uniformity, accessibility, intelligibility and a basis for reform and growth. Therefore, arguments against codification were by and large inapposite to the review by your committee.

Perhaps the most fundamental question considered by the committee relevant to the subject bill revolved around the appropriate congressional role in the rulemaking process (Sec. 2).

The general principle that day-to-day judicial procedure and practice is best regulated by the courts, subject only to general oversight by legislative bodies, is a principle which is firmly rooted in Federal statutory law and dates back to the Judiciary Act of 1789. That act gave the Federal courts power to make necessary rules for the orderly conduct of business.

For the purpose of rulemaking, this existing relationship between Congress and the Federal courts is not unlike the relationship between principal and agent. As Leland L. Tollman, one of the principal architects of the Rules of Civil Procedure, succinctly put it in testimony before the House in 1938:

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> Court rule gets its vitality from Congress, and what Congress may do, it may undo. (House Hearing on Civil Rules, 75th Cong., 1st Sess. 67 (1938).)

* * * * *

As discussed infra, the Congress must ensure that the rule-making process is not delegated to the unbridled discretion of the courts—not because of any distrust of the courts but because of the dictates of sound government.

Other amendments adopted by the committee involve the appropriate scope of judicial discretion, the furtherance of compromise by litigants, the necessity of growth in the law and notions of fundamental fairness within our criminal process. Hopefully, this attempt by the committee to balance competing interests in the context of the subject bill will meet with the general approval of members of the bench and bar and litigants within the Federal system.

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[7] See Testimony of George A. Spiegelberg, Hearings at p. 96.

Committee Amendments

The committee has amended the subject bill in the following respects:

Rule 301. Presumptions in General Civil Actions and Proceedings

This rule governs presumptions in civil cases generally. Rule 302 provides for presumptions in cases controlled by State law.

As submitted by the Supreme Court, presumptions governed by this rule were given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it.

Instead of imposing a burden of persuasion on the party against whom the presumption is directed, the House adopted a provision which shifted the burden of going forward with the evidence. They further provided that "even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of fact." The effect of the amendment is that presumptions are to be treated as evidence.

The committee feels the House amendment is ill-advised. As the joint committees (the Standing Committee on Practice and Procedure of the Judicial Conference and the Advisory Committee on the Rules of Evidence) stated: "Presumptions are not evidence, but ways of dealing with evidence." [8] This treatment requires juries to perform the task of considering "as evidence" facts upon which they have no direct evidence and which may confuse them in performance of their duties. California had a rule much like that contained in the House amendment. It was sharply criticized by Justice Traynor in *Speck* v. *Sarver* [9] and was repealed after 93 troublesome years.[10]

Professor McCormick gives a concise and compelling critique of the presumption as evidence rule:

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> Another solution, formerly more popular than now, is to instruct the jury that the presumption is 'evidence', to be weighed and considered with the testimony in the case. This avoids the danger that the jury may infer that the presumption is conclusive, but it probably means little to the jury, and certainly runs counter to accepted theories of the nature of evidence.[11]

For these reasons the committee has deleted that provision of the House-passed rule that treats presumptions as evidence. The effect of the rule as adopted by the committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden of persuasion remains on the party to whom it is allocated under the rules governing the allocation in the first instance.

The court may instruct the jury that they may infer the existence of the presumed fact from proof of the basic facts giving rise to the

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[8] Ibid.
[9] 20 Cal. 2d 585, 594, 128 P. 2d 16, 21 (1942).
[10] Cal. Ev. Code 1965 § 600.
[11] McCormick, Evidence, 669 (1954); id. 825 (2d ed. 1972).

presumption. However, it would be inappropriate under this rule to instruct the jury that the inference they are to draw is conclusive.

Rule 408. Compromise and offers to compromise

This rule as reported makes evidence of settlement or attempted settlement of a disputed claim inadmissible when offered as an admission of liability or the amount of liability. The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible.

Under present law, in most jurisdictions, statements of fact made during settlement negotiations, however, are excepted from this ban and are admissible. The only escape from admissibility of statements of fact made in a settlement negotiation is if the declarant or his representative expressly states that the statement is hypothetical in nature or it made without prejudice. Rule 408 as submitted by the Court reversed the traditional rule. It would have brought statements of fact within the ban and made them, as well as an offer of settlement, inadmissible.

The House amended the rule and would continue to make evidence of facts disclosed during compromise negotiations admissible. It thus reverted to the traditional rule. The House committee report states that the committee intends to preserve current law under which a party may protect himself by couching his statements in hypothetical form.[12] The real impact of this amendment, however, is to deprive the rule of much of its salutary effect. The exception for factual admissions was believed by the Advisory Committee to hamper free communication between parties and thus to constitute an unjustifiable restraint upon efforts to negotiate settlements—the encouragement of which is the purpose of the rule. Further, by protecting hypothetically phrased statements, it constituted a preference for the sophisticated, and a trap for the unwary.

Three States which had adopted rules of evidence patterned after the proposed rules prescribed by the Supreme Court opted for versions of rule 408 identical with the Supreme Court draft with respect to the inadmissibility of conduct or statements made in compromise negotiations.[13]

For these reasons, the committee has deleted the House amendment and restored the rule to the version submitted by the Supreme Court with one additional amendment. This amendment adds a sentence to insure that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation.

Rule 410. Offer to plead guilty; nolo contendere; withdrawn plea of guilty

As adopted by the House, rule 410 would make inadmissible pleas of guilty or nolo contendere subsequently withdrawn as well as offers to make such pleas. Such a rule is clearly justified as a means of encourag-

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[12] See Report No. 93–650, dated November 15, 1973.

[13] Nev. Rev. Stats. § 48.105; N. Mex. Stats. Anno. (1973 Supp.) § 20–4–408; West's Wis. Stats. Anno (1973 Supp.) § 904.08.

ing pleading. However, the House rule would then go on to render inadmissible for any purpose statements made in connection with these pleas or offers as well.

The committee finds this aspect of the House rule unjustified. Of course, in certain circumstances such statements should be excluded. If, for example, a plea is vitiated because of coercion, statements made in connection with the plea may also have been coerced and should be inadmissible on that basis. In other cases, however, voluntary statements of an accused made in court on the record, in connection with a plea, and determined by a court to be reliable should be admissible even though the plea is subsequently withdrawn. This is particularly true in those cases where, if the House rule were in effect, a defendent would be able to contradict his previous statements and thereby lie with impunity.[14] To prevent such an injustice, the rule has been modified to permit the use of such statements for the limited purposes of impeachment and in subsequent perjury or false statement prosecutions.

Rule 501. Privileges—General rule

Article V as submitted to Congress contained 13 rules. Nine of those rules defined specific nonconstitutional privileges which the Federal courts must recognize (i.e., required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Many of these rules contained controversial modifications or restrictions upon common law privileges. As noted supra, the House amended article V to eliminate all of the Court's specific rules on privileges. Through a single rule, 501, the House provided that privileges shall be governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience (a standard derived from rule 26 of the Federal Rules of Criminal Procedure) except in the case of an element of a civil claim or defense as to which State law supplies the rule of decision, in which event state privilege law was to govern.

The committee agrees with the main thrust of the House amendment: that a federally developed common law based on modern reason and experience shall apply except where the State nature of the issues renders deference to State privilege law the wiser course, as in the usual diversity case. The committee understands that thrust of the House amendment to require that State privilege law be applied in "diversity" cases (actions on questions of State law between citizens of different States arising under 28 U.S.C. § 1332). The language of the House amendment, however, goes beyond this in some respects, and falls short of it in others: State privilege law applies even in nondiversity, Federal question civil cases, where an issue governed by State substantive law is the object of the evidence (such issues do sometimes arise in such cases); and, in all instances where State privilege law is to be applied, e.g., on proof of a State issue in a diversity case, a close reading reveals that State privilege law is not to be applied unless the matter to be proved is an element of that state claim

[14] See *Harris* v. *New York*, 401 U.S. 222 (1971).

or defense, as distinguished from a step along the way in the proof of it.

The committee is concerned that the language used in the House amendment could be difficult to apply. It provides that "in civil actions . . . with respect to an element of a claim or defense as to which State law supplies the rule of decision," State law on privilege applies. The question of what is an element of a claim or defense is likely to engender considerable litigation. If the matter in question constitutes an element of a claim, State law supplies the privilege rule; whereas if it is a mere item of proof with respect to a claim, then, even though State law might supply the rule of decision, Federal law on the privilege would apply. Further, disputes will arise as to how the rule should be applied in an antitrust action or in a tax case where the Federal statute is silent as to a particular aspect of the substantive law in question, but Federal cases had incorporated State law by reference to State law.[15] Is a claim (or defense) based on such a reference a claim or defense as to which federal or State law supplies the rule of decision?

