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RULES OF EVIDENCE
(SUPPLEMENT)

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HEARINGS
BEFORE THE
SUBCOMMITTEE ON CRIMINAL JUSTICE
(FORMERLY DESIGNATED AS SPECIAL SUBCOMMITTEE ON REFORM OF FEDERAL CRIMINAL LAWS)
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-THIRD CONGRESS
FIRST SESSION
ON
PROPOSED RULES OF EVIDENCE

A11600 663659

This supplement is a compilation of additional material submitted for the record as a result of hearings held on February 7, 8, 22, 28; March 9 and 15, 1973

Serial No. 2



Printed for the use of the Committee on the Judiciary

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
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Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

21-191 WASHINGTON : 1973

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Foreword

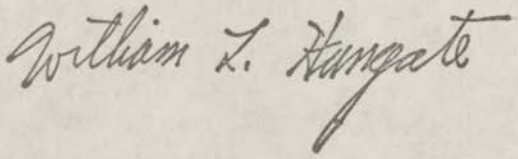
After extensive hearings and deliberations, the Subcommittee on Criminal Justice developed a Committee Print of H.R. 5463, a bill to "establish the Federal Rules of Evidence, and for other purposes."

The Subcommittee circulated this Committee Print, dated June 28, 1973, nationwide for comment. Views were solicited from the Bar Association of each of the fifty states and the District of Columbia, the Department of Justice, the Supreme Court and the Judicial Conference, and all individuals and organizations of whose interest the Subcommittee was aware. The text of the Print was inserted in the Congressional Record, two days earlier, on June 26, 1973. On July 17, 1973 the Print was published in the U.S. Law Week, and on July 18, 1973 it appeared in The Criminal Law Reporter. The West Publishing Company reprinted it in the U.S. Code Congressional and Administrative News on August 10, 1973.

Many valuable comments, suggestions, and observations were received by the Subcommittee as a result of this wide circulation. For the most part, these appear in this supplement following the June Print. The material preceding the June Print consists mainly of documents received prior to June 28, 1973, but not printed in the original volume of the hearings. On October 10, 1973, the Subcommittee published a second Committee Print. This Print represents the final action of the Subcommittee taken in five markup sessions at which the comments received on the earlier Print were considered. The October 9, 1973 Print, beginning on page 357, concludes this supplement.

In sum, this supplement together with the original hearings contains all of the testimony and materials considered by the Subcommittee in its six days of hearings, the seventeen markup sessions leading to the development of the Committee Print of June 28, 1973, and the five subsequent markup sessions this Fall culminating in the Print of October 10, 1973.

As Chairman of the Subcommittee, I wish to express my thanks to the members of the Subcommittee and the staff for their diligent attention to this very important work, and to the many individuals and organizations whose testimony and written submissions were of immeasurable assistance. A special word of tribute to the committees of the Judicial Conference which developed the proposed rules that served as our starting point. Their encouragement and advice contributed much to the Subcommittee's work. Finally, our thanks to Professor Edward W. Cleary, Reporter of the Advisory Committee on Rules of Evidence, whose counsel during our deliberations was always cheerfully available.



Chairman, Subcommittee on Criminal Justice.

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ORGANIZATIONS REPRESENTED

American Bar Association.
American College of Trial Lawyers.
American Hospital Association.
American Medical Association.
American Patent Law Association.
American Psychoanalytic Association.
Association of American Publisher's, Inc.
Association of the Bar of the City of New York.
Association of Trial Lawyers of America Colorado Bar Association.
Connecticut Bar Association.
Department of Justice.
Department of the Treasury.
District of Columbia Defense Lawyers Association.
Environmental Action Fund.
Equal Employment Opportunity Commission.
Federal Defenders of San Diego, Inc.
Illinois State Medical Society.
Missouri Bar Civil Practice and Procedure Committee.
National Association of Social Workers, Inc.
New York Committee of Trial Lawyers.
North Dakota State Bar Association.
Pennsylvania Bar Institute.
Public Citizen, Inc.
Study Committee on Federal Rules of Evidence of the District of Columbia Bar.
Washington Council of Lawyers.
Washington State Bar Association.

RULES OF EVIDENCE (Supplement)

ARIZONA STATE UNIVERSITY,
COLLEGE OF LAW,
Tempe, Ariz., February 12, 1973.

HERBERT E. HOFFMAN, Esq.,
Counsel for Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. HOFFMAN: Enclosed is the list of references to federal statutes contained in the Proposed Federal Rules of Evidence and Advisory Committee's Notes that I mentioned. The list was prepared to demonstrate the sensitivity of the Advisory Committee to positions taken by the Congress in the field of evidence and may have omitted a reference or two.

I am also enclosing a supplemental memorandum on Proposed Rule 509 with respect to an official information privilege. The memorandum was prepared for use in testifying but we did not reach the subject, due to the shortness of time.

The Proposed Wisconsin Rules of Evidence have just been published, and I have taken the liberty of asking Judge John A. Decker of Milwaukee, reporter for the committee, to send you a copy. You will find that the rules are the Proposed Federal Rules with occasional modifications. Supplementary local notes appear to be carefully drawn.

Judge Maris, Mr. Jenner, and I all are most appreciative of the courtesy shown us by the subcommittee and by yourself.

Sincerely yours,

EDWARD W. CLEARY, *Reporter.*

RULE 509: OFFICIAL INFORMATION

Rule 509 in its second aspect recognizes a qualified privilege for certain kinds of governmental information. To support a successful claim of the privilege, two conditions must be met: (1) a showing must be made that disclosure would be contrary to the public interest, and (2) the information must fall within one of three specified categories.

Neither the Preliminary Draft of 1969 nor the Revised Draft of 1971 made provision for a privilege of this kind. The position taken in those drafts was not based upon any conclusion that government files, except to the extent made privileged by one of the other rules or by statute, should be open to unlimited disclosure. Quite the contrary. The Advisory Committee's Note recognized that protection was wholly appropriate with respect to certain kinds of information and in certain types of situations. Great weight was given the Freedom of Information Act as an important congressional expression of policy as to what those areas should be. Rather than formulating an express privilege, however, the Advisory Committee concluded that the other privileges, the limitations upon discovery, and an expanding concept of standing to raise questions of relevancy, all taken together, afforded the requisite protection.

On further consideration, however, the conclusion was reached that more specific guidelines would be helpful to the bench and bar in resolving problems in this often difficult area. The approach that was taken finds sanction both in the Freedom of Information Act and in court decisions, including those disposing of such problems on grounds of lack of relevancy.

Turning, then, to the three categories mentioned above, certain observations should be made. (A) The first category is "intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policy-making functions." Its basis is found in the provision of the Freedom of Information Act exempting "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The first category of the rule was drafted with a view to implementing this quoted provision of the Act and is believed to be wholly consistent with it, both in letter and in spirit.

(B) The second category in the rule is "investigatory files compiled for law enforcement purposes and not otherwise available." Lest there be confusion, the provision is expressly made subject to the Jencks Act. 18 U.S.C. § 3500, which imposes most substantial limitations upon access to such files. Here again the provision of the rule finds its basis in a provision of the Freedom of Information Act, viz.: "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." The rule is designed to implement the quoted provision of the Act.

(C) The third category broadly refers to information exempt from disclosure under the Freedom of Information Act. In some instances, for example state secrets, resort to this provision of the rule will not be necessary, as the matter has already been made the subject of another privilege. Otherwise the reference is to the nine exemptions of the Act. It seems evident that the Congress, in enacting the Act, did so on the assumption that each of the exemptions represents a type of information which ought not be made available to the public generally. Accordingly, these areas were exempted from compulsory disclosure obtainable through the procedures provided in the Act. The Act, however, requires no standing; anyone is entitled to nonexempt information with no more of a showing than that he desires the information. While the convenient nature of proceedings under the Act has led to employing it for the purpose of obtaining evidence for use in litigation, it seems apparent that it was not designed for that purpose and that its nine exemptions were not meant as expressions of evidentiary privilege. It seems further apparent, however, that the congressional policy manifested in the Act would be violated by a rule calling for indiscriminate disclosure. For these reasons the rule allows a privilege with respect to the exemptions when disclosure would be contrary to the public interest, but not otherwise.

Rules' Recognition of Congressional Positions

Rule 103(a). Advisory Committee's Note points out that the rule does not purport to change the law with respect to harmless error, citing 28 U.S.C. § 2111. (p. 12)

Rule 201(e). Advisory Committee's Note points out that the provision for hearing on timely request has a parallel in the Administrative Procedure Act, 5 U.S.C. § 556(e). (p. 22)

Rule 301. In stating the general effect of presumptions, the rule specifically excepts cases otherwise provided by Act of Congress. (p. 24)

Rule 303(a). Same provision as in Rule 301, supra. (p. 27)

Rule 303(b), (c). Advisory Committee's Note points out that the Congress may wish to enact legislation supplanting the rule with respect to presumptions. (p. 30)

Rule 402. The rule recognizes the continuing effects of Acts of Congress excluding relevant evidence in particular situations (p. 32), and the Advisory Committee's Note cites a number of these statutes. (p. 33)

Rule 501. The rule recognizes the continuing effect of privileges created by Act of Congress (p. 45), and the Advisory Committee's Note cites a number of these statutes. (p. 45)

Rule 504. The Advisory Committee's Note points out that the rule leaves undisturbed the provision against disclosure of the identity of persons who are the subjects of research on the use and effect of drug Abuse and Control Act of 1970, 42 U.S.C. 242(a)(2), and that the rule is consistent with the definition of "drug dependent person" in 42 U.S.C. 201(q), added by the Drug Abuse and Control Act of 1970. (p. 57) The note also points out that the rule is in harmony with other federal statutes pertaining to treatment for drug addiction. (p. 57) The note additionally states that the rule's provisions respecting court ordered mental examinations are in conformity with 18 U.S.C. § 4244 (statements by accused during examination into competency to stand trial not admissible at trial) and 42 U.S.C. § 3420 (physician conducting examination in drug addiction commitment proceeding competent and compellable witness).

Rule 505(c). The rule abandons the Supreme Court's conclusion in *Hawkins* v. *United States*, 358 U.S. 74 (1958), that the common law privilege continued to bar a wife from testifying against her husband in Mann Act cases (18 U.S.C. §§ 2421–2424), and adopts for all violations of this kind the contrary rule announced by Congress with respect to unlawful importation of aliens for immoral purposes, 8 U.S.C. § 1328. (pp. 59, 60).

Rule 509(a)(1). The term "national defense" in the rule is taken from statutes on the subject. 18 U.S.C. §§ 793, 794. See also 5 U.S.C. § 1002; 50 U.S.C. App. § 2152(d). (pp. 65, 66).

Rule 509(a)(2). The qualified privilege provided by the rule is based on the policies that underlie the Freedom of Information Act, 5 U.S.C. § 552, and the privilege is subject to the Jencks Act, 18 U.S.C. § 3500. Both statutes are cited in the rule (p. 65) and dwelt upon in the Advisory Committee's Note (pp. 66, 67).

Rule 509(d). The requirement of notice to the government, when a claim of privilege might be appropriate but is not made, is based on the similar provision with respect to cases raising questions of the validity of an Act of Congress in 28 U.S.C. § 2403. See Advisory Committee's Note. (p. 68).

Rule 603. The Advisory Committee's Note calls attention to certain governing federal statutes on the subject of oaths, affirmations, and perjury. (p. 76).

Rule 605. The Advisory Committee's Note suggests that, in view of the mandate of 28 U.S.C. § 455 requiring a judge to disqualify himself in a case in which he is or has been a material witness, the likelihood of questions of his competency to testify in a case over which he is presiding is slight. (p. 77).

Rule 606(b). The Advisory Committee's Note points out that the rule relates to competency, not nondisclosure, the latter being the subject of 18 U.S.C. § 3500.

Rule 609. The rule is in accordance with Congressional policy manifested in the 1970 amendment of § 14–305 of the D.C. Code. P.L. 91–358, 84 Stat. 473. See Advisory Committee's Note. (p. 83)

Rule 612. The rule is expressly made subject to the Jencks Act, 18 U.S.C. § 3500. (p. 89) See also the Advisory Committee's Note. (pp. 89, 90)

Rule 802. The rule excepts from its operation such hearsay as is made admissible by Act of Congress. (p. 110) The Advisory Committee's Note calls attention to several of those acts. (pp. 110, 111)

Rule 803(6). The Advisory Committee's Note states that the rule is designed to preserve the advantages of 28 U.S.C. § 1732. (p. 118)

Rule 803(8). The Advisory Committee's Note observes that the rule expands upon 28 U.S.C. § 1733 so as to include records of nonfederal agencies as well as those of federal agencies. (p. 121) The note also lists a number of federal statutes under which evaluative reports are admissible and points out that statutes of this kind are left undisturbed by the rule. (pp. 122, 123)

Rule 803(10). The Advisory Committee's Note refers to several federal statutes as illustrative applications of the principle involved. (pp. 123, 124)

Rule 901(b)(3). The treatment of handwriting exemplars for comparison purposes is, as the Advisory Committee's Note observes, consistent with 28 U.S.C. § 1731. (p. 143)

Rule 901(b)(10). The rule expressly preserves methods of authentication provided by Act of Congress (p. 141), and the Advisory Committee's Note includes an illustration of such a statute. (p. 145)

Rule 902(10). The rule dispenses with preliminary proof of authenticity when so provided by Act of Congress. (p. 146) The Advisory Committee's Note cites several illustrative statutes. (p. 148)

Rule 1001(4). The Advisory Committee's Note refers to cited statutory provisions for support. (p. 150)

Rule 1002. The rule recognizes the continuing effect of Congressional exceptions to the requirement of producing the original of a document. (p. 150) Illustrative statutes are cited in the Advisory Committee's Note. (p. 151)

Rule 1005. As the Advisory Committee's Note observes, the rule expands the effect of 28 U.S.C. § 1733(b) to include records of nonfederal as well as those federal agencies. (p. 154)

Rule 1101. The rule and Advisory Committee's Note contain many references to applicable statutes. (pp. 155–161)

ARIZONA STATE UNIVERSITY,
COLLEGE OF LAW,
TEMPE, ARIZ., *March 22, 1973*.

HERBERT E. HOFFMAN, Esq.,
Counsel for Subcommittee on Reform of Federal Criminal Laws,
Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. HOFFMAN: In your telephone call of yesterday, you requested information with respect to changes made in proposed Federal Evidence Rules 104(c) and (d) subsequent to the Revised Draft of March, 1971. These changes were made at the Advisory Committee meeting of September 3–5, 1971. As I explained in our conversation, the proceedings of this meeting have not been transcribed, and I will therefore have to depend upon the materials that were placed before the committee for its consideration and upon memory.

Rule 104(c)

The Revised Draft of March, 1971, was amended by striking the concluding phrase "or, when an accused is a witness, if he so requests." The basis for the amendment was that the matter had better be left to the discretion of the judge, as provided in the Preliminary Draft. Several factors underlay the discussion: much preliminary matter is harmless, regardless of the eventual ruling of the judge; much that is admissible on the issue of admissibility is also admissible as bearing on probative value, and repetition once before judge and again before jury may be needless and time wasting.

Rule 104(d)

The Revised Draft of March, 1971, was amended by deleting the final sentence: "Testimony given by him at a hearing in which he is asserting any constitutional right, or any right to have evidence suppressed or excluded, is not admissible against him as substantive evidence but may be used for impeachment if clearly contradictory of testimony given by him at the trial."

The Preliminary Draft of the rule had contained a provision of this kind but only with respect to preliminary hearings on confessions or unlawfully obtained evidence. The Revised Draft expanded the rule to include all grounds for suppression or exclusion, and the Advisory Committee concluded that this coverage was beyond what was justified by the competing interests involved. Moreover, after the publication of the Revised Draft in March, 1971, the Supreme Court handed down two decisions, *Harris* v. *New York*, 401 U.S. 222 (1971), and *McGautha* v. *California*, 402 U.S. 183 (1971), that substantially marked out the area along constitutional lines. The earlier estimate of the waning effect of *Walder* v. *United States*, 347 U.S. 62 (1954), proved to have been erroneous, and the Advisory Committee decided to abandon the area as one appropriate for constitutional determination.

Rule 102

You also raise a question as to the reference to growth and development in proposed Rule 102. An illustration may be found in Judge Weinstein's opinion in *United States* v. *Lopez*, 328 F. Supp. 1077 (E.D.N.Y., 1971), drawing upon the procedure specified in proposed Rule 510, which deals with informers, to resolve the question whether the government's profile of potential hijackers must be disclosed in a search and seizure case. It seems essential that the rules contain at some point a provision allowing expansion by analogy to cover new or unanticipated situations, and the provision in question should serve this purpose.

Sincerely yours,

EDWARD W. CLEARY, *Reporter.*

ARIZONA STATE UNIVERSITY,
COLLEGE OF LAW,
Tempe, Ariz., March 28, 1973.

HERBERT E. HOFFMAN, Esq.,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. HOFFMAN: Your letter of March 23rd asks me to comment upon a suggested revision of proposed rule 107 which would (1) substitute "of the same" in lieu of "or any other," and (2) insert after "which" the phrase "relates to the same subject matter or."

I comment as follows.

(1) The first of the suggested amendments would substantially narrow the rule by limiting its application to situations involving only a single document. The effect would be to deny the benefit of the rule in other situations where a just result would require its application. For example, the meaning of a letter may be affected greatly by the tenor of a letter to which it was written in reply. Or again, the effect of a written contract may be changed substantially by a subsequent modifying agreement. I believe the rule ought to apply in such cases.

(2) The second suggested amendment may appear to have as its purpose some expansion of the rule. If it were not for the first suggested amendment the broadening effect would be very substantial, probably undesirable so. However, when read with the first suggested amendment, the effect is negligible. It may be worth noting that the predecessor of present Rule 32(a)(4) of the Rules of Civil Procedure contained the word "relevant"; this was abandoned as being inconsistent

with the purpose of the rule, and "fairness" was substituted as the test of when other parts of a deposition might be called for.

The suggested reformulation also contains some internal inconsistency. When the entire writing is introduced, it seems scarcely possible to require him to introduce any other part.

My recommendation is against the suggested amendments.

Perhaps I might take this occasion to call to the attention of yourself and the Subcommittee an aspect of the situation with respect to the proposed rules dealing with privilege. Since the Enabling Acts refer only to district courts and magistrates, the applicability of the privilege rules as transmitted to the Congress was limited to proceedings in district courts and before magistrates. The Congress, however, suffers from no limitation in this regard, and the Subcommittee may wish to consider making rules of privilege applicable in proceedings before administrative agencies and in congressional hearings.

Sincerely yours,

EDWARD W. CLEARY, *Reporter.*

PUBLIC CITIZEN, INC.,
Washington, D.C., March 28, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: When I testified before your Committee on March 9, 1973, Congressman David W. Dennis requested that I put my supplemental recommendations dated March 9, 1973, into the form of a statute for your consideration. Accordingly, I have prepared a proposed statute which I am enclosing for your use.

Certain matters occurred to me in connection with the preparation of this proposal which may be of some assistance to you in evaluating it and which may help clarify its intent. I have made this single statute applicable to rules for civil, criminal, and bankruptcy matters although the other rule making authority for those types of actions are contained in separate provisions. I saw no reason for separate treatment, and in fact I believe that it would be useful to consolidate all rule making powers of the Supreme Court under one chapter in Title 28 rather than have them spread out in their present form. This would help insure that the standards for rule making in all three areas are the same except when Congress specifically decided that differences are appropriate.

The definition of a privilege in Section 2073(b)(1) is intended to be all inclusive. It is taken largely from Rule 501, with the final phrase in subpart (D) and the final sentence in Section 2073(b)(2) intended to bring under the prohibition laws such as the Dead Man's Acts which are purportedly abolished by Rule 601.

The procedures outlined in Section 2073(c) for the use of an advisory committee are, of course, flexible ones, particularly with respect to the minimum time limits described therein.

I have deliberately omitted any procedure that would require the Supreme Court to publish its proposed changes in the drafts sent to it by the advisory committee before transmitting the rules to Congress because it seemed somewhat inappropriate to direct the Court to follow detailed procedures after most of the significant work has been done by the advisory committee. The legislative history should make it clear that the Court is not prohibited from publishing for comment any proposed changes, and that Congress encourages it to do so.

One other modification in existing procedures for handling changes in the draft rules seems appropriate, but I decided not to include it as a direction to the advisory committee because it seemed an undue interference with its operations. It would be extremely helpful for everyone if the advisory committee would "red-line" its changes so that modifications in both the language of the rule and in the advisory committee's notes, could be readily identified. This was not done for these rules of evidence, thus greatly complicating the job of reviewing each new draft. I believe that a statement in the committee report to this effect would insure future compliance by the advisory committee.

Sections 2073(d) and (e) outline the procedures for actually putting the rules into effect and hopefully clarify the rights of Congress in this regard. I have chosen the vehicle of a Concurrent Resolution for the method of disapproval in order to eliminate a Presidential Veto. However, if Congress should wish to disapprove a rule after it had gone into effect, it would still be able to do so by passing a statute to override the rule, but that statute would be subject to the

normal legislative process. Although Sections 2073(d) and (e) are applicable only to the rules of evidence, it is my recommendation that these procedures be made applicable to all rule making powers of the Supreme Court. Specifically, this would require the elimination/amendment to the third paragraphs in Sections 2072 and 2075 of Title 28 and the second sentence in 18 U.S.C. § 3771. The confusion caused by those provisions applies not only to the rules of evidence, and this would seem to be a proper time to eliminate it.

The change in Section 460 of Title 28 is intended to insure that the Supreme Court has the power to issue rules applicable to the United States District Courts for the Canal Zone, Guam and the Virgin Islands, which are not included in the definition of "district court" under Section 451. There appears to be a deficiency in this regard now in Section 2072, since it refers to rules for the "district courts" which are defined in Section 451. No comparable problem exists for the bankruptcy rules since Section 2075 makes no reference to the district courts, but speaks only in terms of the power of the Supreme Court to issue rules "under the Bankruptcy Act."

Finally, I have one additional recommendation which I have not embodied in a statute, but which I believe would be appropriate for your Committee to consider. Some of the opposition to the rules of evidence was concerned with the closed-door procedures of the advisory committee. Rumors have circulated indicating that the committee was often closely divided on very controversial questions, and yet such differences are rarely evident in the final committee notes or elsewhere.

In my opinion, there is no need for such secrecy, and it would be healthy for the committee and the public to have all drafting sessions and meetings of the committee open to anyone who wished to attend, and, if minutes were kept, to have those minutes made publicly available. Just last year Congress passed the Federal Advisory Committee Act, Public Law 92–463, which opened the doors of the numerous committees which provide policy inputs into the Executive Branch of Government. The role of an advisory committee to the Supreme Court in connection with its rule making functions performs a far more crucial task than the advisory committees do for the Executive, since they actually draft the rules which become law with little or no modification by the Court. It surely seems appropriate that these committees be subject to the same rules of openness that now prevail for other committees which perform far less crucial functions in our law making process.

The 1972 Advisory Committee Act does not now apply to committees advising the judiciary, but I recommend that it be amended to make it applicable not only to committees advising the Supreme Court on rules, but to all other advisory committees respecting the Federal Judiciary. While some modifications in the 1972 Act may be appropriate to take account of differences between the two branches of Government, the presumption should be against any changes that would reduce openness from the standard applicable to the Executive. In this connection, hearings should probably be held before any specific legislation is proposed, and it is for that reason that I have not prepared any statutory language for your consideration at this time. In my opinion, had the advisory committee meetings on the rules of evidence been open to the public, many of the problems that were aired before your Committee would have been eliminated or would have surfaced long before the rules were put into final form.

Thank you for the opportunity to submit these additional comments and the enclosed statute, and if there are any questions raised by this submission, I would be pleased to try to answer them.

Respectfully submitted,

ALAN B. MORRISON.

Enclosures.

ARIZONA STATE UNIVERSITY,
COLLEGE OF LAW,
Tempe, Ariz., March 30, 1973.

HERBERT E. HOFFMAN, Esq.,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws,
Committee on the Judiciary,
Rayburn House Office Building,
Washington, D.C.

DEAR MR. HOFFMAN: Your letter of March 26th is quite correct in calling attention to the discrepancy between the description of Rule 403 contained in the first sentence of the Advisory Committee's Note to Rule 106 and the actual con-

tent of Rule 403 as transmitted to the Congress. The first sentence of the note to Rule 106 should be amended to read:

A close relationship exists between this rule and Rule 403 which permits exclusion when "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."

Your comment serves also to raise the broader question of the ultimate status and treatment of the Advisory Committee's Notes. Any amendment to a rule presumably will require at least a *pro tanto* change in the note, which to that extent will then cease to be the Advisory Committee's note. When the California Evidence Code of 1965 was enacted this aspect was handled by labelling the original notes "Comment—Law Revision Commission" and those to revised sections "Comment—Assembly Committee on Judiciary."

Sincerely,

EDWARD W. CLEARY, *Reporter.*

LAW OFFICES, JAMES F. SCHAEFFER,
Memphis, Tenn., March 30, 1973.

HERBERT E. HOFFMAN,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. HOFFMAN: This letter is in compliance with the request of the Special Sub-Committee on Reform of Federal Criminal Laws that the Association of Trial Lawyers of America make known to the Committee its position with respect to those proposed Federal Rules of Evidence which are considered by the Association to be acceptable in their present form and non-controversial.

As Chairman of the Federal Evidence and Procedure Committee of ATL, by the authority of the Committee and with the advice and consultation of Professor Joe A. Moore of Memphis State University, we now wish to advise, subject to objection within five days from date of any member of our Committee, the following proposed Federal Rules of Evidence are considered to be acceptable in their present form and non-controversial.

Article I. General Provisions:
- Rule 101. Scope.
- Rule 102. Purpose and construction.
- Rule 103. Rulings on evidence:
  - (a) Effect of erroneous ruling:
    - (1) Objection.
    - (2) Offer of proof.
  - (b) Record of offer and ruling.
  - (c) Hearing of jury.
  - (d) Plain error.

Article II. Judicial Notice:
- Rule 201. Judicial notice of adjudicative facts:
  - (a) Scope of rule.
  - (b) Kinds of facts.
  - (c) When Discretionary.
  - (d) When mandatory.
  - (e) Opportunity to be heard.
  - (f) Time of taking notice.
  - (g) Instructing jury.

Article IV. Relevancy and Its Limits:
- Rule 401. Definition of "relevant evidence".
- Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.
- Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.
- Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes:
  - (a) Character evidence generally:
    - (1) Character of accused.
    - (2) Character of victim.
  - (b) Other crimes, wrongs, or acts.
- Rule 407. Subsequent remedial measures.
- Rule 408. Compromise and offers to compromise.

Rule 409. Payment of medical and similar expenses.
Rule 410. Offer to plead guilty; nolo contendere; withdrawn plea of guilty.
Rule 411. Liability insurance.
Article VI. Witnesses:
Rule 602. Lack of personal knowledge.
Rule 603. Oath of affirmation.
Rule 604. Interpreters.
Rule 605. Competency of judge as witness.
Rule 606. Competency of juror as witness:
(a) At the trial.
Rule 610. Religious beliefs or opinions.
Rule 614. Calling and interrogation of witnesses by judge.
Rule 615. Exclusion of witnesses.
Article VII. Opinions and Expert Testimony:
Rule 702. Testimony by experts.
Rule 705. Disclosure of facts or data underlying expert opinion.
Article IX. Authentication and Identification:
All proposed rules under this section are acceptable in their present form and non-controversial.
Article X. Contents of Writings, Recordings, and Photographs:
Rule 1001. Definitions:
(1) Writings and recordings.
(2) Photographs.
(3) Original.
(4) Duplicate.
Rule 1002. Requirement of original.
Rule 1003. Admissibility of duplicates.
Rule 1005. Public records.
Rule 1006. Summaries.
Rule 1007. Testimony or written admission of party.
Rule 1008. Functions of judge and jury.
Article XI. Miscellaneous Rules:
Rule 1101. Applicability of rules:
(a) Courts of magistrates.
(b) Proceedings generally.
(d) Rules inapplicable:
(2) Grand jury.

Concerted indepth analysis of those rules proposed not listed above is in process. ATL proposes to officially submit to your Committee on or before July 1, 1973, a complete critique and analysis of the remainder of the rules. It is our hope and request that final action will not be taken until our organization can be heard on those rules which we deem extremely questionable in their wisdom and widely controversial.

Respectfully submitted,

JAMES F. SCHAEFFER,
Chairman, Federal Evidence and Procedure Committee.

[From the Third Branch, April, 1973]

A MESSAGE FROM THE CHIEF JUSTICE

Congress has postponed, pending further action, the effective date of the Rules of Evidence promulgated by the Supreme Court last fall. These Rules were developed by an Advisory Committee, appointed by Chief Justice Warren in 1965 and acting under the rulemaking power Congress delegated to the judiciary. Some lawyers and District Judges have expressed concern over this action by Congress. There is no occasion for concern on this score for the rulemaking process is working as it should.

It is important to recall the history of rulemaking. In 1934, Congress vested civil rulemaking power in the Supreme Court, and subsequently Congress granted broader authority including rulemaking for criminal procedure. This process of rulemaking includes, as a first step, the appointment of a Judicial Conference Advisory Committee. That Committee conducts studies, and develops rules; circulation of drafts to bench and bar follows. When the rules have been developed the Advisory Committee submits them to the Standing Committee on Rules of Practice and Procedure. If approved by the Standing Committee, the

rules then go to the Judicial Conference of the United States. If the Conference approves them, they are submitted to the Supreme Court. If the Court in turn approves them, they are then transmitted to the Congress. Absent negative action by that body, the rules become law 90 days later, although a later date for their taking effect may be set by the Court or by the Congress to permit more time for Congressional scrutiny. It will readily be seen that this four-stage "screening" is as thorough and comprehensive as any legislative process could be.

This is the mechanism the Congress devised nearly 40 years ago with the cooperation of the courts and the bar. It is a most effective one and certainly is as careful a technical screening as could be provided, especially given the multitudinous responsibilities with which Congress is burdened and the specialized nature of procedure in federal litigation.

After this extremely careful process of formulating rules, however, comes the time for review by the elected representatives of the people.

Thus, rulemaking is a partnership, a joint enterprise, between Congress and the Judicial Branch. It was first carried to successful conclusion in 1938, with the adoption of the Federal Rules of Civil Procedure; then came the Federal Rules of Criminal Procedure. Later on Appellate Rules were adopted. All of these rules are under constant scrutiny of Judicial Conference Advisory Committees.

The rulemaking enterprise has been one of the most successful and fruitful of any joint effort between branches of government in history. But, we must always remember that it is a *joint* enterprise, and while Congress has rendered us the compliment of general approval in the past, it does not mean that the Congress should accept blindly or on faith whatever we submit. Nor does the action of Congress in extending the time for consideration of the rules now submitted indicate more than an appropriate desire to give careful study to an important development in the law.

The current Rules of Evidence have been under study for a total of eight years. They were completed more than two years ago by the Advisory Committee, approved by the Standing Committee on Rules of Practice and Procedure and the Judicial Conference, and then submitted to the Supreme Court. After initial consideration, the Supreme Court "remanded" them to the Rules Committee for further consideration and consultation with the bar. After this additional screening, certain of the rules were revised and resubmitted to the Supreme Court. The Court approved them in late 1972 and submitted them to the Congress in early 1973.

It is well known that District Judges have been applying many of the proposed rules, very often as persuasive authority, while they were in the draft stage. This is not surprising since these rules are largely a codification of long-established and tested rules of evidence that state and federal judges have been using and developing for generations.

I return to my basic point: the rulemaking process is functioning as its designers intended. The Congress is, as always, overwhelmed by many problems of an urgent nature, and is entitled to adequate time to study carefully any proposed rules submitted. The House Judiciary Committee is proceeding with this review in a sub-committee chaired by Congressman William L. Hungate of Missouri. The system is working and will do so as long as each component performs its assigned role.

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

ARIZONA STATE UNIVERSITY COLLEGE OF LAW,
Tempe, Ariz., April 3, 1973.

Mr. ROGER A. PAULEY,
Associate Counsel, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

Dear Mr. PAULEY: Your letter of March 30th sets forth the following proposed addition to Rule 601:

(b) *Dead Man's Acts Recognized in Certain Cases.*

In any civil action in which a claim sued upon or issue pertaining thereto has its source in State law, the Federal courts shall apply the law as to the

qualification or competency of a witness under a dead man's act which would be applied in the resolution of such claim or issue by the courts of the State in which the Federal court is located if the action had been properly commenced there.

You then ask my comment on the *Erie* formulation as compared with that in Rule 302 as transmitted to the Congress.

I comment as follows:

(1) Your proposal purports to set forth a standard, viz. when "a claim sued upon or issue pertaining thereto has its source in state law," which determines that an *Erie* situation generally is involved, and then goes on to say that a state dead man's act may be included as part of the *Erie* package, somewhat in the fashion of the fleas going with the dog. The phrase "claim sued upon" has an adequately definite meaning, but the same can scarcely be said with respect to "issue pertaining thereto." See Wright, *Law of Federal Courts* §§ 55, 59 (2nd ed. 1970). The language in your version is akin to that appearing in the Advisory Committee's Note to Rule 302, but the latter was used discursively, not as a term of art in a rule. I doubt the wisdom of attempting to restate *Erie* in a rule dealing with the competency of witnesses. You might do better simply to adopt the phrasing of Rule 302, which was evolved by persons who gave much thought to the matter in formulating the ALI provision cited in the Advisory Committee's Note.

(2) Your proposal then requires the federal court to apply the law of the state where the federal court is located in determining whether the or a dead man's act applies. In this regard you might wish to read the Commentary to § 2344 in the ALI Study of the Division of Jurisdiction Between State and Federal Courts 148–150, P.F.D. No. 1 (1965), pointing out certain difficulties in applying the *Klaxon* rule and suggesting that it is not constitutionally mandated.

(3) In the first paragraph of your memorandum you state that the Advisory Committee's Note "recognizes that the effect is to nullify a *substantive* policy still followed in several States." [Italic supplied.] The Note is in fact devoid of any suggestion that dead man's acts are substantive, and the Committee consistently has taken the position that they are not.

(4) Though you did not ask for comment on the merits of your proposal, I am taking the liberty of enclosing a memorandum submitted to the Advisory Committee on the subject of dead man's acts which may serve usefully to give some insight into the implications of the proposal. The memorandum was much too lengthy to include in the published notes.

Sincerely yours,

EDWARD W. CLEARY, *Reporter.*

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT,
Port Huron, Mich., April 4, 1973.

Re Proposed Rules of Evidence for United States Courts

Hon. JAMES HARVEY,
Member of Congress,
Washington, D.C.

DEAR JIM: There is now before the Congress a proposal for adoption of Rules of Evidence for the United States Courts. Rule 803(18) provides as follows:

"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 treaties, 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."

I have written numerous letters to the original committee which proposed adoption of these rules. I attach a copy of a letter which I wrote on May 14, 1971. May I, without repetition, submit for your consideration the thoughts expressed in that letter. There are many other provisions of the Rules of Evidence which reflect the ever-increasing impairment of traditional rules which have stood the test of time as very valuable. I opposed some of the other rules, but I do not propose to further contend against them.

Inasmuch as the ultimate responsibility for adoption of these rules is that of the Congress, I respectfully urge rejection of this proposed Rule 18 relating to "learned treatises."

