

AMENDMENTS TO FEDERAL RULES OF EVIDENCE

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COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT  
OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE THAT  
HAVE BEEN ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C.  
2072



MAY 13, 2010.—Referred to the Committee on the Judiciary and ordered  
to be printed

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U.S. GOVERNMENT PRINTING OFFICE



SUPREME COURT OF THE UNITED STATES,  
*Washington, DC. April 28, 2010.*

Hon. NANCY PELOSI,  
*Speaker of the House of Representatives,*  
*Washington, DC*

DEAR MADAM SPEAKER: I have the honor to submit to the Congress the amendment to the Federal Rules of Evidence that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

JOHN G. ROBERTS, Jr.,  
*Chief Justice.*

April 28, 2010

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein an amendment to Evidence Rule 804.

[See infra., pp. \_\_\_\_\_.]

2. That the foregoing amendment to the Federal Rules of Evidence shall take effect on December 1, 2010, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

**AMENDMENT TO THE FEDERAL  
RULES OF EVIDENCE**

**Rule 804. Hearsay Exceptions; Declarant  
Unavailable**

\* \* \* \* \*

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

\* \* \* \* \*

**(3) Statement against interest.** — A statement that:

**(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

2                   FEDERAL RULES OF EVIDENCE

**(B)** is supported by corroborating  
circumstances that clearly indicate its trustworthiness, if  
it is offered in a criminal case as one that tends to expose  
the declarant to criminal liability.

\* \* \* \* \*



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

JAMES C. DUFF  
*Secretary*

December 18, 2009

MEMORANDUM

To: The Chief Justice of the United States and the Associate Justices of the Supreme Court

From: James C. Duff *James C. Duff*

RE: TRANSMITTAL OF PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court a proposed amendment to Rule 804 of the Federal Rules of Evidence, which was approved by the Judicial Conference at its September 2009 session. The Judicial Conference recommends that the amendment be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendment, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference as well as the Report of the Advisory Committee on the Federal Rules of Evidence.

Attachments

EXCERPT FROM THE  
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES:

\* \* \* \* \*

FEDERAL RULES OF EVIDENCE

*Rule Recommended for Approval and Transmission*

The Advisory Committee on Evidence Rules submitted proposed amendments to Rule 804(b)(3) with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed changes were circulated to the bench and bar for comment in August 2008. The scheduled public hearings on the proposed changes were canceled because no one asked to testify.

The proposed amendments to Rule 804(b)(3) require the government to show corroborating circumstances as a condition for admission of an unavailable declarant's statement against penal interest. The current rule requires only the defendant to make such a showing. A number of courts have applied the corroborating-circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the rule does not so provide. A unitary approach to declarations against penal interest assures both the prosecution and the accused that the rule will not be abused and that only reliable hearsay statements will be admitted under the exception. The Department of Justice does not oppose the amendments.

The Committee concurred with the advisory committee's recommendations.

**Recommendation:** That the Judicial Conference —

Approve the proposed amendments to Evidence Rule 804(b)(3) and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.



COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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**TO:** Honorable Lee H. Rosenthal, Chair  
Standing Committee on Rules of Practice and Procedure

**FROM:** Robert L. Hinkle, Chair  
Advisory Committee on Evidence Rules

**DATE:** May 6, 2009

**RE:** Report of the Advisory Committee on Evidence Rules

**Introduction**

The Advisory Committee on Evidence Rules met on April 23-24 in Washington, D.C. The meeting produced two action items for Standing Committee consideration at the June 2009 meeting.

\* \* \* \* \*

The second action item involves Rule 804(b)(3), the hearsay exception for an unavailable declarant's statement against interest. As the Standing Committee will recall, a year ago the Advisory Committee proposed, and the Standing Committee approved, releasing for public comment a proposed amendment to this rule. The current rule requires a criminal-case defendant — but not the government — to show corroborating circumstances as a condition to admission of an unavailable declarant's statement against penal interest. The amendment would extend the corroborating-circumstances requirement to the government, as some courts have done anyway. The Justice Department does not oppose the amendment. The proposed amendment makes no change for civil cases or for statements against pecuniary interest.