Another problem not entirely avoidable is the complexity or difficulty the rule introduces into the trial of a Federal case containing a combination of Federal and State claims and defenses, e.g. an action involving Federal antitrust and State unfair competition claims. Two different bodies of privilege law would need to be consulted. It may even develop that the same witness-testimony might be relevant on both counts and privileged as to one but not the other.[15a]

The formulation adopted by the House is pregnant with litigious mischief. The committee has, therefore, adopted what we believe will be a clearer and more practical guideline for determining when courts should respect State rules of privilege. Basically, it provides that in criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced.[16] Conversely, in diversity cases where the litigation in question turns on a substantive question of State law, and is brought in the Federal courts because the parties reside in different States, the committee believes it is clear that State rules of privilege should apply unless the proof is directed at a claim or defense for which Federal law supplies the rule of decision (a situation which would not commonly arise.) [17] It is intended that the State rules of privilege should

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[15] For a discussion of reference to State substantive law, see note on Federal Incorporation by Reference of State Law, Hart & Wechsler, The Federal Courts and the Federal System, pp. 491–94 (2d ed. 1973).

[15a] The problems with the House formulation are discussed in Rothstein. The Proposed Amendments to the Federal Rules of Evidence, 62 Georgetown University Law Journal 125 (1973) at notes 25, 26 and 70–74 and accompanying text.

[16] It is also intended that the Federal law of privileges should be applied with respect to pendant State law claims when they arise in a Federal question case.

[17] While such a situation might require use of two bodies of privilege law, federal and state, in the same case, nevertheless the occasions on which this would be required are considerably reduced as compared with the House version, and confined to situations where the Federal and State interests are such as to justify application of neither privilege law to the case as a whole. If the rule proposed here results in two conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rule favoring reception of the evidence should be applied. This policy is based on the present rule 43(a) of the Federal Rules of Civil Procedure which provides: In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.

apply equally in original diversity actions and diversity actions removed under 28 U.S.C. § 1441(b).

Two other comments on the privilege rule should be made. The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

Further, we would understand that the prohibition against spouses testifying against each other is considered a rule of privilege and covered by this rule and not by rule 601 of the competency of witnesses.

Rule 601. General Rule of Competency

The amendment to rule 601 parallels the treatment accorded rule 501 discussed immediately above.

Rule 606(b). Competency of Juror as a Witness: Inquiry into Validity of Verdict or Indictment

As adopted by the House, this rule would permit the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of conduct in the jury room. This extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised.

The rule passed by the House embodies a suggestion by the Advisory Committee of the Judicial Conference that is considerably broader than the final version adopted by the Supreme Court, which embodied long-accepted Federal law. Although forbidding the impeachment of verdicts by inquiry into the jurors' mental processes, it deletes from the Supreme Court version the proscription against testimony "as to any matter or statement occurring during the course of the jury's deliberations." This deletion would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations.

Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court. In *McDonald* v. *Pless*, the Court stated:

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> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient

> to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.[18]
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> * * * * *

As it stands then, the rule would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors.

Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.

Rule 609(a). Impeachment by Evidence of Conviction

As proposed by the Supreme Court, the rule would allow the use of prior convictions to impeach if the crime was a felony or a misdemeanor if the misdemeanor involved dishonesty or false statement. As modified by the House, the rule would admit prior convictions for impeachment purposes only if the offense, whether felony or misdemeanor, involved dishonesty or false statement.

The committee has adopted a modified version of the House-passed rule. In your committee's view, the danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence. Therefore, with respect to defendants, the committee agreed with the House limitation that only offenses involving false statement or dishonesty may be used. By that phrase, the committee means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit or falsification bearing on the accused's propensity to testify truthfully.

With respect to other witnesses, in addition to any prior conviction involving false statement or dishonesty, any other felony may be used to impeach if, and only if, the court finds that the probative value of such evidence outweighs its prejudicial effect against the party offering that witness.

Notwithstanding this provision, proof of any prior offense otherwise admissible under rule 404 could still be offered for the purposes sanctioned by that rule. Furthermore, the committee intends that notwithstanding this rule, a defendant's misrepresentation regarding the existence or nature of prior convictions may be met by rebuttal evidence, including the record of such prior convictions. Similarly, such records may be offered to rebut representations made by the defendant regarding his attitude toward or willingness to commit a general category of offense, although denials or other representations

[18] 238 U.S. 264, at 267 (1914).

by the defendant regarding the specific conduct which forms the basis of the charge against him shall not make prior convictions admissible to rebut such statement.

In regard to either type of representation, of course, prior convictions may be offered in rebuttal only if the defendant's statement is made in response to defense counsel's questions or is made gratuitously in the course of cross-examination. Prior convictions may not be offered as rebuttal evidence if the prosecution has sought to circumvent the purpose of this rule by asking questions which elicit such representations from the defendant.

One other clarifying amendment has been added to this subsection, that is, to provide that the admissibility of evidence of a prior conviction is permitted only upon cross-examination of a witness. It is not admissible if a person does not testify. It is to be understood, however, that a court record of a prior conviction is admissible to prove that conviction if the witness has forgotten or denies its existence.

Rule 609(b). Impeachment by Evidence of Conviction of Crime; Time Limit

Although convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness. Rather than exclude all convictions over 10 years old, the committee adopted an amendment in the form of a final clause to the section granting the court discretion to admit convictions over 10 years old, but only upon a determination by the court that the probative value of the conviction supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

It is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances. The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact. It is expected that, in fairness, the court will give the party against whom the conviction is introduced a full and adequate opportunity to contest its admission.

Rule 801(d)(1)(A). Hearsay definitions; Prior Statement by Witness

Rule 801 defines what is and what is not hearsay for the purpose of admitting a prior statement as substantive evidence. A prior statement of a witness at a trial or hearing which is inconsistent with his testimony is, of course, always admissible for the purpose of impeaching the witness' credibility.

As submitted by the Supreme Court, subdivision (d)(1)(A) made admissible as substantive evidence the prior statement of a witness inconsistent with his present testimony.

The House severely limited the admissibility of prior inconsistent statements by adding a requirement that the prior statement must have been subject to cross-examination, thus precluding even the use of grand jury statements. The requirement that the prior statement must have been subject to cross-examination appears unnecessary since this rule comes into play only when the witness testifies in the present

trial. At that time, he is on the stand and can explain an earlier position and be cross-examined as to both.

The requirement that the statement be under oath also appears unnecessary. Notwithstanding the absence of an oath contemporaneous with the statement, the witness, when on the stand, qualifying or denying the prior statement, is under oath. In any event, of all the many recognized exceptions to the hearsay rule, only one (former testimony) requires that the out-of-court statement have been made under oath. With respect to the lack of evidence of the demeanor of the witness at the time of the prior statement, it would be difficult to improve upon Judge Learned Hand's observation that when the jury decides that the truth is not what the witness says now but what he said before, they are still deciding from what they see and hear in court.[19]

The rule as submitted by the Court has positive advantages. The prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play. A realistic method is provided for dealing with the turncoat witness who changes his story on the stand.[20]

New Jersey, California, and Utah have adopted a rule similar to this one; and Nevada, New Mexico, and Wisconsin have adopted the identical Federal rule.

For all of these reasons, we think the House amendment should be rejected and the rule as submitted by the Supreme Court reinstated.[21]

As submitted by the Supreme Court and as passed by the House, subdivision (d)(1)(c) of rule 801 made admissible the prior statement identifying a person made after perceiving him. The committee decided to delete this provision because of the concern that a person could be convicted solely upon evidence admissible under this subdivision.

Rule 803(6). Hearsay Exceptions; Records of Regularly Conducted Activity

Rule 803(6) as submitted by the Supreme Court permitted a record made in the course of a regularly conducted activity to be admissible in certain circumstances. This rule constituted a broadening of the traditional business records hearsay exception which has been long advocated by scholars and judges active in the law of evidence.

The House felt there were insufficient guarantees of reliability of records not within a broadly defined business records exception. We disagree. Even under the House definition of "business" including profession, occupation, and "calling of every kind," the records of many regularly conducted activities will, or may be, excluded from evidence. Under the principle of ejusdem generis, the intent of "calling of every kind" would seem to be related to work-related endeavors—e.g., butcher, baker, artist, etc.