It may be urged that these rules are the product of careful consideration by the judicial conferences of the United States and eminent members of the bar, including those in the academic. This is usually the beginning and, too often, the end of consideration of such proposals. The rules are actually written many times by single academicians whose conceptions find approval notwithstanding the eminence of committees appointed to review them.

I doubt that the Judicial Conference of the United States was able to give the time needed for contemplative consideration of these rules. As lawyers, we know how frequently rules will be the product not of the entire prestigious committee appointed, but of the man who prepared them in the quiet of academic precincts, oftimes a man who has had little exposure to the actual trial of lawsuits. Revered rules of evidence are the product of experience provided by actual trials.

In a recent conference with a member of the committee that compiled these rules, I asked the question as to who is to resolve a contest as to which books may be, and which may not be, learned treatises. I was told the plan would be that the initial resolution of such question would be for the District Judge. Just how a District Judge is going to be able to find time during the trial of a lawsuit, or on pre-trial, to read and appraise the qualification of a particular "learned treatise" escapes me. Is each judge to interrupt a trial long enough to study such writing and come to a conclusion as to its standing as a "learned treatise"? This will indeed but add further difficulties to the trial of cases in the United States District Courts.

May I, therefore, perhaps as a last ditch stand, ask that you and others to whom I am writing give consideration to whether the Rule I mention should be adopted.

Sincerely yours,

CLIFFORD O'SULLIVAN.

Enclosures.

Enclosed is a xerox copy of a dissenting opinion written by Justice Eugene F. Black of the Michigan Supreme Court. I agree with Justice Black.

[NOTE.—Letters were also sent to Congressmen O'Hara, and Hutchinson by Judge O'Sullivan. Both were subsequently forwarded to Chairman Hungate.]

DISSENTING OPINION BY BLACK, J.

BLACK, J. (*dissenting*). This suit for medical malpractice was tried to a jury in 1969. The jury's verdict was negative. Judgment entered accordingly. Bypass of the Court of Appeals was granted September 23, 1970 (384 Mich 760). The appeal was subjected to conference and finally submitted June 10, 1971.

Since then our majority must have labored, conferred, caucused and searched—surely without surcease and in mighty unison—to find some or any colorable way to overrule as now due for entry; the Court's opinion not having been delivered to the writer until July 11, 1972, some ten days ago. Recalling a fair aphorism of some despairing writer upon the injustice of delayed justice,[1] I hasten to respond—partly from notes made when the appeal with salient issue was fresh in mind—in time for the filing of these pro and con opinions on our next "Judgment Day" (July 26, 1972).

Our reports, printed thus far in 1971–1972, are on the shelves of thousands of lawyers and judges. They bear now undeniable witness of both a profaning and deplorable fact; that this temporally seated and largely fledgling Court is bent purposefully upon progressive destruction of all or near all of the great canons and precedential precepts which the nationally revered COOLEY Court, and the succeeding FELLOWS Court, have bequeathed to Michigan. In this latest case the employed means of destruction are drawn prominently from Professor Wigmore's gratuitous invention of a new legal term—"Learned Treatises" (which I accept for present purposes)—and from a naked *dixit* which the professor has hurled at targeted decisions expressly including *People v Hall*, 48 Mich 482 (1882).[2] By this Topic IX, the professor alleges that the applied reasoning of those decisions amounts only to "ignorant exaggeration", despite acknowledgment that what he

[1] "Some regard must be had for the shortness of human life."

[2] Perhaps, at this stage, the thoughtful reader of our respective contributions might well pause for comparison of the Court's opinion of *People v Hall* with the professor's creed (VI Wigmore on Evience, 3d ed, "Topic IX: Learned Treatises", pp 2-22). There he will find in perfect array the real and the practical on one hand, and the visionary notions of a professional theorizer on the other.

If any Brother can find in Topic IX any inkling of actual experience in the presentation of evidence, or of having learned what one may only learn by years spent on the lower level of trial courtrooms, doubtless he will trot it forth by amendment or addition to the Court's opinion. No better support for the decisions the Brothers are set now to overrule can be found or made than that which appears in Wigmore's own stilted criticism thereof. I mean later to pluck out a few of these curious gems for unceremonious comment.

stands for—by Topic IX—"has obtained *complete* recognition *in only one or two jurisdictions*" (p 2).

Having reviewed the Court's opinion in conjunction with entire Topic IX, I perceive no need for defense of *People v Hall, supra*, and the Michigan cases that have followed it all these years. All such cases, devoid as they are of the speculations of pendants and the collegiate whimsies of law reviewers, have since the 1880's breathed common sense into our trial courtrooms and are guarded adequately by the great weight of reasoned authority.[3] I propose instead to inquire whether the professor and our temporal majority are not themselves guilty of such "ignorant exaggeration". As a sort of prelude, it is suggested respectfully that just about all of the doctrines written in Topic IX had to be bred, and then inbred, on the campuses of our more effete law schools where theories are taught apart from that down to earth wisdom one may gain only by years of preparing and trying and winning and losing both in trial and appellate courts, a plethora of contested actions. Let me try this out.

I have declared above an intent to pluck, from Topic IX, a few selections for comment. This may be unnecessary, for if the reader by this time has perused that topic contemplatively, along with the *judicial* authorities which the professor disparages, he will have identified enough "ignorant exaggeration" to satisfy himself. Yet I cannot resist comment upon a few of the impractical notions one finds in Topic IX.

Wigmore starts out, under (1) on page 2 of Topic IX, by alleging that "[t]he only forceful" objection to what he advocates is that the author of such a learned treatise, not having been called to the stand, is "a person not subjected to cross-examination". (Yes, it is a bit forceful.) Then, moving to (2) on page 3, he identifise the next objection he would overrule. It is that a "medical book which was a standard last year year long becomes obsolete this year". Then comes that long paragraphic tirade headed. "There is ignorant exaggeration in these charges". In the body thereof the professor presents a series of altiloquent questions. After quoting each I shall endeavor to respond by "Comment".

Wigmore: "For if these works [learned treatises] are rejected because they may not embody the latest results of science, what shall be said of specialist witnesses in general?"

Comment.—Only this: By the question that specialist witness is *on the stand.* The author of the learned treatise *is not.* The counsel has not sought to take that author's deposition, if perforce the latter is beyond reach of the Court's process. Nor has the counsel bothered to explain why he has neither deposed nor subpoenaed the author. Even if the author is available for deposition or summon by subpoena, the counsel (after interview) may have concluded that the "learned treatise" itself would make more mileage in the juryroom than would the testimony of its writer, or that the testimony of the writer might slaughter an auspicious case for damages or, if such be the case, weaken seriously an equally promising defense.

So here comes the reasty hearsay of Topic IX. Counsel, encouraged from here on by this Court, purposely and subtly will cull for cross-examination—out of the multiplying pro and con myriads thereof—publications the *verity* and *reliability* of which need be supported only by general questions and uncertain answers the negative sum of which becomes just what this trial judge found. Under *Jones v Bloom* this will be done without pretense of showing that the writers thus winnowed are *not* available for deposed or witness chair attestation of what they have published, locally or distantly. It will be done with no showing that not one witness is available to prove the qualification or qualifications of any such writer—to make "statements upon the subject in hand" (per Wigmore's suggestion, § 1694, quoted post), and it is bound to make of medical malpractice trials veritable wars of even more lengthy attrition; with each side employing such a published congeries of conflicting medical views as would thoroughly confusticate any jury the members of which, like all of us outside the medical profession, are not equipped to interpret and apply medical books. Once real hearsay is let loose in our trial courtrooms, farce and foolishness take over and the added public as well as private expense thereof cannot help but lead to more "no fault" compensation.

Wigmore: "Out of the hundreds of scientific experts who are this month testifying in courts of justice, how many are speaking from a thorough acquaintance with the latest researches in their subjects?"

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[3] This is a fact our majority tacitly concedes by its painful assembly of a minority of states which, as the Brethren dare no more than say, "have all modified the rule to some extent" (*ante* p 119). Aye, the minority has *modified to some extent;* not *destroyed* as the gentleman of this Court are about to record. The "extent" is not of course described or proposed.

Comment.—Again, by this question, that scientific expert *is on the witness stand.* No phantom of hearsay is he. Naturally he is asked to state not only the extent of his knowledge but also his opinion of such "latest researches". Is there something wrong, or highly improper, about that? Some expert or experts thus interrogated might surprise the examining counsel and every one in the courtroom by the utter currency of their knowledge; just as others might fail miserably, and just as any learned treatise might prevail or fail should its author be deposed or called before the jury to prove, if he can, the *present* dependability of what he has written.

Professor Wigmore has touched here, quite unwittingly, the tender nerve of what he advocates; for much more now than in 1940 is it true (Topic IX p 3) that "*Science is shifting;* that experiment and discovery are continually altering scientific theories and rendering them valueless."

Wigmore: "For how many of them is it possible to maintain steady pace with the daily progress of science?"

Comment.—Same answer, Just cross-examine each of them as ever before. Isn't that the best way, compared with easygoing employment of hearsay, as proposed by Topic IX? One cannot, as observed below by trial judge Kaufman, "cross-examine the book".

Wigmore: "How many are not testifying on information obtained at a medical or other technical school a decade or more ago, in the standard books of that day?"

Comment.—A definite minority I would say, always ascertainable by cross-examination. Really, this question emphasizes the need for drawing out the decade-indicative fact by vigorous interrogation of any expert who attempts to vouch in a "learned treatise" written years ago.

I must terminate this testimonial portrayal now, for Professor Wigmore has in Topic IX presented no more such questions. Nonetheless he has supplied an even more forceful reason for my present disagreement with the Brethren in majority. Incredibly, they have ignored totally the need of laying a definite foundation for employment in court of these learned treatises when the authors thereof are not—on account of death, disease, disinclination, or disappearance—within reach of depositional or other judicial process. Said § 1694 provides:

"§ 1694. *Testimonial Qualifications; Production of Original.* (1) The treatise-writer must, like every other witness, be shown before hand to be properly *qualified* to make statements upon the subject in hand. This will require, as in other Hearsay exceptions (*ante*, § 1424), another witness who will testify to these qualifications, —which means here the summoning of any one in the profession, art, or trade of the writer and ascertaining from him the writer's standing as an authority. This removes the danger of an ignorant use of statements by writers of no standing; but it is merely the application of the general principle as to testimonial qualifications. It is done even in those jurisdictions (*post*, § 1637) where the Exception is recognized only in a fragmentary form. Practically, also, it guards against the supposed danger, already adverted to, of allowing the jury to be confused by book-passages offered without explanation; for the expert who indorses the book can also be used to make explanations where desirable. It also forbids, of necessity, the loose and unsafe practice (*post*, § 1700), followed in some jurisdictions, of permitting counsel to read indiscriminately to the jury, as a part of his argument, extracts from scientific treatises, and furnishes the real reason why this is to be condemned.

"(2) The rule of *production of the book itself* (*ante*, § 1179) also applies, where it is desired to employ a specific book; but this does not forbid asking the witness a general question as to the opinion of the profession." [4] (Italics by Wigmore.)

In the light of § 1694, I present here the specific question this plaintiff-appellant has presented for answer (stated question II):

"Did the trial court commit prejudicial error by requiring an admission from a medical witness that he relied on a certain textbook in the formulation of the opinions expressed in court as being the only basis upon which such a medical witness could be cross-examined?

Here counsel goes on to outline his argument this way:

"Plaintiffs were prevented from using these books as a basis for cross-examination, because of the so-called Michigan rule which only permits the use of such books if a witness testifies that he relied on such a book in giving his testimony."

When an important question of law like this comes up for review, it is wise to ascertain with utmost precision just how that question arose, and then came to submission and ruling, in the trial court. Should the Court fail in that regard, it

[4] Was any effort made here to show, "beforehand" that any author involved was "properly qualified to make statements upon the subject in hand."? There is no smidgen thereof. See the appendix, *post* p 137.

makes only for more compound fractures of our decisions—of which already there are too many.

The majority says, without quotation or reference:

"At the trial, plaintiff's attorney attempted to cross-examine Dr. Attenson by reading excerpts from textbooks which Dr. Attenson testified he recognized as authoritative. It is conceded that Dr. Attenson had not relied upon these textbooks as authority for answers to previous questions, and the trial court, relying on previous Michigan Supreme Court decisions, refused to permit such cross-examination."

This just isn't right, either in record or actual fact. Rather than argue with the Court over a matter of such critical nature, I have instead included by separate appendix (*post* p. 17) *all* of Dr. Attenson's cross-examination that might possibly be said as having formed a basis for review of stated question :.. Careful reading of that appendix, by the profession, is respectfully invited. I need but quote here the parts with respect to which the trial judge took part, leaving the rest for contemplative reading of the more lengthy appendix:

"*The Court:* * * * Now, let me ask you this. Is this book an authority?

"*The witness:* It is one of many.

"*The Court:* Okay. And do you base your opinion upon this book, the opinions that you have experienced as to how anesthetics should be administered?

"*The witness:* Well, honestly, I don't.

"*The Court:* You don't? All right. And then I guess that answers the question then, counsel.

"Here is the law in Michigan, very precisely and concisely:

" 'The only circumstances under which medical books can be read in evidence are where the witness has based his opinions upon them and has referred to them as authority.'

"And evidently, he said he doesn't base his opinions upon that book."

* * * * * * *

"*Q.* (*by Mr. Peisner* [*plaintiff's counsel*] *continuing*): Doctor, I will ask you once again: To the extent that you base your opinion on any book, do you base it on this Monheim book?

"*A.* Not that book specifically. I'm sorry, I can't honestly say that.

* * * * * * *

"*Q.* [*by Mr. Peisner continuing*] Do you have any book that you base your opinion on?

"*A.* I don't think you can specifically say one book; it is the sum total of your entire exposure.

The Court: I guess he has answered the question, counsel" * * *

"There was no offer, or declaration of intent to offer, any of these "books" as evidence. No request for inclusion thereof in the record was made. None were marked for identification and maintained in the record that way, so that the trial judge (and an appellate court in turn) might review them for evidentiary utility or admission for a specific purpose. No one of such "books" was shown to the witness, for examination by him, nor was any specific portion thereof called to his attention for the purpose of desired interrogation. Nothing can be found in the original record that appears to be a book, or a text, or perhaps a learned treatise. No effort was made to obtain a separate record of the cross-examination desired. As to that see GCR 1963, 604 and *Bujalski* v. *Metzler Motor Sales Co*, 353 Mich 493, 497–499 (1958), and cases cited therein. For aught this Court knows or the trial judge knew from the record, Messrs. Collins, Vandam, Monheim, Dripps, Eckendouf and Nuy were not writers of published "learned treatises" within Wignore's contemplation or, say, within the more extreme purview of (thus far unacceptable) Rule 529 of the Model Code of Evidence, p 294:

"Rule 529. *Learned Treatises.*

"A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject."

To summarize: Of the specific point brought to review it is enough to say that Judge Kaufman was not exactly interested in any kind of notice, judicial or otherwise, of these unsworn publications. Nor has any member of the Court declared himself ready to thus notice any of them. And, so far as concerns our yet undemolished rule, that a medical witness must first refer "to a textbook as his author-

ity" before it may be used to contradict him (*DeHaan v Winter*, 258 Mich. 293, 299 [1932]), the profession is referred to the continuant appendix hereof to see whether Dr. Attenson at any point did so refer.

Here then is the appeal which the Court has chosen for arrant demolition of a really learned treatise, *People v Hall, supra*, the levelheaded sense of which, both in this Court and in our trial courts, has since the 1880's protected both plaintiffs and defendants in medical malpractice from the treachery of the worst kind of hearsay; the kind that is apt to impress the unwary by the mere fact of its having been printed and published somewhere and sometime in the past. Strangely, it seems too often that when someone writes a book, or an article, or a treatise of any kind for publication, he thereby becomes an "expert"; as if print could make him a specialist or masterhand. The conclusion is not apt to be quite so common in the author's home town, where he is known personally (as he ought to be in the courtroom when anyone seeks to read his published ideas to a sworn jury).

For comparison with the best our majority has been able to strain—after a year's work—from minority writings picked and chosen here and there from other states, I submit below that kind of practical knowledge and legal experience out of which sound judicial precedent can only be made (*People v Hall, supra*, 490–491):

"We observe that resort was had to reading medical books to the jury, the record not showing, however, what matters were thus laid before them. If this was anything it was evidence, and probably evidence which was used with some effect. The practice is not permissible. Scientific or expert testimony must be given by living witnesses who can be cross-examined concerning their means of knowledge and can explain in language open to general comprehension what is necessary for the jury to know. The only legal reason for allowing the evidence of opinions is found in the presumption that an ordinary juryman or other person without special knowledge could not understand the bearing of facts that need interpretation. Medical books are not addressed to common readers, but require particular knowledge to understand them. Every one knows the inability of ordinary persons to understand or discriminate between symptoms or groups of symptoms, which cannot always be described to those who have not seen them, and which with slight changes and combinations mean something very different from what they mean in other cases. The cases must be very rare in which any but an educated physician could understand detached passages at all, or know how much credit was due to either the author in general or to particular parts of his book. If jurors could be safetly trusted with the interpretation of such books, it is hard to see on what principle living witnesses would be required. Scientific men are supposed to be able from their study and experience to give the general results accepted by the scientific world, and the extent of their knowledge is tested by their personal examination. But the continued changes of view brought about by new discoveries in most matters of science, and the necessary assumption by scientific writers of some technical knowledge in their readers, render the use of such works before juries—especially in detached portions and selected passages—not only misleading but dangerous. The weight of authority as well as of reason is against their reception."

I vote of course to affirm.

Supplement (August 26, 1972):

The foregoing opinion of dissent was delivered to the other Justices July 21. In it I made reference to our then upcoming day of judgment (July 26) and to the need for decision of a case submitted last year, June 10, 1971 to be exact.

July 26 Justice Adams held up determination of this appeal. Now the Court's next judgment day is August 29. Today I have examined a memo sent out under date of August 24, by Justice Swainson, author of the foregoing majority opinion. It advises that Justice Adams has proposed and he has agreed to insert a new paragraph in the Court's opinion, reading as follows:

"Great caution must be exercised by the trial court to ascertain that the authority cited is pertinent to the subject matter under consideration and passages which are irrelevant are not admitted into evidence. See *O'Dowd v Linehan*, 385 Mich 491 (1971)."

I agree there will be a vigilant need for "[g]reat caution" on the part of our trial judges as they attempt to determine and apply what by its opinion the Court's majority seems to want done, and would dwell a bit upon that need in view of employment, not only of the above quoted "[s]ee *O'Dowd*", but also of that same "see" on the same page of the Court's opinion; in each instance without specific or other lead to what the Court has in mind.

Obediently, I have read anew Justice Adams' opinion of *O'Dowd*. In it I find nothing that even remotely tends to provide light for this "[g]reat caution"

paragraph. The latter seems purposed toward precise pertinence and relevance of "the authority cited"; but in *O'Dowd* no "authority" or publication was cited, or produced, or involved in any way. In *O'Dowd* Justice ADAMS was engaged in another field; that of defending some—but definitely not all—of the so-called expert testimony of a professional witness, self-styled "an accident reconstruction expert". No publication or "learned treatise" was relied upon by any party in *O'Dowd*, either as evidence or for the purpose of cross-examination. Hence it is deferentially suggested that the profession, when interested in identifying if possible the new rule ordained by *Jones v Bloom*, will gain nothing by "seeing" *O'Dowd*.

In recent years we have treated the Bar and our lower court benches to prolix writing, pro and con, upon the extent to which "standards" must be set forth in statutes of peril of constitutional veto by this Court. Pinpointed examples will be found in both opinions of *City of Pleasant Ridge v Governor*, 382 Mich 225 (1969) and currently in both opinions of *People v Fields*, 388 Mich—(July 26, 1972).[5] Why, *People v Fields* having set the Court's new tenor of desired "standards", should not the trial lawyers and trial judges of Michigan be supplied just a few understandable patterns, if not a norm or two, for application of what in hazy outline we are told to "see"?

Taking that new "[g]reat caution" paragraph in conjunction with the preceding "[w]e, therefore, hold" paragraph of the Court's opinion, let me expose just one of the manifest doubts today's majority has inserted like a wrench into our hitherto worthy evidentiary machinery. Going through the majority opinion with care, the reader will find that our trial judges are provided no gauge and no guide to what should be done when the expert brought to the stand—whether called by the plaintiff or by the defendant—warily refuses on cross-examination to "recognize" as *presently* authentic any publication or publications which the cross-examiner has submitted to him. When that occurs (as all but the naive will surely expect), and the cross-examiner moves that the trial judge judicially notice the submitted publication, what can or should the trial judge do—without risking this Court's second-sighted animadversion?

The only answer I am able to glean[6] from these inscrutable paragraphs of the Court's opinion is that the Brethren, by telling us only to "see" *Darling* v *Charleston Community Memorial Hospital*, 33 Ill 2d 326; 211 NE2d 253; 14 ALR3d 860 (1965) and *Dolcin Corp* v *Federal Trade Comm*, 94 US App DC 247; 219 F2d 742, 746–747 (1954) (*cert den* 348 US 981; 75 S Ct 571; 99 L Ed 763),[7] has provided a pretty tough choice for the trial judge; the two cases not being exactly in harmony with each other and *Dolcin*, a Federal decision, having made very clear the outside limits of *Reilly* v *Pinkus*, 338 US 269; 70 S Ct 110; 94 L Ed 63 (1949), upon which the majority mistakenly depends (*ante* 119).

Darling, as I shall demonstrate by full quotation of its 15th paragraph, goes sled length for the not yet acceptable doctrine of Rule 529 of the Model Code of Evidence (which I have previously quoted, *ante*).[8] *Dolcin*, on the other hand, drawing from *Reilly* v *Pinkus*, *supra*, declares that the judge or presiding administrative officer "has broad discretion to determine the extent of the cross-examination on written authorities"; also that application of the rule of *Reilly* v *Pinkus*, *supra*, *depends upon a fact;* that the expert on the stand has based "an opinion to a significant degree upon his reading."

Arrayed below, for comparison, are the textual presentations of *Darling*, and then of *Dolcin*. *Darling*, having criticized the rule our majority now overrules, proceeds by its 14th paragraph largely upon the alleged strength of Wigmore's doctrine (15th paragraph of *Darling*):

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[5] In the *Pleasant Ridge* case Justice ADAMS dissented. In the *Fields* case his opinion on "standards" prevailed.

[6] There may be just another, discernible only by divination from our parade of recent opinions of reviewed damage actions. If the *plaintiff's* counsel demands judicial notice of his pet publication or publications, then grant the demanded notice. If the *defendant's* counsel insists upon notice of his favorite or favorites, that will be time for the exercise by the trial judge of the mandated "[g]reat caution."

[7] Here is footnote 4 on pp 746-747, the reference being to *Reilly* v *Pinkus*:

"4. The Court does not say how the authority of those works is to be determined. It seems clear from the facts given in the opinion that it is unnecessary for the witness himself to recognize the authority of the work [but see *Lawrence* v *Nutter*, 4 Cir, 1953, 203 F2d 540] or even to have read it [but see *Shaw* v *Duncan*, 10 Cir, 1952, 194 F2d 779]. We think the authority of the work is for the presiding officer to decide. And we think he should have a broad discretion in determining what—and how much—evidence may be presented on that question."

[8] *Darling* also, by its 14th paragraph, seems to adopt Rule 63 of the Uniform Rules of Evidence. That rule bans hearsay evidence "except: * * * (31) Learned Treatises. A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject."

"The unsatisfactory quality of expert testimony has been the subject of frequent comment, and it has induced judicial action. (See *Opp* v. *Pryor*, 294 Ill 538, 545; 128 NE 580 [1920]; *Kemeny* v *Skorch*, 22 Ill App 2d 160, 170; 159 NE 2d 489 [1959]; see also Supreme Court Rule 17—2, Ill Rev Stat 1963, chap 110, par 101.17—2; Cleary, Handbook of Illinois Evidence, secs 3.3, p 41, 11.10, pp 190–191.) An individual becomes an expert by studying and absorbing a body of knowledge. To prevent cross-examination upon the relevant body of knowledge serves only to protect the ignorant or unscrupulous expert witness. In our opinion expert testimony will be a more effective tool in the attainment of justice if cross-examination is permitted as to the views of recognized authorities, expressed in treatises or periodicals written for professional colleagues. (Cf. Model Code of Evidence, Rule 529.) The author's competence is established if the judge takes judicial notice of it, or if it is established by a witness expert in the subject."

Dolcin, on the other hand, tells us about *Reilly* v *Pinkus*, *supra*, and proceeds (pp 746–747):

"*Reilly* v *Pinkus*, we think, stands for the general proposition that an expert witness who bases an opinion to a significant degree upon his reading may be cross-examined as to that opinion by reference to other reputable works in his field. It is not necessary for the witness to have relied in his testimony upon the particular authority the cross-examiner seeks to use. And we do not think that the Court limited its ruling to cases involving fraud. The *Reilly* case also hold that the trial examiner has broad discretion to determine the extent of the cross-examination on written authorities. He probably has, in some cases, discretion to determine whether there should be any such cross-examination at all. But it is error to exclude such questions by blanket rule, without more."

Is this question of judicial *notice* to be one of judicial *discretion*, depending upon the judge's own perusal of that which is tendered for *notice?* May the trial judge, in effort to determine this novelty of judicial notice, employ the usual and customary rules by which judges take or refuse notice, or—not being a medic or expert skilled other than at law—must he resort to study of each submitted text or publication to make his decision? What if counsel on both sides, each armed with a trunkload of publications the quality and currency of which is warily avoided by all called experts, insist regardless upon judicial notice of all of their respective wares? Are we not—now—committed to a new and uncertain field of judicial notice where, the trial judge having read parts or portions of proffered Hirsute On Headaches countered by Fuzzy on Diseases of the Head, is required to choose between the two (or tell the jury to choose), even though Hirsute and Fuzzy have not been sworn and the only verity of their "learned" treatises is the fact of printing and publication thereof, say at Walla Walla, or Oshkosh, or Bad Axe? I think it high time for retort that this Court of 1971–1972 has already made of itself a tear-down tribunal of precedential demolition; one with insufficient capability of construction anew of that which might at least equal in excellence and eminence what is so airily destroyed.

I conclude with due remark that if there is to be, in Michigan, judicial discretion to deny such a projected cross-examination as well as discretion to grant same, Judge Kaufman below had far better reason to say "nay" when he did than "yea". Consider the appendix hereof, and note my thus far unchallenged detail of the way the question discussed in our respective opinions is supposed to have been raised and saved for review.

APPENDIX

(That part of the cross-examination of Dr. Attenson dealing with identity of and claimed reliance upon medical publications.)

Q. [*by plaintiff's counsel, Mr. Peisner*]: Doctor, I will ask you, is Principles of Anesthesiology by Vincent Collins one of your authorities for the administration and use of anesthetics, anesthesia?

A. No, I wouldn't say that it really is. I did not use that book to any great extent while I was in training. There are so many, it is difficult to isolate one solitary book.

Q. All right, what is your authority?

A. Basically your authority comes more from clinical experience, from journals, from meetings. Because most of these books are dealing with anesthesia on an inpatient basis; whereas, anesthesia on an outpatient basis is an entirely different piece altogether.

Q. Do you rely on any medical text book as your authority for anesthesia?

Mr. Gruber [*defendants' counsel*]: Well, your Honor, wait a minute now; I think that if he was to ask him did he rely in this case, it may be proper, but if he is asking him if he ever read a text book——

The Court: That's not the question.

Mr. Peisnse: That's not the question.

Mr. Gruber: Well, then, I will state the objection on these grounds; that excepting this case, nothing else is material. We are talking about one patient and one case. And if he relied on anything for that, I suppose he is entitled to ask him. But whether he—I don't see the materiality or relevancy——

The Court: Well, it could be material and relevant, unless he treats each patient differently. We will take the answer.

A. Would you repeat your question?

Q. (*By Mr. Peisner, continuing*): What is the authority you rely on then for the administration of anesthetic, generally speaking?

A. In your office?

Q. You, yourself.

A. Clinical experience, Dripps, Eckendouf and Vandam.

Q. How do you spell that?

A. D-r-i-p-p-s, V-a-n-d-a-m.

Q. Yes. Any others?

A. To a good extent there are parts from many journals which discuss and go over various forms of administering an outpatient general anesthetic.

Q. Any text books other than that one by Vandam?

A. We read through, have looked at our texts. Do you want me to list all the texts I've looked at?

Q. Well, the ones that you rely on.

A. Well, I don't understand what you mean, rely on.

Q. Rely on as the authority that you studied from, and whose information and instructions are—form the basis for your administration of a general anesthetic.

A. Well, like I said, the basis of these books are on inpatient, and you are dealing with outpatient and you must modify it, therefore.

Q. All right. With such modifications, what would you rely on other than Vandam?

A. I've read Monheim's book.

Q. Do you rely on it?

A. As much as I rely on a journal.

Q. Any others?

A. Offhand, I can't think of the names of the different books.

Q. How about Adrian Nuy's book?

A. Once again, Adrian Nuy's book was not stressed, because we stress, basically, if you are going to deal with pharmacology which is what he deals with by and large, we would go to other texts such as Goodman and—Bess and Taylor. There are other books in the same area, or similar areas.

Q. But you do rely on Vandam and Monheim?

A. I rely on them, yes, for basic principles which must be then expounded on as far as how they suit the patient or the situation.

Q. To the same extent, you also rely on the Principle of Anesthesia by Vincent Collings?

A. No. I have to—honestly must admit that I'd never really spent that much time with that book.

Q. The book you refer to by Vandam is Introduction to Anesthesia, by three authors, Dripps, Eckendouf and Vandam?

A. Yes.

Q. In order that there won't be any question about it, I'll show you the flyleaf of it. It's Introduction to Anesthesia, The Principles of Safe Practice. And the authors are Robert D. Dripps, James E. Eckendouf, and Leroy D. Vandam; is that correct?

A. Yes.

Q. I will read you, from page 179—

Mr. Gruber: Just a minute.

Your Honor, once again we are right back to where we started from. I don't think a proper foundation has been laid. The question has not been asked or answered as to whether or not this book, or any other book for that matter, was relied on in the treatment of the plaintiff in this case. And unless it was I don't think there is a foundation for it.

Mr. Peisner: Shall I answer that, your Honor?

The Court: Go ahead.

Mr. Peisner: Well, to begin with, I believe Mr. Gruber is contradicting himself. When he was examining the doctor this morning he asked him about his general procedures in the office with every patient he had. And when I asked him to restrict

himself to this one patient I was overruled, because the court felt that his entire procedures as to all of the patients was material, and we should take it.

Therefore, Mr. Gruber is now trying to contradict himself.

Mr. Gruber: Well, don't accuse Mr. Gruber of trying or not trying anything. We are talking about an entirely different matter, Mr. Peisner. I think you should respond to this motion.

Mr. Peisner: Now, this motion—this objection, in and of itself—the doctor relies—said that he does rely on this book. He made no qualifications of this. And I hardly think it necessary to ask him if he administers anesthetic one way to one patient and another way to another patient. If he relies on it, he relies on it.

Mr. Gruber: As a matter of fact, maybe you should ask that question.

The Court: Well, he said he relies on this book as an authority.

Now, let me ask you this: Is this book an authority?

The Witness: It is one of many.

The Court: Okay. And do you base your opinion upon this book, the opinions that you have experienced as to how anesthetics should be administered?

The Witness: Well, honestly, I don't.

The Court: You don't? All right.

And then I guess that answers the question then, Counsel.

Here is the law in Michigan, very precisely and concisely:

"The only circumstances under which medical books can be read in evidence are where the witness has based his opinions upon them and has referred to them as authority."

And evidently, he said he doesn't base his opinions upon that book.

Q. (By Mr. Peisner, continuing): Let me get this straight, doctor:

You have recognized this book as an authority you say you rely on?

A. May I say something?

Mr. Gruber: Wait a minute.

Your Honor, how many times is he going to be allowed to ask the same things? Now, we have had a ruling on this three separate times.

The Court: Yes, I sustained his objection.

Mr. Peisner: I just want to see if the doctor wants to contradict himself in that matter.

Mr. Gruber: You are testifying. He hasn't contradicted himself at all. I move the jury be advised to disregard that remark.

The Court: The remark may be stricken. It is improper.

Mr. Peisner: All right.

Q. (By Mr. Peisner, continuing): I will ask you, on the book—on Mr. Monheim's book, which you said you did rely on—

A. Mr. Gruber, it's—

Mr. Gruber: How—

A. When I say I rely upon it, do I also—I also rely upon the training I received for six months in anesthesia. Now, that's not in book form. I rely upon the training I learned from other people, that is also not in book form. I cannot dogmatically say that I do A, B and C according to Dr. Monheim's book, because there are variations which you are not even asking me about.

Q. We will get to them in a moment.

Mr. Gruber: Your Honor, again, and for the same reasons without having to go any further, I move that he not be allowed to proceed on the basis of these books. The doctor has answered. If we are going to get every possible book on anesthesia from some medical library, go through the same things, we are going to be here all day.

Mr. Peisner: Well, we have covered the book on Vandam. I want to cover the book on Monheim.

Mr. Gruber: He has already answered that.

Mr. Peisner: I didn't hear any answer other than yours, Mr. Gruber.

The Court: Well, he hasn't testified yet that he bases his opinions upon them and has referred to them as authorities. It's one or the other in some cases.

Mr. Peisner: That's what I was about to ask him.

Mr. Gruber: Well, he just said he didn't.

Mr. Peisner: Well, we are discussing the Vandam book.

The Court: Good. Ask the question. I will permit him to ask the question.

Q. (By Mr. Peisner, continuing): Do you base your opinion on the Monheim book?

A. Are you asking solely?

Q. Well, in the context of what you said. You said that you got your training from observation, from experience, from other instructors, and also on books to

the extent that you use books. Do you base your opinion to that extent on the Monheim book?

A. I base my opinion primarily upon the clinical approach to, which is learned through our residency, because obviously, just because you can sit down and read the book, that doesn't mean you can go out and give an anesthetic. So you must base your opinions, by and large, on what is clinically done in the field, what is currently being used in offices, what is currently being talked about and discussed and being worked in the hospital. That, more than a book. This is the way the people come in. This is where your patient comes in. You can't treat everything the way the book says, A, B and C, and just totally disregard the patient as though they don't exist, just because the book says it.

Q. But you are not answering my question, doctor, and I'll ask that the answer be stricken because it is not responsive.

Mr. Gruber: Wait a minute.

The Court: I think it was his response to the question. The answer may stand.

Q. (*By Mr. Peisner, continuing*): Doctor, I will ask you once again: To the extent that you base your opinion on any book, do you base it on this Monheim book?

A. Not that book specifically. I'm sorry, I can't honestly say that.

Q. Do you base your opinion on any book?

A. You are asking me what percentage of my opinion is based on a book, and what percentage is clinical.

Mr. Gruber: Opinion as to what? I mean we are getting so far—

The Court: As to his administration of anesthetics, obviously. That is what we are talking about.

Mr. Gruber: I'm not sure.

The Court: That is what we are talking about?

Mr. Peisner: That's what we are talking about.

The Court: I would assume that's what this case is about.