At the April 2009 meeting, the Advisory Committee considered the few public comments received on the proposal. The comments were generally favorable. The Advisory Committee made no changes of substance to the proposal as released for public comment, but the Committee made stylistic changes consistent with some of the public comments and with the ongoing restyling project.<sup>1</sup> The Advisory Committee now asks the Standing Committee to approve the proposed amendment to Rule 804(b)(3) for submission to the Judicial Conference. The text of the proposed rule in black-line form and a summary of the public comments are attached to this Report as Appendix B.

A complete discussion of these items is in the draft minutes attached to this Report as Appendix C.

\* \* \* \* \*

## **II. Action Item — Proposed Amendment to Evidence Rule 804(b)(3)**

As noted above in the introduction to this report, Rule 804(b)(3) now provides that in a criminal case, the defendant — but not the government — must show corroborating circumstances as a condition for admitting an unavailable declarant's statement against penal interest. The proposed amendment would extend the corroborating-circumstances requirement to the government, as some courts have done anyway.

Nobody asked to speak at the scheduled public hearings on the proposed amendment. The hearings were canceled. A small number of written public comments were filed. They are summarized at the end of Appendix B to this report. No comment opposed requiring the government to show corroborating circumstances. Two comments suggested that although the government should be required to show corroborating circumstances, the defendant should not. The Advisory Committee rejected that suggestion. One comment suggested the rule should be amended further to overturn a controlling Supreme Court decision on another aspect of the rule. The Advisory Committee rejected that suggestion. Finally, several comments proposed stylistic changes. The Advisory Committee implemented those suggestions and sought to avoid successive changes by restyling the proposed Rule 804(b)(3) as will occur anyway as part of the restyling process. The Committee revised the proposed Committee Note to reflect this decision and in response to a further comment on the Note.

Appendix B to this report sets out the proposed amendment in black-line form. The appendix also includes the proposed Committee Note and summarizes the public comments.

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<sup>1</sup>The Committee removed one sentence from the Committee Note after the report was submitted.

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**Recommendation: The Advisory Committee on Evidence Rules recommends that the Standing Committee approve the proposed amendment to Rule 804(b)(3) for submission to the Judicial Conference.**

\* \* \* \* \*

1 \* \* \* \* \*

5 \* \* \* \* \*

8                    (A) a reasonable person in the declarant's  
9                    position would have made only if the  
10                  person believed it to be true because,  
11                  when made, it was so contrary to the  
12                  declarant's proprietary or pecuniary  
13                  interest or had so great a tendency to

\*New material is underlined; matter to be omitted is lined through.

## FEDERAL RULES OF EVIDENCE

14 ~~invalidate the declarant's claim against~~  
15 ~~someone else or to expose the declarant~~  
16 ~~to civil or criminal liability~~ was at the  
17 time of its making so far contrary to the  
18 declarant's pecuniary or proprietary  
19 interest, or so far tended to subject the  
20 declarant to civil or criminal liability, or  
21 to render invalid a claim by the  
22 declarant against another, that a  
23 reasonable person in the declarant's  
24 position would not have made the  
25 statement unless believing it to be true.  
26 ; and

27 **(B)** ~~A statement tending to expose the~~  
28 ~~declarant to criminal liability and~~  
29 ~~offered to exculpate the accused is not~~  
30 ~~admissible unless~~ is supported by

31 corroborating circumstances that clearly  
 32 indicate ~~the~~ its trustworthiness ~~of the~~  
 33 statement, if it is offered in a criminal  
 34 case as one that tends to expose the  
 35 declarant to criminal liability.

36 \* \* \* \* \*

### Committee Note

**Subdivision (b)(3).** Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez*, 584 F.2d 694, 701 (5<sup>th</sup> Cir. 1978) (“by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)”; *United States v. Shukri*, 207 F.3d 412 (7<sup>th</sup> Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

All other changes to the structure and wording of the Rule are intended to be stylistic only. There is no intent to change any other result in any ruling on evidence admissibility.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.

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#### **CHANGES MADE AFTER PUBLICATION AND COMMENTS**

The rule, as submitted for public comment, was restyled in accordance with the style conventions of the Style Subcommittee of the Committee on Rules of Practice and Procedure. As restyled, the proposed amendment addresses the style suggestions made in public comments.

The proposed Committee Note was amended to add a short discussion on applying the corroborating circumstances requirement.

**What follows is the proposed amendment in “clean” form:**

**(3) Statement against interest.** A statement that:

(A) a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

○