Thus, it appears that the records of many institutions or groups might not be admissible under the House amendments. For example, schools, churches, and hospitals will not normally be considered busi-

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[19] *Di Carlo* v. *United States*, 6 F. 2d 364 (2d Cir. 1925).

[20] See Comment, California Evidence Code § 1235; McCormick, Evidence, § 38 (2nd ed. 1972).

[21] It would appear that some of the opposition to this Rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely as to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate.

nesses within the definition. Yet, these are groups which keep financial and other records on a regular basis in a manner similar to business enterprises. We believe these records are of equivalent trustworthiness and should be admitted into evidence.

Three states, which have recently codified their evidence rules, have adopted the Supreme Court version of rule 803(6), providing for admission of memoranda of a "regularly conducted activity." None adopted the words "business activity" used in the House amendment.[22]

Therefore, the committee deleted the word "business" as it appears before the word "activity". The last sentence then is unnecessary and was also deleted.

It is the understanding of the committee that the use of the phrase "person with knowledge" is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of a computer printout, upon a report from the company's computer programer or one who has knowledge of the particular record system. In short, the scope of the phrase "person with knowledge" is meant to be coterminous with the custodian of the evidence or other qualified witness. The committee believes this represents the desired rule in light of the complex nature of modern business organizations.

Rules 803(8) and 804(b)(5). Hearsay Exceptions; Public Records and reports

The House approved rule 803(8), as submitted by the Supreme Court, with one substantive change. It excluded from the hearsay exception reports containing matters observed by police officers and other law enforcement personnel in criminal cases. Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

The committee accepts the House's decision to exclude such recorded observations where the police officer is available to testify in court about his observation. However, where he is unavailable as unavailability is defined in rule 804 (a)(4) and (a)(5), the report should be admitted as the best available evidence. Accordingly, the committee has amended rule 803(8) to refer to the provision of rule 804(b)(5), which allows the admission of such reports, records or other statements where the police officer or other law enforcement officer is unavailable because of death, then existing physical or mental illness or infirmity, or not being successfully subject to legal process.

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[22] See Nev. Rev. Stats. § 15.135; N. Mex. Stats. (1973 Supp.) § 20-4-803(6); West's Wis. Stats. Anno. (1973 Supp.) § 908.03(6).

The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

The Advisory Committee explains the factors to be considered:

* * * * *

> Factors which may be assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L. Rev. 363 (1957); (2) the special skill or experience of the official, id.; (3) whether a hearing was held and the level at which conducted, Franklin v. Skelly Oil Co., 141 F. 2d 568 (19th Cir. 1944); (4) possible motivation problems suggested by Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943). Others no doubt could be added.[23]

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The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish sufficient guidance on the admissibility of evaluative reports.

Rules 803(24) and 804(b)(6). Hearsay Exceptions; Other Exceptions

The proposed Rules of Evidence submitted to Congress contained identical provisions in rules 803 and 804 (which set forth the various hearsay exceptions), admitting any hearsay statement not specifically covered by any of the stated exceptions, if the hearsay statement was found to have "comparable circumstantial guarantees of trustworthiness." The House deleted these provisions (proposed rules 803(24) and 804(b)(6)) as injecting "too much uncertainty" into the law of evidence and impairing the ability of practitioners to prepare for trial. The House felt that rule 102, which directs the courts to construe the Rules of Evidence so as to promote growth and development, would permit sufficient flexibility to admit hearsay evidence in appropriate cases under various factual situations that might arise.

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[23] Advisory Committee's notes, to rule 803(8)(c).

We disagree with the total rejection of a residual hearsay exception. While we view rule 102 as being intended to provide for a broader construction and interpretation of these rules, we feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact.

The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of probativeness and necessity could properly be admissible.

The case of *Dallas County* v. *Commercial Union Assoc. Co., Ltd.*, 286 F.2d 388 (5th Cir. 1961) illustrates the point. The issue in that case was whether the tower of the county courthouse collapsed because it was struck by lightning (covered by insurance) or because of structural weakness and deterioration of the structure (not covered). Investigation of the structure revealed the presence of charcoal and charred timbers. In order to show that lightning may not have been the cause of the charring, the insurer offered a copy of a local newspaper published over 50 years earlier containing an unsigned article describing a fire in the courthouse while it was under construction. The Court found that the newspaper did not qualify for admission as a business record or an ancient document and did not fit within any other recognized hearsay exception. The court concluded, however, that the article was trustworthy because it was inconceivable that a newspaper reporter in a small town would report a fire in the courthouse if none had occurred. *See also United States* v. *Barbati*, 284 F. Supp. 409 (E.D.N.Y. 1968).

Because exceptional cases like the *Dallas County* case may arise in the future, the committee has decided to reinstate a residual exception for rules 803 and 804(b).

The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.

Therefore, the committee has adopted a residual exception for rules 803 and 804(b) of much narrower scope and applicability than the Supreme Court version. In order to qualify for admission, a hearsay statement not falling within one of the recognized exceptions would have to satisfy at least four conditions. First, it must have "equivalent circumstantial guarantees of trustworthiness." Second, it must be offered as evidence of a material fact. Third, the court must determine that 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." This requirement is intended to insure that only statements which have high probative value and necessity may qualify for admission under the residual exceptions. Fourth, the court must determine that "the general purposes of these rules and the

interests of justice will best be served by admission of the statement into evidence."

It is intended that the residual hearsay exceptions will be used very rarely, and only in execptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

In order to establish a well-defined jurisprudence, the special facts and circumstances which, in the court's judgment, indicates that the statement has a sufficiently high degree of trustworthiness and necessity to justify its admission should be stated on the record. It is expected that the court will give the opposing party a full and adequate opportunity to contest the admission of any statement sought to be introduced under these subsections.

Rule 804(a)(5). Hearsay Exceptions; Declarant Unavailable; Definition of Unavailability

Subdivision (a) of rule 804 as submitted by the Supreme Court defined the conditions under which a witness was considered to be unavailable. It was amended in the House.

The purpose of the amendment, according to the report of the House Committee on the Judiciary, is "primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being unavailable." [25]

Under the House amendment, before a witness is declared unavailable, a party must try to depose a witness (declarant) with respect to dying declarations, declarations against interest, and declarations of pedigree. None of these situations would seem to warrant this needless, impractical and highly restrictive complication. A good case can be made for eliminating the unavailability requirement entirely for declarations against interest cases.[26]

In dying declaration cases, the declarant will usually, though not necessarily, be deceased at the time of trial. Pedigree statements which are admittedly and necessarily based largely on word of mouth are not greatly fortified by a deposition requirement.

Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the amendment. No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule (a)(3) and Criminal Rule 15(e), a deposition, though taken, may not be admissible, and under Criminal Rule 15(a) substantial obstacles exist in the way of even taking a deposition.

For these reasons, the committee deleted the House amendment.

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[25] H. Rept. 93–650, at p. 15.

[26] Uniform rule 63(10); Kan. Stat. Anno. 60–460(j); 2A N.J. Stats. Anno. 84–63(10).

The committee understand that the rule as to unavailability, as explained by the Advisory Committee "contains no requirement that an attempt be made to take the deposition of a declarent." In reflecting the committee's judgment, the statement is accurate insofar as it goes. Where, however, the proponent of the statement, with knowledge of the existence of the statement, fails to confront the declarant with the statement at the taking of the deposition, then the proponent should not, in fairness, be permitted to treat the declarant as "unavailable" simply because the declarant was not amenable to process compelling his attendance at trail. The committee does not consider it necessary to amend the rule to this effect because such a situation abuses, not conforms to, the rule. Fairness would preclude a person from introducing a hearsay statement on a particular issue if the person taking the deposition was aware of the issue at the time of the deposition but failed to depose the unavailable witness on that issue.

Rule 804(b)(3). Hearsay Exceptions; Declarant Unavailable; Statement Against Interest

The rule defines those statements which are considered to be against interest and thus of sufficient trustworthiness to be admissible even though hearsay. With regard to the type of interest declared against, the version submitted by the Supreme Court included inter alia, statements tending to subject a declarant to civil liability or to invalidate a claim by him against another. The House struck these provisions as redundant. In view of the conflicting case law construing pecuniary or proprietary interests narrowly so as to exclude, e.g., tort cases, this deletion could be misconstrued.