Q. (*By Mr. Peisner, continuing*): All right, can you answer that, doctor?

A. I can't say that I do, because in many books—Just for one isolated instance, many authorities will say a certain larygoscope is the best, and they are very dogmatic about that. Now, if you do not avail yourself—

Q. I'm not talking about equipment, I'm talking about basic—

A. Equipment is in the books.

Q. I'm talking about as to the extent that you base your opinion, and your authority on basic principles of the administration of anesthetics. I'm not talking about equipment, I'm not talking about specific drugs, not specific techniques; basic principles—

A. I think it is the sum total of all these things.

Q. Well, to the extent that you base on any book—

A. I can't—

Q. —do you have any book that you base your opinion on?

A. I don't think you can specifically say one book; it is the sum total of your entire exposure.

The Court: I guess he has answered the question, counsel.

SPECIAL SUBCOMMITTEE ON REFORM
OF FEDERAL CRIMINAL LAWS,
April 5, 1973.

Prof. EDWARD W. CLEARY,
College of Law
Arizona State University
Tempe, Ariz.

DEAR PROFESSOR CLEARY: At yesterday's meeting the Subcommittee asked that I seek additional information from you with respect to the following Rules in Article IV:

Rule 404(a)(2)

1. Exactly what is the current law?
2. Exactly what did the Advisory Committee have in mind in adding to the March 1971 draft the words "or evidence . . . aggressor"?
3. Should the limitation of applicability of the added language to "homicide" cases be extended to other crimes of violence—e.g., assaults, manslaughter, etc.?

Rule 404(b)

The Subcommittee considers the change in language between the March 1971 draft and the current draft as being one primarily of emphasis. However, there was some feeling that the earlier version was closer to being an expression of existing law. Any light you can shed on this would be appreciated.

Rule 405(a)

1. Why was the last sentence added to the text of the 1969 draft?
2. What was the reasoning behind recognizing opinion evidence as a means of proving character, thereby departing from the usual contemporary practice?

Rule 405(b)

1. Can you supply any further justification for support of the change being made in existing law by this subsection in allowing inquiries as to specific instances of conduct as part of a case in chief when character is in issue?
2. Can you supply the Subcommittee with comments received by the Advisory Committee on this Rule?

I understand you will be speaking to the Administrative Law Judges tomorrow. If I have a chance, I plan to drop in and say hello.

Sincerely,

HERBERT E. HOFFMAN, *Counsel.*

ARIZONA STATE UNIVERSITY,
COLLEGE OF LAW,
Tempe, Ariz., April 13, 1973.

HERBERT E. HOFFMAN, Esq.,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. HOFFMAN: With regard to Article IV of the proposed Evidence Rules, I answer your inquiries of April 5, 1973, as follows:

Rule 404(a)(2)

(1) You ask what is the current law.

The weight of authority supports the first clause, i.e. the clause concerning a pertinent trait of character of the victim. Probably the only situations where the character of the victim used circumstantially is relevant are rape cases (on the issue of consent), homicides (on the issue who was the aggressor), and similar related offenses. See discussion and cases collected in 1 Wigmore, Evidence §§ 62, 63 (3rd ed. 1940).

As to the second clause, i.e. evidence of a character trait of peacefulness offered by the prosecution, both McCormick and Wigmore state that it is inadmissible as part of the prosecution's case in chief. Both authorities agree that there is disagreement in the cases as to when the prosecution may introduce the evidence in rebuttal, some allowing it only in rebuttal of evidence of violent character and others allowing it to rebut any evidence by the accused that deceased was the first aggressor. See Wigmore § 63; McCormick, Evidence § 193 (2nd ed. 1972). Wigmore favored the latter position, which appears to be supported by a majority of the more recent decisions and is that taken by the rule. Trying to distinguish between what are and what are not attacks on character seems not to be helpful in reaching a result.

In the situations to which the exception applies, the likelihood of there being no impartial witness serves to emphasize the need for the character evidence.

More or less as a footnote, it should be observed that evidence of the character or reputation of the victim in a homicide case is generally admitted as a circumstance bearing on the reasonableness of the conduct of the accused who claims self-defense. This is a wholly different use of the evidence and the proposed rule does not purport to deal with it.

(2) You ask what the Advisory Committee had in mind in adding to the March 1971 draft the words "or evidence . . . aggressor."

I believe that this inquiry is answered by my comments under (1).

(3) You ask whether the second clause of the exception should be extended to crimes of violence other than homicide.

Logic may well suggest this course, but the practical need for the evidence is much less. It therefore seems wiser not to expand the exception to the general prohibition against using character evidence circumstantially set forth at the beginning of the proposed rule.

Rule 404(b)

You inquire as to whether the change in language between the March 1971 draft and the draft transmitted to the Congress is not primarily one of emphasis.

The purpose of the change was to conform the proposed rule to the prefatory statement preceding the hearsay exceptions in proposed Rules 803 and 804. The need is for a form of statement which avoids suggesting that the evidence may not be objectionable under some other rule. The change in phraseology did not reflect a change in the thinking of the Advisory Committee but was made with a view to clarification. To that extent the change of language was one of emphasis.

Rule 405(a)

(1) You ask why the last sentence was added to the 1969 draft.

The sentence to which you refer first appears in the 1971 draft. At that time what is now the next to the last paragraph of the Advisory Committee's Note was added by way of explanation. Subsequently what is now the last paragraph was added by way of further explanation.

The sentence was added for purposes of clarification and simplification. In most jurisdictions, cross-examination of reputation witnesses as to specific instances of conduct has been limited to "have you heard" questions, to the exclusion of questions directed to the incident itself. As an exercise in logic this approach has some specious appeal, but realistically viewed it is an absurdity. The distinction becomes even more unacceptable when character is proved through the medium of opinion evidence. The sentence eliminates it.

The sentence makes clear that specific instances may not be recited in the direct testimony of reputation and opinion witnesses. It also makes clear that cross-examination is not limited to such matters as opportunity to learn of reputation or to form an opinion but extends as well to relevant specific instances.

(2) You ask what was the reasoning behind recognizing opinion evidence as a means of proving character, thereby departing from the usual contemporary practice.

The matter is covered in 7 Wigmore §§ 1980–1986, especially § 1986. In brief, here is what Wigmore says: The original practice called for the personal opinion of the witness, based on personal acquaintance. This was the English rule until the 1860's, when it was determined that the character of an accused was provable only by reputation. The original rule still prevails as to the character of witnesses. [To the same effect is Cross, Evidence 221, 222 (3rd ed. 1967).] The early American rule followed the original English rule, but eventually departed from it in favor of reputation, though a combination of reputation and opinion came to prevail with regard to the character of witnesses for veracity. The so-called rule against opinions is not a satisfactory ground for abandoning the original rule.

Opinion based on personal acquaintance is far more helpful than some supposed reputation consisting of "the secondhand, irresponsible product of multiplied guesses and gossip." See also, with respect to proving the character of witnesses for veracity, McCormick § 44, at 90, 91.

Rule 405(b)

(1) You ask whether I can supply any further justification for support of the change being made in existing law by allowing inquiries as to specific instances of conduct as part of a case in chief when character is in issue.

I must observe at the outset that the subdivision simply states existing law and in no sense represents a change. McCormick § 187 (2nd ed.); 1 Wigmore §§ 202–213.

The subdivision applies, it must be noted, only in the relatively rare situations where character is truly an issue in the case, e.g. chaste character of victim in prosecution for seduction, incompetency of driver in action for negligently entrusting a vehicle. What is commonly called "putting his character in issue" by an accused does not actually involve character in issue, but rather a circumstantial use of character, which is not within the subdivision.

The justification for the rule is that character, when truly in issue, deserves the most searching inquiry and convincing proof. Specific incidents meet that standard and are therefore admitted despite problems of collateral issues and possible surprise. See McCormick and Wigmore, *supra*.

(2) In response to your request for copies of comments received by the Advisory Committee on this proposed rule, I will, of course, supply them. Since some delay will be involved, however, I will send them later under separate cover.

It was a pleasure to see you last week, and I particularly appreciated the ride to the airport.

Sincerely yours,

EDWARD W. CLEARY, *Reporter.*

ASSOCIATION OF AMERICAN PUBLISHERS, INC.,
Washington, D.C., April 10, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: We are submitting herewith a statement on behalf of the Association of American Publishers on the proposed Uniform Federal Rules of Evidence which are currently before your Subcommittee.

Our statement is being submitted in sufficient copies for each member of the Subcommittee.

Thank you for your consideration of our views.

Yours sincerely,

RICHARD P. KLEEMAN,
Assistant Director, Washington Office.

STATEMENT SUBMITTED ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., TO THE SPECIAL SUBCOMMITTEE ON REFORM OF FEDERAL CRIMINAL LAWS REGARDING THE UNIFORM FEDERAL RULES OF EVIDENCE

Mr. Chairman and Members of the Subcommittee, our Association, which represents the book and educational materials publishing industry, welcomed the action of the Congress in postponing the effective date of the Uniform Federal Rules of Evidence until there has been close scrutiny of the proposed rules and positive action upon them by the Congress.

In the following statement, our Association, whose members are responsible for at least three-fourths of the annual American production of books, will confine its comments on the substance of the proposed rules to those issues most relevant to publishing in particular and to First Amendment freedoms in general.

Since the people's right of access to information stems directly from First Amendment protection of the freedom of speech and of the press, any evidentiary rules must of necessity comply with First Amendment mandates. We shall, therefore, limit our comments to Article 5 as it relates to privileges and "secrets of state."

We feel there is a substantial question as to whether Article 5 of the proposed Rules on privileges can survive close constitutional scrutiny. Completely absent from Article 5 is any privilege covering confidential sources and information given to news and information gatherers and disseminators. Recent experience and many pages of testimony before other Congressional subcommittees specifically considering "shield" legislation is sufficient evidence of the fact that careful consideration must be given as to whether such a privilege should be included in any comprehensive legislation on privileges.

The omission of a "newsman's" protection is highlighted by the inclusion of a comprehensive privilege to the government to refuse to disclose the identity of a government informer. Inclusion of the identity-of-informer privilege would seem to be based upon a concern for the well-being of the particular informer and a general desire to encourage others to impart information without the fear of excessive self-involvement or risk. Certainly the purpose of shield legislation is no less vital; it is also very analogous. The absence of a "newsman's" protection resulting in the compulsory disclosure of the identity of confidential sources could very well endanger the well-being of a particular source and would certainly lead to a reluctance on the part of other potential sources to impart confidential information. The overriding risk is, of course, the impediment to access to information and a hindrance to the free flow of information to the public.

Absence of a "newsman's" protection in the Rules of Evidence would also result in the invalidation of the various state shield laws for federal proceedings. Hence, the efforts already made in the direction of re-fortifying the First Amendment in its goal to create and protect a free flow of information to the public will suffer a tremendous setback.

Another problem raised by Article 5 of the Rules is the comprehensive Rule 509 on "secrets of state" and "other official information". While a concept of a privilege for state secrets is not new, Rule 509 expands the categories of information to which the privilege applies, decreases the government's burden of showing the need for non-disclosure, and limits the procedural rights of the parties and counsel to contest the government's claim.

With respect to "secrets of state", the Rule does not require any showing that disclosure would be contrary to the public interest. It does not even allow the court to review the "secret" information for the purpose of making it's own de-

termination of that issue. Moreover, the definition of "secrets of state" is sufficiently broad to allow the government to claim the privilege with respect to any information relating to defense or international relations. The government need only show "reasonable likelihood of danger" that the evidence will reveal a secret of state. Much information which may fall within that phraseology has been revealed to the public, contrary to the government's desires, and has caused no harm to the national security whatsoever. The obvious example in the Pentagon Papers. Even now there is a misunderstanding among the State Department, the Senate Foreign Relations Committee and U.S. District Court Judge Byrne, presiding over the Ellsberg case, as to what portions of the documents are still "secret".

The opinions of the Supreme Court Justices in the Pentagon Papers case (*New York Times v. United States*) are helpful in pointing out the problems with Rule 509. First is the over-breadth of the definition of a "secret of state". That definition is even less precise than that of "security" as used by the government in the Pentagon Papers case. In his opinion in that case, Justice Black noted that:

"The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."

The decisions in the Pentagon Papers case also illustrate the problems with the procedures set forth in Rule 509. As noted above, these procedures do not require the government to submit the material in question to the court for its own scrutiny and do not impose any burden on the government to show that actual harm will result from disclosure.

In discussing the Pentagon Papers themselves—and not just government assertions with respect thereto—Justice Stewart stated:

"I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate and irreparable damage to our nation or its people."

Similarly, Justice Brennan found that the Government had to make a strong showing of "direct, immediate and irreparable" harm.

"Thus, only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis on which that aid is sought to scrutiny by the judiciary."

Neither the basis for this sort of analysis, nor the imposition of a burden is contained in Rule 509. Although the Supreme Court has passed on the Uniform Rules of Evidence, it is clear from the dissent of Justice Douglas, that the Court did not particularly review the Rules and cannot be said to have sanctioned any one or all of them. It would seem that Rule 509 is so directly in conflict with recent opinions of the Supreme Court Justices that that Rule would probably not withstand scrutiny by the Court. This, of course, is apart from the issue of whether the Rule appears proper to the Congress.

With respect to other official information, we question whether such a category for privilege was ever before in existence. Its broadness and lack of compelling need for non-disclosure is indicated by the Rule itself, which allows any attorney representing the government to assert the privilege. The mere requirement that the disclosure be shown to be contrary to the public interest does not begin to bring it within the realm of genuine national security requirements. Indeed, it could be argued that any information which might be embarrassing to government officials could be contrary to the public interest by weakening the public's confidence in its officials. Yet, that is exactly the kind of information to which the public, let alone any parties in litigation with the government, is entitled.

Another problem is raised by the procedures contained in 509(c) with respect to the rights of counsel to oppose the assertion of the privilege by the government. As to "secrets of state", counsel can be precluded from seeing the government's presentation of the claim, let alone the underlying material, and counsel can be precluded from an opportunity to inspect "official information" presented to the Court *in camera*. In terms of *in camera* inspection, the Rule ignores completely the traditional distinction between purely factual information and matters of law and policy. Presumably even solely factual material would not be available for inspection by opposing counsel. It does appear that the drafters of Rule 509(c) forgot that the American legal system is predicated on the belief that Courts can best make decisions when issues are presented by opposing adversaries.

In short, we feel that Rule 509 so greatly increases the possibility of government secrecy and hence so greatly decreases the public's access to information to which it is entitled, that it raises substantial questions of conflict with the clear goals of the First Amendment. Any legislation dealing with the privilege of state secrets or other official information must be carefully drafted to impinge upon the First Amendment as little as possible. Rule 509 does not comply with that need for strictly delimited legislation. Added to the problems inherent with the Rules themselves, is the disturbing fact, brought out in recent hearings, that Rule 509 was added to the proposed Rules at the request of the government, and without full consideration of all persons who participated in drafting other sections of the Rules.

In view of the foregoing, we believe it essential that Congress, after subjecting the Rules to thorough analysis, develop Rules which are compatible with the overriding considerations of First Amendment goals.

CENTER FOR LAW AND SOCIAL POLICY,
Washington, D.C., April 13, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee of the Committee on the Judiciary, Rayburn Building, Washington, D.C.

DEAR CHAIRMAN HUNGATE: In response to your request, we enclose a brief statement of the problems we have encountered with each of the Federal Evidence Rules the Subcommittee is still considering that we previously identified as "controversial" in our testimony on behalf of the Washington Council of Lawyers.

More important than these individual problems is our overriding concern that whatever revisions in the Rules your Subcommittee adopts be exposed to the widest spectrum of the bar and the public before they are formally proposed as legislation. The crucial importance of wide public circulation and opportunity for comment has been amply demonstrated by the flaws in the Court-proposed Rules. The need is just as great now with respect to the Subcommittee's own draft Rules.

To ensure that bar and lay groups and individuals are afforded the maximum feasible opportunity to review the revisions in the Rules and bring their views to the Subcommittee's attention in timely fashion, we believe it is essential for the Subcommittee as a whole to consider and decide upon effective mechanisms for guaranteeing that both the bar and the public are: (1) *fully informed* that the Subcommittee plans to recommend revised Rules in the form of legislation; (2) given an adequate opportunity to *obtain copies* of the proposed revisions and *adequate time to study* and report on them; (3) given an adequate opportunity to present their views to the Subcommittee through *both* (a) *written comments* and (b) *public hearings*.

We believe the Subcommittee should also plan: (4) to meet again following the public hearings to make further changes indicated to be necessary.

We are especially concerned that those the Subcommittee affirmatively alerts to its proposed legislation include not just the national and state bar associations but also the criminal defense bar, legal services bar, public interest and civil liberties and civil rights lawyers and groups, the poverty bar, and the public at large.

In short, we believe it is essential that the Subcommittee not make the same mistake of inadequate provision for public scrutiny and comment that was harmful to the Court-proposed Rules and instrumental in provoking the opposition of much of the bar.

An additional problem you will have to face is revision and/or rewriting of the accompanying explanatory Notes. Notes to other procedural rules promulgated by the Supreme Court have been integral to the rules' interpretation and application. Messrs. Cleary and Jenner suggested in their testimony that that is also true here: purposes and explanations of rules are often found only in the Notes. Without them, the Rules may lack the supporting material necessary for just and meaningful application. Whether the Subcommittee will choose to do away with Notes, or rewrite them and issue them in the form of a Committee Report, or some other alternative, should be a subject on which members of the Bar (and especially those involved in the drafting processes on the Advisory and Standing Committee) are invited to comment and testify at public hearings.

Sincerely,

CHARLES R. HALPERN,
GEORGE T. FRAMPTON, JR.

Rule 606(b)—Impeachment of Jury Verdicts. Comments to the Advisory Committee and the legal literature reveals a considerable difference of opinion about the best substantive rule in this area. Since it appears questionable whether the Rule as drafted reflects its purpose as stated by the accompanying Notes, and since this is arguably a matter of substantive law (concerning proper grounds for a new trial or reversal on appeal) that ought not to be dealt with under the rubric of a witness' "competency," one solution to the problems involved might be to omit the Rule altogether and leave the matter to caselaw.

Rule 607—Impeachment of a Party's Own Witness. Criminal defense lawyers apparently fear that this new rule may be subject to abuse by the Government in criminal prosecutions (see, e.g., NLADA testimony). This problem would presumably be alleviated by amending the Rule to apply only in civil cases, where the need for the new rule is strongest.

Rule 608—Character evidence. Rule 608 must be read in conjunction with Rules 404 and 405. Together, these rules would (a) permit impeachment of a witness' character by testimony relating not just to his "reputation" for truthfulness but others' "opinions" about the witness, and (b) permit inquiring into all manner of a witness' former conduct to impeach him, on cross.

As the Note admits, "modern practice has purported" to repudiate the first rule. The second, as Mr. Johnson points out in his letter to Chairman Hungate dated April 6, 1973, "may authorize open season on witnesses . . . in the federal courts."

This general broadening of the admissibility of character evidence is something the Subcommittee might study as a whole, investigating and making its own determination of the existing law and practice in federal courts, with a view to limiting impeachment of a witness' character to "reputation" evidence and excluding altogether impeachment by prior conduct falling short of criminal charges or convictions.

Rule 609—Impeachment By Prior Conviction. First, this Rule is inconsistent with the underlying thrust of Rules 404, 405, and 608 that limit use of character evidence to that closely related to truthfulness. A consistent Rule here would permit impeachment only by prior convictions involving dishonesty or perhaps moral turpitude (e.g., Rule 609(a)(2), now applicable only to misdemeanors).

Second, the Rule as now drafted is the only Rule that explicitly contradicts and is inconsistent with Rule 403, permitting and requiring the trial judge to exclude evidence whose potential for prejudice outweighs its probative value. The existing Rule 609 does not permit the trial judge *any* discretion, but commands him to admit evidence he may well believe should not be admitted.

Third, the Advisory Committee's own considered view would have recognized such discretion in the trial judge (March 1971 Draft), and this view ought to be given weight.

If the Subcommittee decides to adopt the existing no-discretion approach, two difficulties remain. First, impeachment by juvenile court convictions apparently contradicts present law. Second, the "ten year time cut-off" has apparently been changed from the Advisory Committee's own formulation to one that violates the stated purpose of the provision.

Rule 706—Court Appointed Experts. Trial lawyers' groups' reports to the Advisory Committee suggested that in civil cases this provision could upset the litigative balance unfairly in many instances. Since the Federal Criminal Rules already provide for such experts in criminal cases, these objections could presumably be met simply be deleting this Rule.

Article VIII—Hearsay. Other groups testified at great length on this article. We note that the most vociferous objections to Article VIII might be met by making a number of small changes such as eliminating Rule 803(24) and altering the definition in the Rule and Notes of "unavailability for trial."

Article V—Privileges, Etc. The bulk of our previous testimony adequately presented the general and specific objections to Article V: problems of constitutionality and federalism; a bias against personal privacy and in favor of Governmental secrecy; unprecedented new rules for Governmental witholding of information; etc. The simplest way to meet the many objections to this Article made by various witnesses would, of course, simply be to omit the Article in its entirety.

THE UNIVERSITY OF IOWA,
COLLEGE OF LAW,
Iowa City, Iowa, April 16, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Herb Hoffman called me late last week and requested that I provide additional information regarding the posture of state authorities supporting the approaches I suggested to you in my letter of February 27 concerning (1) competency of jurors to impeach a jury verdict and (2) scope of cross-examination.

RULE 606(b). COMPETENCY OF JUROR: INQUIRY INTO VERDICT

The final draft of any enlightened evidence code should embrace an approach which allows inquiry into quotient verdicts and the like (see my letter of February 27). Our state (Iowa) has had such a rule for over 100 years, with salutary results. Dean Mason Ladd's favorance of such an approach is demonstrable from his oral comments as well as the written comments he has incorporated in his evidence casebooks spanning almost 30 years. The Comment in 53 Iowa Law Review 1366, 1367 (1968) lists the following states as adhering to the approach which I have suggested, a rule which would permit jurors to testify to objective jury misconduct which does not inhere in the verdict: *Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, Washington,* and *Wisconsin.* Id. at 1367 n. 3. To this list a most prestigious addition came in 1969. Chief Justice Traynor aligned *California* with the view I have advocated in *People* v. *Hutchinson,* 455 p. 2d 132 (Cal. 1969) (proof of overt acts of misconduct allowed; proof of subjective reasoning processes of jurors which cannot be corroborated disallowed). In his opinion, Justice Traynor stated that the new rule allowing proof of *objective misconduct by juries either within or without the jury room* "has been advocated by the commentators . . . and has been the basic limitation on proof set by the leading decisions allowing jurors to impeach their verdicts." He based this extremely well-reasoned California decision on the original Iowa case in this line of authority, *Wright v. Illinois & Miss. Tel. Co.,* 20 Iowa 195 (1866).

RULE 611(b). SCOPE OF CROSS-EXAMINATION

In his September 1972 speech at the University of Iowa, Solicitor General Griswold posited this question: "Should not the scope of cross-examination be restricted to what has traditionally been its limitation in the Federal courts and numerous state courts, namely, the subject matter of direct examination, and credibility?" The limited Federal rule of cross-examination had its genesis in an 1840 decision of the Supreme Court, *Philadelphia and Trenton R.R. v. Stimpson,* 39 U.S. (14 Pet.) 448 (1840), and the rule spread rapidly to all Federal courts and four-fifths of the state courts. See Carlson, "Cross-Examination of the Accused," 52 Cornell Law Quarterly 705 (1967) (collecting the authorities). In the 1972 edition of McCormick's *Handbook on Evidence,* the following relevant point is made in § 21, setting forth the posture of the authorities today:

> The Federal courts generally and the majority of the states have agreed in the view that the cross-examination must be limited to the matters testified to on the direct examination.

The McCormick *Handbook* indicates that England and about one-fifth of the states follow the opposing wide-open approach to cross-examination. If we eliminate the jurisdictions listed by McCormick as adhering to the wide-open

view, the following jurisdictions would appear to remain, falling into the majority rule of narrow cross-examination which I favor:

Alabama	Iowa	North Dakota
Alaska	Kansas	Ohio
Arkansas	Kentucky	Oklahoma
California	Maryland	Oregon
Colorado	Michigan	Pennsylvania
Connecticut	Minnesota	Rhode Island
Delaware	Montana	South Dakota
District of Columbia	Nebraska	Utah
Florida	Nevada	Vermont
Hawaii	New Hampshire	Virginia
Idaho	New Jersey	Washington
Illinois	New Mexico	West Virginia
Indiana	New York	Wyoming

I believe the Federal Advisoy Committee has in several areas made excellent suggestions for a much-needed set of evidence rules in federal trials. Where their work can be improved upon, you are picking these spots up, strengthening their work, and the final result will be an excellent product. Best regards as you proceed. I hope that my references concerning the position of the various states on certain matters as above outlined is of assistance to you.

Sincerely,

RONALD L. CARLSON,
Associate Dean and Professor of Law.

CORNELL LAW QUARTERLY, VOLUME 52, SPRING 1967

CROSS-EXAMINATION OF THE ACCUSED

(*By Ronald L. Carlson*†)

A rule of cross-examination long operative in federal criminal trials limits the permissible scope of cross-examination to matters opened up by the defendant in his direct testimony. A competing rule employed in some states permits wide-open cross-examination of the accused. The author traces the history of the more limited federal rule and examines its constitutional basis. The question of whether the limited rule is required by the fifth amendment is explored, as well as the implications of this question for states conducting criminal prosecutions under the wide-open rule. Finally, the author considers the problem of unsettling prior convictions should the fifth amendment impose a constitutional limitation upon cross-examination.

> "There is no higher nor more important duty resting upon the courts than to see that the citizen is fully afforded the rights and immunities guaranteed to him by the Constitution."*

An important consideration in criminal trials is the extent to which the accused may be cross-examined once he takes the stand. Whether this examination is limited to matters raised in the examination in chief, or whether the scope of cross-examination extends broadly to the entire case can be critically significant in defense counsel's decision to call the accused as a witness.

There are two major views on this problem of cross-examination. The American (or federal) rule limits cross-examination of the defendant to matters stated in the direct examination. Another view, termed the Massachusetts (or English) rule by many writers, allows cross-examination on all relevant phases of the case. Several jurisdictions follow this broad interrogation rule and require an accused to answer cross-examination questions which inquire into matters foreign to the defendant's testimony in chief.[1]

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†Assistant Professor of Law, University of Iowa. The author gratefully acknowledges the research assistance of Leon Shearer of the College of Law.

*Tucker v. United States, 5 F. 2d 818, 824 (8th Cir. 1925).

[1] Apparently the rule permits cross-examination by the prosecution on the whole case, the only limitation being that the inquiries direct themselves to relevant matter. 4 Jones, Evidence § 928, at 1742-43 (5th ed. 1958); McCormick, Evidence § 26, at 50 (1954) [hereinafter cited as McCormick]. See e.g., Clarke v. State, 78 Ala. 474 (1885); State v. Domino, 714 La. 950, 102 So. 2d 227 (1958); Commonwealth v. Smith, 163 Mass. 411, 40 N.E. 18 (1895); Rush v. State, 254 Miss. 641, 182 So. 2d 214 (1966); State v. Huskins, 209 N.C. 717, 184 S.E. 480 (1936); State v. McGee, 55 S.C. 247, 33 S.E. 353 (1899); Brown v. State 33 Tex. Crim. 597, 44 S.W. 176 (1898).

The competing rules have received independent evaluation and rest upon different theories.[2] The Massachusetts rule was brought from England, where it is still in use. In both civil and criminal cases this rule is based on the philosophy that when a witness testifies, he should present all the facts unrestricted by technical rules of evidence. Court and counsel are relieved of the duty of determining when questions are within the proper scope of cross-examination and when they are without. This ease of application was a major factor in winning Wigmore's support for the rule.[3]

An argument often advanced on behalf of the more limited federal rule is that it makes for orderliness of trial. A party may not develop a major portion of his case out of normal order through the vehicle of cross-examination. It has also been suggested that there is an element of basic fairness in preventing the cross-examiner from using a witness called by the opposition to establish his own case through the device of leading questions.[4] The Supreme Court's solicitude for the

[2] It is beyond the purview of this article to resolve the extended debate over which rule is preferable as a rule of trial procedure, and the major contentions advanced for the two rules are adverted to only briefly. The purpose of this article is to inquire whether one of the rules operates in violation of the privilege against self-incrimination.

[3] 6 Wigmore, Evidence § 1888, at 544-45 (3d ed. 1940) [hereinafter cited as Wigmore]. Wigmore is critical of the federal rule and objects to its appellation as the American rule, despite its operation in the vast majority of American jurisdictions. The advantages and disadvantages of the Massachusetts rule, the federal rule, and the variations of each have been well and fully set forth. As summarized in Smith, Rules Relating to the Examination of Witnesses 219 (1948):

And so each rule has its advocates. The virtue of the *Massachusetts* rule lies in the simplicity of its application as originally pointed out by *Chief Justice Shaw*. A *Massachusetts* lawyer will also remind his listener of the oath taken by all witnesses to tell the truth, the *whole* truth, and nothing but the truth. This he does not do under the *Federal* rule in cases where he is not later recalled as a witness.

The *Federal* practitioner will emphasize the fact that the rule in his court makes for a more orderly presentation of the case and prevents or minimizes the danger of a confusion of issuss, because in theory at least, the jury hears only one party's case at a time.

[4] In 4 Jones, Evidence § 908, at 1700 (1958) a spirited defense of the federal rule is presented:

The rule limiting the cross-examination to the general subject matter of the direct examination is certainly more conducive to the systematic and orderly trial of causes; and it has the further merit that it prevents the cross-examiner from proving, by leading questions, independent facts by a witness who is friendly to him and whom the a lverse party is obliged to call. This rule clearly applies where the attempt is made to draw out, by cross-examination, facts having no connection with the matters which have been stated in the direct examination, but which constitute the substantive defense or claim of the cross-examiner. [Footnotes omitted.]

The United States Supreme Court made this relevant comment regarding the limited rule in Wills v. Russell, 100 U.S. 621, 625-26 (1879):

Authorities of the highest character show that the established rule of practice in the Federal courts and in most other jurisdictions in this country is that a party has no right to cross-examine a witness, without leave of the court, as to any facts and circumstances not connected with matters stated in his direct examination, subject to two necessary exceptions. He may ask questions to show bias or prejudice in the witness, or to lay the foundation to a limit evidence of prior contradictory statements. . . .

It has been twice so ruled by this court, and is undoubtedly a valuable rule of practice, and one well calculated to promote regularity and logical order in jury trials. . . . In accord, Note, "The Scope of Cross Examination," 30 Ky. L.J. 317 (1942), wherein four major reasons are advanced for the majority rule. Contra, 6 Wigmore § 1887; McCormick § 27; Carroll, "The Extent of the Cross-Examination to Which an Accused May Be Subjected When He Offers Himself as a Witness in His Own Behalf," 11 Va. L. Rev. 249 (1925); Comment, "Scope of Cross-Examination in Louisiana," 10 Tulane L. Rev. 294 (1936). See generally McKelvey, Evidence 585-86 (5th ed. 1944); Maguire, Evidence: Common Sense and Common Law 44-49 (1947); Morgan, Basic Problems of Evidence 65-67 (1962).

It may be argued that the continued retention of the restricted rule in the great majority of states lends credence to proponent's claims that it operates as a salutary tool of trial procedure. It is sometimes urged that since the accused may not be called as a witness for the prosecution in the first instance, the order of trial justification a lvanced for the majority rule fails in criminal cases. However, other objectives of the rule remain, including constitutional considerations and the shielding of the accused from unlimited cross-examination. That the scope objection is frequently interposed is evidenced by the number of federal and state appellate decisions dealing with the proper limits of cross-examination.

The manner of application of the federal rule is importa nt for states which employ it. Two interpretations have been suggested:

First, cross-examination is limited to the precise facts testified to on the direct; or, second, cross-examination includes questions concerning facts which it was the purpose in examining on direct to prove. Although these two interpretations bothered the courts for a number of years, it appears that all courts following the federal rule have now adopted the latter interpretation.

Note, "The Scope of Cross Examination," 24 Iowa L. Rev. 564, 568 (1939). The cross-examination may search the full details of matters within the scope of the direct examination. Branch v. United States, 171 F. 2d 337 (D.C. Cir.1948).

In courts following the federal rule, new matter may be inquired into on cross-examination for the purpose of impeaching the witness. See, e.g., United States v. Fontana, 231 F.2d 807, 809-812 (3d Cir. 1956). It is not difficult in theory to square the departure allowed in impeachment with the federal rule itself. The explanation is that since such cross-examination does not deal with substantive matter it does not really open new matters: it deals with testimony brought out on direct by weakening what was there said. See Note, "The Scope of Cross Examination," 24 Iowa L. Rev. 564, 574 (1939).

limited rule is evidenced by its rejection of a proposed provision for the Federal Rules of Civil Procedure which would have permitted cross-examination on every material matter in the case regardless of the scope of direct examination.[5]

The limited federal rule had its genesis in an 1840 decision wherein the Supreme Court indicated "that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matter stated in his direct examination."[6] The rule spread rapidly and was applied fully in federal criminal

[5] The Court struck down the concluding sentence from the Advisory Committee's 1937 draft of Rule 43(b) which read: "Except as stated in the last preceding sentence, any witness called by a party and examined as to any matter material to any issue may be cross-examined by the adverse party upon all matters material to every issue of the action." In proposing amendments to the Rules in 1946 the Advisory Committee did not recommend any amendment to Rule 43. The Committee commented that the rule was working better than the commentators had expected. 5 Moore, Federal Practice ¶ 43.01[7] (2d ed. 1966).

The rejection of the wide-open rule by the Supreme Court was discussed in Bell v. United States, 185 F.2d 302, 310-11 (4th Cir. 1950):

> This rule [limited cross-examination] has been the subject of some attack; and an attempt was made by Advisory Committee when formulating the Rules of Civil Procedure in 1936 and 1937 to change the rule to allow cross examination upon all the material and pertinent issues of the action. The Supreme Court in rejecting these proposals and in adopting Rule 43(b) of the Federal Rules of Civil Procedure, . . . as it now stands, indicate that "the historic limitation upon the scope of cross examination to the subject matter of the direct examination is still to be enforced in the federal courts."

See also Special Committee on Evidence, Judicial Conference of the United States, "Preliminary Study of the Feasibility of Developing Uniform Rules of Evidence for the Federal Courts," 30 F.R.D. 79, 97-98 (1961).

On the subject of freedom of federal courts from state rules covering the scope of cross-examination, see generally Hendrey v. United States, 233 Fed. 5, 15 (6th Cir. 1916). See also Callahan & Ferguson, "Evidence and the New Federal Rules of Civil Procedure," 45 Yale L.J. 622, 634 (1936); Orfield, "The Reform of Federal Criminal Evidence," 32 F.R.D. 121, 141 (1961).