Three States which have recently codified their rules of evidence have followed the Supreme Court's version of this rule, i.e., that a statement is against interest if it tends to subject a declarant to civil liability.[27]

The committee believes that the reference to statements tending to subject a person to civil liability constitutes a desirable clarification of the scope of the rule. Therefore, we have reinstated the Supreme Court language on this matter.

The Court rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to statements tending to make him an object of hatred, ridicule, or disgrace. The House eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. Although there is considerable support for the admissibility of such statements (all three of the State rules referred to supra, would admit such statements), we accept the deletion by the House.

Rule 804(b)(3). Hearsay Exceptions; statement against interest

The House amended this exception to add a sentence making inadmissible a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused. The sentence was added to codify the constitutional principle announced in *Bruton* v. *United States*, 391 U.S. 123 (1968). *Bruton* held that the admission of the extrajudicial hearsay

[27] Nev. Rev. Stats. § 51.345; N. Mex. Stats. (1973 supp.) § 20–4–804(4); West's Wis. Stats. Anno. (1973 supp.) § 908.045(4).

statement of one codefendant inculpating a second codefendant violated the confrontation clause of the sixth amendment.

The committee decided to delete this provision because the basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the fifth amendment's right against self-incrimination and, here, the sixth amendment's right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise. Furthermore, the House provision does not appear to recognize the exceptions to the *Bruton* rule, e.g. where the codefendant takes the stand and is subject to cross examination; where the accused confessed, see *United States* v. *Mancusi*, 404 F. 2d 296 (2d Cir. 1968), cert. denied 397 U.S. 942 (1907); where the accused was placed at the scene of the crime, see *United States* v. *Zelker*, 452 F. 2d 1009 (2d Cir. 1971). For these reasons, the committee decided to delete this provision.

Rule 806. Attacking and Supporting Credibility of Declarant

Rule 906, as passed by the House and as proposed by the Supreme Court provides that whenever a hearsay statement is admitted, the credibility of the declarant of the statement may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Rule 801 defines what is a hearsay statement. While statements by a person authorized by a party-opponent to make a statement concerning the subject, by the party-opponent's agent or by a coconspirator of a party—see rule 801(d)(2)(c), (d) and (e)—are traditionally defined as exceptions to the hearsay rule, rule 801 defines such admission by a party-opponent as statements which are not hearsay. Consequently, rule 806 by referring exclusively to the admission of hearsay statements, does not appear to allow the credibility of the declarant to be attacked when the declarant is a coconspirator, agent or authorized spokesman. The committee is of the view that such statements should open the declarant to attacks on his credibility. Indeed, the reason such statements are excluded from the operation of rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, viz some statements, instead of being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay. The phrase "or a statement defined in rule 801(d)(2)(c), (d) and (e)" is added to the rule in order to subject the declarant of such statements, like the declarant of hearsay statements, to attacks on his credibility.[28]

Section 2. Enabling Act

The House, in order to clarify the power of the Supreme Court to issue Rules of Evidence or amendments to them, added a new section 2076 to title 28, United States Code, specifying the Supreme Court's authority. The present Rules Enabling Acts (18 U.S.C. §§ 3771, 3772, 3402; 28 U.S.C. 2072, 2075), which the Supreme Court invoked as the authority pursuant to which it promulgated the Rules of Evidence, provide that the Court may prescribe rules of "practice and procedure" and submit them to Congress. The rules then take effect auto-

[28] The committee considered it unnecessary to include statements contained in rule 801(d)(2)(A) and (B)—the statement by the party-opponent himself or the statement of which he has manifested his adoption—because the credibility of the party-opponent is always subject to an attack on his credibility.

matically either at such time as the Court directs, or after 90 days following their submission. An act of Congress is necessary to prevent any rule so submitted from taking effect.

The House believed that the Rules of Evidence involve policy judgments as to which it is appropriate for the Congress to play a greater role than that provided in the present Enabling Acts. Accordingly, the bill provides for a new statutory procedure by which amendments to the Rules of Evidence may be made, designed to insure adequate congressional participation in the evidence rulemaking process. Section 2(a) adds a new section, 2076, to title 28, United States Code, permitting the Court to prescribe amendments to the Rules of Evidence, which amendments must be reported to the Congress. However, three changes were made with respect to the role of Congress. First, any rule, rather than the entire package of rules may be disapproved. Second, either House of Congress, rather than the both Houses acting together, can prevent a rule from becoming operative. Third, rather than the 90-day period allowed in the existing Rules Enabling Acts, a 180-day period is prescribed for congressional action.

In order to augment the power of Congress to review rules of evidence, the committee made two additional amendments. It decided to extend the review period to 365 days—1 full year—and adopted a provision under which either House of Congress can defer the effective date of a rule to permit further study, either until a later date or until approved by Act of Congress. Thus, either House of Congress can disapprove or defer consideration of any proposed rule or combination of rules. The committee also added one clarifying amendment which provides that either a proposed rule or a rule already in effect may be amended by act of Congress. While this has been generally understood, the committee feels it should be made clear.

The committee considered the possibility of requiring congressional approval of any rule of evidence submitted to it by the Court. We determined, however, that while requiring affirmative congressional action was appropriate to this first effort at codifying the Rules of Evidence, it was not needed with respect to subsequent amendments which would likely be of more modest dimension. Indeed, the committee believed that to require affirmative congressional action with respect to amendments might well result in some worthwhile amendments not being approved because of other pressing demands on the Congress. The committee thus concluded that the system of allowing Court-proposed amendments to the Rules of Evidence to take effect automatically unless disapproved by either House strikes a sound balance between the proper role of Congress in the amendatory process and the dictates of convenience and legislative priorities.

For the same reasons, the committee has deleted an amendment made no the floor of the House providing that no amendment creating, abolishing or modifying a privilege could take effect until aproved by act of Congress. The basis for the House action was the belief that rules of privilege constitute matters of substance that require affirmative congressional approval. While matters of privilege are, in a sense, substantive, and also involve particularly sensitive issues, the committee does not believe that privileges necessarily require different treatment from other rules, provided there are adequate safeguards so that

the Congress retains sufficient review power to review effectively proposed changes in this area, as well as in others. By extending the period of review from 90 to 365 days and by providing that any proposed rule may be disapproved or its effective date deferred by either House of Congress, the committee believes that the Congress does, in fact retain sufficient review power to reflect its views on such matters.

Subsection (b) strikes out section 1732(a) of title 28, United States Code, since its subject matter is covered in rule 803(b) relating to records of a regularly conducted activity.

Subsection (c) amends section 1733 of title 28, United States Code, since that section is largely, if not entirely, encompassed by rule 803 (8) relating to public records and reports. Because of the possibility that section 1733 may reach some matters not touched by rule 803(9), subsection (c) does not repeal section 1733 but merely provides that the section does not apply to actions, cases, and proceedings to which the Rules of Evidence are applicable.

Additional Commentaries

Additional commentary was deemed appropriate by the committee with respect to certain rules left undisturbed in the subject bill.

Rule 104(d). Preliminary Questions: Testimony by accused

Under rule 104(c) the hearing on a preliminary matter may at times be conducted in front of the jury. Should an accused testify in such a hearing, waiving his privilege against self-incrimination as to the preliminary issue, rule 104(d) provides that he will not generally be subject to cross-examination as to any other issue. This rule is not, however, intended to immunize the accused from cross-examination where, in testifying about a preliminary issue, he injects other issues into the hearing. If he could not be cross-examined about any issues gratuitously raised by him beyond the scope of the preliminary matters, injustice might result. Accordingly, in order to prevent any such unjust result, the committee intends the rule to be construed to provide that the accused may subject himself to cross-examination as to issues raised by his own testimony upon a preliminary matter before a jury.

Rule 105. Summing Up and Comment by Judge

This rule as submitted by the Supreme Court permitted the judge to sum up and comment on the evidence. The House struck the rule.

The committee accepts the House action with the understanding that the present Federal practice, taken from the common law, of the trial judge's discretionary authority to comment on and summarize the evidence is left undisturbed.

Rule 404(b). Character Evidence Not Admissible To Prove Conduct; Other crimes, wrongs, or acts

This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge.

Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time.

Rule 611(b). Mode and Order of Interrogation and Presentation; Scope of Cross-examination

Rule 611(b) as submitted by the Supreme Court permitted a broad scope of cross-examination: "cross-examination on any matter relevant to any issue in the case" unless the judge, in the interests of justice, limited the scope of cross-examination.

The House narrowed the Rule to the more traditional practice of limiting cross-examination to the subject matter of direct examination (and credibility), but with discretion in the judge to permit inquiry into additional matters in situations where that would aid in the development of the evidence or otherwise facilitate the conduct of the trial.

The committee agrees with the House amendment. Although there are good arguments in support of broad cross-examination from prospectives of developing all relevant evidence, we believe the factors of insuring an orderly and predictable development of the evidence weigh in favor of the narrower rule, especially when discreation is given to the trial judge to permit inquiry into additional matters. The committee expressly approves this discretion and believes it will permit sufficient flexibility allowing a broader scope of cross-examination whenever appropriate.

The House amendment providing broader discretionary cross-examination permitted inquiry into additional matters only as if on direct examination. As a general rule, we concur with this limitation, however, we would understand that this limitation would not preclude the utilization of leading questions if the conditions of subsection (c) of this rule were met, bearing in mind the judge's discretion in any case to limit the scope of cross-examination.[29]

Further, the committee has received correspondence from Federal judges commenting on the applicability of this rule to section 1407 of title 28. It is the committee's judgment that this rule as reported by the House is flexible enough to provide sufficiently broad cross-examination in appropriate situations in multidistrict litigation.

Rule 611(c). Mode and Order of Interrogation and Presentation; Leading Questions

As submitted by the Supreme Court, the rule provided: "In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions."

The final sentence of subsection (c) was amended by the House for the purpose of clarifying the fact that a "hostile witness"—that is a witness who is hostile in fact—could be subject to interrogation by leading questions. The rule as submitted by the Supreme Court declared certain witnesses hostile as a matter of law and thus subject to interrogation by leading questions without any showing of hostility in fact. These were adverse parties or witnesses identified with adverse parties. However, the wording of the first sentence of sub-

[29] See McCormick on Evidence, §§ 24–26 (especially 24) (2d ed. 1972).

section (c) while generally prohibiting the use of leading questions on direct examination, also provides "except as may be necessary to develop his testimony." Further, the first paragraph of the Advisory Committee note explaining the subsection makes clear that they intended that leading questions could be asked of a hostile witness or a witness who was unwilling or biased and even though that witness was not associated with an adverse party. Thus, we question whether the House amendment was necessary.

However, concluding that it was not intended to affect the meaning of the first sentence of the subsection and was intended solely to clarify the fact that leading questions are permissible in the interrogation of a witness, who is hostile in fact, the committee accepts that House amendment.

The final sentence of this subsection was also amended by the House to cover criminal as well as civil cases. The committee accepts this amendment, but notes that it may be difficult in criminal cases to determine when a witness is "identified with an adverse party," and thus the rule should be applied with caution.

Rule 615. Exclusion of Witnesses

Many district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent is or may be a witness. The practice is permitted as an exception to the rule of exclusion and compares with the situation defense counsel finds himself in—he always has the client with him to consult during the trial. The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some specialized subject matter. The agent, too, having lived with the case for a long time, may be able to assist in meeting trial surprises where the best-prepared counsel would otherwise have difficulty. Yet, it would not seem the Government could often meet the burden under rule 615 of showing that the agent's presence is essential. Furthermore, it could be dangerous to use the agent as a witness as early in the case as possible, so that he might then help counsel as a nonwitness, since the agent's testimony could be needed in rebuttal. Using another, nonwitness agent from the same investigative agency would not generally meet government counsel's needs.

This problem is solved if it is clear that investigative agents are within the group specified under the second exception made in the rule, for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." It is our understanding that this was the intention of the House committee. It is certainly this committee's construction of the rule.

Rule 801(d)(2)(E). Hearsay Definitions: Statements Which Are Not Hearsay

The House approved the long-accepted rule that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay as it was submitted by the Supreme Court. While the rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged. *United States* v. *Rinaldi*, 393 F.2d 97, 99 (2d Cir.), cert.

denied 393 U.S. 913 (1968); *United States* v. *Spencer*, 415 F.2d 1301, 1304 (7th Cir., 1969).

Rule 803(4). Hearsay Exceptions; Statements for the Purposes of Medical Diagnosis or Treatment

The House approved this rule as it was submitted by the Supreme Court "with the understanding that it is not intended in any way to adversely affect present privilege rules." We also approve this rule, and we would point out with respect to the question of its relation to privileges, it must be read in conjunction with rule 35 of the Federal Rules of Civil Procedure which provides that whenever the physical or mental condition of a party (plaintiff or defendant) is in controversy, the court may require him to submit to an examination by a physician. It is these examinations which will normally be admitted under this exception.

Rule 803(5). Hearsay Exceptions; Recorded recollection

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The House amended the rule to add the words "or adopted by the witness" after the phrase "shown to have been made," language parallel to the Jencks Act.[30]

The committee accepts the House amendment with the understanding and belief that it was not intended to narrow the scope of applicability of the rule. In fact, we understand it to clarify the rule's applicability to a memorandum adopted by the witness as well as one made by him. While the rule as submitted by the Court was silent on the question of who made the memorandum, we view the House amendment as a helpful clarification, noting, however, that the Advisory Committee's note to this rule suggests that the important thing is the accuracy of the memorandum rather than who made it.

The committee does not view the House amendment as precluding admissibility in situations in which multiple participants were involved.

When the verifying witness has not prepared the report, but merely examined it and found it accurate, he has adopted the report, and it is therefore admissible. The rule should also be interpreted to cover other situations involving multiple participants, e.g., employer dictating to secretary, secretary making memorandum at direction of employer, or information being passed along a chain of persons, as in *Curtis* v. *Bradley*.[31]

The committee also accepts the understanding of the House that a memorandum or report, although barred under this rule, would nonetheless be admissible if it came within another hearsay exception. We consider this principle to be applicable to all the hearsay rules.

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[30] 18 U.S.C. § 3500.

[31] 65 Conn. 99, 31 Atl. 591 (1894). See also, *Rathbun* v. *Brancatella*, 93 N.J.L. 222, 107 Atl. 279 (1919); see also *McCormick on Evidence*, § 303 (2d ed. 1972).

Rule 804(b)(1). Hearsay Exceptions; Declarant unavailable; Former testimony

Former testimony.—Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness.

The House amended the rule to apply only to a party's predecessor in interest. Although the committee recognizes considerable merit to the rule submitted by the Supreme Court, a position which has been advocated by many scholars and judges, we have concluded that the difference between the two versions is not great and we accept the House amendment.

Section 3

Section 3 affirmatively approves conforming amendments, proposed by the Court to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, which will be necessitated by the enactment into law of the Federal Rules of Evidence. These amendments were submitted by the Court to Congress along with the proposed Rules of Evidence. Affirmative congressional approval of them in order to render them effective is required by the terms of Public Law 93–12.

Cost

Enactment of H.R. 5463 will entail no cost to the Government of the United States.

Communication From the Chief Justice of the United States

Supreme Court of the United States,
Washington, D.C., February 5, 1973.

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court, I have the honor to submit to the Congress the Rules of Evidence of the United States Courts and Magistrates, amendments and further amendments to the Federal Rules of Civil Procedures and amendments to the Federal Rules of Criminal Procedures which have been adopted by the Supreme Court, pursuant to Title 28, United States Code, Sections 2072 and 2075 and Title 18, United States Code, Sections 3402, 3771 and 3772. Mr. Justice Douglas dissents from the adoption of these rules and amendments.

Accompanying these amendments is the report of the Judicial Conference of the United States submitted to the Court for its consideration, pursuant to Title 28, United States Code, Section 331.

Respectfully.

Warren E. Burger,
Chief Justice of the United States.

Changes in Existing Law

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill as re-

ported are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

* * * * * * *

§ 1732. Record made in regular course of business; photographic copies.

[(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

[All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

[The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.]

[(b)] If any business, institution, members of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

§ 1733. Government records and papers; copies.

(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.

(*c*) *This section does not apply to cases, actions, and proceedings to which the Federal Rules of Evidence apply.*

* * * * * * *

Chapter 131.—RULES OF COURTS

Section 2076. Rules of Evidence.

The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; if either House of Congress by resolution disapprove any amendment so reported prior to its effective date it shall not take effect. Any rule whether proposed or in force may be amended by Act of Congress. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect.

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93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 93-1597

FEDERAL RULES OF EVIDENCE

DECEMBER 14, 1974.—Ordered to be printed

Mr. HUNGATE, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 5463]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 5463) to establish rules of evidence for certain courts and proceedings, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its amendments numbered 2, 15, 16, 17, 18, 19, 20, 30, 31, 33, 35, 39, 42, 44.