It now seems well settled that in the Federal courts a party has no right to cross-examine as to any facts or circumstances not brought out in direct examination. This rule is applied both in civil and criminal cases. See Northern Pac. R.R. v. Urlin, 158 U.S. 271 (1895); Houghton v. Jones, 68 U.S. (1 Wall.) 702 (1863); United States v. Spatuzza, 331 F.2d 114 (7th Cir. 1964); Dixon v. United States, 303 F.2d 226 (D.C. Cir. 1962); Wegman v. United States, 272 F.2d 31 (8th Cir. 1959); United States v. Kretzke, 220 F.2d 785 (7th Cir. 1955); United States v. Skidmore, 123 F.2d 604 (7th Cir. 1941); Leche v. United States, 118 F.2d 246 (5th Cir. 1941); Union Elec. Light & Power Co. v. Snyder Estate Co., 95 F.2d 297 (8th Cir. 1933); De Soto Motor Corp. v. Stewart, 62 F.2d 914 (10th Cir. 1932); Farley v. Norfolk & W. Ry., 14 F.2d 93 (4th Cir. 1926).

[6] Philadelphia & Trenton R.R. v. Stimpson, 39 U.S. (14 Pet.) 448 (1840). This Supreme Court decision was preceded by a Pennsylvania opinion of major import wherein Chief Justice Gibson of the Pennsylvania Supreme Court adopted the limited rule of cross-examination. Ellmaker v. Buckley, 16 S. & R. 72 (Pa. 1827). See 6 Wigmore § 1885. The rule of restricted cross-examination was a feature of English chancery procedure. The practice in England prior to the Simpson and Ellmaker decisions is summarized in Hinton, Cases on Evidence 267 n.71 (2d ed. 1931):

> In Dean of Ely v. Stewart, 2 Atk. 44 (1740), the following statement was made by Lord Hardwicke: "Where at law a witness is produced to a single point by the plaintiff or defendant, the adverse party may cross-examine as to the same individual point, but not to any other matter; so in equity, if a great variety of facts and points arise, and the plaintiff examines only as to one, the defendant may cross-examine to the same point, but can not make use of such witness to prove a different fact." This statement is probably correct as to the chancery practice of that period, when the written cross-interrogatories were almost as a matter of necessity based on the direct interrogatories. It seems, however, that Lord Hardwicke may have been mistaken as to the actual practice at law. In Dickenson v. Shee, 4 Esp. 67 (Nisi Prius, 1801), it was ruled by Lord Kenyon that a witness called by the plaintiff to prove one of the elements of his case was subject to cross-examination on a distinct matter of defense. The editor has been unable to find a ruling by a court in banc on the point.

McCormick's findings indicate that the American rule prevails in about four-fifths of the states. McCormick § 21, at 43. For the state of the law in various jurisdictions, see Chamberlayne, Trial Evidence § 340 (1936); 2 Conrad, Modern Trial Evidence § 1186 (1956); 4 Jones, supra note 1, § 928; 3 Wharton, Criminal Evidence § 889 (12th ed. 1955); 2 Underhill, Criminal Evidence § 504, at 1246-50 (5th ed. 1956); 6 Wigmore § 1890. It is interesting to note that in Missouri, where the wide-open practice prevails in civil cases, the accused in criminal matters is shielded from cross-examination except upon matters referred to in the examination in chief. See Mo. Ann. Stat. §§ 491.070, 546.260 (1952).

Wigmore sought to group all jurisdictions into three categories, including in addition to the two cross-examination rules already discussed the so-called "Michigan rule." This would permit broad cross-examination of the witness as to everything save the cross-examiner's affirmative case. 6 Wigmore § 1889. Morgan, however, notes that what Wigmore called the Michigan rule does not exist in Michigan. 1 Morgan, supra note 4, at 66; see Comment, "Cross-Examination: Permissible Scope in Michigan," 36 U. Det. L.J. 162 (1958). See also Annots., "Right To Cross Examine Witness in Respect of Facts Not Included in His Direct Examination," 108 A.L.R. 167 (1937); "Cross Examination of Witness Called To Testify on Particular Point or Under Order of Court," 7 A.L.R. 1116, 1125 (1920) (developing the minority rule and listing Georgia, Massachusetts, Michigan, and Mississippi thereunder); 58 Am. Jur. "Witnesses" § 629; 98 C.J.S. "Witnesses" § 378(b) (1957).

Although attempts at classification of jurisdictions have been criticized because of the various approaches employed in the several states using the federal rule, such classifications continue. See Maguire, Weinstein, Chadbourn & Mansfield, Cases on Evidence 283-84 (5th ed. 1965); Note, "The Limiting Effect of Direct Examination Upon the Scope of Cross Examination," 37 Colum. L. Rev. 1373 (1937).

cases. Significantly, certain decisions treating the rule in criminal prosecutions suggested that its application was not merely appropriate trial procedure, but had a basis in the Constitution.[7] Important judicial language to this effect, not heretofore analyzed for the point explored in this article, indicates that an accused who takes the stand waives his fifth-amendment privilege against self-incrimination only as to matters covered in the direct examination.[8]

Is the federal cross-examination rule constitutionally oriented? Is cross-examination beyond the scope of the direct examination prohibited by the federal privilege against self-incrimination? In 1964 the federal privilege against self-incrimination was extended to the states in *Malloy v. Hogan*.[9] Following this extension, the privilege was applied to limit stringently pretrial interrogation of suspects by state officers,[10] and to prohibit comment on the accused's refusal to testify at trial.[11] It must now be considered whether this extension of the fifth amendment imposes limits on cross-examination of the accused in state prosecutions.

This problem has obvious ramifications for those jurisdictions which permit wide-open cross-examination; if a rule of restricted cross-examination is constitutionally required, such wide-open interrogations of the accused may be directly violative of his fifth amendment rights. Moreover, the issue is important even in the majority of states which apply the limited rule of cross-examination. The limited rule is more difficult to apply in practice, and more likely to lead to error and resultant appeals. Hence, if it is constitutionally required, the "harmless error" doctrine may not be available to cure its misapplications, and there will be a significant increase in the number of cases holding trial court rulings to be reversible error. These considerations raise a serious question for the administration of criminal justice: may a state properly apply the broad rule of cross-examination when the accused takes the stand.

DECISIONAL GUIDELINES

The answer to the inquiry just raised turns on whether the limited federal rule was adopted only as a rule of trial procedure, or whether it was required by the constitutional privilege against self-incrimination. Resolution of this issue necessitates examination of case language bearing on the point.

After the adoption of the fifth amendment in 1789, the federal courts were faced with the task of making its written protections meaningful. In implementing the self-incrimination clause, the courts prohibited comment on an accused's failure to testify in federal criminal cases.[12] Paralleling this development was the evolution of the rule restricting the permissible scope of cross-examination in federal trials. Early decisions had no occasion to consider whether the limited cross-examination rule was required by the fifth amendment in criminal cases. The question of the extent of a defendant's waiver of his constitutional privilege

[6] It should be noted that the question of the scope of cross-examination and that of the scope of waiver of the privilege are separate and distinct. See 1 Morgan, supra note 4, at 179–80. Although both may serve to limit cross-examination, the former operates by virtue of statutory or decisional authority, whereas the latter expresses a constitutional concept. The interaction of the two principles occurs when the accused takes the witness stand. If the scope of waiver is limited, i.e., if the privilege is waived only as to matters testified to on direct examination, the rule of limited cross-examination may operate as an ancillary procedural device to implement such a concept of waiver and prevent cross-examination offensive to the constitutional privilege. Of course, a jurisdiction can apply a broad waiver rule and deem the privilege destroyed as to every matter relevant to the merits, yet employ the limited cross-examination rule as a procedural device. But the converse does not appear equally true. A jurisdiction applying a narrow waiver rule may be prohobited by privilege considerations from applying a rule of wide-open cross-examination of the accused since such interrogations, exceeding the boundaries of the waiver, delve into matter respecting which the privilege has not been waived. See Note, 5 U. Chi. L. Rev. 116 (1937). Applying the wide-open cross-examination rule in this situation and requiring the defendant to respond may compel him to speak in derogation of his privilege of silence.

Intimations that a limited cross-examination rule may be required by the fifth amendment do no elevate the federal cross-examination rule as such to the level of a constitutional standard. What is implied is that the operative rule governing the scope of cross-examination must not be inconsistent with the applicable waiver rule.

[8] See, e.g., Brown v. United States, 356 U.S. 148, 154–55 (1958); Powers v. United States, 223 U.S. 303, 315 (1912); Fitzpatrick v. United States, 178 U.S. 304, 315–16 (1900); Ziegler v. United States, 174 F.2d 439, 446–47 (9th Cir. 1949); Madden v. United States, 20 F.2d 289 (9th Cir. 1927); Tucker v. United States, 5 F.2d 818 (8th Cir. 1925); Wilson v. United States, 4 F.2d 888 (8th Cir. 1925); Harrold v. Territory of Oklahoma, 169 Fed. 47, 51 (8th Cir. 1909); United States v. Barker, 11 F.R.D. 421, 422 (N.D. Cal. 1951).

[9] 378 U.S. 1 (1964).

[10] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

[11] Griffin v. California, 380 U.S. 609 (1965).

[12] The history of the no comment rule is traced in Note, "Griffin v. California," 70 Dick. L. Rev. 98 (1965). See also Friendly, "The Bill of Rights as a Code of Criminal Procedure," 53 Calif. L. Rev. 929, 938–40 (1965), wherein the author develops the position that the no comment rule, with its statutory base, emerged in federal practice as a result of legislative mandate rather than constitutional prohibition. But compare Justice Harlan's concurring opinion in Griffin v. California, supra note 11, at 615.

did not confront the courts in this context for some time. When this question was ultimately reached, a body of federal authority developed attributing constitutional dignity to the limited rule.

Tucker v. United States [13] is an example from this line of precedent. In *Tucker*, the defendant and others were charged with using the mails to promote fraud. The indictment alleged that they mailed newspapers containing advertisements instrumental to a fraudulent scheme at a United States Post Office. It was essential for the government to prove that a fraudulent scheme existed and that in the execution thereof the defendant caused the advertisements to be inserted in the paper. At trial the defendant's direct testimony went wholly to refuting the existence of any fraudulent scheme; he at no time went into the issue concerning the insertion of ads in the newspaper. On cross-examination he was asked if he inserted the advertisements as charged. Over objection that such question was outside the scope of the direct examination and therefore compelled the defendant to be a witness against himself, the trial court required the defendant to answer. After citing pertinent decisions of the Supreme Court, the court of appeals reversed in terse language:

The questions asked the witness Dudley Tucker on cross-examination were clearly outside the scope of his direct testimony. They had reference to the second element of the offenses charged, while his direct examination was limited to a refutation of the first element. The questions on cross-examination did not in any way test the truth of the direct examination; they did not seek to explain or modify the same; they were asked for the sole purpose of proving an independent element in the government's case. In eliciting the answers to the questions propounded to Dudley Tucker with reference to the insertion of the advertisements, the government made Dudley Tucker its witness, and compelled him over seasonable and proper objection to be a witness against himself, in violation of the Fifth Amendment to the Constitution. There is no higher nor more important duty resting upon the courts than to see that the citizen is fully afforded the rights and immunities guaranteed to him by the Constitution.[14]

As the court observed during its discussion, the facts surrounding the historical origin of the privilege against self-incrimination shed little light on this problem. The history of the privilege extends into the early years of the common law to a time when an accused could not testify on his own behalf. The first American statute according the defendant capacity to give evidence was not enacted until 1864.[15] In 1878 Congress, by statute, provided that a person charged with a federal offense could be a competent witness at his trial.[16] Following this grant of capacity to testify, it became relevant to explore the protective boundaries of a defendant's privilege at trial. The *Tucker* court reasoned that the federal exclusion of compulsory self-incrimination prohibited forced disclosure on issues foreign to the defendant's direct testimony:

If there is good reason why a defendant should not be compelled to be a witness against himself, there ought to be equally good reason why, if he has testified voluntarily upon one issue, he should not be compelled to testify against his will concerning matters wholly unrelated to that issue, which would not be within the scope of proper cross-examination if he were an ordinary witness.[17]

The above decision relied in part on the prior case of *Harrold v. Territory of Oklahoma*,[18] which construed the defendant's privilege in this way:

He may not "be compelled in any criminal case to be a witness against himself." When he testifies as a witness he waives this privilege of silence and subject himself to cross-examination and impeachment to the same extent as any other witness would subject himself thereto in the same situation, but no farther. He may be cross-examined upon the subjects of his direct examination, but not upon other subjects . . . . An accused person who testifies to the single fact that a bill of sale or a deed was signed by the grantor does not thereby waive his privilege to refuse to testify upon every other material issue in his case. He

[13] 5 F.2d 818 (8th Cir. 1925).
[14] Id. at 824.
[15] See Note, "Griffin v. California," 70 Dick. L. Rev. 98, 100 (1965).
[16] 20 Stat. 30 (1878), as amended 62 Stat. 833 (1948), 18 U.S.C. § 3481 (1964).
[17] Tucker v. United States, 5 F. 2d 818, 822 (8th Cir. 1925). It appears that cross-examination only on matters relevant to the direct operates to limit interrogation of the accused much more than cross-examination on all matters relevant to the issue. Wigmore expressed preference for broad interrogation, and for the view that voluntary taking of the witness stand by an accused constitutes a waiver of the privilege against self-incrimination as to all relevant matters. 8 Wigmore § 2276(2), at 459–62. Another view limits the waiver to matters testified about on direct examination. Wigmore urges that this latter view be interpreted to produce a waiver identical in scope to the broad waiver rule by using the theory that the subject of the direct examination of an accused is the whole fact of guilt or innocence. Id. at 467. The Tucker case appears to reject such an application.
[18] 169 Fed. 47 (8th Cir. 1909).

waives his privilege of silence upon the subjects relative to which he testifies, but upon no other.[19]

These cases agree that a full and fair cross-examination of the witness is an absolute right. But when the witness has not employed his testimony to present evidence on a particular issue, it is error to cross-examine him on that issue. The decisions reject as constitutionally improper the proposition that an accused waives his protective privilege on every material issue in the case when he testifies.

Other federal cases have been added to the above.[20] A recent court of appeals decision asserts that the extent of the accused's waiver of the privilege at trial is determined by his direct testimony,[21] citing two Supreme Court decisions as supporting its holding.[22] Therefore, it is appropriate at this point to turn to the proclamations of the high Court relating to the problem. The Court has on numerous occasions made clear its requirement that cross-examination be confined to the subject of the direct examination. As indicated above, the question is whether the Court is thereby expressing a concept of constitutional proportions.

Of the cases which consider the problem, *Fitzpatrick* v. *United States*[23] is one of the most significant. The defendant, convicted of murder in the federal District Court for Alaska, argued that his privilege against self-incrimination had been violated by the trail court's failure to restrict the cross-examination when he testified.[24] After reviewing the record, the Supreme Court, holding that the cross-examination of the accused did not exceed the direct, affirmed the conviction. In so doing it set forth the constitutional guidelines governing a defendant's waiver of the federal privilege at trial:

> Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. . . . *If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of State v. Lurch, 12 Oregon 99, is authority for saying that this would be error. It would be a clear case of the defendant being compelled to furnish original evidence against himself.* State v. Saunders, 14 Or. 300, is also authority for the proposition that he cannot be compelled to answer as to any facts not relevant to his direct examination.[25]

In *Fitzpatrick* the defendant's waiver apparently was complete as to matters stated in the direct examination, and cross-examination could fully explore the details of matters previously covered. But the waiver was also limited by the direct examination. Requiring an accused to respond to cross-examination ques-

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[19] Id. at 51.

[20] In Wilson v. United States, 4 F. 2d 888 (8th Cir. 1925), a federal prosecution for illegal possession and sale of liquor, the direct examination of the defendant did not inquire into her alleged possession of alcohol. Over objection, questions were propounded to the defendant on cross-examination outside the scope of the examination in chief. The court reversed defendant's conviction and in so doing left no doubt that the reversal was based on constitutional grounds:

> The defendant, if the witnesses are to be believed, is guilty; but she herself, by grossly improper cross-examination, wholly outside of her examination in chief, was made to disclose facts showing her possession of beer, alcohol, and mash. . . .
>
> Some of this cross-examination may be excusable, upon the ground that the government is not to be confined in cross-examination to a mere categorical reiteration of the testimony of a defendant given in his examination in chief (State v. Miller, 156 Mo. 76, 56 S.W. 957; State v. Corrigan, 262 Mo. 195, 171 S.W. 51); *but the greater part of it is inexcusable upon any ground consistent with the rules that a defendant is entitled to a fair trial, and that he may not be compelled to be a witness against himself.*

Id. at 889. [Emphasis added.] See De Rose v. United States, 315 F. 2d 482, 485-86 (9th Cir. 1963); Ziegler v. United States, 174 F. 2d 439, 446-47 (9th Cir. 1949); Madden v. United States, 20 F. 2d 289 (9th Cir. 1927); United States v. Barker, 11 F.R.D. 421, 422 (N.D. Cal. 1951). See also Semler v. United States, 332 F. 2d 6, 7 (9th Cir. 1964); Graul v. United States, 47 App. D.C. 543, 550 (1918) (cross-examination must relate to the subject matter of the examination in chief; if new matter, the witness may claim privilege against self-incrimination and it must be allowed).

[21] United States ex rel. Irwin v. Pate, 357 F. 2d 911, 915-16 (7th Cir. 1966).

[22] Fitzpatrick v. United States, 178 U.S. 304, 315 (1900); Brown v. United States, 356 U.S. 148 (1958).

[23] 178 U.S. 304 (1900).

[24] Id. at 314-15.

[25] Id. at 315-16.

tions covering matters wholly outside the examination in chief, albeit material to the case, would improperly compel him to be a witness against himself.[26]

Subsequently, the Supreme Court considered the permissible boundaries of cross-examination in *Powers* v. *United States*.[27] The defendant protested that the cross-examination at his criminal trial exceeded the scope of the direct examination. The Government agreed that three prior Supreme Court cases had intimated that a testifying defendant's waiver of his fifth amendment privilege extended only to matters explored on direct examination.[28] It was argued, however, that the cross-examination of the defendant here was within the field of the direct. The Court so found, stating that a defendant who takes the stand on his own behalf is required to submit to cross-examination concerning matters pertinent to the examination in chief.[29]

At the time of the *Powers* case, the states were splitting into different camps with respect to the scope of waiver of the privilege by an accused who testified in his own behalf. In addition, particularized applications developed among jurisdictions applying the same general waiver rule. This trend was encouraged by the fact that subsequent Supreme Court opinions, although still citing the case, appeared to turn away from the language found in *Fitzpatrick*.[30] and several

[26] This is the construction placed upon Fitzpatrick by the Tucker and Harrold cases. See text accompanying notes 13-19 supra.

Justice Brown in the Fitzpatrick opinion approved the Oregon rule, which held that freedom from compulsory self-incrimination was violated when cross-examination of the accused was extended beyond the facts to which he had originally testified. As stated in State v. Lurch, 12 Ore. 99, 103 (1885), statutes allowing the accused to be a witness do not compel him to be a witness against himself:

> [I]t would be a great violation of good faith to permit the State to take advantage of his situation and change the trial into an inquisition. The cross-examination in such cases must be strictly confined to the facts testified to by the accused. The law throws around him in such case an immunity which ought to be sacredly maintained.

Ibid.

[27] 223 U.S. 303 (1912).

[28] The Attorney General's brief (see id. at 309) referred to a general dispute over whether the waiver of the privilege by a testifying defendant extended broadly to all things relevant to the issue as held in certain State cases, or was limited to the scope of proper cross-examination as was intimated in Sawyer v. United States, 202 U.S. 150, 165 (1906); Fitzpatrick v. United States, 178 U.S. 304, 314 (1900); Spies v. Illinois, 123 U.S. 131, 180 (1887).

[29] Powers v. United States, 223 U.S. 303, 315 (1912).

[30] Raffel v. United States, 271 U.S. 494 (1926) contained sweeping language to the effect that a witness' waiver is not partial but complete when he testifies. A question occurs as to whether the waiver is complete respecting matters relevant to the testimony on direct examination only, or the entire case. Raffel was indicted for conspiracy to violate the national prohibition act. At trial, he did not offer himself as a witness, and the jury failed to reach a verdict. He was retried and, testifying in his own behalf, was asked questions by the court which required him to disclose that the had not testified at the first trial and explain why he had not.

On review, the Supreme Court decided that Raffel's privilege against self-incrimination had not been violated. The Court deemed the trial court's questions germane to statements already made by the defendant in direct examination. While the Court referred broadly to the proposition that a defendant waives his privilege by testifying, the decision contains other indications to the effect that proper cross-examination extends only to matters opened up on direct. This conclusion is based upon the Court's statement that when a defendant "takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined." Id. at 497. It is abundantly clear that the cross-examination of other witnesses in federal trials at the time of the Raffel decision extended only to matters brought out in direct examination of such witnesses. The decision cites Tucker v. United States, 5 F. 2d 818 (8th Cir. 1925) as authority for the appropriate rule. See text accompanying note 14 supra for the rule announced in that case. At any rate, much of the effect of Raffel may have been vitiated by two later cases. See Grunewald v. United States, 353 U.S. 391, 415-24 (1957); Stewart v. United States, 366 U.S. 1 (1961); cf. State v. Conway, 328 Mo. 580, 154 S.W.2d 128 (1941).

For lower federal court decisions which incline to a position of broad waiver, see, e.g., Bolling v. United States, 18 F. 2d 863 (4th Cir. 1927); Le More v. United States, 253 Fed. 887 (5th Cir. 1918), cert. denied, 248 U.S. 586 (1919). See also Johnson v. United States, 318 U.S. 189 (1943), and Caminetti v. United States, 242 U.S. 470 (1917), dealing with the ancillary problem of comment on the partial silence of an accused. An of an accused. An interesting question is posed in Maguire, Weinstein, Chadbourn & Mansfield, supra note 6, at 813:

> Incidentally, what if any influence may the Griffin decision be expected to have upon the rule of Caminetti v. United States, . . . permitting adverse comment as to failure of a criminal defendant, who *does* take the stand and give cautiously limited testimony, to say anything about vital aspects of the case clearly within his personal knowledge? In approaching this question, is it essential to know the applicable rule on scope of cross-examination?

Two recent cases considering these issues are People v. Ing, 65 Cal. 2d 650, 422 P. 2d 590, 55 Cal. Rptr. 902 (Dist. Ct. App. 1967), and People v. Perez, 65 Cal. 2d 662, 422 P. 2d 597, 55 Cal. Rptr. 909 (Dist. Ct. App. 1967). Ing was a rape prosecution. Evidence of the alleged rapes committed by the defendant was offered to show a common scheme or plan. On direct examination, the defendant denied committing the rapes charged, but made no reference to the other alleged offenses. In Perez the defendant was charged with four counts of first-degree robbery. On direct examination, he offered an alibi with respect to counts 1 and 2, but did not testify with respect to counts 3 and 4. In both cases the court stated that cross-examination concerning the offenses about which defendant had refused to testify would have been permissible, and held that the prosecutor's comment on defendant's silence did not violate the privilege against self-incrimination. In so doing, the court impliedly equated the permissible scope of comment on defendant's failure to testify with the permissible scope of cross-examination.

observers concluded that a defendant waived his fifth amendment privilege completely when he testified.[31]

The matter appears to have remained open for several years. Then in 1958 the Supreme Court again had occassion to discuss the problem in the important case of *Brown* v. *United States*.[32] In *Brown* the defendant took the stand in a denaturalization proceeding and on cross-examination by the Government refused to answer questions respecting communist associations. Analyzing the constitutional privilege in this setting, Justice Frankfurter adverted to *Fitzpatrick* v. *United States* and pointed out that a defendant has no right to set forth all the facts in his favor without laying himself open to cross-examination on those facts.[33] The opinion contains relevant comments which seem to indicate that waiver of the fifth amendment privilege extends to matters opened up by the party on direct examination, but perhaps only that far. In this connection, Justice Frankfurter's summary of the law applicable to criminal defendants who testify in their own behalf is instructive:

> Our problem is illumined by the situation of a defendant in a criminal case. If he takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination. "[H]e has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts." Fitzpatrick v. United States, 178 U.S. 304, 315; and see Reagan v. United States, 157 U.S. 301, 304–305. The reasoning of these cases applies to a witness in any proceeding who voluntarily takes the stand and offers testimony in his own behalf. It is reasoning that controls the result in the case before us.[34]

The above passage indicates that the reasoning of the *Fitzpatrick* decision is controlling. But in addition to the reliance on *Fitzpatrick*, another feature of the *Brown* opinion is striking. The decision emphasized that the witness himself, if he is a party, determines the area of disclosure, and therefore of inquiry.[35] It would appear that a party can only control the area of disclosure so referred to when the cross-examination is confined to the direct examination. Wide-open cross-examination of the accused may range well beyond the scope of the direct, and beyond the party's control.

Commentators have summarized *Brown* as espousing a constitutional rule of limited waiver.[36] It is interesting to note, moreover, that Brown was recently cited by the Seventh Circuit as imposing constitutional limitations on cross-examination in criminal prosecutions.[37]

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[31] See 8 Wigmore § 2276(2). But see Morgan, "The Privilege Against Self-Incrimination," 14 Minn. L. Rev. 1, 42–43 (1949):

> The extent to which a person waives his privilege by testifying is the subject of conflicting decisions. . . . In the Federal Courts, the decisions of the Supreme Court are far from clear, but they imply that the accused and every other witness is subject to cross-examination upon all matters relevant to the content of his direct examination.

[32] 356 U.S. 148 (1958).

[33] Id. at 155.

[34] Id. at 154–55.

[35] Id. at 155. It is noted that courts applying a narrow theory of waiver nonetheless permit impeachment as an incident of the direct examination. See note 4 supra. This possibility appears to give pause to dissenting Justice Black, who scrutinizes the majority statement that it is the defendant, as a witness, who determines the area of disclosure and therefore of inquiry:

> I do not believe this assumption is correct. While it is true that a party can determine the area of his own disclosures on direct examination, the scope of permissible cross-examination is not restricted to the matters raised on direct but may include other and quite different matters if they will aid the court or jury to appraise the credibility of the witness and the probative value of his testimony.

Id. at 159 (dissenting opinion). Justice Brennan also dissented, and commented that a rule decreeing waiver of privilege by merely taking the stand developed as a historical corollary of the fact that the accused could not be called as a witness. The Brennan dissent does not explore the scope of waiver, but should this dissent be construed as indicating complete waiver by an accused on all material matters regardless of the scope of direct examination, such construction would appear to miss the distinct point made by the majority. See Morgan, supra note 31, at 42–43. A careful annotation of the problem contained in the Brown case appears in 72 A.L.R.2d 818, 833, 841 (1960).

[36] E.g., Note, 37 Texas L. Rev. 343, 344 (1959). See also "The Supreme Court, 1957 Term," 72 Harv. L. Rev. 77, 177 (1958), wherein the Brown case is summarized as holding that a defendant who voluntarily takes the stand waives the privilege against self-incrimination to the extent of cross-examination on matters raised by his own testimony on direct.

[37] United States ex rel. Irwin v. Pate, 357 F.2d 911, 915–16 (7th Cir. 1966). In reviewing a criminal conviction, the court carefully noted that the cross-examination of the defendant who testified was related to his direct testimony. The court went on to state:

> In a criminal case, if a defendant voluntarily takes the stand to testify in his own behalf, his testimony may be impeached and he may be cross-examined. The extent of the waiver of the privilege against self-incrimination is determined by what the defendant's testimony makes relevant for cross-examination.

Id. at 915.

These federal decisions contain distinct indications to the effect that a limited cross-examination of the accused is required by the fifth amendment. Much of the language militates in the direction of extending the waiver of the constitutional privilege to matters opened up on direct examination, but not beyond. As stated by one writer: "In the absence of special statutory provision, courts following the federal rule hold that a defendant in taking the stand in a criminal case waives his constitutional privilege not to testify to the extent that the federal rule permits cross-examination." [38] Under this view, the waiver extends only to matters touched upon in direct examination, since this is the extent to which the federal rule permits cross-examination. Another commentator concluded: "The constitutional privilege against self-incrimination and the statute of 1878 permitting the defendant to testify have been construed as requiring a restrictive cross-examination." [39]

Of course, other observers summarize the prevailing law differently, often citing the broad language of those cases decided before *Brown*. Well after those decisions were history, however, a leading American commentator concluded that Supreme Court decisions implied that the accused was subject to cross-examination upon all matters relevant to the content of his *direct* examination.[40] Clearly, the reviewed cases raise serious questions as to the protective scope of the federal privilege at trial, and the limits which the constitutional guarantee may impose upon cross-examination.

IMPLICATIONS FOR STATE PROSECUTIONS

The contrariety of views respecting an accused's waiver of privilege [41] at trial indicates the need for clarification by the Supreme Court. With the sweep of the federal privilege in state trials now governed by federal standards, guidance for the states seems essential. In addition, the articulation of an approved waiver rule would be instructive for those concerned with drafting new rules of evidence for state or federal practice. It may be argued that clarification is unnecessary because the controlling principles regarding scope of waiver have been definitively announced. But there are protagonists on both sides of the issue, stating either that the broad or the narrow rule has been firmly established.[42] If limited cross-examination is essential to fair trial, as indicated by certain federal cases,[43] this should be made clear.

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[38] Note, 24 Iowa L. Rev. 564, 569 (1939).

[39] Orfield, "Examination of Witnesses in Federal Criminal Cases," 4 Ariz. L. Rev. 215, 240 (1962). See also 4 Jones, supra note 4, § 928, at 1741: "There is reason for confining the cross-examination of a defendant to the matters which have been elicited by the direct examination because, to compel answers to other questions, may be deemed a violation of the constitutional provision which exempts him from testifying against himself;" Burby, Law Refresher 704 (1946): "According to one view, the waiver extends to testimony with respect to any material fact. According to the weight of authority, however, the waiver extends only to matters touched upon in the direct examination;" Orfield, "The Privilege Against Self-Incrimination in Federal Cases," 25 U. Pitt. L. Rev. 503, 553 (1964).

The doctrine of limited waiver is recognized elsewhere in the law of evidence. Most of the authorities agree that if the accused takes the stand for the purpose of testifying on a preliminary question, such as the voluntariness of a confession, this is not to be taken as a complete waiver. Many cases limit the waiver to the particular issue, because it is felt that to do otherwise would penalize the defendant for testifying. McCormick § 131. See also, Maguire, Evidence of Guilt § 2.082(2) (1959); Model Code of Evidence rule 208, comment (1942). The discussion contained in the body of this article deals with testimony on the merits, as opposed to testimony on preliminary matters.

In addition, it is noted that testimony in one proceeding, or one stage of a proceeding, which testimony incorporates the fullest disclosure, does not waive the privilege in a later proceeding or stage. Maguire, supra, § 2.082(1).

[40] See Morgan, supra note 31, at 42-43.

[41] On the difference between the scope of the self-incrimination privilege and the scope of waiver, see note 7 supra.

[42] To the effect that limited waiver may be the controlling rule, see Quick, "Self Incrimination Under the Uniform Rules of Evidence," 3 Wayne L. Rev. 1, 20 (1956); Morgan, supra note 31, at 42-43; Orfield, "Examination of Witnesses in Federal Criminal Cases," supra note 39, at 240; Burby, supra note 39; Note, 24 Iowa L. Rev. 564, 569 (1939). Coates, McCormick § 131; Douglas & Fisher, Evidence Handbook 183 (1958); 2 Conrad, supra note 6, § 1122. See also People v. Zerillo, 214 P. 2d 31, 35 (Cal. Dist. Ct. App.) rev'd on other grounds, 33 Cal. 2d 222, 223 P. 2d 223 (1950); People v. McCarthy, 88 Cal. App. 2d 883, 888, 200 P. 2d 69, 72 (Dist. Ct. App. 1948); Lombard v. Mayberry, 24 Neb. 674, 691, 40 N.W. 271, 279 (1888).

While the commentators have criticized the narrow waiver rule, such criticism has occasionally been singled out for castigation by the courts. See, e.g., State v. Vance, 38 Utah L, 38-41, 110 Pac. 434, 447-48 (1910). State decisions generally deal with the subject problem in the context of State self-incrimination provisions. The Supreme Court of Washington was faced with the permissible extent of cross-examination in State v. Crowder, 119 Wash. 459, 101 Pac. 850 (1922), where it cited authority to the effect that the United States Supreme Court had previously laid down this rule that an adversary has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in the witness direct examination. Applying the self-incrimination provision of the Washington constitution, the court ruled that the defendant's privilege against self-incrimination was violated when he was compelled to testify on cross-examination regarding a matter not touched on during the examination in chief.

[43] See notes 20, 26 supra.

Wigmore, as noted earlier, favored substantial elimination of the accused's privilege once he abandoned the safety of the defense table and took the stand.[44] He disliked use of the privilege to cut off a vital source of information. However, it appears that growing improvements in techniques for investigating and solving crime make the use of forced self-accusation far less imperative than it may have been when Wigmore wrote.[45] As one writer has stated in analyzing Wigmore's approach to the waiver problem: "No data has been presented to demonstrate that the operation of the majority rule, that waiver is limited to the matter testified about on direct, has been difficult of administration or inimical to the administration of justice." [46]

Any future indication by the Supreme Court that limited cross-examination constitutes an intrinsic incident of the fifth amendment could have powerful ramifications. Until 1964 the scope of a defendant's privilege against self-incrimination in state prosecutions was determined solely by the constitution of the state involved.[47] *Malloy's* application of the fifth amendment to the states sounded the death knell for "dual sovereignty" in the area of self-incrimination protection.[48] The Court made clear that the states were bound to federal constitutional standards governing the privilege.[49] Thus, a future holding which confines the scope of waiver to direct examination could have dramatic implications for state practice. Cross-examination beyond the scope of the direct might thereafter be constitutionally impermissible, the freedom of the states to allow wide-open cross-examination of the defendant being superseded by the accused's fifth-amendment protection.

In addition to this disquieting prospect for "wide-open rule" states, there may be a major problem in regard to cases already tried.[50] Standards established by previous federal decisions govern the present scope of constitutional protection.[51] If the limited waiver rule is derived from the constitution, one may contend that this federal standard unsettles prior convictions obtained under the "wide-open" rule. Would prisoners previously convicted upon trials wherein the cross-examination ranged well beyond direct testimony possess meritorious habeas corpus claims based upon the fact that the cross-examination explored areas protected from forced disclosure? Posed differently, did not the Supreme Court in *Brown* v. *United States* [52] indicate that it is the defendant who determines the general area of disclosure, and not the prosecutor through the vehicle of inquiries which probe matters foreign to the direct testimony?

The problem of unsettling prior convictions arises with virtually every constitutional interpretation extended to state criminal procedure. In connection with

[44] 8 Wigmore § 2276(2). See also, Degnan, "Non-Rules Evidence Law: Cross-Examination," 6 Utah L. Rev. 323 (1959).

[45] See Note, 73 Yale L.J. 1491, 1497–98 (1964).

[46] Quick, supra note 42, at 20. See also Model Code of Evidence rule 208 (1947). Proponents may advance several arguments on behalf of the narrow waiver rule which limits cross-examination to the direct. (1) Wide-open cross-examination increases the reluctance of the defendant to testify, contrary to the basic policy of the rules of evidence which seek to encourage this testimony. (2) It is unfair to permit the prosecutor to establish independent elements in his own case through the vehicle of cross-examination, thereby violating the fundamental concept that the individual should not be conscripted to assist the government in convicting himself. (3) Limited cross-examination subjects any testimony given by the defendant to the antiseptic test of adversary interrogation, yet shields him from overreaching prosecutorial inquisition. (4) The limited rule stimulates governmental investigation from other sources and discourages forced disclosures by the accused. See generally Quick, supra note 42, at 18–20.