That the House recede from its disagreement to the amendments of the Senate numbered 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 21, 22, 23, 24, 25, 36, 37, 38, 41, 43, and agree to the same.

Amendment numbered 3:

That the House recede from its disagreement to the amendment of the Senate numbered 3, and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following: (5) *Other exceptions.*

And the Senate agree to the same.

Amendment numbered 14:

That the House recede from its disagreement to the amendment of the Senate numbered 14, and agree to the same with an amendment as follows:

At the end of the matter proposed to be inserted by the Senate amendment insert the following:

This rule shall not take effect until August 1, 1975, and shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule, and which takes effect after the date of the enactment of the Act establishing these Federal Rules of Evidence.

And the Senate agree to the same.

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Amendment numbered 26:

That the House recede from its disagreement to the amendment of the Senate numbered 26, and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

(1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment

And the Senate agree to the same.

Amendment numbered 27:

That the House recede from its disagreement to the amendment of the Senate numbered 27, and agree to the same with an amendment as follows:

At the end of the matter proposed to be inserted by the Senate amendment insert the following:

However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

And the Senate agree to the same.

Amendment numbered 28:

That the House recede from its disagreement to the amendment of the Senate numbered 28, and agree to the same with an amendment as follows:

Strike out the period at the end of Senate amendment numbered 28 and insert in lieu thereof the following:

and insert in lieu thereof the following:

and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

And the Senate agree to the same.

Amendment numbered 29:

That the House recede from its disagreement to the amendment of the Senate numbered 29, and agree to the same with an amendment, as follows:

In lieu of the matter proposed to be stricken by the Senate amendment, insert the following: *or*

And the Senate agree to the same.

Amendment numbered 32:

That the House recede from its disagreement to the amendment of the Senate numbered 32, and agree to the same with an amendment as follows:

Strike out the period at the end of the Senate amendment numbered 32 and insert in lieu thereof the following:

and insert in lieu thereof the following:

The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

And the Senate agree to the same.

Amendment numbered 34:

That the House recede from its disagreement to the amendment of the Senate numbered 34, and agree to the same with an amendment as follows:

At the end of the matter proposed to be inserted by the Senate amendment insert the following:

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, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

And the Senate agree to the same.

Amendment numbered 40:

That the House recede from its disagreement to the amendment of the Senate numbered 40, and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

(5) 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 (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, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

And the Senate agree to the same.

WILLIAM L. HUNGATE,
BOB KASTENMEIER,
DON EDWARDS,
HENRY P. SMITH III,
DAVID W. DENNIS,
Mangers on the part of the House.

JAMES O. EASTLAND,
JOHN L. MCCLELLAN,
P. A. HART,
SAM J. ERVIN, Jr.,
QUENTIN N. BURDICK,
ROMAN L. HRUSKA,
STROM THURMOND,
HUGH SCOTT,
Managers on the part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two houses on the amendments of the Senate to the bill (H.R. 5463) to establish rules of evidence for certain courts and proceedings, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House and Senate conferees met twice to discuss the differences in the Senate and House versions of H.R. 5463. The first meeting took place in the afternoon of Wednesday, December 11, 1974, and the second took place in the afternoon of Thursday, December 12, 1974.

The Senate made 44 amendments to the House bill, seven of which are of a technical or conforming nature. Of these seven, the Conference adopts 5, the Senate recedes from 1, and the Conference adopts one of the technical amendments with an amendment.

The more significant differences in the House and Senate versions of the bill were resolved as follows:

RULE 103. RULINGS ON EVIDENCE

The House bill contains the word "judge". The Senate amendment substitutes the word "court" in order to conform with usage elsewhere in the House bill.

The Conference adopts the Senate amendment.

RULE 301. PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS

The House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut it. Even though evidence contradicting the presumption is offered, a presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption, but it does not shift to that party the burden of persuasion on the existence of the presumed fact.

Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court

cannot instruct the jury that it may *presume* the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.

The Conference adopts the Senate amendment.

RULE 405. METHODS OF PROVING CHARACTER

The Senate makes two language changes in the nature of conforming amendments. The Conference adopts the Senate amendments.

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

The House bill provides that evidence of admissions of liability or opinions given during compromise negotiations is not admissible, but that evidence of facts disclosed during compromise negotiations is not inadmissible by virtue of having been first disclosed in the compromise negotiations. The Senate amendment provides that evidence of conduct or statements made in compromise negotiations is not admissible. The Senate amendment also provides that the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

The House bill was drafted to meet the objection of executive agencies that under the rule as proposed by the Supreme Court, a party could present a fact during compromise negotiations and thereby prevent an opposing party from offering evidence of that fact at trial even though such evidence was obtained from independent sources. The Senate amendment expressly precludes this result.

The Conference adopts the Senate amendment.

RULE 410. OFFER TO PLEAD GUILTY; NOLO CONTENDERE; WITHDRAWN PLEA OF GUILTY

The House bill provides that evidence of a guilty or nolo contendere plea, of an offer of either plea, or of statements made in connection with such pleas or offers of such pleas, is inadmissible in any civil or criminal action, case or proceeding against the person making such plea or offer. The Senate amendment makes the rule inapplicable to a voluntary and reliable statement made in court on the record where the statement is offered in a subsequent prosecution of the declarant for perjury or false statement.

The issues raised by Rule 410 are also raised by proposed Rule 11(e)(6) of the Federal Rules of Criminal Procedure presently pending before Congress. This proposed rule, which deals with the admissibility of pleas of guilty or nolo contendere, offers to make such pleas, and statements made in connection with such pleas, was promulgated by the Supreme Court on April 22, 1974, and in the absence of congressional action will become effective on August 1, 1975. The conferees intend to make no change in the presently-existing case law until that date, leaving the courts free to develop rules in this area on a case-by-case basis.

The Conferees further determined that the issues presented by the use of guilty and nolo contendere pleas, offers of such pleas, and statements made in connection with such pleas or offers, can be explored

in greater detail during Congressional consideration of Rule 11(e)(6) of the Federal Rules of Criminal Procedure. The Conferees believe, therefore, that it is best to defer its effective date until August 1, 1975. The Conferees intend that Rule 410 would be superseded by any subsequent Federal Rule of Criminal Procedure or Act of Congress with which it is inconsistent, if the Federal Rule of Criminal Procedure or Act of Congress takes effect or becomes law after the date of the enactment of the act establishing the rules of evidence.

The conference adopts the Senate amendment with an amendment that expresses the above intentions.

RULE 501. GENERAL RULE (OF PRIVILEGE)

Rule 501 deals with the privilege of a witness not to testify. Both the House and Senate bills provide that federal privilege law applies in criminal cases. In civil actions and proceedings, the House bill provides that state privilege law applies "to an element of a claim or defense as to which State law supplies the rule of decision." The Senate bill provides that "in civil actions and proceedings arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and removed under 28 U.S.C. § 1441(b) the privilege of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to "an element of a claim or defense." If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state privilege law applies to that item of proof.

Under the provision in the House bill, therefore, state privilege law will usually apply in diversity cases. There may be diversity cases, however, where a claim or defense is based upon federal law. In such instances, federal privilege law will apply to evidence relevant to the federal claim or defense. See *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942).

In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law. As Justice Jackson has said:

> A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state.

D'Oench, Duhme & Co. v. *Federal Deposit Insurance Corp.*, 315 U.S. 447, 471 (1942) (Jackson, J., concurring). When a federal court chooses to absorb state law, it is applying the state law as a matter of federal common law. Thus, state law does not supply the rule of decision (even though the federal court may apply a rule derived from

state decisions), and state privilege law would not apply. See C. A. Wright, *Federal Courts* 251–252 (2d ed. 1970); *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946); *DeSylva* v. *Ballentine*, 351 U.S. 570, 581 (1956); 9 Wright & Miller, *Federal Rules and Procedure* § 2408.

In civil actions and proceedings, where the rule of decision as to a claim or defense or as to an element of a claim or defense is supplied by state law, the House provision requires that state privilege law apply.

The Conference adopts the House provision.

RULE 601. GENERAL RULE OF COMPETENCY

Rule 601 deals with competency of witnesses. Both the House and Senate bills provide that federal competency law applies in criminal cases. In civil actions and proceedings, the House bill provides that state competency law applies "to an element of a claim or defense as to which State law supplies the rule of decision." The Senate bill provides that "in civil actions and proceedings arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and removed under 28 U.S.C. § 1441(b) the competency of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to "an element of a claim or defense." If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state competency law applies to that item of proof.

For reasons similar to those underlying its action on Rule 501, the Conference adopts the House provision.

RULE 606. COMPETENCY OF JUROR AS WITNESS

Rule 606(b) deals with juror testimony in an inquiry into the validity of a verdict or indictment. The House bill provides that a juror cannot testify about his mental processes or about the effect of anything upon his or another juror's mind as influencing him to assent to or dissent from a verdict or indictment. Thus, the House bill allows a juror to testify about objective matters occurring during the jury's deliberation, such as the misconduct of another juror or the reaching of a quotient verdict. The Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations. The Senate bill does provide, however, that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention and on the question whether any outside influence was improperly brought to bear on any juror.

The Conference adopts the Senate amendment. The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations.

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

The Senate amendment adds the words "opinion or" to conform the first sentence of the rule with the remainder of the rule.

The Conference adopts the Senate amendment.

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

Rule 609 defines when a party may use evidence of a prior conviction in order to impeach a witness. The Senate amendments make changes in two subsections of Rule 609.

A. Rule 609(a)—General Rule

The House bill provides that the credibility of a witness can be attacked by proof of prior conviction of a crime only if the crime involves dishonesty or false statement. The Senate amendment provides that a witness' credibility may be attacked if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involves dishonesty or false statement, regardless of the punishment.

The Conference adopts the Senate amendment with an amendment. The Conference amendment provides that the credibility of a witness, whether a defendant or someone else, may be attacked by proof of a prior conviction but only if the crime: (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted and the court determines that the probative value of the conviction outweighs its prejudicial effect to the defendant; or (2) involved dishonesty or false statement regardless of the punishment.

By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant*. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial

by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

B. Rule 609(b)—Time Limit

The House bill provides in subsection (b) that evidence of conviction of a crime may not be used for impeachment purposes under subsection (a) if more than ten years have elapsed since the date of the conviction or the date the witness was released from confinement imposed for the conviction, whichever is later. The Senate amendment permits the use of convictions older than ten years, if 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.

The Conference adopts the Senate amendment with an amendment requiring notice by a party that he intends to request that the court allow him to use a conviction older than ten years. The Conferees anticipate that a written notice, in order to give the adversary a fair opportunity to contest the use of the evidence, will ordinarily include such information as the date of the conviction, the jurisdiction, and the offense or statute involved. In order to eliminate the possibility that the flexibility of this provision may impair the ability of a party-opponent to prepare for trial, the Conferees intend that the notice provision operate to avoid surprise.

RULE 801. DEFINITIONS

Rule 801 supplies some basic definitions for the rules of evidence that deal with hearsay. Rule 801(d)(1) defines certain statements as not hearsay. The Senate amendments make two changes in it.

A. Rule 801(d)(1)(A)

The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and if the statement is inconsistent with his testimony and was given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition. The Senate amendment drops the requirement that the prior statement be given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition.

The Conference adopts the Senate amendment with an amendment, so that the rule now requires that the prior inconsistent statement be given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. The rule as adopted covers statements before a grand jury. Prior inconsistent statements may, of course, be used for impeaching the credibility of a witness. When the prior inconsistent statement is one made by a defendant in a criminal case, it is covered by Rule 801(d)(2).

B. Rule 801(d)(1)(C)

The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and the statement is one of identification of a person made after perceiving him. The Senate amendment eliminated this provision.

The Conference adopts the Senate amendment.

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

Rule 803 defines when hearsay statements are admissible in evidence even though the declarant is available as a witness. The Senate amendments make three changes in this rule.

A. Rule 803(6)—Records of Regularly Conducted Activity

The House bill provides in subsection (6) that records of a regularly conducted "business" activity qualify for admission into evidence as an exception to the hearsay rule. "Business" is defined as including "business, profession, occupation and calling of every kind." The Senate amendment drops the requirement that the records be those of a "business" activity and eliminates the definition of "business." The Senate amendment provides that records are admissible if they are records of a regularly conducted "activity."

The Conference adopts the House provision that the records must be those of a regularly conducted "business" activity. The Conferees changed the definition of "business" contained in the House provision in order to make it clear that the records of institutions and associations like schools, churches and hospitals are admissible under this provision. The records of public schools and hospitals are also covered by Rule 803(8), which deals with public records and reports.

B. Rule 803(8)—Public Records and Reports

The Senate amendment adds language, not contained in the House bill, that refers to another rule that was added by the Senate in another amendment (Rule 804(b)(5)—Criminal law enforcement records and reports).

In view of its action on Rule 804(b)(5) (Criminal law enforcement records and reports), the Conference does not adopt the Senate amendment and restores the bill to the House version.

C. Rule 803(24)—Other exceptions

The Senate amendment adds a new subsection, (24), which makes admissible a hearsay statement not specifically covered by any of the previous twenty-three subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and 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 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.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given

sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement.

RULE 804. HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

Rule 804 defines what hearsay statements are admissible in evidence if the declarant is unavailable as a witness. The Senate amendments make four changes in the rule.

A. Rule 804(a)(5)—Definition of Unavailabilty

Subsection (a) defines the term "unavailability as a witness". The House bill provides in subsection (a)(5) that the party who desires to use the statement must be unable to procure the declarant's attendance by process or other reasonable means. In the case of dying declarations, statements against interest and statements of personal or family history, the House bill requires that the proponent must also be unable to procure the declarant's *testimony* (such as by deposition or interrogatories) by process or other reasonable means. The Senate amendment eliminates this latter provision.

The Conference adopts the provision contained in the House bill.

B. Rule 804(b)(3)—Statement against Interest

The Senate amendment to subsection (b)(3) provides that a statement is against interest and not excluded by the hearsay rule when the declarant is unavailable as a witness, if the statement tends to subject a person to civil or criminal liability or renders invalid a claim by him against another. The House bill did not refer specifically to civil liability and to rendering invalid a claim against another. The Senate amendment also deletes from the House bill the provision that subsection (b)(3) does not apply to a statement or confession, made by a codefendant or another, which implicates the accused and the person who made the statement, when that statement or confession is offered against the accused in a criminal case.

The Conference adopts the Senate amendment. The Conferees intend to include within the purview of this rule, statements subjecting a person to civil liability and statements rendering claims invalid. The Conferees agree to delete the provision regarding statements by a codefendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles.

C. Rule 804(b)(5)—Criminal Law Enforcement Records and Reports

The Senate amendment adds a new hearsay exception, not contained in the House bill, which provides that certain law enforcement records are admissible if the officer-declarant is unavailable to testify or be present because of (1) death or physical or mental illness or infirmity or (2) absence from the proceeding and the proponent of the statement has been unable to procure his attendance by process or other reasonable means.

The Conference does not adopt the Senate amendment, preferring instead to leave the bill in the House version, which contained no such provision.

D. Rule 804(b)(6)—Other Exceptions

The Senate amendment adds a new subsection, (b)(6), which makes admissible a hearsay statement not specifically covered by any of the five previous subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and 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 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.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that renumbers this subsection and provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement.

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

The Senate amendment permits an attack upon the credibility of the declarant of a statement if the statement is one by a person authorized by a party-opponent to make a statement concerning the subject, one by an agent of a party-opponent, or one by a coconspirator of the party-opponent, as these statements are defined in Rules 801(d)(2)(C), (D) and (E). The House bill has no such provision.

The Conference adopts the Senate amendment. The Senate amendment conforms the rule to present practice.

SECTION 2. ENABLING ACT

Section 2 of the bill adds a new section to title 28 of the United States Code that establishes a procedure for amending the rules of evidence in the future. The House bill provides that the Supreme Court may promulgate amendments, and these amendments become effective 180 days after being reported to Congress, However, any amendment that creates, abolishes or modifies a rule of privilege does not become effective until approved by Act of Congress. The Senate amendments changed the length of time that must elapse before an amendment becomes effective to 365 days. The Senate amendments also added language, not contained in the House provision, that (1) either House can defer the effective date of a proposed amendment to a later date or until approved by Act of Congress and (2) an Act of Congress can amend any rule of evidence, whether proposed or in effect. Finally, the Senate amendments struck the provision requiring

that amendments creating, abolishing or modifying a privilege be approved by Act of Congress.