[47] See Note, 52 Cornell L.Q. 323, 330 (1967).

[48] Recent terms of the Supreme Court have added fresh dimensions to the controversy over incorporation of the Bill of Rights into the fourteenth amendment. See Cushman, "Incorporation: Due Process and the Bill of Rights," 51 Cornell L.Q. 467 (1966); "The Supreme Court, 1964 Term," 79 Harv. L. Rev. 56, 107 (1965). The decision prohibiting comment on the accused's failure to testify illustrates the current approach to the incorporation problem. Traditionally, the Court asked whether the given right was implicit in the concept of ordered liberty and therefore an essential requirement of due process. However, the Court's recent application of the no-comment rule to state trials has stressed the need for similar standards in state and federal trials to protect the accused's privilege against self-incrimination. "It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court." Malloy v. Hogan, 378 U.S. 1, 11 (1964).

[49] See "The Supreme Court, 1964 Term," 79 Harv. L. Rev. 56, 112 (1965); Note, 61 Nw. U.L. Rev. 654, 657 (1966).

[50] For recent articulations of the English rule in state criminal cases, see Madden v. State, 10 Ala. App. 271, 274, 112 So. 2d 796, 799 (1959); State v. Taylor, 99 Ariz. 86, 90, 407 P 2d 69, 62 (1965), cert. denied, 384 U.S. 979 (1966); Rush v. State, 254 Miss. 641, 654, 182 So. 2d 214, 219 (1966). See also, Jones v. Commonwealth, 327 Mass. 491, 99 N.E. 2d 456 (1941), also reflecting state-court handling of state privilege against self-incrimination and decreeing broad waiver which accommodates wide-open cross-examination of accused. Compare Evans v. O'Connor, 174 Mass. 287, 54 N.E. 557 (1899). Recognition of the general impact of Mallory v. Hogan is contained in Commonwealth v. Baker, 348 Mass. 60, 201 N.E. 2d 119 (1964).

[51] "The Supreme Court, 1964 Term," 79 Harv. L. Rev. 56, 107–13. (1965).

[52] 356 U.S. 148 (1958).

the application to the states of the rule prohibiting comment on the accused's failure to testify, the Court decided that this guarantee was entitled to prospective effect only.[53] Respecting another Bill of Rights extension, that which established an indigent defendant's right to counsel in state felony trials,[54] retrospective operation was decreed.[55] In making these determinations regarding retroactivity, the Court placed major reliance on the nature of the constitutional right at issue. It indicated that the right-to-counsel guarantee was designed to insure the reliability of the guilt-determining process, and its vitality would have been seriously vitiated by prospective application only.[56] The Court's most recent decision on retroactivity, dealing with the rules governing police interrogation of suspects, denied retrospective operation.[57] This latest case appears to accord major consideration to two significant concerns—the degree to which the right was anticipated by prior decisions of the Court and the effect of retroactive application on the administration of justice.[58]

Tested by these criteria, any decision limiting cross-examination in state trials may be a questionable candidate for retroactivity. Although retroactive application of a cross-examination standard would not have the same disrupting effect feared in connection with *Griffin v. California*,[59] it is an open issue whether this right was anticipated by *Malloy*. Counter-arguments can be made, however, including the contention that certain federal cases approving the limited waiver rule did so on constitutional grounds, whereas the no-comment rule had a largely statutory base.[60] Suffice it to say that the matter is not free from dispute.

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[53] Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966).

[54] Gideon v. Wainwright, 372 U.S. 335 (1963).

[55] See Comment, 64 Mich. L. Rev. 832 (1966).

[56] See Linkletter v. Walker, 381 U.S. 618, 639 & n. 20 (1965); Mishkin, "The Supreme Court, 1964 Term: Foreword," 79 Harv. L. Rev. 56, 79–86 (1965); Note, 41 Notre Dame Law. 206 (1965).

[57] Johnson v. New Jersey, 384 U.S. 719 (1966).

[58] See Hall & Kamisar, Modern Criminal Procedure 503-04 (2d ed. 1966); "The Supreme Court, 1965 Term," 80 Harv. L. Rev. 91, 137 (1966). See also Linkletter v. Walker, supra note 56.

[59] 380 U.S. 609 (1965). See also Tehan v. United States ex rel. Shott, supra note 53.

[60] At this point, some comparison of the development of the federal cross-examination rule with the no-comment rule is instructive. In 1878 Congress enacted a statute prohibiting comment on the accused's refusal to testify. When the problem of adverse comment reached the Supreme Court for the first time in the landmark case of Wilson v. United States, 149 U.S. 60 (1893), the situation was covered by this statute and did not require a constitutional interpretation. Seventy-one years after Wilson the Court extended protection against compulsory self-incrimination to state procedure in Malloy v. Hogan, 378 U.S.1 (1964). Up to this time it had never been decided whether comment violated the fifth amendment, although that result was hinted at in several opinions. See Note, 70 Dick. L. Rev. 98 (1965). The state comment question had always been presented in conjunction with requests to extend the federal self-incrimination privilege to the states, a proposition rejected by the Court numerous times. But once Malloy applied the fifth-amendment protection against self-incrimination to the states, it became necessary to determine whether comment in a state court violated the constitutional guarantee.

At the time of Malloy six states permitted such comment, including California. In Griffin v. California, 380 U.S. 609 (1965), the United States Supreme Court held that the fifth amendment in its direct application to the states by reason of the fourteenth amendment forbade adverse comment on the accused's silence. Shortly after this decision, the Court ruled that Griffin was entitled only to prospective operation, stressing the disruptive effect a retroactive holding would have on the administration of justice. Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966). The Court pointed out that a retrospective application of Griffin would require the retrail of thousands of prisoners serving lengthy sentences imposed many years before Griffin. This "floodgate" argument also held sway in Johnson v. New Jersey, supra note 57, which renedered prospective effect to recent decisions limiting interrogation of suspects by state officers. Johnson further indicates that where the announced procedural standard was fully anticipated by a prior decision, prospectivity is measured from the date of such prior decision. Id. at 721.

In connection with any cross-examination holding, it might be urged that the constitutional basis of Griffin was unclear prior to its announcement, whereas the doctrine of limited waiver of privilege by a testifying defendant was constitutionally oriented in several federal cases which treated the problem. Assuming arguendo that the view prevails that the limited cross-examination rule was anticipated by Malloy, prospective operation might be applied from the date of that decision. The "floodgate" objection lodged against retroactive operation of the Griffin rule does not then appear to be equally applicable. The argument would proceed as follows. Certainly prior to Malloy a limited cross-examination rule was not mandatory on the states, and jurisdictions applying the English rule of cross-examination were free to experiment with wide-open interrogation of the accused. After Malloy, however, the federal standard became compulsory and defendants exposed to prosecutions thereafter were entitled to trials in which the fifth amendment was fully observed, including the right to be cross-examined only on issues opened by the defendant's direct examination. To the extent that the English or Massachusetts rule jurisdictions used wide open cross-examination in trials after Malloy, such cases may merit new trials under the federal rule. Dating prospectivity from Malloy, a 1964 decision, does not require retrial of a large number of prisoners convicted on evidence now remote and unavailable, as would retroactive application to all cases. The prisoner seeking retroactive operation of the Griffin rule was in effect requesting "full" retroactivity when he asked that it be applied to his 1961 trial.

Of course, a refusal by the Supreme Court to approve a rule of limited waiver in this context would render concern over prior convictions academic. Recent decisions of the Court, however, have extended the privilege against self-incrimination [61] and narrowly restricted waiver of the constitutional guarantee.[62] A prominent commentator concludes that the privilege must be given broad construction to prevent compulsory self-incrimination in any proceeding.[63] This is especially the case where the compulsory incrimination involves an accused in a criminal trial.[64] The trend of current Supreme Court decisions evidences the Court's full agreement with these principles. In overruling *Cohen v. Hurley* [65] very recently, the majority opinion spoke strongly against the use of legal process to force from the lips of the accused the evidence necessary to convict him.[66] In the face of an expanding fifth amendment, there appears to be a real possibility that the Court may apply a narrow waiver principle to the accused who takes the stand at trial.

Conclusion

The principles governing the breadth of the federal privilege against self-incrimination at trial must be restudied. Language contained in *Tucker, Fitzpatrick* and allied cases indicates that if there is a good reason why a defendant should not be compelled to be a witness against himself, there is an equally good reason why he should not be compelled to testify against his will respecting matters untouched by his direct testimony. These federal decisions indicate that wide-open cross-examination of the accused may breach the constitutional prohibition against self-incrimination. The problem appears to be of great moment not only for the states as a result of *Malloy v. Hogan*,[67] but also for those charged with responsibility for drafting new rules of evidence for federal trials.[68]

Eighty years ago the question of whether cross-examination of an accused in state courts must be confined to matters pertinent ot the testimony in chief was deemed a matter of state law and not a federal question. The Supreme Court so stated in *Spies v. Illinois*,[69] which held that the first ten amendments to the Constitution were not intended to limit the powers of state governments but to operate on the national government alone. The *Spies* decision came at a time when states were free to infringe upon or abolish an accused's exemption from compulsory self-incrimination as they saw fit. That this precedent did not remain intact is history. What is not yet history is the impact of the essential incidents of the federal privilege against self-incrimination on state criminal procedure. The implications of this constitutional application for states which employ the broad cross-examination rule can be great indeed. Not only must the appropriate dimensions of cross-examination be evaluated for future cases, but significant consideration must be accorded prior convictions obtained in violation of the limited scope rule. Exploration of the full dimensions of the privilege against self-incrimination must continue, because the limitations it imposes on cross-examination of an accused who takes the witness stand in his own behalf are of vital concern for state criminal procedure.

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[61] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Jackson v. Denno, 378 U.S. 368 (1964); Malloy v. Hogan, supra note 60.

[62] See Miranda v. Arizona, supra note 61. The problem explored in this article takes on fresh dimensions in light of the Supreme Court's pronounced hostility to theories of broad waiver of the privilege, a view articulated in the context of state pre-trial interrogations of the accused. The privilege stands as a humane safeguard against coerced self-disclosure, and loss by waiver will be closely scrutinized.

[63] Griswold, The Fifth Amendment Today 55 (1955).

[64] See Griffin v. California, supra note 60; Wilson v. United States, 149 U.S. 60 (1893).

[65] 366 U.S. 117 (1961).

[66] Spevack v. Klein, 385 U.S. 511 (1967).

[67] 378 U.S. 1 (1963).

[68] See Green, "Drafting Uniform Federal Rules of Evidence," 52 Cornell L.Q. 177, 194-95 (1967).

[69] 123 U.S. 131, 180 (1887).

U.S. TAX COURT,
Washington, D.C., April 16, 1973.

Mr. HERBERT HOFFMAN,
Rayburn House Office Building,
Washington, D.C.

DEAR MR. HOFFMAN: Enclosed is a copy of the Tax Court rule with respect to the exclusion of proposed witnesses.

We would again like to thank you and Congressman Hungate for the consideration which you showed us on Friday.

Yours truly,

H. TODD MILLER,
Clerk to Hon. Charles R. Simpson.

Enclosure.

RULE 402

No. 1. 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 adopted by the Supreme Court pursuant to statutory authority.

No. 2. 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 adopted by the Supreme Court under section 3402, 3771, or 3772 of title 18 of the United States Code, or under section 2072 or 2075 of title 28 of the United States Code.

ARIZONA STATE UNIVERSITY,
COLLEGE OF LAW,
Tempe, Ariz., April 17, 1973.

HERBERT E. HOFFMAN, Esq.,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. HOFFMAN: Replying further to your letter of April 5th and implementing my reply of April 13th, I enclose copies of the comments received by the Advisory Committee with regard to proposed Evidence Rule 405.

The enclosure does not include reports and letters which, after commenting on other rules, either said nothing about Rule 405 or simply said something to the general effect that other rules in Article IV were approved.

Sincerely yours,

EDWARD W. CLEARY,
Reporter.

SUGGESTIONS RECEIVED BY ADVISORY COMMITTEE CONCERNING PROPOSED EVIDENCE RULE 405 FOLLOWING PUBLICATION OF REVISED DRAFT OF MARCH 1971

RULE 405(A)

Suggestion: Department of Justice Analysis

Rule 405(a) provides that where admissible, evidence of character or a trait of character may be proved by opinion testimony as well as by reputation.

Problem: Authorization to use opinion testimony, though recommended by some text-writers, is contrary to present law and practice, which limits such evidence to reputation. *See* McCormick, pp. 334–35:

The reasons for the almost universal disfavor with which courts regard opinion testimony, were persuasively stated by the New York Court of Appeals in the leading case of *People* v. *Van Gaasbeck*, 189 N.Y. 408, 418, 82 N.E. 718, 721 (1907):

> If a witness is to be permitted to testify to the character of an accused person, basing his testimony solely on his own knowledge and observation, he cannot logically be prohibited from stating the particular incidents affecting the defendant, and the particular actions of the defendant which have led him to his favorable conclusion. In most instances it would be utterly impossible for the prosecution to ascertain whether occurrences narrated by the witness as constituting the foundation of his conclusion were or were not true. They might be utterly false, and yet incapable of disproof at the time of trial. Furthermore, even if evidence were accessible to controvert the specific statements of the witness in this respect, its admission would lead to the introduction into the case of innumerable

> collateral issues which could not be tried out without introducing the utmost complication and confusion into the trial tending to distract the minds of the jurymen and befog the chief issue in litigation.

Opinion testimony is objectionable for other reasons. Unlike reputation-evidence, which can be established by a limited number of witnesses and therefore is subject to control by the court, opinion testimony would be difficult to limit since it is the individual opinion which is relevant. As the Advisory Committee's Note makes clear, if a person is charged with a crime such as theft, the proposed opinion testimony rule would permit the accused's employer or a psychiatrist to give his opinion that the accused is an honest man. Such evidence of good character *by itself* "may be" sufficient to raise a reasonable doubt as to guilt and the jury is to be so instructed. *Michelson* v. *United States*, 335 U.S. 469 (1948). Moreover under present practice, the "may be" of *Michelson* has become the general practice with a jury being rountinely so instructed once any evidence of good character is admitted. To permit acquittal on this ground—an employer's or psychiatrist's personal opinion as to honesty—is in our view, an unwise rule of law.

Recommendation: We suggest that the authorization in Rule 405(a) to use opinion testimony to prove character or a trait of character should be eliminated. This can be accomplished by inserting a period in the first sentence of Rule 405(a) after the word "reputation" and deleting the result of the sentence.

Suggestion: Thomas A. Flannery, Esq. United States Attorney, Washington, D.C.

Proposed Rule 405(a) and also Rule 608(a) permit proof of character, where relevant, to be by personal opinion in addition to reputation. Use of personal opinion to prove character is not permitted in the federal courts. *Michelson* v. *United States*, 355 U.S. 469 (1948). As McCormick observes (p. 334–35):

> Reputation evidence, though muted and colorless, is thought to have the advantage of avoiding side-issues as to particular acts and incidents in the past life of the accused.

Opinion testimony, however, would inevitably lead to the introduction into a case of collateral issues which can only result in confusion and distraction of the jury from the main issues in dispute. Moreover, particularly as to moral traits of character, individual opinion is easily fabricated and difficult to cross-examine.

It can be persuasively argued that proof of character is both uncertain and distracting and, consequently, should not be allowed at all. If, however, character evidence is to be permitted, I oppose expanding the methods of proof and departing from the procedure set forth by the Supreme Court in *Michelson*.

SUGGESTIONS RECEIVED BY ADVISORY COMMITTEE CONCERNING PROPOSED EVIDENCE RULE 405 FOLLOWING TRANSMISSION OF DRAFT BY JUDICIAL CONFERENCE TO SUPREME COURT AFTER MEETING OF OCTOBER 1971

* * * * * * *

Rule 405 and Rule 608: *Methods of Proving Character*, and *Evidence of Character and Conduct of Witness*—These provisions permit the use of *opinion* testimony to prove a relevant trait of character. Under Rule 405, opinion testimony is permitted to negate an element of the offense charged. Pursuant to Rule 608(a), opinion testimony is permitted to buttress the defendant's credibility when it is challenged. We suggest that both provisions should restrict proof of character to reputation testimony as is the settled rule in practically all courts. *Michelson* v. *United States*, 335 U.S. 469 (1948), indicated that the courts have long recognized that proof of character by direct opinion testimony has the tendency of injecting into a trial collateral issues which complicate and confuse the trial. The Advisory Committee's note to Rule 405 acknowledges that the proposals under Rule 405 and Rule 608(a) represent a clear departure from usual practice based upon complaints of logical inconsistency advanced by the text writers.

It is our view that departure from the traditional rules relating to proof of character would inject collateral issues and confusion into litigation. Proposed Rules 405 and 608(a) disregard practicalities implicit in the longstanding practice: (1) There is no practical way of testing by cross-examination the formation of an individually held opinion concerning a specific character trait, especially if the trait involves a moral quality, such as truth and veracity. (2) Opinion testimony as to character can more easily be contrived than reputation evidence. Some knowledge of facts extraneous to a witness is required to be able to testify concerning reputation in the community. (3) A small number of witnesses usually

adequately serves to establish reputation and the point at which reputation testimony becomes unnecessarily cumulative is not difficult to discern. If individual opinion testimony is relevant, it could never be cumulative and would be difficult to terminate.

SUGGESTIONS RECEIVED BY ADVISORY COMMITTEE CONCERNING PROPOSED EVIDENCE RULE 405 FOLLOWING PUBLICATION OF PRELIMINARY DRAFT OF MARCH, 1969

Rule 4–05. *Methods of Proving Character.* Approved with the following modifications:

1. In subsections (a) and (b) the phrase "character or a trait of character" should read only "a trait of character", the words "character or" being stricken.

2. In sub-section (a) the phrase "or in the form of an opinion" should be removed. The Committee expressed the view that "opinion" evidence should be excluded when at trial the trait of a person's character is relevant.

* * * * * * *

Rule IV–05. Methods of proving character.

Rule IV–05 (A) provides that in all cases in which evidence of character or a trait of character of a person is admissible, proof may be made not only by testimony as to reputation, but also in form of an opinion of a witness as to such character. We believe the use of opinion of a witness as to a character or character traits is an improvement on the California Rule which apparently permits proof of character by a testimony as to a reputation alone. Evidence of reputation of a person in the community for a character trait seems to be the rankest form of hearsay and easily would be unreliable. A person might well know the character and character traits of a party or witness in an action through many years of experience, and yet be unable to testify as to reputation in the community since the character traits may not be the subject of reputation in the community. The witness who testifies as to an opinion as to character traits would be subjected to a cross examination under which the said opinion could be evaluated and weighed quite like any other opinion of a witness might be tested.

* * * * * * *

Rule 4–05(a), line 4. After the word "reputation" there should be inserted the language, "subject to Rule 6–08(b)".

* * * * * * *

Rule 4–05 is endorsed as written.

* * * * * * *

RULE 4–05. METHODS OF PROVING CHARACTER

The Committee again urges the same considerations for a review and reevaluation of Section 4–05 as was mentioned with regard to Rule 4–04(b), to-wit: that every effort be made to determine that a proposed rule of evidence incorporated herein not have any adverse effect on the rights of accuseds in criminal proceedings.

* * * * * * *

RULES 4–04, 4–05, 4–06, AND 6–08, CHARACTER AND HABIT

As presently drafted these rules give rise to some confusion, particularly with regard to their inter-relationship. Since the problems which we perceive would require an overall reworking of these rules, we have not suggested particular language changes. We will attempt, however, to state some of the problems which we find in the present draft.

Rule 4–04(a)(3) allows evidence of the character of a witness. It is apparently the intent of the drafters that admissibility of character evidence under this rule be limited to those instances specified in Rule 6–08. If this is the intent, then it seems that Rule 4–04(a)(3) should state specifically that the exception it creates is limited to those instances specified in Rule 6–08. Without such a clear expression of intent, there will remain room for argument that Rule 6–08 was not intended to provide the exclusive guide to determining the admissibility of evidence concerning the character of a witness.

Similarly, the present draft of Rule 4–05 could give rise to some confusion concerning the admissibility of proof of specific instances of conduct. It is ap-

parently the purpose of the rule to limit proof of specific instances of conduct to situations where the trait of character is an essential element of a charge, claim or defense. If that is the intent, should not the rule state this specifically rather than rely on a negative implication as it presently does. In addition, the provision of Rule 4-05 seems somewhat inconsistent with the provision of Rule 6-08(b) that specific instances of conduct may be inquired into on cross-examination.

By limiting proof of character, except as to witnesses, to criminal cases, Rule 4-04 could give rise to the anomalous situation that a defendant in a criminal assault trial could introduce evidence of the victim's pugnacious character to support a claim of self-defense but could not introduce the same evidence if the victim brought a civil suit for assault. It seems that in such a situation the trial judge should at least have the discretion to admit evidence of this type.

Similarly, the trial judge should have discretion to admit, at least on cross-examination, testimony of an individual's routine which did not meet the standard of habit established in Rule 4-06. For example, an individual may be known to stop routinely for a drink on his way home from work so that he normally did not arrive home until 7:30 p.m. If he testified that he was home at 6:30 p.m., and this was material to his testimony, it would seem that he should at least be subject to cross-examination on the reasons why he departed from his usual routine on this particular occasion.

The rules on evidence of the character of the accused make no reference to the proper scope of cross-examination of character witnesses. Since Rule 6-08 does provide that a witness testifying as to the character of a witness may be questioned about specific instances relevant to truthfulness, the absence of any similar provision governing the cross-examination of witnesses who testify as to the character of the accused may lead to the conclusion that such testimony is not to be allowed. Since this would be a radical departure from existing law, see *Michelson v. United States*, 355 U.S. 469, we believe that the rules or, at least the comments, should be changed to show that no departure from the present rule is intended.

COMMITTEE ON RULES OF PRACTICE & PROCEDURE,
U.S. Supreme Court Building,
Washington, D.C.

GENTLEMEN: We are enclosing herewith a copy of the report of the Washington State Bar Association's Committee on the New Federal Rules relative to the proposed Rules of Evidence.

This report has been approved by the Board of Governors of the Washington State Bar Association.

Very truly yours,

ALICE RALLS,
Executive Director.

* * * * * * *

Rule 4-05(a). The committee does not believe that proof of character by opinions of laymen should be permitted. On a practical level, the committee is convinced that weaknesses of such opinion testimony cannot be exposed except with difficulty by cross-examination of the witness, and that challenging of his answers on cross-examination by extrinsic evidence would usually be barred. The danger mentioned seems very real. The committee recognizes that reputation evidence may not be completely realistic and that it may in effect disguise the opinion of the witness who testifies to reputation. However, again on a practical level, it seems preferable to lay opinion testimony, because it can much more easily and clearly be tested by cross-examination of the witness.

Expert opinion would appear to involve opinions of psychiatrists or psychologists. As a minimum protection, the committee believes that expert opinion based only upon observation of a person in the courtroom should be excluded, even though the expert might testify that such observation was sufficient basis for him to form a relevant opinion.

The committee therefore recommends that the words "or in the form of an opinion" be deleted (*recommendation that the words, "or in the form of an opinion" be deleted*).

Rule 4-05(b). The scope of this paragraph is not sufficiently defined by the language referring to "an essential element of a charge, claim, or defense." This matter should be clarified (*recommendation that language be clarified*).

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SPENCER A. GARD,
ATTORNEY AT LAW,
Iola, Kans., October 8, 1969.
(On Board SS UNITED STATES).

ALBERT E. JENNER, Jr., Esq.,
Chicago, Ill.

DEAR MR. JENNER: Before leaving for England in May I did not have time to study the Preliminary Draft of Proposed Rules of Evidence for United States District Courts. But I took the pamphlet along and have spent the major portion of the return voyage on the SS *United States* going over it.

Most of the doubts that arose in the course of reading vanished as I continued to read, so there is little left to criticize. What I must say is that the whole work is amazingly good—better than I thought would be possible in a field where individual opinions are often too uncompromising.

* * * * * * *

Rule 4–05(a) should recite that it is subject to Rule 6–08. And I believe that it would be better to say in (a) "in all cases where evidence of character is circumstantially relevant" instead of "is admissible," and to say that proof in such cases may be made *only* by testimony of reputation or opinion.

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THE UNIVERSITY OF NEBRASKA,
COLLEGE OF LAW,
Lincoln, Nebr. August 29, 1969.

HON. ROBERT VAN PELT,
Post Office Building, Lincoln, Nebr.

DEAR BOB: Pursuant to our conversation at lunch, I am enclosing a memorandum of some of the problems that struck as I read the Proposed Rules of Evidence. These are largely problems of drafting rather than the rightness of the Committee's choice of rule. As I suggested, there are a few rules that I am unhappy with and I will try to put together some additional remarks about those.

After you have had a chance to go over them I would be happy to discuss the memo—in fact, I would very much like to do so. Please feel free to do anything you want with it—send it or any part to the other members of the Committee.

Lest this letter or the memo be misconstrued, let me hasten to repeat that I also think it is a superb job; I would like to help get it adopted in any way I can; and I am confident that it will be.

Sincerely,

DAVID DOW,
Professor of Law.

I am not sure as to the intended status of the classic problems of the Michelson case: To what extent does the Rule permit the opponent to suggest specific instances of conduct contrary to the claimed character?

JANUARY 5, 1970.

Re: Preliminary Draft of Proposed Rules of Evidence for U.S. District Courts

KENNETH H. HANSON, Esq.,
Chairman, Federal Civil Procedure Committee (Chicago Bar Association),
U.S. Department of Justice,
Chicago, Ill.

DEAR CHAIRMAN HANSON: I have examined Article IV of the Proposed Rules referred to above. Article IV is concerned with relevancy of evidence, and its limits. The rules contained in Article IV, numbered 4–1 thru 4–11, basically codify existency common law.

Two minor changes from the common law may be worthy of mention. The first is found in Rule 4–05, which provides that evidence of character may be made in the form of an opinion. In my judgment, this is an improvement over the common law rule. Our urban society, where a man may reside in a large apartment building for years and never get to know his neighbors—nor they him—has been largely responsible for making the concept of "reputation in the community" non-viable.

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JUNE 24, 1969.

Hon. JACK B. WEINSTEIN,
U.S. District Judge,
Brooklyn, N.Y.

DEAR JUDGE WEINSTEIN: It was a pleasure to see you again at the Judiciary Conference in Manchester, so many years after our panel discussion at Columbia.

I have the following comments on the proposed federal rules of evidence. You, or the committee, or your staff might find them of some relevance. I preface these comments by saying that I believe the rules well-drawn and to be a helpful and desirable advance.

* * * * * * *

Rule 4-05. This rule deals with evidence of character, and provides inter alia that it may be proved by evidence of reputation. There seems to be no rule specifying how reputation may be proved. There are problems in the proof of reputation which perhaps might be resolved by a rule on that subject. Cf. *Michelson v. United States,* 335 U.S. 469.

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ILLINOIS STATE MEDICAL SOCIETY,
CHICAGO, ILL., *April 26,1793.*

HON. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE RODINO: Recently proposed to Congress were new Federal Rules of Evidence, Rule 504, by the Judicial Conference of the United States. These would replace Rule 27, which protects the confidential nature of the physician-patient relationship.

The Illinois State Medical Society recommends that there should be continued recognition and incorporation of a qualified physician-patient privilege. It is suggested that Rule 27 of the Uniform Rules of Evidence be maintained.

Enclosed is a copy of a resolution recently adopted by the policy-making Illinois State Medical Society House of Delegates. In it the basic rationale of physicians in Illinois is enunciated. This is supportive of the position forwarded to you from the AMA last January 31.

Congress, in its wisdom, has enacted PL 93-12, delaying implementation of proposed Rule 504 until the end of the current session. ISMS encourages your continued critical appraisal of this matter. We understand that Rep. Hungate of Missouri has introduced HR 5463 which incorporates the tenets of Rule 504. The full ramifications of this should be explored.

Be assured that the Illinois State Medical Society is available to you should you need any further comment or suggestion in this matter.

Sincerely yours,

WILLIAM M. LEES, M.D.,
Chairman, Board of Trustees.

Introduced by: William M. Lees, Chairman, Board of Trustees.
Subject: Privileged Communications.
Referred to: Reference Committee on Governmental Affairs and Medical Legal.

Whereas, proposed Federal Rules of Evidence, Rule 5-04, are being suggested to replace existing Rule 27 of the Uniform Rules of Evidence of the American Bar Association; and

Whereas, the proposed Rule 5-04 would eliminate most provisions of confidentiality except in mental illness; and

Whereas, confidentiality is the right of the patient and the physician is obligated to respect this confidence; and

Whereas, the Congress has guaranteed confidentiality and immunity for persons testifying to closed congressional committees; and

Whereas, certain areas of medical inquiry might result in disclosures by a patient that should be kept secret and disclosure of non-relevant personal information could be harmful and grossly embarrassing; and

Whereas, curtailment of free expression by the patient could interfere with good medical diagnosis and care; and

Whereas, individual rights must be protected; therefore be it

Resolved, That the Illinois State Medical Society indicate its complete support for the vigorous position of the American Medical Association in opposing new Rule 5-04; and be it further

Resolved, That support for present Rule 27 which guarantees confidentiality of patient communications be endorsed; and be it further

Resolved, That a personal copy of this Resolution be transmitted to each member of the Illinois Congressional Delegation; and be it further

Resolved, That this matter be given publicity to all citizens of Illinois, professional and laity, and that all ISMS members be encouraged to write to their personal representatives.

ARIZONA STATE UNIVERSITY,
COLLEGE OF LAW,
Tempe, Ariz., April 30, 1973.

Herbert E. Hoffman, Esq.,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. HOFFMAN: On Friday and Saturday of last week I participated in a program in San Francisco on the proposed Federal Rules of Evidence sponsored by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association.

As you know, many programs on the rules have been given since the publication of the Preliminary Draft in 1969. The noteworthy feature of this particular presentation, as you can see from the enclosed copy of the program, is that the participants were almost entirely persons who had no connection with the process of drafting the rules. They were, with minor exceptions, not merely receptive to but highly enthusiastic about the rules. Moreover, the presentations were thoughtful, practical, and in depth.

The entire program was videotaped, and I would urge it upon you and the Subcommittee as a valuable source of information about the rules and about the reception that they have met and are meeting in most quarters. I am certain that Mr. Paul Wolkin, director of the program, would make the videotapes available.

Sincerely yours,

EDWARD W. CLEARY,
Reporter.

ARIZONA STATE UNIVERSITY,
COLLEGE OF LAW,
Tempe, Ariz., April 30, 1973.

HERBERT E. HOFFMAN, ESQ.,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. HOFFMAN: You will be interested to know that the Supreme Court of New Mexico within the last few days adopted the proposed Federal Rules of Evidence virtually without change. Nevada adopted the rules (Preliminary Draft) in 1971 with some changes in the area of privilege. The Supreme Court of Wisconsin, I am reliably informed, is expected within the next few weeks to adopt rules substantially as set forth in the Winter 1973 issue of the Marquette Law Review. These are the proposed Federal Rules with what I would describe as minor changes, and I am told that a few additional changes "not of much consequence" have been made.

Sincerely yours,

EDWARD W. CLEARY,
Reporter.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES,
Washington, D.C., May 2, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, House Committee on the Judiciary, Washington, D.C.

DEAR MR. CHAIRMAN: I want to thank you for your courtesy in incorporating my letter of February 16, 1973, and its attachments in your hearings record on the Rules of Evidence.

It has been brought to my attention, however, that by inadvertence my letter of August 12 and my exchange of correspondence with the Professor Charles Wright was not included in the attachments reprinted in the Record.

The matter is not of large moment, but since these documents form a helpful bit of legislative history in the development of the Rules project, if you have additional days of hearings in which these items might conveniently be included, it would be appreciated if you would place them in your Record.

Attached for your convenience is another copy of these items, and with kindest regards, I am

Sincerely,

JOHN L. MCCLELLAN,
Chairman.

Enclosure.

EXHIBIT I

U.S. SENATE,
Washington, D.C., August 12, 1971.

Hon. ALBERT B. MARIS,
Committee on Rules of Practice and Procedure,
Supreme Court Building, Washington, D.C.

DEAR JUDGE MARIS: I write to express my concern that the promulgation of the proposed Federal Rules of Evidence in their present form would seriously impair the administration of justice in the United States. In the main, I fully support your effort to secure for Federal courts compact, clear-cut, uniform, accessible and authoritative rules of evidence. But I must deprecate any effort which would go beyond such a codification, radically alter present law and further debilitate an already weak Federal system of criminal justice.

My comments here represent my initial opinions on the Rules as now drafted. With full public hearings, in which the drafters of the Rules could be heard and the criticism and suggestions of others solicited, I recognize that I might be persuaded that other positions on these various issues ought to be adopted. Nevertheless, I thought it perhaps wise to share with you my thoughts at this stage in your reconsideration of the proposed Rules.

RULE 103

Subdivision (a) of Rule 103 provides that error may not be predicated upon a ruling admitting or excluding evidence "unless a substantial right" of a party was affected.

I would assume that this Rule does little more than codify the harmless error rule. See, e.g., *Chapman* v. *California*, 386 U.S. 18 (1967). It would be helpful, however, if language were added regulating the notion of "substantial right" to the probable effect of the error on the verdict or finding. Such a provision is found in the *Model Code of Evidence* §§6(b) and 7(b). To the degree that rules of evidence seek to implement policies other than those immediately associated with the just determination of judicial disputes, it will always be possible to envision that a "substantial right" (e.g., the invasion of privacy associated with the use of the product of an unlawful wiretap) may have been violated, even though it had no impact on the final outcome of the proceeding. In such cases, a retrial would be a needless expenditure of public resources and further contribute to the massive problem of delay in our courts.

RULE 104

Subdivision (d) of Rule 104 limits the use that may be made of testimony of an accused given during a preliminary hearing on admissibility to "impeachment of clearly contradictory testimony by him at trial."

This provision appears to be an unwarranted extension of *Simmons* v. *United States*, 390 U.S. 377 (1968) and a narrowing of *Walder* v. *United States*, 347 U.S. 62 (1954). *Simmons* held that the testimony of an accused, establishing ownership of a suitcase, given on a motion to suppress, may not be used to establish guilt in the Government's case in chief; it says nothing about its use to establish guilt by rebuttal testimony after the defendant has put in an inconsistent defense (e.g., to rebut alibi witnesses not including the accused himself). *Walder* held that evidence obtained contrary to the Fourth Amendment may be used to unmask by rebuttal testimony affirmative perjury on collateral issues by an accused who testifies in his own behalf. Following and extending *Walder*, *Harris* v. *New York*, 401 U.S. 222 (1971), held that evidence obtained contrary to the Fifth Amendment may be used to unmask by impeachment on cross-examination perjury by an accused

who testifies in his own behalf. Neither *Walder* nor *Harris* limits the use of such evidence to "clearly contradictory" testimony. I would suggest, therefore, that, in the absence of some compelling showing of need, "clearly contradictory" be, changed to "inconsistent" and provision be made for the use of the evidence in cross-examination or rebuttal. If the purpose of a criminal trial "is to seek out and determine the truth or falsity of the charges brought against the defendant," *Lopez* v. *United States*, 373 U.S. 427, 440 (1963), the needless suppression of impeaching or rebuttal testimony ought to be avoided.

RULE 303

Rule 303 deals with the effect of presumptions in criminal cases. As you may be aware, proposed Rule 303 differs in its treatment of presumptions from Section 103(4) of the proposed Federal Criminal Code of the National Commission on Reform of Federal Criminal Laws, the Brown Commission. I would urge on you acceptance of the Brown Commission's draft, with one reservation to preserve current law while Congress is considering the issue.

In my judgment, Section 103(4) is superior to the draft of Rule 303 principally because it requires the court to instruct the jury that the "law regards the facts giving rise to the presumption as strong evidence of the fact presumed." Especially where statutory presumptions are at issue, any other course of action would deprive the jury of the special insight of experience that legally underpins the presumption itself.

For present purposes, however, I would recommend that the alternative formulation of the last clause of subsection (4)(a) be substituted for the black letter text of the Brown Commission's recommendation. See *Final Report of Commission, Comment* pp. 159–60. This would be consistent with present law. *See Curley* v. *United States*, 160 F. 2d 229 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). Since Congress will face this issue as it processes the recommendations of the Brown Commission, it would be preferable to avoid making a change in present law that might be itself so soon reversed. Every effort should be made to coordinate the consideration of parallel or odentical areas of the law by those entrusted with parallel or overlapping responsibilities, and needless confusion by several changes in basic concepts in an already difficult area of the law ought to be avoided if at all practicable.

RULE 403

Rule 403 codifies the familiar principle that evidence, even though relevant may be excluded if its probative value is substantially outweighted by such dangers as unfair prejudice, confusion of issues, delay, etc. Rule 403 also draws a distinction between those situations thought to require mandatory rather than discretionary exclusion.

In my judgment, this distinction is without foundation either in prior case law or in reason, and I would recommend to you that the Rule be redrafted along the lines of *Model Code of Evidence* § 303, where the discretionary character of the judgment to exclude is made explicit. See generally *McCormick* § 152 pp. 319–21.

I recognize, of course, that a distinction may be validly drawn between general applications of the principle and the situation where delay is the point at issue. My quarrel is not with this distinction, which the Advisory Committee note indicates at p. 31, is at the bottom of the division of Rule 403 into two parts. My difficulty lies with the failure of Subdivision (a) to see the ultimate issue in terms that emphasize the sound discretion of the trial judge and to uphold his ruling on appeal, absent abuse of discretion, in what will always be a balancing situation. I see no reason to purport to draw a hard and fast line that no one will be able to trace in practice. The adoption of the present draft would only provide criminal defendants with another standard ground for appeal and lead to more needless reversals and retrials in criminal cases.

RULE 404

Rule 404 deals with the inadmissibility of evidence of character or a trait of character to show conduct on a particular occasion. Subdivision (a)(2) makes possible, however, the use of evidence of the character of a victim of crime in instances where the accused first puts it in issue.

In my judgment, this exception is not broad enough as it is presently drafted. The cases are not without conflict, but it seems to me altogether reasonable, in at least homicide prosecutions, to permit the Government to rebut evidence of self-defense with proof of the man's character for peace and good order, even

though the accused has not put the dead man's character directly in issue. Both *McCormick* § 160 p. 339–40 and 3 *Wigmore* § 63 n. 2 support this view, and I urge your acceptance of it.

Too little is said now in behalf of the victims of crime. When the dead man cannot speak in his own behalf, his good name in the community ought to speak for him, when either his character or his conduct is attacked by the accused.

RULE 410

Rule 410 reflects the familiar principle that pleas of guilty or otherwise, later validly withdrawn, cannot be subsequently used.

Two unwarranted changes, however, were introduced in Rule 410 from the March 1969 draft to the March 1971 version. The March 1969 draft limited the principle of unavailability to proceeding in which the person who made the plea was himself involved. The March 1971 version apparently broadened the Rule by omitting these words of limitation.

When it is not being used against the person who made it, it is difficult for me to perceive what policy is served by an unwillingness to use, for example, a voluntary plea of guilty and its accompanying *McCarthy* (394 U.S. 459 (1969)) statements acknowledging guilt merely because the plea was later validly withdrawn. Proposed Rule 804(b)(4), criticized below, would make admissible statements against interest under certain conditions. Would Rule 410 so qualify proposed Rule 804(b)(4) that the plea and public confession of A could not be used by B to exculpate himself, where A's plea was validly withdrawn and he died before he could be re-tried?

It makes sense to give meaning to the ability to withdraw a plea by prohibiting its subsequent use in such a fashion that would undermine the withdrawal itself. This is, of course, the thrust of the dictum of the Supreme Court in *Kercheval* v. *United States*, 274 U.S. 220 (1927) (withdrawn plea to be excluded in subsequent trial). But that salutary and necessary policy is distorted by the March 1971 drafts apparent willingness to write a rule that would suppress the truth. I suggest, therefore, the adoption of suitable language that would return the Rule to its original scope.

The March 1971 version would also expand the March 1969 draft by extending the dictum of *Kercheval* on pleas to *McCarthy* statements made by the accused to the court when it takes a plea under Rule 11 Feb. Rules of Cri. Proc. I deprecate the suppression of voluntary statements by courts charged with finding truth, but I recognize the force of the logic that would extend the scope of *Kercheval* to meet the new rituals of plea-taking that require factual inquiries by the court to guarantee the voluntary character of the pleas. Nevertheless, I suggest that a rule of simple exclusion goes too far. As I noted above in connection with Rule 104, there are instances involving impeachment or rebuttal testimony where truth should outweigh the desire to make meaningful the judgment that a plea ought to be able to be withdrawn effectively. Consequently, I suggest that suitable language be added to the Rule itself or that the commentary at least reflects that the scope of the exclusion is not without limitation.

RULE 502

Rule 502 creates a Federal privilege to refuse to disclose and to prevent the disclosure of reports required by Federal or State law to be filed by persons, associations or corporations, where such is provided in the Federal or State statute requiring the report to be filed.

I am somewhat troubled by the apparent scope of this new privilege. It apparently has no counterpart in the Model Code of Evidence. The cases cited in the Advisory Committee's Note, moreover, are not particularly enlightening. To uphold values found in the privilege against self-incrimination, it may be necessary to accord protection against disclosure of information required to be filed by an individual, but why extend the privilege to an association or a corporation? Neither comes with the protection of the privilege against self-incrimination. *Wilson* v. *United States*, 221 U.S. 361 (1911) (corporations); *United States* v. *White*, 322 U.S. 694 (1944) (unions). Where Federal law is at issue, Rule 501, of course, controls. Information privileged by Federal statute ought to be accorded appropriate status under the rules. But why should the rules incorporate wholesale State law? If the litigation were between private parties or civil in character, I might readily agree that due deference to policies grounded in Federalism ought to control. See *Wright, Federal Courts* § 93 p. 415. But the administration of Federal criminal justice has never been thought to be generally subject

to State privileges, See *Funk* v. *United States*, 290 U.S. 371 (1933); *Wolfle* v. *United States*, 291 U.S. 7 (1934); *Rule 26 Fed. Rules of Crim. Proc.* Why should a required reports exception be carved out of this salutary general principle? I am not willing to suggest that in particular instances the courts ought not recognize such a privilege, but this should take place on a case by case basis; I would be reluctant to support a wholesale adoption of State law in this area without knowing quite what it was that was being adopted. *McCormick* § 149 pp. 311–12, for example, suggests that "in legislative halls when bills requiring such reports are proposed, the need for encouraging frank and full reports looms large to the proponents, but the judges and lawyers who would urge the need for truth in litigation are not alerted to oppose the privilege. The need might not be all that it appears to be. Consequently, I suggest that Rule 502 be deleted; it seems, in short, to hold out promise of more unforeseen difficulty than needed benefit.

Finally, in reference to the wording of the last sentence of Rule 502, I call your attention to the comparable and preferable language of 18 U.S.C. § 6002: "for perjury, giving a false statement, or otherwise failing to comply" with the statute.

RULE 504

Rule 504 adopts, subject to certain exceptions, in general Federal jurisprudence, not a doctor-patient, but a psychotherapist-patient privilege.

I am troubled by the omission in the Rules of any recognition of the general doctor-patient privilege. Although I recognize that the weight of scholarly opinion argues against its adoption, its support in the community is attested to by its inclusion in the *Model Code of Evidence* §§ 220–23 over the objections of the Reporter and Chief Consultant and its acceptance in a majority of states.

Nevertheless, because of my general opposition to any rule of evidence that suppresses the truth, I am willing, at least at this juncture, to see the rule written in its present draft form. It ought to be pointed out, however, that the shift in language from the March 1969 draft to the March 1971 version redefining "psychotherapist" from a doctor "who devotes a substantial portion of his time" to one "who devotes all *or a part of his time*" to psychotherapy virtually undermines your professed policy of not writing a general privilege. All doctors face and must treat in some fashion those whose illnesses are more psychosomatic than organic. If you are going to adopt the rule that you argue for, I would suggest, therefore, that you return to the language of the March 1969 draft.

RULE 505

Rule 505 recognizes in Federal criminal jurisprudence a limited privilege of a person to prevent his spouse from testifying against him.

Several aspects of this rule trouble me. The failure to write a rule protecting confidential communications seems a sharp break with tradition, but if a broad enough privilege against testimony is written, the same ground will be covered, at least in criminal cases, and the failure may not be crucial. But I am concerned that neither the text of the Rule nor the Advisory Committee Note offers any definition of "spouse." Compare *Model Code of Evidence* § 214(a). The matter could be handled either on the face of the Rule or in the comment, but it ought to be made unequivocal that the Rule is inapplicable where the marriage is a sham, *Lutwak* v. *United States*, 344 U.S. 604 (1953) or is at an end, through divorce or separation. See, e.g., *Barsky* v. *United States*, 339 F. 2d 980 (9th Cir. 1964).

If the rationale of the rule is the desire to achieve "the prevention of marital dissension and the repugnancy of requiring a person to condemn or be condemned by his spouse," Advisory Committee Note at p. 56, I find it strange, moreover, that Subdivision (c)(2) excludes events occurring prior to the marriage. Would not such testimony equally promote dissension and give rise to repugnancy? I would suggest, therefore, that this limitation be omitted to maintain consistency with your professed policy.

At the same time, I suggest that the testifying spouse be made the holder of the privilege. I recognize that *Hawkins* v. *United States*, 358 U.S. 74 (1958) may be cited for the contrary position, but if the rationale is the prevention of dissension, the goal is already beyond attainment where the spouse is willing to cooperate. To shut the mouth of a spouse willing to testify on the motion of the other is not to prevent or to heal a marriage break-up—that has already occurred—but to suppress the truth with no countervailing social gain. See *McCormick* § 66 p. 145.

I note, too, that this is already the position that has been adopted by the Congress for the District of Columbia in 14 D.C. Code 306(a) (1964).

Finally, I would suggest a return to the original language of Subdivision (a) of the March 1969 draft, which writes the privilege in terms of "testifying against". No issue is presented of marital dissension or repugnancy where the spouse as such does not testify. The use of testimony taken from another proceeding, where the privilege did not obtain, ought to be permitted. In theory or practice, it differs little from well recognized exceptions to the doctrine of privileged communications, where the privilege is not to suppress the truth of a communication, but merely to prevent the testimony of the spouse from being compelled. See, e.g., *Dickerson* v. *United States*, 65 F.2d 824 (1st Cir. 1933) (trial of husband for murder of wife; letter of wife found by third person among her effects held admissible). Problems may be presented by testimony in grand juries, but there is an ample number of precedents in related areas to make practical the drawing of the necessary distinctions to protect a person from having to testify there against his spouse. See, e.g., *People* v. *Tomasello*, 21 N.Y. 2d 143 234 N.E. 2d 190 (1967) (prospective defendant called before grand jury); see generally Birzon and Gerard, "The Prospective Defendant Rule and the Privilege against Self-Incrimination in New York," 15 *Buff. L. Rev.* 595 (1966).

Finally, I suggest that "or other similar statute" be added to Subdivision (c)(3). There are a number of statutes comparable to either 8 U.S.C. § 1328 and 18 U.S.C. §§ 242-24 in that they deal with prostitution or vice that might be logically added. See e.g., 18 U.S.C. § 1952. Coverage can be obtained over them by general language without fear that another one is overlooked by inadvertance.

RULE 506

Rule 506 recognizes a privilege for confidential communications made to a clergyman.

Few can quarrel with the motivation that leads to the adoption in Federal law of this privilege. Indeed, it may be a necessary implication of the First Amendment itself. Compare *United States* v. *Caldwell*, 8 Crim. L. Reptr. 2124 (9th Cir. 1970), *cert. granted*, 9 Crim. L. Reptr. 4028 (5-5-71). Nevertheless, I am troubled by the possible implications of extending it beyond its roots in the discipline or accustomed practice or a religious community. Compare the formulation of the privilege found in *Model Code of Evidence* § 219. I recognize, of course, that the role of a clergyman extends beyond the custom of confession. As the Advisroy Committee Note indicates at p. 58, many "clergyman now receive training in marriage counseling and the handling of personality problems." But so do marriage counselors and social workers. If we are protecting confidential communications in these areas, why should the rule be limited to spiritual advisors? I am not willing at the present time to write a rule quite so broad. No defensible rationale for distinguishing between those who wear the cloth and those who do not in these sensitive areas suggests itself to me. Consequently, I would suggest that Rule 506 be given a much more narrow and defensible scope, along the lines of the *Model Code of Evidence* § 219.

On the other hand, should you go forward with the text of the present rule, I would seriously urge on you the need to recognize, at least in those areas beyond "penitential communications," see *Model Code of Evidence* § 219(1)(c), some sort of countervailing weight. As Rule 506 is now drafted, it is an absolute. Yet exceptions are recognized in Rule 504 to the psychotherapist-patient privilege and in Rule 503 to the lawyer-client privilege. At least where communications, not penitential in character, concern a mental illness and there is a need for hospitalization, see Rule 504(d)(1), or are in furtherance of crime or fraud, see Rule 503(d)(1), I can see no justification for writing the Rule in its present unlimited form.

It is fashionable in some quarters today, for example, for clergymen to protect real and imagined defects in our society, not through constitutionally protected speech or assembly, but through criminal conduct, sometimes dangerous not only to property but also to life and limb. I so no reason why the law should offer them a shield behind which they can seek to overturn unlawfully our traditional institutions free of legal responsibility. I urge on you, therefore, the need to reconsider the unwarranted scope of the present draft.

RULE 509

Rule 509 recognizes a Governmental privilege in military and state secrets.

As presently drafted, this Rule raises a number of serious issues in my mind, although I am not prepared, at this juncture, to venture an opinion on how I

would approach these matters should they come before the Congress. As you may be aware, these issues are now the subject of extensive hearings before the Subcommittee on Separation of Powers in the Senate. Nevertheless, I should like to share with you some of my deep concerns.

As originally proposed in March 1969, the rule closely followed *United States* v. *Reynolds*, 345 U.S. 1 (1953), where the Government's right to withhold military information in a tort suit against it was upheld. The test under the March 1969 rule was a "showing of substantial danger that the evidence will disclose a secret of state." "Secret of state" was defined in terms paralleling the *Model Code of Evidence* § 227(1). The March 1971 version, however, omitted this definition and subtly shifted the test; it would now require a showing of reasonable likelihood of danger that disclosure of the evidence would be detrimental or injurious of the national defense or international relations of the United States." The showing may be heard in chambers, but "all counsel are entitled to inspect the claim and showing and to be heard thereon."

I am concerned that you have withheld what you purported to recognize by setting up an unrealistic procedure for testing the claim. The Supreme Court itself in the *Reynolds* case reasoned that the procedure adopted to determine the validity of a claim must not "force the disclosure of the very thing that privilege was designed to protect." 345 U.S. at 8. I strongly urge you to return to the approach of the March 1969 draft and provide for an *in camera* procedure for testing the claim.

The Subcommittee on Criminal Laws and Procedures held extensive hearings and made an exhaustive study of the unhappy experience of the litigation surrounding the disclosure rule announced by the Supreme Court in *Alderman* v. *United States*, 394 U.S. 165 (1969) in the area of electronic surveillance. See generally my discussion in "Organized Crime Control Act (S. 30) or Its Critics: Which Threatens Civil Liberties," 46 *Norte Dame Lawyer* 57, 108–33 (1970). Our hearings and studies showed that "protective measures" are an illusion, and disclosure to counsel too often means disclosure to accused and the newspapers. It would be most unwise to go down that road again.

It is appropriate at this point to raise a related problem. The proposed rules do not contain an explicit rule parallel to *Model Code of Evidence* § 228, which deals with official information not open to public disclosure. The Advisory Committee Note to Rule 509 at pp. 63–64 indicates that this omission was intentional. It may well be, however, that Rule 501, in fact, covers this situation, when it states except as "provided by Act of Congress" before it specifies that only those privileges set out in the Rules are recognized. As the Advisory Committee Note indicates, Congress has authorized heads of executive departments to control the information that they possess, and the courts have consistently upheld the validity of regulations dealing with disclosure against challenge in the context of the issuance of judicial subpoenae, see, e.g., *United States* v. *Ragen*, 340 U.S. 462 (1951), although the right to control that information is, of course, now limited under the Freedom of Information Act, 5 U.S.C. § 552.

I cannot say that I am enamored of an "official information" privilege in all its possible ramifications and in light of its many abuses, but it is too deeply imbedded in our history to dismiss it as merely a problem in relevancy, as the Advisory Committee Note does at p. 64. It deserves a more discriminating treatment.

On the other hand, I see no reason to accord "official information" a status equal to that of "state secrets." If an official information privilege is to be recognized—and I think that it should receive a more detailed treatment than the present Rule accords it—the Rules should meet the issue head-on and provide suitable definitions and procedures for its claim and determination. See *McCormick* §§ 145–47. Consequently, I urge on you the careful reconsideration of Rule 501 and its parallel problems.

RULE 510

Rule 510 recognizes the traditional informant's privilege.

The present version of Rule 510, however, raises a number of troublesome questions. Would "law enforcement" officer include a member of a legislative committee or its staff investigating conduct that may constitute a violation of Federal or State law for the purpose of developing legislation? My experience with the Permanent Subcommittee on Investigations leads me to suggest that any lack of clarity here ought to be resolved in favor of recognizing this dimension of the privilege.

Similarly, how narrowly would "information purporting to reveal a violation of law" be read? Many times informants provide information of a general intelligence character that cannot immediately be tied into a violation of a specific

law. This is particularly true in subversive and organized crime investigations. Information also often leads not to a violation of law, but to the location of a fugitive. I trust that these situations would be protected by the privilege.

I recognize, of course, if the Government calls the informant, the accused ought to be able to elicit from him on cross-examination testimony as to his identity background. See, e.g., *Alford* v. *United States*, 282 U.S. 687 (1931). On the other hand, when the accused calls a person as his witness, inquiry into such matters should be more restricted. See, e.g., *Beasley* v. *United States*, 218 F. 2d 366, 368 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 907 (1955). This distinction, in my judgment, is not given sufficient recognition in the language of Subdivision (c)(1). I suggest, therefore, the addition of an appropriate qualifying phrase.

As proposed in the March 1969 draft, Rule 510 basically codified the law as announced in *Roviaro* v. *United States*, 353 U.S. 53, 59 (1957). To obtain the informant's identity, the Rule provided that it was necessary to show that his identity was necessary "to a fair determination of guilt or innocence." The March 1971 version, however, introduced a subtle difference. Now the test is to be a "fair determination of a material issue." This is explained in the Advisory Committee Note at 66 as a change made necessary to adopt the rule to civil proceedings. Nevertheless, as so stated, despite the language to the contrary in the Advisory Committee Note at p. 66, it might well be read to set aside the Supreme Court's decision in *McCray* v. *Illinois*, 386 U.S. 300 (1967), where the Court upheld a refusal to disclose an informant's identity, where his testimony bore not on guilt or innocence, but on the propriety of an arrest without a warrant. I suggest, therefore, a return to the original language of the 1969 draft, duly qualified to apply to criminal proceedings, along with the addition of the new language, duly qualified as applicable only to civil proceedings.

It seems to me to be advisable, moreover, to adapt the *in camera* procedure of Subdivision (3) to the issues posed by Subdivision (2). The court ought to have available to it some mechanism whereby it can determine of what value the informant's testimony or identity would be on the issue of "guilt or innocence" or to a "fair determination of a material" issue. In addition, I wonder if dismissal should be the automatic remedy. Might it not be just as proper to strike one or more counts or to sever one or more defendants? The remedy you propose seems to me to be altogether too inflexible in the criminal context.

Finally, I am not sure that I understand the provision of Subdivision (3) that permits *all* counsel to be present at every stage that *any* counsel is permitted. I can envision situations where in the process of an *in camera* showing it would be necessary to have counsel for the Government present, but the procedure would be self-defeating if counsel for the accused was present. My remarks above in reference to Rule 509 need not be repeated fully here. My point is simply that too often today so-called "movement" lawyers draw no distinction between themselves and those they represent, and in organized crime prosecutions, even though a prominent lawyer will be retained, the ubiquitous "house counsel" will be present to handle special chores. The failure to recognize these realities of trial practice is most unwise.

At the same time, I see no reason to require all defense counsel to be present in all situations. Where the issue concerns only one of several defendants, why should it be necessary to run unnecessary risks by having all counsel present? In short, I would hope that on further reflection you could be lead to modify and to clarity these provisions, so that the procedure you adopt does not undermine the privilege you recognize.

RULE 606

Rule 606 deals with the competency of jurors as witnesses, either in the trial itself or to inquire into the validity of an indictment or verdict.

I have no objection to permitting jurors to testify that improper information came to their attention. This may be necessary to protect verdicts from improper influence, especially by the news media. This rule has deep roots in Federal practice. *Mattox* v. *United States*, 146 U.S. 140 (1892). But as I read the present draft of Rule 606, it would go further and permit the impeachment of verdicts by inquiry into, not the mental processes themselves, but what happened in terms of conduct in the jury room.

The mischief in this Rule ought to be plain for all to see. Judges need not explain their verdicts beyond the judgment and the opinion. Were it possible to overturn a decision because, in fact, it was not based on precedent, but bias, and this was an issue that could be litigated, it would indeed be brought before the courts. Present law, as I read it, wisely prohibits this sort of inquiry before it starts with jurors as it is unthinkable with judges. *Hyde* v. *United States*, 225 U.S. 347 (1912) (compro-

mise verdict). *McDonald* v. *Pless*, 238 U.S. 264 (1915) (affidavit as to quotient verdict excluded). I do not believe it would be possible to conduct trials, particularly criminal prosecutions, as we know them today, if every verdict were followed by a post-trial hearing into the conduct of the juror's deliberations.

Should my views on this question not obtain, I would at least urge, for the sake of finality, that consideration be given to permitting testimony to support a verdict, when inquiry is made into conduct within the jury room. See *McCormick* § 68 n. 16 p. 149. Better no testimony at all, but if testimony is to come in, a principle of harmless error in fact ought to be recognized. I urge that you recognize that trials are human processes and that perfect trials, using lay jurors as the Sixth Amendment rightly commands, are an illusionary goal.

RULE 608

Rule 608 deals with the admissibility of evidence of character and the use of specific instances of conduct to attack the credibility of a witness, including the accused.

I question the departure from the traditional practice of not permitting an accused to buttress his character for veracity before it is attacked by the prosecution. See *McCormick* § 158 p. 334 n. 7. The question, however, is not of large moment. Of more concern to me is the apparent shift away from the sort of full and effective cross-examination envirioned by the Supreme Court in *Michaelson* v. *United States*, 335 U.S. 469 (1949) by the substitution of the phrase "clearly probative . . . and not remote in time" in Subdivision (b), in the March 1971 version for the term "relevant" in the March 1969 draft. Granted that abuse is possible, I would trust to the common sense, fairness and discretion of the trial judge under a general concept of "relevancy" before introducing unnecessary second guessing on an appeal on issues such as "clearness" and "remoteness." I urge, therefore, a return to the original language of the March 1969 draft; the present draft bespeaks too much of a lack of trust in trial judges.

RULE 609

Rule 609 deals with impeachment by evidence of conviction of crime.

I note that the March 1971 version rejects the position of the March 1969 draft and adopts the rule of *Lucky* v. *United States*, 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965).

I find it somewhat difficult to understand that less than eight months after the Congress, after full hearings and debate, specifically rejected *Luck* in the District of Columbia Court Reform and Criminal Procedure Act of 1970, P.L. 91–351 § 133 that it would now be suggested that it ought to be adopted for the entire Federal system.

Putting aside for a moment the intrinsic merits of the issue, I would suggest that this Rule be rewritten in terms of the March 1969 draft. If the 1970 Crime Act is to be overturned, I suggest that this is a question for the Congress to decide.

RULE 611

Rule 611 deals with the mode and order of the presentation of evidence, including the scope of cross-examination and the use of leading questions.

It may be debated that the shift from the traditional rule in Federal courts limiting the scope of cross-examination embodied in the March 1969 draft to the wide-open rule of the March 1971 version is a wise choice. But when it is coupled with the striking of "shall" in Subdivision (a) and the insertion of the weaker "may" in Subdivision (a)'s directive to the trial judge to control his own court room, I am convinced that it is unwise. At the very least, I would suggest that the Rule, not only give recognition to power of the judge to order the presentation of evidence, but also place upon him the unequivocal duty to see that it is done to avoid confusion and bring out the truth. Once again I am constrained to comment that your draft bespeaks of a lack of trust in trial judges.

RULE 612

Rule 612 deals with the production of writing used to refresh a witness' memory.

In the main, the rule is unobjectionable. I am troubled, however, about one of its features—that relating to documents examined *before*, rather than *at* trial—and its relation to the scope of cross-examination proposed in Rule 611, noted above.

As I understand it today, the controlling teaching in Federal courts is that of *Goldman* v. *United States*, 316 U.S. 129, 132 (1942), which does not permit the production of documents not used *during* the trial. The language of Rule 612, obviously, would set aside this practice. Coupled with the wide-open cross-examination of Rule 611, I do not see any meaningful limitation of the extent to which documents might be produced, or at least enterprising defense counsel might not call for. (The right to call for documents is not limited to the scope of the direct examination, but is phrased in terms of the "testimony of the witness.") Particularly in those cases touching national security information, where the witness may have refreshed his recollection so that his testimony in the trial would not reveal information that is classified and unrelated to the trial, I can foresee that this rule would introduce far too many tangential issues and raise endless matters for endless appeals and retrials; it would contribute so little to fair and effective cross-examination that I must question its wisdom.

All of this may be pointed out without noting that the Rule, as now written, flies directly against the policy of 18 U.S.C. § 3500, which sharply restricts not only pre-tiral discovery, but also sharply limits the production of documents at trial. In this connection, I note that the Congress has most recently reaffirmed the policy of restricted discovery of Government documents and extended the scope of 18 U.S.C. § 3500 to cover grand jury testimony. P.L. 91–452 § 102.

I strongly urge, therefore, that the Rule be redrafted in line with both the teaching of *Goldman* and the policy of 18 U.S.C. § 3500.

Article VII: Opinion rules

Article VII of the Rules deals with opinion testimony, either by laymen or by experts.

In the main, it promises to increase the knowledge that will be available to the triers of fact. Consequently, it may be expected to enhance the system of justice.

In my judgment, however, it would also be helpful if the Rules contained provisions like those found in *Model Code of Evidence* §§ 404–08, dealing with notice and examination of expert testimony before it is given. In civil proceedings, there is, of course, now ample means for obtaining pre-trial discovery either for the Government or the accused. Given the special considerations there applicable, this may well serve the course of justice. However, that may be, I see little justification for fear of the consequences of pre-trial notice and discovery by either side where the testimony is expert in charter, and no valid objection under the Fifth Amendment on the part of the accused. See *Jones* v. *Superior Court*, 85 Cal. 2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962) (medical testimony of accused in rape prosecution purporting to show impotency held discoverable). Given the increased latitude accorded expert testimony under the proposed Rules, there is all the more reason to guarantee that such testimony will be subject to the most searching cross-examination. The cause of truth will not be served if the result of the Rules is simply to turn over to the experts the trial of various issues. I urge you, therefore, to give careful consideration to these provisions of the Model Code.

Hearsay: Article VIII

Rule 801 contains definitions applicable in Article VIII, which deals with the hearsay rule and its various exceptions.

I am not sure of the significance of the omission from the March 1971 version of Subdivision 801(c)(2)(iv), dealing with transcripts of testimony, which was contained in the March 1969 draft. I assume that its coverage was duplicative of Subdivisions 801(c) (i) (inconsistent statements) and (ii) (consistent statement offered for rebuttal). To that degree, it was, of course, surplusage. The only area not covered by (i) and (ii) would be consistent statements not offered for rebuttal purposes. Consequently, the effect of (iv)'s omission was to place back within the definition of hearsay such statements.

This seems to be a reasonable modification of the March 1969 draft, which was perhaps too expansive in this regard. However, if the significance of the omission was to disapprove of the reasoning or result of *United States* v. *DeSisto*, 329 F.2d 929 (2nd Cir. 1964), *cert. denied*, 377 U.S. 979 (1965), cited in the Advisory Committee Note at p. 167, I would strongly urge that the language of the original text be restored. *De Sisto* contains, in my judgment, a highly persuasive analysis of the hearsay rule and should be followed in your efforts to make sense out of the law in this area.

Co-Conspirator Declaration Rule

I regret that you did not take the opportunity of the formulation of comprehensive rules of evidence to re-examine the present law dealing with the admission of the declaration of co-conspirators. Subdivision 801(d)(v), as the Advisory Committee Note indicates at p. 104, follows uncritically the "accepted pattern." Here I would urge on you a re-examination of the law in this area. Consequently, I take the liberty of commenting more expansively on my understanding on the development of the hearsay rule and its various exceptions. What I suggest, however, is that the present requirement of "furtherance" be omitted and that two new ones be added: (1) a requirement of the presence of an independent circumstantial guarantee of trustworthiness, and (2) a requirement of relevancy to the character or the execution of the conspiracy itself.

My suggestion must first be placed in historical context. With the development of the witnesses in the common law trial of the 1600's, there developed a series of rules, as I am sure you are aware, each seeking to establish the truth of testimony. The witness must, as Chief Justice Vaughn put it in *Bushel's Trial* (1670) 6 How. St. Tr. 999, 1003, speak to "what hath fallen under his senses." The law then rightly wanted no part of second-hand information. Closely allied to this principle was the rule that demanded confrontation-cross-examination. Too many knew of the injustice done in *Raleigh's Trial* (1603), 2 How. St. Tr. 16, when Chief Justice Popham refused to produce Lord Cobham, the accuser. No precise date or ruling stands out as decisive, but the rule seems to have become fixed between 1675 and 1690.

This rule against hearsay, however, was not without exceptions. Sworn depositions could be used, as Raleigh himself conceded, "where the accuser is not to be had conveniently" (1603) 2 How. St. Tr. 16, 18. Nevertheless, with firm establishment of the exclusion of extrajudicial unsworn statements, the anomaly of the sworn statement stood out, and in *Fenwick's Trial* (1696), 13 How. St. Tr. 537, 618, the principle if not the rule carried the day, for it soon became "a fundamental rule (of) law that no evidence shall be given against a man, but in the presence of the prisoner, because he may cross-examine him who gives such evidence."

Today, of course, this common law rule is reflected in our Sixth Amendment, which guarantees "the accused the right to be confronted with the witness against him." Nevertheless, as 5 *Wigmore* § 1397 p. 130–31 put it:

> . . . this right of cross-examination thus secured was *not a right devoid of exceptions*. The right to subject opposing testimony to cross-examination is the right to have the hearsay rule enforced; for the hearsay rule is the rule requiring cross-examination. . . . Now the hearsay rule is not a rule without exceptions; there never was a time when it was without exceptions. There were a number of well-established ones at the time of the earliest constitutions, and *others might be expected to be developed in the future*. The rule had always involved the idea of exceptions, and the constitution makers indorsed the general principle merely as such. They did not attempt to enumerate exceptions; they merely named and described the principle sufficiently to indicate what was intended. . . . The rule sanctioned by the Constitution is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, *developed, or created therein*. (Emphasis added)

He continued:

> The revision and extension of those exceptions is gradually progressing, and it is well to appreciate fully that there is in progress nothing inconsistent with constitutional sanctions. So bold are nowadays the attempts to wrest the Constitution in aid of crime, and so complacent some courts in listening to fantastic and unfounded objections to evidence, that the permissibility of such changes should not be left in the slightest doubt. *Id.* at 135.

A large number of "exceptions" to the hearsay rule have thus evolved, permitting the admission of many extrajudicial declarations despite their inclusion within the term "hearsay." The number may be put at "ten to twenty," depending on the system of "classification." *McCormick* § 300 p. 626. Two examples are declarations against interest, see, e.g., *People* v. *Spriggs*, 60 Cal. 2d 868, 36 Cal. Rptr. 841, 389 P. 2d 377 (1964), and dying declarations, see e.g., *Mattox* v. *United States*, 156 U.S. 237 243 (1895) (dictum). Thus, for as long as there has been a hearsay rule, the boundaries of the "hearsay" definition and its "exceptions" have resulted in the admissibility of extrajudicial declarations in many situations where an oath, the presence of the trier of fact, or an opportunity to cross-examine was absent—and in some situations, such as dying declarations and declarations against interest, where *all three* factors were absent. Further, these rules have been held not to

infringe the constitutional right of confrontation, on the ground that it embraces limitations and exceptions just as does the hearsay rule itself. See, e.g., *Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965) (dictum); *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965); *Kirby* v. *United States*, 174 U.S. 47, 61 (1899); *Mattox* v. *United States*, 156 U.S. 237 (1895).

Still more important is the fluidity of the hearsay and confrontation rules' contours and exceptions. Created by the courts through the process of common law adjudication, they have remained subject to judicial expansion, contraction, and restatement as learning and experience have advanced. Congress itself has amended the hearsay rule and exceptions, see, e.g., 28 U.S.C. § 1733 (government records), and the rule-making process, too, has been involved. See, e.g., Fed. R. Crim. P. 27 (government records). Such expansion of admissibility is, in short, not inconsistent with the limitations of the Constitution. As Mr. Justice Cardozo wrote for the Supreme Court in *Snyder* v. *Massachusetts*, 291 U.S. 97, 107 (1934), "the exceptions [to the right of confrontation] are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule." I propose one such expansion.

In the area of organized crime, the existence of a conspiratorial relationship is usually shown either by circumstantial evidence, by the testimony of a co-conspirator who has turned state's evidence, or by evidence of the out-of-court declarations or acts of a co-conspirator and of the accused himself.

Today, the co-conspirator declaration rule is unsually framed in these terms: Any declaration by one co-conspirator, voiced in furtherance of the conspiracy and during its pendency, is admissible against each co-conspirator, subject to the laying of an independent foundation of the existence of the conspiracy and the accused's participation in it. "Development in the Law—Conspiracy," 72 *Harv. L. Rev.* 920, 983–84 (1959).

It is my suggestion that this existing hearsay exception be enlarged by substituting for the present requirement that the declaration be in "furtherance" of the conspiracy requirements that there be facts or circumstances from which the "trustworthiness" of the declaration may be inferred and that the declaration relate to the character or the execution of the conspiracy.