The Conference adopts the House provision on the time period (180 days) and the House provision requiring that an amendment creating, abolishing or modifying a rule of privilege cannot become effective until approved by Act of Congress. The Conference adopts the Senate amendment providing that either House can defer the effective date of an amendment to the rules of evidence and that any rule, either proposed or in effect, can be amended by Act of Congress. In making these changes in the enabling Act, Conference recognizes the continuing role of the Supreme Court in promulgating rules of evidence.

WILLIAM L. HUNGATE,
BOB KASTENMEIER,
DON EDWARDS,
HENRY P. SMITH III,
DAVID W. DENNIS,
Managers on the part of the House.

JAMES O. EASTLAND,
JOHN L. MCCLELLAN,
P. A. HART,
SAM J. ERVIN, JR.,
QUENTIN N. BURDICK,
ROMAN L. HRUSKA,
STROM THURMOND,
HUGH SCOTT,
Managers on the part of the Senate.

○

H. R. 5463

Ninety-third Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-first day of January, one thousand nine hundred and seventy-four

An Act

To establish rules of evidence for certain courts and proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following rules shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act. These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply.

TABLE OF CONTENTS

RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope

These rules govern proceedings in the courts of the United States and before United States magistrates, to the extent and with the exceptions stated in rule 1101.

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 103. Rulings on Evidence

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

(1) Objection.—In case 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 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 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 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 the hearing of the jury.

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

Rule 104. Preliminary Questions

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

(b) Relevancy conditioned on fact.—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury.—Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

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

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

Rule 105. Limited Admissibility

When evidence which 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.

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

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 not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

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

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

(e) Opportunity to be heard.—A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior 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.—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.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

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.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

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

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

(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, 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 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.

Rule 405. Methods of Proving Character

(a) Reputation or opinion.—In all cases in which 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 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 conduct.

Rule 406. Habit; Routine Practice

Evidence of the habit of a person 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 or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 407. Subsequent Remedial Measures

When, 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 not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or 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 or invalidity of the claim or its amount. 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 when 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.

Rule 409. Payment of Medical and Similar Expenses

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

Rule 410. Offer To Plead Gulity; Nolo Contendere; Withdrawn Plea of Guilty

Except as otherwise provided by Act of Congress, 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 any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer. This 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 rule shall not take effect until August 1, 1975, and shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule, and which takes effect after the date of the enactment of the Act establishing these Federal Rules of Evidence.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he 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.

Article V. Privileges

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Article VI. Witnesses

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

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

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

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 make a true translation.

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.

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 is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment.—Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question 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. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes.

Rule 607. Who May Impeach

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

Rule 608. Evidence of Character and Conduct of Witness

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

character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

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

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

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

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

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

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

Rule 610. Religious Beliefs or 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 credibility is impaired or enhanced.

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court.—The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (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, permit inquiry into additional matters as if on direct examination.

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

Rule 612. Writing Used To Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

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

Rule 613. Prior Statements of Witnesses

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

(b) Extrinsic evidence of prior inconsistent statement of witness.—Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him 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).

Rule 614. Calling and Interrogation of Witnesses by Court

(a) Calling by court.—The court may, on its own motion or at the suggestion of a party, 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 the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Rule 615. Exclusion of Witnesses

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

Article VII. Opinions and Expert Testimony

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

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.

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 him 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.

Rule 704. Opinion on Ultimate Issue

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

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

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.

Rule 706. Court Appointed Experts

(a) Appointment.—The court may on its own motion or on the motion of any party enter 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 not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation.—Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. 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 under the fifth amendment. In other civil actions and proceedings 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 rule limits the parties in calling expert witnesses of their own selection.

ARTICLE VIII. HEARSAY

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement.—A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant.—A "declarant" is a person who makes a statement.

(c) Hearsay.—"Hearsay" is 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) Statements which are not hearsay.—A statement is not hearsay if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

(2) Admission by party-opponent.—The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

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

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

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

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

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

(5) Recorded recollection.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his 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.

(6) Records of regularly conducted 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, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business"

as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).—Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), 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, unless the sources of information or other circumstances indicate lack of trustworthiness.

(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.

(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.

(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, 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.

(11) Records of religious organizations.—Statements of births, marriages, divorces, deaths, 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.

(12) Marriage, baptismal, and similar certificates.—Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, 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.

(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.

(14) Records of documents affecting an interest in property.—The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, 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.

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

(16) Statements in ancient documents.—Statements in a document in existence twenty years or more the authenticity of which is established.

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

(18) Learned treatises.—To the extent called to the attention of an expert witness upon cross-examination or relied upon by him 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 the 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.

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

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

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

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

(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 same would be provable by evidence of reputation.

(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 (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, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804. Hearsay Exceptions: Declarant Unavailable

(a) Definition of unavailability.—"Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

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

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

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

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

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

(3) Statement against interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissable unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history.—(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or

was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) 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 (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, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 805. Hearsay Within Hearsay

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

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he 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 him on the statement as if under cross-examination.

Article IX. Authentication and Identification

Rule 901. Requirement of Authentication or Identification

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

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

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

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

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

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

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

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

(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, 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.

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

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

(10) Methods provided by statute or rule.—Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

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, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

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

(3) Foreign public documents.—A document purporting to be executed or attested in his official capacity by a person 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 (A) of the executing or attesting person, or (B) 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.

(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 person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications.—Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals.—Printed materials purporting to be newspapers or periodicals.

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

(8) Acknowledged documents.—Documents 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.

(9) Commercial paper and related documents.—Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress.—Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

Rule 903. Subscribing Witness' Testimony Unnecessary

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

Article X. Contents of Writings, Recordings, and Photographs

Rule 1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) Writings and recordings.—"Writings" and "recordings" consist of letters, words, 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.

(2) Photographs.—"Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original.—An "original" of a writing or recording is the 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, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) Duplicate.—A "duplicate" is a counterpart 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 accurately reproduces the original.

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

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 of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a 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; or

(2) Original not obtainable.—No original can be obtained by any available judicial process or procedure; or

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

(4) Collateral matters.—The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, 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 which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of 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 an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether 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.

Article XI. Miscellaneous Rules

Rule 1101. Applicability of Rules

(a) Courts and magistrates.—These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the District of the Canal Zone, the United States courts of appeals, the Court of Claims, and to United States magistrates, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States magistrates, referees in bankruptcy, and commissioners of the Court of Claims.

(b) Proceedings generally.—These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under the Bankruptcy Act.

(c) Rule of privilege.—The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable.—The rules (other than 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.

(2) Grand jury.—Proceedings before grand juries.

(3) Miscellaneous proceedings.—Proceedings for extradition or rendition; preliminary examinations 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.

(e) Rules applicable in part.—In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of minor and petty offenses by United States magistrates; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C.

499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the Anti-Smuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258; habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2076 of title 28 of the United States Code.

Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.

SEC. 2. (a) Title 28 of the United States Code is amended—

(1) by inserting immediately after section 2075 the following new section:

"§ 2076. Rules of evidence

"The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so reported it shall not take effect. The effective date of any amendment so reported may be deferred by either House of Congress to a later date or until approved by Act of Congress. Any rule whether proposed or in force may be amended by Act of Congress. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect. Any such amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress"; and

(2) by adding at the end of the table of sections of chapter 131 the following new item:

"2076. Rules of evidence."

(b) Section 1732 of title 28 of the United States Code is amended by striking out subsection (a), and by striking out "(b)".

(c) Section 1733 of title 28 of the United States Code is amended by adding at the end thereof the following new subsection:

"(c) This section does not apply to cases, actions, and proceedings to which the Federal Rules of Evidence apply."

SEC. 3. The Congress expressly approves the amendments to the Federal Rules of Civil Procedure, and the amendments to the Federal Rules of Criminal Procedure, which are embraced by the orders entered by the Supreme Court of the United States on November 20, 1972, and December 18, 1972, and such amendments shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

FOR IMMEDIATE RELEASE JANUARY 3, 1975

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

I have approved H.R. 5463, a bill establishing for the first time in our history uniform rules of evidence on the admissibility of proof in Federal court proceedings.

Enactment of this code culminates some 13 years of study by distinguished experts on the Federal judicial system. It will lend greater uniformity, accessibility and intelligibility to Federal rules of evidence.

I salute the efforts of the Advisory Committee on Rules of Evidence and the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, the Chief Justice and Associate Justices of the Supreme Court, the members of the Senate Committee on the Judiciary, the members of the House Subcommittee on Criminal Justice, and officials of the Department of Justice. Their joint efforts in a healthy spirit of compromise were essential to the completion of this new legal legislation.

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