The Subcommittee on Criminal Laws and Procedures had such a proposal under consideration as part of S. 30, the "Organized Crime Control Act of 1970," now P.L. 91–452. Hearings were held on the proposal, and it received the endorsement of a number of witnesses. See generally *Measures Relating to Organized Crime*, Hearings before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, United States Senate, 91st Cong., 1st Sess. (1969). It was not processed by the Subcommittee as part of the final bill largely out of a feeling that piece-meal reform was unwise and that this and related endeavours might well wait your work.

In support of the suggestion, I should like to draw your attention to the testimony in the hearings on the proposal of the Department of Justice and Professor Henry Ruth, then with the University of Pennsylvania Law School, now head of the Criminal Justice Coordinating Council in New York City. The Department fully supported the change and stated the need and justification for it in these terms:

The "co-conspirator's hearsay exception" is a firmly established exception to the general rule against the use of hearsay to establish criminal liability. *Krulewitch* v. *United States*, 336 U.S. 440, 443 (1949). The exception has come to rest in American jurisprudence on agency principles as articulated by Mr. Justice Story in *United States* v. *Goodling*, 25 U.S. (12 Wheat.) 460, 469 (1827), and the exception remains as yet unquestioned by the Supreme Court. See *Bruton* v. *United States*, 391 U.S. 123, 128 n. 3 (1968).

The rationale behind this proposed change apparently is that the "furtherance" requirement of this exception is of somewhat ill-defined meaning, but apparently an out-growth of the agency rationale which is sometimes stated in terms of *res gestae* landguage, but which many other courts interpret so broadly as to apply to anything that relates to the conspiracy. Since this reduces the requirement to relevancy, and since all evidence must be relevant, it is reasoned that the "furtherance" requirement is thus eliminated in substance if not in form. This being so, it is felt that something more, namely, the element of trustworthiness should be required.

The logic of this argument is quite compelling, and the substitution of the element of trustworthiness of relevant eivdence for the furtherance requirement would appear to be not only more realistic in terms of current judicial interpreta-

tion but also more consistent with the policy behind this exception to the general rule of exclusion of hearsay evidence.

Criminal law conspiracy principles have been most effective in organized crime prosecutions, and there can be no doubt that the "co-conspirator's hearsay exception" has been a vital factor in their success. The continued vitality of this co-conspirator rule is absolutely essential in conspiracy prosecutions of all types. Since the agency rationale which currently supports this exception is subject to increasing criticism by the courts and by the authorities in the field, it would seem only prudent to move away from this rationale toward a more realistic basis for the exception, that is from agency to trustworthiness.

The movement to eliminate the furtherance requirement began with Professor Morgan's examination of the soundness of the vicarious liability rationale in an article in 42 Harvard Law 461 (1939). As a result of Professor Morgan's article the furtherance requirement was eliminated both in the *Uniform Rules of Evidence*, 63(9), and in the *Model Code of Evidence*, Rule 508(b). It has also been approved by Professor McCormick, *Evidence*, Section 244 (1964).

The ambiguity of the furtherance requirement has caused considerable difficulty in the admission of testimony in conspiracy prosecutions, and more often than not a narrow construction of the term results in the exclusion of the Government's evidence. Few opportunities for appellate review of the principle have been occasioned since the Government has no right to appeal.

On the other hand, a conflict among the Circuit Courts exists in the cases of *United States* v. *Birnbaun*, 337 F.2d 490 (C.A. 2, 1964), where Judge Lumbard applies a strict agency construction to the furtherance requirement, and in *International Indemnity Company* v. *Lehman*, 28 F.2d 1 (C.A. 7, 1928), *cert. denied*, 278 U.S. 648, which is classically cited for the virtual abandonment of the furtherance requirement in favor of the test of relevancy.

In view of these authorities, then, and in view of the apparent reality that many courts have discarded the furtherance requirement in favor of relevancy, it would seem that this is an appropriate time to codify this principle. Perhaps an even more cogent reason for discarding the furtherance requirement which is based on agency and shifting the basis of the exception to trustworthiness, however, is the portent in several recent Supreme Court decisions, *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Barber* v. *Page*, 390 U.S. 719 (1968); and *Bruton* v. *United States*, 391 U.S. 123 (1968), that the Supreme Court may be moving towards re-examination of the present theory sustaining the admissibility of co-conspirator's statements based on agency principles. These cases, while dealing with co-conspirator's statements sought to be admitted after the termination of the conspiracy, indicate that the right to confrontation under the Sixth Amendment still permits some traditional hearsay exceptions, based upon necessity and trustworthiness. In view of these decisions, therefore, it would seem that this would be a prudent time to enact this provision. (Hearings at 374–75)

Professor Ruth stated:

Existing law as to co-conspirator statements is founded upon the common law and in effect is a substantive extension of the agency doctrine that each conspirator is responsible for the acts of other conspirators in furtherance of the conspiracy. The theory rests upon a vicarious admission philosophy that each conspirator is an agent for the others and those others thereby adopt whatever each conspirator does and says in furtherance of one plan. Wigmore supports this theory against strong opposition from Morgan. See Wigmore, secs. 1079–1080a (3d ed. 1940). The furtherance principle was also retained in the California and New Jersey evidence codes adopted in 1965 and 1967 respectively.

On the other hand, the Model Code of Evidence and the Uniform Rules of Evidence omit the furtherance requirement in their practically identical Rules 508(b) and 63(9)(b) respectively. The Model Code provides:

"* * *

"(b) the party and the declarant were participants in a plan to commit a crime or civil wrong and the hearsay declaration was relevant to the plan or its subject matter and was made while the plan was in existence and before its execution was complete. * * *"

Four recent United States Supreme Court cases have re-examined hearsay exceptions insofar as admissibility at trial may conflict with the Sixth Amendment right to confrontation of witnesses at trial, a provision now applicable to the states. See *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Barber* v. *Page*, 390 U.S. 719 (1968); and *Bruton* v. *United States*, 391 U.S. 123 (1968). In addition, the Court has just granted certiorari in *Evans* v. *Dutton*, 400

F. 2d 826 (5th Cir. 1968). Each of the cases involve co-conspirator statements, but in each the statement sought to be admitted was made following the termination of the conspiracy. Thus, there is only a portent that the Supreme Court may be moving towards re-examination of admissibility of co-conspirator statements as vicarious admissions. The above cases do reveal applicable principles: (1) the confrontation doctrine is at the heart of a fair trial; (2) confrontation does not mean merely the right to cross-examine at some point of time; it includes a right of confrontation at trial where the jury can see the witness' demeanor; (3) the Sixth Amendment still permits some traditional hearsay exceptions, based upon necessity and trustworthiness; but a witness' unavailability at trial must be based upon cogent reasons and other indicia of strong reliability must be present.

Rejection of the furtherance requirement makes much sense to me. That requirement is necessary if one retains the vicarious admission theory. But that theory is quite strained in that authority to act for another does not necessarily imply authority to speak for another in those circumstances where such speaking is not in effect conduct in furtherance of the conspiracy. Reliability of the declarant seems really to be based upon a finding that a conspirator's statement is against his interest, whether that interest be penal, social or economic. And Title VII, in requiring the declaration to relate to the existence or execution of the conspiracy during the declarant's participation in it, moves towards this reliability. The further requirement of facts and circumstances implying trustworthiness builds upon the need for reliability. (Hearings pp. 337–38)

In addition, I note that the American Bar Association approved the elimination of the furtherance requirement when it approved the Uniform Rules of Evidence in 1953. See 30 *A.B.A.J.* 1029 (1953). Finally, the statutes of four states codify the rule omitting this requirement. See *Ga. Code Ann.* § 38–306; *Kan. Stat. Ann* § 60–460(1); *Mont. Rev. Code Ann.* § 93–401–27(6); *Ore. Rev. Stat.* § 41, 910(6).

My suggestion could be implemented by substituting the following language for Rule 801(d)(2)(v):

"A statement by a co-conspirator of a party during the course of the conspiracy, relating to the character or the execution of the conspiracy, and there were facts and circumstances from which its trustworthiness may be inferred."

The requirement of "relating," of course, speaks pretty much for itself. What I envision for the element of "trustworthiness" is not terribly different from the criterion now generally applicable in other hearsay exceptions. Corroboration by independent evidence would make it trustworthy. See e.g., *Smith* v. *United States*, 348 U.S. 147, 155 n. 3 (1954). It might have been voiced in circumstances making it especially credible. See, e.g., *Holt* v. *United States*, 94 F. 2d 90 (10th Cir. 1937) (deathbed confession excluded as not in furtherance). Normally, however, that the statement was against the penal interest of the declarant himself ought to suffice. See *Model Code of Evidence* § 508, Comment p. 251. ("These statements are likely to be true [since they] * * * are usually made with a realization that they are against the declarant's interest.")

I have framed this suggestion as an amendment to Subdivision 801(d)(2)(v). And it could be rationalized there. However, it would seem far more logical to put it following Subdivision 804(d) where the requirement of "unavailability" would be fully applicable to it as an independent exception to the hearsay rule not founded on the doctrine of vicarious admission. See Testimony of Professor Ruth, *Hearings* at p. 338.

Statement against interest

In the main, I support the introduction into Federal law of the concept of declarations against not only material, but also penal interests. But I am seriously troubled with the scope of the Rule as it is now written.

Initially, it seems to me that the Rule ought to have some requirement of directness and immediateness. See *McCormick* § 253 p. 546. The rationale of the Rule is that such statements are trustworthy because people do not normally speak against themselves. This rationale is supportable to the degree that statement is directly and immediately against the declarant's interest, and conversely, unsupportable to the degree that the statement is merely indirectly or only remotely against a declarant's interest. We would be guaranteeing the trustworthiness of the evidence we admit if these thoughts were added to the rule.

Second, there ought to be some requirement that the fact asserted by the declarant be within the scope of his personal knowledge. See *McCormick* § 253, p. 546. The Supreme Court has been careful to accept hearsay in the context of showing of probable cause for search and seizure only where the declarant can

reasonably be said to have had personal knowledge of that about which he speaks. See, e.g., *Spinelli* v. *United States*, 393 U.S. 410 (1969). We should do no less here.

Third, I believe that the rule goes too far when it accepts declarations against penal interest at their face value. I suggest that such declarations be admitted only when they are in such a form that they would qualify to convict the declarant himself. As you have phrased the Rule now, it will only apply to admit exculpatory evidence. It will not serve to admit incriminating evidence. (I will treat this aspect of the rule below.) On the assumption that this limitation is to remain, I think it unwise not to look more carefully at what you are proposing.

Homes in his classic dissent in *Donnelly* v. *United States*, 228 U.S. 243, 277 (1913) did not argue for the admission of such declaration *simpliciter*. He suggested that Joe Dick's confession of murder should be admitted to exculpate Donnelly when it was "coupled with circumstances pointing to its truth." He added, too, that there should be "no ground for connecting Donnelly with Dick."

I would apply a rule of corroboration to such declarations as strong as the rule we now apply to confessions where introduced for the purpose of conviction. See *Smith* v. *United States*, 348 U.S. 84 (1954). In each case, we are proving by the declarant's statement that he committee a crime. All of the reasons which lead us to demand that confessions be trustworthy when we seek to convict by their use apply when an accused seeks, in effect, to convict another by such a confession in order that he himself may go free.

Next, because of the special danger associated with jail-house testimony used to exculpate, I would provide that the prosecution have the right to obtain from the court an instruction to the jury that where the declarant himself had been involved in the past in criminal offenses that his statement should be received and credited only with the utmost care because of the special danger of perjury and the virtually universal experience of the untrustworthiness of such declarations.

Lastly, I would omit entirely the last sentence of Subdivision 804(b)(1). On its face it does not state the law. *Nelson* v. *O'Neill*, 9 Crim. L. Reptr. 3184 (6-1-71) held that the use of a confession of a co-conspirator implicating the other defendant did not contravene the Sixth Amendment where the co-conspirator took the stand to testify, but disavowed the confession. When the principle of a declaration against interest is introduced, a witness should be, I suggest, considered "unavailable" if his present testimony is inconsistent with his prior confession, see *United States* v. *DeSisto*, 329 F. 2d 929 (2nd Cir. 1964), *cert. denied*, 377 U.S. 979 (1965), and such a declaration against interest should then be fully admissible against a fellow accused, at least where the declarant himself was available for cross-examination. Consequently, I would suggest that, consistent with your decision not to write the Rules in terms of their constitutional implications, this last clause be omitted and that the question of what use, if any, declarations against interests should have in criminal proceedings as evidence against an accused be left up to the Supreme Court for constitutional resolution.

I regret that the pressure of the hearings now being held by the Permanent Subcommittee on Investigations into organized crime and other committee work prevented me from preparing and forwarding these comments to you earlier. I followed with interest the issuance of March 1969 draft of the rules; it was received in the Subcommittee on Criminal Laws and Procedures on April 15, 1969. My attention was not drawn to the March 1971 draft, however, until the first part of July: apparently no copy of the revised draft was sent to either my office or to the Subcommittee. In this connection, it would be appreciated if you could arrange to forward to me periodically the results of your deliberations as these Rules continue to be considered.

In conclusion, I would be remiss if I did not repeat that although the bulk of these comments are critical, I fully support your effort and feel that the Rules, as a whole, promise to aid the accurate and just resolution of controversy in our Federal judicial system.

ADDENDUM

You may find it useful to know that these comments were prepared without the benefit of the views of the Department of Justice forwarded to you on August 9, 1971, and I submit them to you without revision in light of the Department's comments. I have, however, now examined the Deputy Attorney General's letter and its attachment. While I cannot say that I concur in or support each of the Department's criticisms, I urge you to give them most careful attention. My own feeling of uneasiness when I first reviewed the revised draft of March 1971 has been reenforced and underscored by many of the Department's comments. It

would be most unfortunate if the rules were forwarded to the Congress in a form with which the Department of Justice found itself in such substantial disagreement.

With kindest regards, I am

Sincerely yours,

JOHN L. MCCLELLAN.

EXHIBIT II

THE UNIVERSITY OF TEXAS AT AUSTIN,
Austin, Tex., August 13, 1971.

HON. JOHN L. MCCLELLAN,
U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: My attention has been called to your remarks in the Senate on August 5th in connection with the introduction of S. 2432. I was interested in your speech because I am, and have been for more than seven years, a member of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, to which you made reference on that occasion.

I was hospitalized for a considerable time last fall after a knee operation. As a result, I did not attend either of the meetings of the Standing Committee at which the proposed Rules of Evidence were considered. I took no part, as is reflected in the report of the Standing Committee to the Judicial Conference, in any of the actions of the Standing Committee with regard to the Evidence Rules.

Though I took no part in all of this, I am concerned by your suggestion that in Rule 609, embodying a form of the *Luck* rule, the Standing Committee took a position that "Congress had recently specifically disapproved." In all of the years that I have been associated with federal rulemaking, there has been the utmost deference by the various committees to the will of Congress and I do not know of any instance in which a rule has been proposed that would be contrary to a recent expression of the view of Congress.

I do not understand Rule 609 to be an exception to this. The Conference Report accompanying S. 2601, the bill that became the District of Columbia Court Reform and Criminal Procedure Act of 1970, said:

The language of the House amendment and the conference substitute is similar to the rule on impeachment recommended by the Advisory Committee on Rules of Evidence to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Should the Supreme Court of the United States subsequently promulgate as part of prescribed rules of evidence for all Federal courts a different rule of impeachment, the conferees suggest the appropriateness of Congress reconsidering the rule adopted in the conference substitute.

If I had been able to participate in the deliberations of the Standing Committee on the Evidence Rules, I would have read this language from the Conference Report as meaning that Congress was incorporating what the rulemakers were then proposing but that it recognized that the end result of the rulemaking process might be something quite different. On this reading, I would have thought that the Standing Committee, the Judicial Conference, and the Supreme Court were free to devise what they considered to be the best possible rule and were not limited by the provision adopted for the District of Columbia.

As you quite properly say in your remarks, "reasonable men can differ over the merits of the Luck rule." I know of no difference, however, on the proposition that the rulemakers should carefully heed the expressed will of Congress. I write you only to emphasize that my colleagues who made these changes in proposed Rule 609 could reasonably believe that they were not disregarding Congress in doing so.

Sincerely yours,

CHARLES ALAN WRIGHT,
McCormick Professor of Law.

SEPTEMBER 2, 1971.

PROF. CHARLES ALAN WRIGHT,
The University of Texas at Austin School of Law, Austin, Tex.

DEAR PROFESSOR WRIGHT: I did not see your kind note of August 13th until my return from Arkansas after the summer recess. It is for this reason that my reply to you has been so long delayed.

The language from H.R. No. 91-1303, 91st Cong., 2d Sess. 231 (1970), quoted in your letter, was not understood by the Congress to have the meaning you suggest, and, it is my understanding, your reading of it does not, in fact, reflect the intent of the conferees.

Both the Senate and the House passed bills in the 91st Congress that set aside the so-called *Luck* rule (121 U.S. App. D.C. 151, 348 F2d 763 (1965) which gave trial judges discretion, in the interest of avoiding undue prejudice, to permit criminal defendants to testify without impeachment by prior convictions. The Senate measure was passed by unanimous consent in December and consolidated in a more general bill in March (Cong. Rec., vol. 115, pt. 28, pp. 37183–37196; vol. 116, pt. 7, pp. 8913–8975). Although it set aside the so-called *Luck* rule, it did contain language limiting the character of the convictions that could be used for impeachment to those relevant to honesty or veracity. In contrast, the House measure allowed a broader approach; it was passed in March (Cong. Rec. vol. 116, pt. 6, pp. 8086–8221). Nevertheless, the record shows that during the debate Congressman Dennis of Indiana proposed that the House measure be limited in a fashion similar to the Senate measure, although he noted that his "amendment in nowise . . . [tried] to retain the *Luck* doctrine." (Cong. Rec., vol. 116, pt. 6, pp. 8151–8157.) The Dennis amendment, however, was defeated two to one. (Id. at p. 8157). The *Luck* rule was not, therefore, the impeachment issue that divided the House and Senate. Division existed on the issue of relevancy not undue prejudice. This can be seen most clearly in the statement of Managers on the Part of the Senate, 91st Cong. 2d Sess. 24–25 (1970), which noted:

Both versions of the bill on impeachment of a witness (notably the defendant) by evidence of prior convictions sought to curtail the case law authority for a trial court in its discretion to exclude evidence of conviction whenever the prejudicial effect of the evidence "far outweights" its probative value as to credibility. See *Luck* v. *United States*, 348 F. 2d 736 (D.C. Cir. 1965). The Senate version would have codified the District of Columbia case law requirement that such conviction reflect upon the honesty or veracity of the witness; but the conferees receded to the House position which allows impeachment by proof of any felony conviction or any misdemeanor involving dishonesty or false statement. The House version—which is the rule in most states and which is supported by a draft of the Advisory Committee on Rules of Evidence to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States—is premised upon the conclusion that a felony conviction is "[a] demonstrated instance of willingness to engage in conduct is disregard of accepted patterns [which] is translatable into willingness to give false testimony."

The recession by the Senate conferees was explicitly conditioned, however, upon a conference agreement to reconsider the rule on impeachment if the Advisory Committee's draft is substantially modified in the Federal rule adopted and promulgated by the Supreme Court. It would be clearly antithetical to have one rule for the District's local courts and a different rule for the Federal courts. The Senate conferees would indeed urge the appropriate judiciary subcommittees to reconsider this provision when the new Federal Rules of Evidence are adopted and become subject to congressional disapproval.

Consequently, you are mistaken, I suggest, if you feel that anything in the legislative history of P.L. No. 91–358 manifests a willingness on the part of the Congress to return to the *Luck* rule, and it is more unfortunate if a possible ambiguity in the House Statement contributed to the Committee's adoption of the *Luck* rule.

I was most disturbed to learn that you did not attend either of the meetings in which the proposed rules were considered and I had not realized that you took no part in the actions of the Standing Committee until you drew this to my attention in your letter. I am constrained to observe now, however, that my confidence in the March 1971 draft has been further undermined. I have long been aware of your admirable work in the area of Federal procedure and it was in no small part in reliance on the sound judgment and expertise of men such as yourself that I have been willing up until now to accept certain of the more radical changes proposed in the present draft of the rules.

With all the best, I am

Sincerely yours,

JOHN L. MCCLELLAN,
U.S. Senator.

THE UNIVERSITY OF TEXAS AT AUSTIN,
SCHOOL OF LAW,
Austin, Tex., September 13, 1971.

Hon. JOHN L. MCCLELLAN,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MCCLELLAN: I am extremely grateful to you for your very helpful letter of September 2d discussing the legislative history of that portion of P.L. 91-358 that deals with impeachment of witnesses by the use of prior convictions. I quite agree with you that the full history as you developed it and the statement of the Managers on the part of the Senate, which you quoted, do shed a different light than I had drawn from the statement of the House Manager. I do not now recall how I came to see the statement of the House Manager or why I saw it and not that of the Senate Manager. I had thought that perhaps I had relied for the legislative history on United States Code Congressional and Administrative News. I have it in my office and do frequently look only to it unless I am preparing a brief or an article for which the full legislative history is of importance. Quite often it will print only a report from one house and not the other. I looked this morning to see if that could explain my mistake but so far as I can find it never printed any legislative history on P.L. 91-358.

I appreciate very much the comments in the final paragraph of your letter. I am glad to say that I have now recovered completely from my knee operation and I will be present when the Standing Committee meets September 30th and October 1st. Do consider the evidence rules in the light of comments on the revised draft. I am sure that your concern will be given great weight by the Committee. I know that they will by me.

I have never had the pleasure of meeting you but I did get to watch you in action two years ago when I attended the hearings before the Judiciary Committee for three days hoping unsuccessfully to testify in support of Judge Haynsworth.

Sincerely,

CHARLES ALAN WRIGHT.

STUART H. JOHNSON, JR.,
ATTORNEY AT LAW,
Washington, D.C., May 4, 1973.

Re: Proposed Rules of Evidence for U.S. Courts

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws,
Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: In connection with proposed Rules 608 and 609 dealing with impeachment of witnesses, I enclose a copy of the abridged report of the decision of the Court of Appeals for this Circuit in *United States* v. *Maynard* (March 26, 1973). Whether or not one agrees with the result, the Committee may wish to consider the Court's view that "Since the range of facts from which bias may be inferred is vast, hard and fast rules permitting or excluding specific types of impeachment might be unwise."

The Committee may also wish to consider the appropriate evidentiary result under the Jencks Act, 18 U.S.C. § 3500 and *Brady* v. *Maryland*, 373 U.S. 83, where, as in *Maynard*, the prosecutor states that he "must have thrown away" the notes of a police interview of the complaining witness.

Copies of this letter with the enclosure are going simultaneously to Congressman Dennis and Congresswoman Holtzman because they have expressed interest in these subjects during the hearings.

With best regards,

Sincerely,

STUART H. JOHNSON, Jr.

Enclosure.

THE DAILY WASHINGTON,
LAW REPORTER,
May 2, 1973.

U.S. COURT OF APPEALS

EVIDENCE BIAS

Admission of evidence of indictment was prejudicial error requiring new trial where witness' motive was already shown in other evidence.

United States v. *Maynard*, U.S. App. D.C. Nos. 24,938, 24,939, March 26, 1973. *Reversed and remanded* per Bazelon, C.J. (McGowan and Leventhal, J.J, concur). Ruth L. Prokop (appointed by this court) for appellant in No. 24,938. Preston Brown (appointed by this court) for appellant in No. 24,939. James A. Adams with Thomas A. Flannery, John A. Terry and Richard N. Stuckley for appellee. Trial Court—Pratt, J.

BAZELON, C.J.: Charles Maynard and Kermit Gilbert were jointly tried and convicted of the assault and armed robbery of one Paul Gueory. During the course of their trial, evidence was admitted that Maynard's sole defense witness, Mrs. Constance Kemper, had been charged with obstruction of justice for her alleged efforts to persuade Gueory not to identify her brother, the appellant Gilbert. On the grounds that the admission of this evidence was error and worked substantial prejudice to Maynard's defense, we reverse Maynard's conviction.

Gilbert contends that handwritten notes taken during a police interview of Gueory should have been available to his defense under the Jencks Act, 18 U.S.C. § 3500 (1970), and *Brady* v. *Maryland* [373 U.S. 83 (1963)]. These notes were delivered to the United States Attorney's office, but were unavailable at the time of trial. Since the record fails to disclose the reason for their disappearance, or any inquiry into the effect thereof, we remand Gilbert's case for a hearing to develop these facts and to consider the issues raised under the Jencks Act, *Brady*, and this court's decision in *United States* v. *Bryant*. [142 U.S. App. D.C. 132, 439 F.2d 642, aff'd after remand 145 U.S. App. D.C. 259, 448 F. 2d 1182 (1971).] In addition, we direct the trial court to consider whether the impeachment of Constance Kemper through reference to her arrest for obstruction of justice was prejudicial error as to Gilbert.

The reasons for our decision follow.

* * * * * * *

Appellant Maynard's principal contention on appeal arises out of the trial judge's ruling to admit evidence that Mrs. Kemper had been arrested and charged, but not convicted, for obstruction of justice. The Government specifically requested such a ruling, and indicated that it would ask Mrs. Kemper a direct question to this effect during her cross-examination.

The theory under which the Government sought the admission of such evidence was that it indicated her bias, or motive for testifying in an exculpatory manner. Counsel for Maynard strenuously objected on the ground that the prejudice resulting from the admission of the charge would far outweigh its probative thrust. The trial court ruled that the evidence would be admitted on the Government's theory, at which point Maynard's defense counsel made the tactical decision to raise the issue of the arrest during his direct examination of Mrs. Kemper. * * * Maynard now contends that the admission of [Mrs. Kemper's] statement was reversible error.

As a general rule it is improper to impeach a witness by showing an outstanding indictment without a final conviction. The reasons behind this rule are that the mere fact of arrest or indictment is still consistent with innocence; an indictment involves repetition of someone else's assertion of the witness' guilt; and it raises a confusing, collateral issue to the case at trial.

In certain situations, however, external facts from which may be inferred a specific bias, or motive to testify in a particular way, are admissible to impeach a witness—e.g., facts which show a familial, employment, or litigious relationship. Since the range of facts from which bias may be inferred is vast, hard and fast rules permitting or excluding specific types of impeachment evidence might be unwise. Thus it may be argued in some cases that the pendency of an indictment against a witness produces a discernible motivation to falsify testimony such as: ill feeling for the person who procured the indictment; interest in currying a favorable disposition from the prosecution; or, as in this case, the self-serving need to exculpate oneself concerning the events charged as a crime.

The Government argues that the trial court's decision to admit the arrest evidence to impeach Mrs. Kemper was not error, since the scope of cross-examina-

tion to elicit bias must be broad and is within the discretion of the trial judge. Further, the use of an indictment to show this particular type of bias has been approved in other Circuits.

As there appears to be no direct precedent in this Circuit, however, we are persuaded by appellant's argument that the prejudicial effect of the admission of the arrest and charge in this case outweighed its probative substance. Admission of these facts was simply not necessary to show that Mrs. Kemper had good reason to testify as she did. Gueory's own testimony had already revealed to the jury all the facts on the basis of which Mrs. Kemper could be charged with a crime. Her motive for denying Gueory's accusations and for testifying about her own actions in an exculpatory manner was unmistakeable. Finally, her being charged with a crime was probative of no more than that the prosecutor, or the grand jury, chose to believe Gueory and not Mrs. Kemper.

* * * * * * *

We disagree with the trial court's characterization of any prejudice which might have resulted as "minimal." After a careful scrutiny of the entire record, we are not assured that "the judgment was not substantially swayed by the error." Mrs. Kemper was Maynard's principle defense witness. It was her word against Gueory's. It seems highly probable that the jury would be swayed by the knowledge that she was charged with obstruction of justice into discrediting her crucial testimony about the hospital confrontation. Therefore, Maynard's substantial rights to a fair trial were prejudiced and his conviction must be reversed.

* * * * * * *

IV

Appellants Gilbert and Maynard contend that the rough notes taken by Detective Caldwell during his initial interrogation of Gueory in the hospital should have been made available to the defense under *Brady* v. *Maryland* and the Jencks Act. Trial counsel for both appellants repeatedly requested production. At the pre-trial hearing to suppress Gueory's identification of Maynard, Detective Caldwell testified that Gueory first responded to his questions about the shooting on October 20, 1969. At that time Gueory also indicated that he did not want to prosecute. Caldwell testified that during this interview Gueory identified one assailant by the name "Big" Gilbert, and described the others as follows: "Another was a Negro male of about six foot with a bush haircut and had glasses on. The other two subjects, he said, were short. He had never seen them in his life. He didn't know any of them."

Caldwell further testified that he had taken rough notes consisting of at least four or five pages, that he would have written down any descriptions given to him, and that he had turned over these notes to the Assistant United States Attorney in charge of the case a few months before trial.

At the conclusion of the direct examination of Gueory, which included his identification of both appellants, counsel for Maynard and Gilbert moved to strike Gueory's testimony on the ground that the rough notes had not been produced. A search of the Government's file had revealed no notes, and the Assistant United States Attorney prosecuting the case stated that they must have been "thrown away."

The trial court did not rule that the notes would not be subject to production, but stated that he would not hold up the cross-examination of Gueory at that time. If the documents were located, Gueory would be re-called for additional cross-examination. The trial court's only statement at trial concerning the Government's duty, and failure, to preserve and produce such notes was that the Government should make every effort to locate them and that there "would be no conspiracy to withhold it."

Further inquiry into the disappearance of the notes took place during a hearing on appellants' motions for a new trial on October 14, 1970. The court at that time ruled that Detective Caldwell's notes were not producible under the Jencks Act because the contents of the notes had not been clarified, and because there was no indication that Gueory had adopted or approved Caldwell's transcription of his statements pursuant to section (e)(1) of the Jencks Act.

These reasons, and the Government's assertion in its brief that it is "highly speculative" that these rough notes contained substantially verbatim statements producible under section (e)(2) of the Act, do not meet the thrust of appellants' arguments and this court's ruling in *United States v. Bryant*.

First, defense counsel did attempt to clarify the contents of the notes as discussed above. It appears that the notes might well have contained Gueory's

statements of a descriptive nature, or statements about "Big" Gilbert which might have been favorable to the defense. This court has previously discussed the importance of such notes and the information they might contain.

Second, while it is clear that the duty of the Government to produce notes under the Jencks Act and under Brady cannot be definitely resolved because the notes cannot be scrutinized, the trial court's inquiry should not founder on impossibility. In Bryant, this court held that the Government's "duty of disclosure is operative as a duty of preservation" which extends to all "discoverable" evidence, defined as including all evidence which "might" have to be produced under Brady or the Act. Bryant further held that "sanctions for non-disclosure based on loss of evidence will be invoked in the future unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures" for preserving evidence.

Since there were no such regular procedures in force at times relevant to these cases, as in Bryant the trial court must employ a case-by-case determination of the degree of bad faith, negligence or inadvertence which led to the nondisclosure of arguably discoverable evidence. It is particularly important to note that the police officer preserved the notes and transmitted them to the United States Attorney's Office. Thus the usual administrative reasons which might have once justified, or at least excused, the police department's failure to preserve such notes are not applicable. The trial court below failed to focus on whether a different or higher duty to preserve evidence ought to apply to the prosecutorial branch of the Government. If the notes were "thrown away" and not just lost, this showing of bad faith, negligence or inadvertence cannot be ignored.

Further, there was no consideration of the appropriate sanction which might have been applied in light of a violation of the duty of preservation. The Jencks Act calls for exclusion of the testimony of the witness whose statements were recorded. What portion of Gueory's testimony would be affected must be determined. It has also been suggested that in a case where notes have been discarded, the "absence of notes may be . . . best handled by instructing the jury with an adaptation of the kind of instruction used in case of a missing witness, that the jury is free to infer that the missing original notes would have been different from the testimony at trial and would have been helpful to defendant."

The trial judge is in the best position to determine what the circumstances of this case require, after consideration of the actions of the United States Attorney and the importance for the impeachment of Gueory which the notes might have served. Accordingly, it is necessary that appellant Gilbert's case be remanded for an inquiry into these points, to determine whether a sanction for nonproduction should have been imposed; and to determine whether Gilbert must receive a new trial.

If appellant Maynard is re-tried, the trial court must undertake a similar inquiry if Gueory testifies and if Detective Caldwell's notes are not produced.

* * * * * * *

Accordingly, the judgment in No. 24,938, *United States* v. *Maynard*, is reversed and No. 24,939, *United States* v. *Gilbert*, is remanded pursuant to this opinion.

AMERICAN HOSPITAL ASSOCIATION,
Washington Service Bureau
Washington, D.C., May 4, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the American Hospital Association which represents more than 7000 hospitals and other health care institutions located in all parts of the country I am writing to place before you and your Subcommittee the views and concerns of our membership with regard to proposed Rule No. 504 as contained in H.R. 5463, a bill to establish rules of evidence for certain courts and proceedings.

This proposed rule would recognize a psychotherapist-patient privilege but does not provide for a general physician-patient privilege. While we favor recognition of a psychotherapist-patient privilege, we are strongly opposed to adoption of proposed Rule 504 because such action would eliminate the traditional general physician-patient privilege and impact adversely on the best interests of patients.

Information given to a physician in the course of examining or treating a patient is almost universally regarded by patients and by courts as highly confidential and

privileged. Many states have enacted statutes which provide that communications, information and data obtained by a doctor in the course of diagnosing or treating a patient are deemed to be strictly confidential and protected from disclosure without the patient's consent. This statutory privilege applies whether the disclosure would be through a deposition or in court testimony, and whether voluntary or pursuant to subpoena. Waiver of this privilege by the patient or someone acting on his behalf is permitted in a variety of ways.

The traditional and statutory doctor-patient privilege, by preserving the patient's right of privacy and protecting him from disclosure of information given in confidence has the effect of encouraging a patient to make known all factors which may relate to his diagnosis and to the course of his treatment. Elimination of this privilege would, we believe, adversely affect the quality of medical care and services as a result of the reluctance of patients to be completely frank with their physicians out of fear that in some Federal court or proceeding, disclosure of information harmful, repugnant or embarrassing to the patient or others might be required. Examples of such information are immediately obvious—venereal disease, sexual impotence, sterility, pregnancy out-of-wedlock, and epilepsy, among others.

Hospitals and other health care institutions are the repositories of medical records of their patients which contain information the patients regard as confidential and not subject to disclosure without their consent. In addition, the hospital licensing statutes and regulations of several States require that information appearing on hospital records be kept confidential unless the patient or someone on his behalf consents to disclosure.

There are also Federal and State statutes and regulations that accord individual privilege as to information about patients receiving care under various public assistance programs and other States have statutes which provide that information, data, and reports obtained by the State's health department, by a medical society or by a hospital staff committee in the course of medical research are deemed strictly confidential and may be used only for medical research. Some of these State laws contain provisions declaring that such information is not admissible as evidence in any court action or before any tribunal, board or agency.

In short, Mr. Chairman, the public has every reason to believe that physicians and hospitals will keep medical records, communications, information and data obtained in the course of diagnosing and treating patients confidential and will withhold disclosure of such information without consent. Recognition and protection of this privilege is, we feel, sound public policy. The American Hospital Association recently adopted a *Patient's Bill of Rights* which specifically affirms a patient's right "to expect that all communications and records pertaining to his care should be treated as confidential."

We are concerned that adoption of proposed Rule No. 504 could have a serious and most unfortunate chilling effect on communications of a patient to his physician, or even his willingness to consult a physician, because of a total lack of protection under the rule from discovery procedures of the Federal courts and the resultant complete loss of the patient's privacy and personal dignity.

We are also concerned over the effect that adoption of Rule 504 would have on the preparation, use and maintenance of hospital medical records and the release of information from such records. In addition to possible abuse of the rights of patients, a further aspect of the matter ought to be noted. If Rule 504 should be adopted without any provisions for accommodating it to the provisions of other Federal and state statutes and regulations, extremely complex and burdensome administrative problems would be thrust on hospitals and other health care institutions. The task of medical records administrators is already difficult in view of the following:

1. An increased emphasis by the public and the courts on patients' rights of privacy.

2. Disparate provisions in statutes, regulations and case law with regard to release of medical information from hospital records depending on whether the release is (a) to individuals or parties without regard to pendency of any court action or administrative proceedings, or (b) to parties involved in litigation or administrative proceedings who are seeking release of information pursuant to discovery, subpoena or by voluntary action.

3. The variety of special statutes or rules conferring privilege on certain classes of patients or types of information and data.

Establishment of Rule 504 would increase the difficulties already faced by medical records administrators with regard to these problems involving conflicts of laws and determinations of applicable laws.

We believe for all the above reasons that elimination of the traditional physician-patient privilege would not be in the public interest. We therefore strongly urge rejection of proposed Rule No. 504.

Copies of this letter are being sent to each member of the Committee on the Judiciary and if we can provide any additional information to the Committee, we will be pleased to do so.

Sincerely,

LEO J. GEHRIG, M.D.,
Vice President.

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON,
New York, N.Y., May 7, 1973.

HERBERT E. HOFFMAN, Esq.,
Counsel of Subcommittee of the Committee on the Judiciary,
Rayburn Building,
House of Representatives,
Washington, D.C.

DEAR MR. HOFFMAN: I have been designated to speak for the American College of Trial Lawyers with respect to the proposed Federal Rules of Evidence.

I have prepared for the use of the Committee considering the proposed rules a critique of the Hearsay Rules and you will find a copy enclosed.

As you know, the "New York Trial Lawyers Committee," under the chairmanship of Robert L. Clare of this city, is preparing material on other portions of the proposed rules for consideration of those dealing with the subject in Congress. The enclosed material will be a part of those comments and I thought it might be helpful to send you a copy in advance so as to be available to the Committee in case it is interested, as I trust it will be.

If you desire additional copies of the enclosed and will drop me a line to that effect, I will be glad to have them prepared and send them along to you or to anyone else you designate.

Yours very sincerely

GEORGE A. SPIEGELBERG.

Enclosure.

COMMENTS ON PROPOSED ARTICLE VIII OF THE FEDERAL RULES OF EVIDENCE NOW UNDER CONSIDERATION BY THE CONGRESS OF THE UNITED STATES

The Hearsay Article is a source of major concern, and the American College of Trial Lawyers is in fundamental disagreement with the structure of the proposal suggested by the Advisory Committee, the Standing Committee and the Supreme Court. It is now being considered by the Congress. It is our belief that Article VIII as drafted unduly encourages the admissibility of unreliable hearsay, fails to provide clear standards for the judiciary and leaves the decision as to the admission of hearsay testimony to the discretion of the trial court. Consequently, we believe that the proposed rules are likely to impair, rather than enhance, the goals of truth determination, certainty of result, uniformity of decision and administrative trial efficiency.

A detailed comparison of the earlier proposals of the Advisory Committee with respect to hearsay, first circulated in 1969, together with suggestions and criticisms of the New York Trial Lawyers Committee, appears at pages 79–88 of the New York Lawyers Project dated June 1, 1970. It is also the fact, however, that certain changes were made by the Advisory Committee before the rules were again circulated in March 1971 and additional changes were again made by the Supreme Court in November of 1972. These last were never circulated to the Bar, although they were reprinted in several Federal Reporters in January of 1973.

It may be helpful briefly to state the eleven exceptions to the rule excluding hearsay developed over the past three hundred years before examining the proposed new Federal rules dealing with the subject. The exceptions will merely be stated, not detailed:

1. *Entries in the regular course of business.* In 1928, by statute, a new Section 374a was added to the Civil Practice Act in New York which undertook to enlarge the rule by permitting memoranda of any act, transaction, occurrence, or event made in the regular course of a business. This rule, of course, attempted to enlarge the rule of entries in regular course which had theretofore been limited to business entries. The statutory attempt failed. Johnson v. Lutz 253 N.Y. 124.

2. *Declaration against pecuniary or proprietary interest.* The declarant must have had knowledge of the fact, constituting the basis of the declaration at the time made.

3. *Dying declarations.* Admissible only where the death of the declarant was the subject of the charge and subsequently in prosecutions for abortion where the woman died. The declarant had to believe himself in extremis and without hope of recovery and to have been competent as a witness if living.

4. *Declaration as to reputation concerning matters of public or general interest.* To be admissible, it was necessary that the declarant be dead; had had sufficient opportunity to acquire knowledge of the fact; had been made prior to the starting of the litigation; related to matters of general reputation and concerned matters of public or general interest.

5. *Res gestae.* Strictly speaking, this exception is available only where the declaration accompanies an act itself admissible and gives it meaning.

6. *Spontaneous declarations.* A declaration made while under emotional stress and not governed by conscious mental processes.

7. *Admissions.* Without considering whether admissions may be used only to discredit other testimony, or whether they may be used as proof of the statement contained in the admission is immaterial here. Admissions may be made by party or by a privy. They may be made by silence where there is a duty to speak and by acts as well as words.

8. *Reported testimony.* Where a witness testified at a prior trial or hearing between the same parties on the same issues and is now dead and the opportunity to cross-examine him existed, his testimony is admissible on the second trial or hearing.

9. *Official documents.* A report filed by a public officer in a public office for a public purpose, containing statements required by statute, when properly certified, is admissible without the testimony of the officer.

10. *Ancient documents.* Recitals in a document more than twenty years of age coming from a proper custody are evidence of the facts recited therein.

11. *Pedigree.* At common law, pedigree declarations could be made by members of the family or by family reputation by were admissible only to prove legal relationship.

Some of the foregoing exceptions to the Hearsay Rule have been varied by judicial decisions in various jurisdiction, usually to liberalize them, e.g., by permitting pedigree declarations to prove illegitimacy or to prove death, birth and marriage as well as relationship.

These generally accepted common law exceptions to the exclusion of heresay are known and understood by those sufficiently interested and slight variation from one jurisdiction to another exhibits a diversity in local belief which is entitled to expression in those jurisdictions holding a variant view.

Since Erie v. Tompkins 304 U.S. 64 decided twenty-five years ago, it has been uniformly stated, tho not always decided, that in diversity cases the federal courts were bound by the law of the state with the controlling interest. Whatever else the case may have done, it went far to abolish forum shopping. That beneficial result is now cancelled out by Art. VI of the proposed rules which abolishes the "Dead Man's rule" heretofore adopted, in one form or another in the great majority of state jurisdictions. Now all the disappointed mistress has to do is to move her domicile to a neighboring state and perjure herself into a furtune.

Art. VI has abolished the "Dead Man's Statute". If the Supreme Court's proposals with respect to Art. VIII are adopted, the Hearsay Rule will be abolished.

The eleven common law exceptions have become twenty-eight. Even more important, however, is the fact that the Trial Court may admit any hearsay statement that it believes has "comparable circumstantial guarantees of trustworthiness."

Trustworthiness is mentioned as a test of admissibility in only three of the twenty-eight stated exceptions (Nos. 6, 7 and 8). As to the other proposed twenty-five, no test of admissibility is required except the discretion of the Trial Court, or the Appellate Court, or both.

How a trial lawyer can prepare a case for trial when, until the trial is in progress, he does not and cannot know what evidence will be offered and admitted against him, it is impossible to conceive.*

RULE 8–03

Federal rules suggested by Supreme Court	*Equivalent common law exceptions*
Subd.:	
2 Excited Utterance	Spontaneous Declarations.
3 State of Mind	Res Gestae.
4 Statements made to a physician for diagnosis or treatment.	Res Gestae.

*See "Project of a Committee of New York Lawyers," pp. 220–221 (June 1, 1970).

While Subd. 4 of the proposed Rule is a well recognized exception to the hearsay rule of common law, we have, perhaps arbitrarily, included it under res gestae, since the statement of the patient to his doctor for the purpose of securing diagnosis or treatment is an act itself admissible and the patient's recital gives that act meaning. It may be that statements of the patient to his doctor for purposes of diagnosis or treatment should be an added common law exception, since it is universally recognized as such at common law.

Federal rules suggested by Supreme Court	*Equivalent common law exceptions*
Subd.	
9 Records of Vital Statistics	Official or public documents.
14 Records affecting an interest in property and 15 statements therein.	
17 Market Reports	Accurate commercial reports and reports of actual sales are admissible at common law or by statute. The same rule did not apply 100 years ago.
RULE 8–03 Subd.	
19 Reputation as to personal or family history	Admissible at common law under "matters of public interest" and the modernized rule as to pedigree.
20 Reputation as to boundaries.	
21 Reputation as to character	Proof of character. At common law character could be proved only by reputation.
22 Judgment of previous conviction.	Conviction of felony admissible at common law to prove essential facts or to impeach.
23 Judgment as to personal family or general history or boundaries.	Admitted under modern interpretation of pedigree or declarations concerning matters of public or general interest.

The subdivisions mentioned above were also recognized at common law as indicated, although in a number of instances requirements of common law are waived, e.g., subdivision 19 enlarges the class of witnesses by including "associates" concerning family history and reputation as to matters of public or general interest. The proposed rule would seem to waive the requirement that the declarant whose statements are being testified to must be dead. The two liberalizations mentioned, and others which it is not necessary to mention, we do not believe to be too harmful. In the past attempted codifications of common law rules are often interpreted in a way that the draftsman never intended and frequently added confusion to a theretofore well understood rule and prevented the growth of the law through judicial interpretation and liberalization.

Subd. 5 Recorded recollection..... Past recollection recorded.

The provision in this section stating that the memo "may be read into evidence but may not itself be received, unless offered by an adverse party" is too restrictive. If the record is admissible in evidence under another hearsay exception, it should be admitted.

In most jurisdictions "present recollection revived" is preferred to "past recollection recorded". Where it cannot be, the past recollection should be admitted, if it is to constitute effective affirmative evidence. It is in order to limit the recorded recollection to entries in the regular course of business since they are trustworthy, but under the proposed rule they would not come in, and the jury would not be aided by a reading to them of the entries, which they could not possibly remember for the same reason the entrant could not.

FEDERAL RULES SUGGESTED BY SUPREME COURT

Rule 8–03

Subd. 6 Records of regular activity

EQUIVALENT COMMON LAW EXCEPTIONS

Entries in regular course

As proposed, the entries in regular course of business, exception which has substantial reliability, is enlarged to include: "in the course of a regularly conducted activity" ... "unless" there are "circumstances" to "indicate lack of trustworthiness".

Thus broadened there is no guarantee of trustworthiness. It would include entries of records kept as a hobby, or kept merely because the keeper likes to keep records when it pleases him to do so. Records on which no one relies and as to which there is no possible check as to reliability should be inadmissible.

In order to be at all trustworthy, the records must be kept in the course of a regularly conducted business or professional activity by a person whose duty it is to make the record.

FEDERAL RULES SUGGESTED BY SUPREME COURT

Rule 8–03 Subd. 7 Absence of entry in records

EQUIVALENT COMMON LAW EXCEPTIONS

No equivalent at common law

Provides that if a record cannot be found where one would expect to find it, it is evidence that the event never occurred.

This suggested rule has nothing to do with hearsay. The only occasion where the non-existence of a filed record is material is where its filing is required to make it effective, e.g., local variations of general state speed regulations are ineffectual unless the ordinance enacting them is filed in the office of the Secretary of State. In such a case the non-filing renders the local ordinance ineffective. It is material for such a purpose, but has nothing to do with hearsay and should be stricken, as it can only tend to confuse and mislead.

Subd. 10 Absence of public record or entry

No equivalent at common law

This subdivision is identical with subdivision 7, except that it deals with "public record or entry". The comments made above with respect to subdivision 7 fully apply to this subdivision. In addition, if we are to have such a regulation, the evidence of the absence of the record should be "in the form of a certification in accordance with Rule 9–02". Testimony that diligent search has failed to turn up the record is not adequate, since there is no way of testing the extent of the diligence or the reliability of the witness who made the search.

Subd. 11 Records of religious organizations

Modern pedigree rule

The effect of this proposed exception is to raise "religious organizations" to the same status as public records kept pursuant to law. This is an unwise extension since the original record should be brought into Court and properly identified by its present keeper or, if he be without the jurisdiction, the data should be provided by deposition.

FEDERAL RULES SUGGESTED BY SUPREME COURT

Rule 8–03 Subd. 12 Certificates of marriage, baptism, etc.

EQUIVALENT COMMON LAW EXCEPTIONS

Modern pedigree rule

Certificates such as those mentioned above should not be admissible unless properly authenticated since they may, and in the past have often been, too easily forged. In addition, the term "religious organization" should be defined and limited as in Section 501(c)(3) of the Internal Revenue Code. These days the term "religious organization" includes a mass of activities that cannot properly be termed "religious".

Subd. 16 Statements in ancient documents

Ancient documents

Not only should the authenticity of the ancient document be established, but it should come from a custody where it would be likely to be found if it is authentic, e.g., as a deed to a former owner then in the hands of the owner and not in the hands of this transferor.

RULE 8–04

The exceptions to the hearsay rule suggested by the Court require that the declarant be unavailable. There are only five hearsay exceptions under 8–04 and none of them are wholly acceptable, and the first two are wholly unacceptable.

FEDERAL RULES SUGGESTED BY SUPREME COURT

Rule 8–04

Subd. 1 Former Testimony

EQUIVALENT COMMON LAW EXCEPTIONS

Former Testimony

In order that former testimony be admitted under the proposed rule, the party against whom the former testimony is now being sought to be admitted must have a "motive" and "interest" similar to the party against whom the testimony was originally proferred. If the common law restrictions that the parties and the issues had to be identical in the former and in the present litigation are to be waived, the very least that must be required if there is to be any guarantee of trustworthiness is that the party against whom the former testimony is now being offered must have had an opportunity to cross examine the witness in the prior action. We strongly believe that at least identity of issues in the former and the present proceeding must also be required.

Subd. 2 Statement of Recent Perception

Non-existent at Common Law

In brief a statement by a declarant now unavailable concerning "an event or condition recently perceived" by him while "his recollection was clear" is admissible provided the declarant did not contemplate or anticipate the litigation and is not interested therein. This proposed rule can only be characterized as an inducement to perjury. It has absolutely no guarantee of trust-worthiness, there is no way in which the statement of the declarant testified to by the witness can be cross-examined, nor is there any way in which an attorney can prepare to meet the alleged statement. Just how bad this proposed exception could be is not difficult to illustrate:

The plaintiff in an auto accident case puts a witness on the stand who will testify that shortly after the occurrence the declarant whom he did not know and never saw again had said to him that he (the declarant) had witnessed the accident and that the defendant had gone through a red light at 60 miles per hour, hit the plaintiff's car and demolished it. The witness will also testify that the declarant's recollection was clear and that the statement made to him by the declarant was "made in good faith", whatever that may mean. This remarkable evidence will be submitted to the jury as proof of the truth contained in the declarant's statement. We believe it is fair to say that such "evidence" is unthinkable. The only way that we can see that it could be met would be with additional perjury. There is absolutely no justification for permitting it to be promulgated as an exception to the hearsay rule.

FEDERAL RULES SUGGESTED BY SUPREME COURT

Rule 8–04

Subd. 3 Statement Under Belief of Impending Death

EQUIVALENT COMMON LAW EXCEPTIONS

Dying declarations

In its present form the proposed court rule favors the admission of a statement by a declarant who believing his death was imminent concerning the cause or circumstances of what he believed to be his impending death. The dying declaration exception to the hearsay rule is the most unreliable of all the exceptions recognized at common law. It was admissible only where the declarant believed himself to be in extremus without hope of recovery and in a criminal case based upon the death of the declarant. In addition, the statement is admissible only if the declarant, if living, could have testified to the act. To illustrate, the deceased, lying with his back to the window at night, was shot in the back and died.

Before he died he stated, "John Jones killed me." The declaration was held inadmissible because the deceased obviously could not see who had shot at him. In a great many states statute extended the rule to include abortion cases. The common law rule permitting as it does the introduction of unreliable evidence should not be extended as the proposed rule undertakes to do. There is no justification for the proposed extension of the rule which would include any dying declaration in civil as well as in criminal cases. The narrow common law exception depends for what trustworthiness it had upon the then prevalent belief that one facing death would not willingly lie, since that might prejudice his after life. In view of the lesser hold of the strict tenets of eternal bliss and eternal damnation, there is a corresponding lessening of whatever guarantee of trustworthiness once existed.

FEDERAL RULES SUGGESTED BY SUPREME COURT

Rule 8-04 Subd. 4 Statement against interest

EQUIVALENT COMMON LAW EXCEPTIONS

Declaration against pecuniary or proprietary fact

Here again is a prospective great relaxation of common law requirements. The main difference in the proposed rule with the existing common law rule is that statements which would expose the declarant to "hatred, ridicule or social disapproval" should be omitted. Today with the revolutionary change from the past of customs and beliefs a substantial percentage of our population may well regard being an object of hatred, ridicule or social disapproval as wholly desirable and, as a result, their statements exposing them to these reactions would have absolutely no guarantee of trustworthiness. If the existing rule is to be extended to exposing the declarant to "civil or criminal liability" it would clearly not be extended so as to make admissible statements which would make him "an object of hatred, ridicule or social disapproval."

FEDERAL RULES SUGGESTED BY SUPREME COURT

Rule 8-04 Subd. 5 Statement of personal or family history

EQUIVALENT COMMON LAW EXCEPTIONS

Modern pedigree rule

The proposed rule substantially broadens the common law rule. Subdivision (i) which allows the declarant's statements as to personal or family history to be admitted is not an unreasonable extension. Subdivision (ii) should not be admissible unless the declarant can be shown by evidence other than his own statements that he is likely to have accurate information concerning the matter contained in the declaration. This change is suggested in order to provide some assurances as to accuracy with respect to the declarant's declaration.

RULE 8-03 SUBD. 24—RULE 8-04 SUBD. 6

These two sections eliminate the rule against hearsay and in its place provide for the discretion of the trial court as the judge of the admissibility of hearsay. Basically hearsay is rumor and we do not believe that any judge is capable of distinguishing between reliable and unreliable rumor.

If the Congress of the United States is in disagreement with the foregoing paragraph, it should squarely face the problem with which it is presented and omit Article 8 entirely, substituting therefor a provision reading:

"Where the trial court believes that a hearsay statement should be admitted, it has the discretion to admit it in any trial or proceeding to which these rules apply."

It may well be asked why the College, feeling as it did, was willing to accept Rule 8-03 subdivision 24 and 8-04 subdivision 5 which allowed the Court complete discretion where a hearsay statement not specifically mentioned had "equivalent substantial probability of trustworthiness" provided that the proponent's intention to offer the unspecified hearsay statement was made known to his adversary sufficiently in advance of the trial to provide him with a fair opportunity to prepare to meet it. At the time this compromise was suggested in June of 1970 the Advisory Committee was recommending the clear and total repeal of the hearsay rule by Rule 8-03(b) and 8-04(b) which provided that the twenty-eight exceptions to the hearsay rule set forth were:

"by way of illustration only and not by way of limitation * * *."

Subsequently, the Advisory Committee omitted the last quoted statement thereby making the twenty-eight exceptions to be hearsay rule by way of limitation, not merely by way of illustration. However, they then added Rule 8-03 subdivision 24 and 8-04 subdivision 5. These sections provide that the Court might admit any hearsay which in its discretion had "equivalent substantial probability of trustworthiness," although not specifically covered by any of the twenty-eight exceptions. No mention was made of the suggestion of the College that adequate notice of the proponent's intention to offer unspecified hearsay was required to be given his opponent.[1]

In view of the fact that the Advisory Committee, the Standing Committee, and the Supreme Court had paid no substantial attention to the anguished cries of the Bar and the further fact that the College did not, and indeed could not, have known that the Congress would interest itself, as it has, there is little wonder that the College tried to rescue something of stability from what was at that time, and still is, total destruction of the rule against hearsay.

The proposed rules of evidence concerning Hearsay are both unnecessary and undesirable. If adopted in anything resembling their present form they will lead to confusion because they leave to the discretion of the trial court questions of the admissibility of evidence which at the present time are controlled by developing rules, most of which have been in existence for over three hundred years. They will encourage forum shopping and will make it impossible for a trial counsel adequately to prepare the case for trial since he will not and cannot know what evidence he will have to meet until it faces him in the courtroom. If the Congress feels it must recommend a codification of some hearsay rules, they should approve only subdivisions 2, 3, 4, 9, 14, 15, 17 and 19-23 inclusive and no part of Rule 8-04 with the possible exception of subdivisions 3, 4 and 5 with the amendments suggested herein.

Respectfully submitted,

AMERICAN COLLEGE OF TRIAL LAWYERS,
By GEORGE A. SPIEGELBERG.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE,
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES,
SUPREME COURT BUILDING,
Washington, D.C., May 8, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn Building, Washington, D.C.

DEAR MR. CHAIRMAN: I respond as follows to the two inquiries in your letter of May 4th concerning the proposed Federal Rules of Evidence.

(1) With respect to Rule 613(b), you ask why there is a proposed modification in the traditional insistence upon specifying the time and sequence of prior statements.

The traditional practice in most jurisdictions, when it is sought to impeach a witness by proof of a prior inconsistent statement, has been to require that a foundation be laid during the cross-examination of the witness. This foundation consists of directing the attention of the witness to the time when, place where, and person to whom the alleged statement was made, and asking the witness whether under those circumstances he made substantially that statement. In the absence of this preliminary routine, extrinsic evidence to prove the prior statement is held inadmissible.

The objectives of the procedure are: (1) to save time, since the witness may admit having made the statement and thus make the extrinsic proof unnecessary; (2) to avoid unfair surprise to the opposite party by affording him an opportunity to draw a denial or explanation from the witness; and (3) to give the witness himself, in fairness, a chance to deny or to explain the apparent discrepancy. These are desirable objectives. The second and third can, however, be achieved by affording an opportunity to explain at any time during the trial, and no particular time sequence is required. Only the first of the objectives named above, saving time, points in the direction of the traditional foundation requirement on cross-examination, and even here countervailing factors are present: the time saved is not great; the laying of the foundation may inadvertently have been overlooked; the impeaching statement may not have been discovered until later;

[1] See "Project of a Committee of New York Lawyers," p. 72 (June 1, 1970).

and premature disclosure may on occasion frustrate the effective impeachment of collusive witnesses. The argument may be made that the recalling of a witness for further cross-examination will afford an adequate solution for these difficulties and hence that the traditional procedure should be retained. The argument is not a sound one. In the first place, recall for cross-examination has traditionally been very much within the discretion of the judge and seems likely to continue so. And secondly, the admissibility of prior inconsistent statements ought not to be enmeshed in the technicalities of cross-examination when all that is being sought is the presentation of an opportunity to deny or explain.

In view of these considerations, the Advisory Committee concluded that the objectives could better be achieved by allowing the opportunity to deny or explain to occur at any time during the trial, rather than limiting it to cross-examination.

Moreover, occasionally situations may arise where the interests of justice will warrant dispensing entirely with the opportunity to explain or deny. Thus if a witness becomes unavailable through absence or death, the judge ought to have discretion to allow the impeaching statement.

In my view, the existing practice would continue in general to be followed under the rule. It is convenient and effective to raise the matter on cross-examination, and doing so would avoid problems that might ultimately arise if witnesses become unavailable before the end of the trial. The rule ought, however, to remain as drawn, leaving the practical approach to the good sense of the practitioner.

(2) You ask why in Article VII there is no requirement of giving prior notice of names and addresses of experts to be called, as is provided in Rule 404(a) of the Model Code of Evidence.

The approaches of the Model Code and the proposed rules to expert witnesses are basically different. The position of the Model Code, Rule 403, is that experts will usually be in effect court-appointed witnesses, with party-selected experts being the exception. The proposed rules, however, assume that experts ordinarily will be those selected by the parties, with appointment by the Court being exceptional.

The Model Code, promulgated in 1942, is essentially the Uniform Expert Testimony Act of 1937. The requirement that a party give notice of his own experts thus was conceived at a time antedating modern discovery. Consequently Model Code Rule 405 provides for the filing of a report by each expert, whether court-appointed or party-selected, if ordered by the court, but contains no provision for taking his deposition. All these matters seem now adequately to be covered by Rule 26(b)(4) of the Rules of Civil Procedure and, in lesser detail, by Rule 16(a) and (c) of the Rules of Criminal Procedure. Little except potential for confusion would appear to be gained by incorporating what is essentially a discovery provision in the Rules of Evidence.

One of the main problems of modern litigation is the proliferation of pretrial proceedings. While they all have worthy objectives, each nevertheless exacts its toll of time and expense. Notice requirements, in addition, are potential trouble-makers in cases of inadvertent oversight or unanticipated developments. The Advisory Committee's approach to notice provisions generally was that they ought to be regarded with skepticism, especially in view of the liberality of modern discovery.

If these observations raise any further questions, please let me know.

Sincerely yours,

EDWARD W. CLEARY, *Reporter.*

PROCOPIO, CORY, HARGREAVES AND SAVITCH,
San Diego, Calif., May 9, 1973.

Re Proposed Federal Rules Of Evidence

Mr. HERBERT E. HOFFMAN,
Committee On The Judiciary, House of Representatives,
Washington, D.C.

DEAR MR. HOFFMAN: I have been advised by Professor Edward W. Cleary of the Advisory Committee on the proposed federal rules of evidence that you are the person to whom this communication should be addressed.

Together with several hundred other lawyers I attended a two-day seminar on the proposed federal rules of evidence in San Francisco, California on April 27 and 28, 1973. While I believe that the vast majority of those in attendance are agreed that the proposed rules will be a substantial advance in practice in the federal courts, there are some matters which I believe should be clarified by

amendment or other correction prior to the final adoption of the rules, whether by the Congress or the Supreme Court.

The most serious concern which I have with the proposed rules as presently promulgated is the seeming limitation of the trade secret privilege, Rule 508, to a natural person. As you know Rule 508 presently states:

"*A person* has a privilege, which may be claimed by *him* or *his* agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by *him*, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. * * *"

While it might be argued that the words "person", "him" and "his" as used in this particular rule are meant by the drafters to encompass corporations, associations and other organizations or entities, the fact that Rules 502 and 503(a)(1) specify "corporation, association or other organization or entity" in conjunction with "person" makes such an argument tenuous at best. It is my opinion, which I believe is joined in by Professor Cleary, to whom a copy of this letter is being furnished, that the failure to specifically include "corporation, association, or other organization or entity" in Rule 508 was an oversight by the drafters. Regardless of the reason for such failure, it obviously should be corrected prior to final adoption of the new rules as it is far more probable that a trade secret is possessed by a business entity of one sort or the other rather than a person.

Another anomaly in Article V, "Privileges" is found in Rule 503(b)(3) and (5). This anomaly is the failure to include "representative of the lawyer" in either of those subsections. I submit that there is no reason to limit the "common interest" privilege 503(b)(3) and joint lawyer privilege 503(b)(5) to communications between lawyers or their representatives. Certainly these privileges should not be lost because confidential information is, for example, communicated by a lawyer for one client to the personal secretary or other representative of a lawyer for another client with a common interest. The same is true with respect to communications between personal representatives of those lawyers and between personal representatives of two or more lawyers representing the same client.

A problem similar to that raised with respect to Rule 508 is presented in Rule 511 "Waiver of Privilege by Voluntary Disclosure." Again, the drafters have limited the waiver rule to "a person", apparently by oversight.

I believe that a very substantial amount of needless litigation will be avoided by making appropriate changes to the proposed rules prior to their final adoption. You are free to use this letter in any manner which you see fit, including inserting it in the record of the Committee's proceedings.

Yours very truly,

PAUL B. WELLS.

THE ASSOCIATION OF THE BAR,
OF THE CITY OF NEW YORK,
May 10, 1973.

HON. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: I have the pleasure of submitting, on behalf of the Association of the Bar of the City of New York, our suggestions for revisions of those sections of the proposed Federal Rules of Evidence that were changed between the Revised Draft of March 1971 and the draft deposited with Congress by the Supreme Court.

Our suggestions are in three parts:

1. Revisions of the Secrets of State and Official Information section, Rule 509. We suggest that the privilege for Secrets of State be identical to the formulation of the Revised Draft, and we suggest a new section, which for convenience we have numbered 509B, for the privilege dealing with Official Information.

Our testimony on these rules was to the effect that there were too few cases, and too much controversy, to permit a satisfactory codification. We adhere to those views. Our textual suggestions are offered in case the proponents for codification of this privilege prevail.

2. Revisions of the balance of Article V. Our view is that the federal courts, even in cases arising under the constitution or laws of the United States, should follow the law pursuant to which the privilege was created, except if an act of Congress provides otherwise. If this view were to be recognized, Rules 502–506, 508 and 511 would not be included in the Code. We also suggest changes in Rule 510, the privilege dealing with informers.

3. Revisions in various other sections changed from the Revised Draft—Rules 104, 403, 404, 609 and 804. Our view, in practically every case, is that the text of the Revised Draft should be re-adopted.

Respectfully submitted.

ALVIN K. HELLERSTEIN.

TO: ALL MEMBERS OF THE COMMITTEE ON FEDERAL COURTS

The Rules of Evidence for the United States Courts And Magistrates, as transmitted to Congress by the United States Supreme Court, contain sweeping changes in the law of evidence. Many of these rules appear ill-advised and the following revisions are therefore suggested. New matter is underlined.[3]

PRELIMINARY QUESTIONS

(c) Hearing of jury.—Hearings on the admissibility of confessions shall 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. *Testimony given by him at a hearing in which he is asserting any constitutional right, or any right to have evidence suppressed or excluded, is not admissible against him as substantive evidence but may be used for impeachment if clearly contradictory of testimony given by him at the trial.*

These changes are suggested as more in keeping with the Advisory Committee's originally expressed intention to give "due regard for the right of an accused not to testify generally." See *Walder* v. *United States*, 347 U.S. 62 (1954); *Simmons* v. *United States*, 390 U.S. 377 (1968).

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

(a) *Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues, or of misleading the jury.*

(b) Exclusion Discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The mandatory exclusion of certain prejudicial evidence was abandoned in the final draft of the rules and should be restored in order to avoid the unlimited exercise of discretion by the trial judge.

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

(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.

This change is suggested in order to clarify the discretionary power of the trial judge to admit character evidence for limited purposes.

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 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.*

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date.

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[3] Generally the changes suggested herein amount to a return to the language of the Advisory Committee's 2d draft.

These changes are suggested since one significant difference between the March 1971 draft and the final version of subdivision (a) is that the discretion of the trial judge to exclude unfairly prejudicial evidence under *Luck* v. *United States*, 348 F. 2d 763 (D.C. Cir. 1965) has been abrogated. The Advisory Committee in its Note to the final version of the Rule indicates that this version was based on the 1970 Congressional Amendment of the District of Columbia Code (84 Stat. 473) which, in effect, rejected the *Luck* doctrine. However, the Advisory Committee makes no mention of the development and refinement of the *Luck* doctrine in *Gordon* v. *United States*, 383 F. 2d 936 (D.C. Cir. 1967), a decision by Judge, now Chief Justice, Burger. It is interesting to note, however, that the Advisory Committee had relied quite extensively on the *Gordon* rationale in its Note to the March, 1971 draft of Rule 609. Moreover, there is no discussion by the Advisory Committee of the reasons, if any, for extending conclusive weight on a nation-wide basis to a decision by Congress affecting only the District of Columbia.

With respect to the time limits placed upon impeachment by evidence of conviction, the final version of subdivision (b) of Rule 609 unduly broadens the applicable 10-year period by measuring the evidence of a conviction from the date of the release of the witness from confinement or the expiration of the period of his parole, probation, or sentence, whichever is the later date. The Advisory Committee in its Note to the final version of this subdivision makes no reference whatsoever to the substantial change in the method of measuring the 10-year period; indeed, the language of the Advisory Committee's Note is identical in the March 1971 draft and the final version of the Rules.

Rule 804. Hearsay Exceptions: Declarant Unavailable

(b)(4) 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. *This exception does not include a statement or confession offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused.*

This change is suggested since the final version of this subdivision makes inadmissible an uncorroborated exculpatory statement which exposes the declarant to criminal liability. The March, 1971 version of this subdivision, however, referred only to statements by a co-defendant or other person which implicated both the declarant and the accused. Thus, while the March draft attempted to accommodate the rationale of *Bruton* v. *United States*, 389 U.S. 818 (1968), the final version of the Rule does not purport to deal with the *Bruton* question. While reference is made to *Bruton* in the Advisory Committee's Note to the final version of the Rules, there is no persuasive discussion of the rationale for the change from the March, 1971 draft in this regard. Moreover, the final version of the Rule requires corroboration before a statement against interest offered to exculpate the accused is admissible. The March draft did not deal with the question of the corroboration and, in fact, the Advisory Committee's Note to the March draft indicated that "Questions of possible fabrication are better trusted to the competence of juries than made the subject of attempted treatment by rule." However, in the Advisory Committee's Note to the final version of Rule 804(b)(4), the corroboration requirement is described as "circumventing fabrication." No explanation for this unwarranted shift in the Advisory Committee's opinion is offered in the Note.

Proposed Revisions of Article V of the Proposed Rules of Evidence

We have consistently recommended that the existence and scope of privileges be governed, at least in most instances, by the law of the state in which the communication claimed to be privileged is made. If that view is adopted, then the following provision could be substituted for Rule 501:

"Unless otherwise provided by Act of Congress or these Rules, any claim that a witness is privileged from testifying as to a confidential communication shall be determined in accordance with the law, including, if applicable, its conflicts of laws rules, of the State, District of Columbia, or territory of the United States which governs the communication."

If this view is adopted, Rules 502, 503, 504, 505, 506, and 508 should be omitted. Rule 507, dealing with political vote could be left as it stands. Rule 509 should be altered in the manner hereafter suggested.

Rule 510(c)(1) is, in our view, confusingly worded and should be revised to read as follows:

"No privilege exists if the identity of the informer has been disclosed to the party seeking disclosure of his identity or if the informer appears as a witness for the government."

We are not sure of the reason for including the phrase "or his interest in the subject matter of his communication" in Rule 510(c)(1) as it is presently drafted. It appears to us that the only thing which should destroy the privilege is disclosure of the privileged information, *i.e.*, the informer's identity. We also question the language, as presently drafted, which would cause the privilege to be lost if the information was disclosed to "those who would have cause to resent the communication." First of all it might not always be easy to determine who might have cause "to resent" the communication. Second, disclosure to one person who "resented" the communication, *e.g.*, someone implicated in wrongdoing who decides to testify for the government, ought not necessarily to destroy the privilege as against other persons who might seek the information.

Rule 510(c)(2) and (c)(3) should be revised by inserting the words "other than counsel for the government" after "no counsel or party" in the last sentence of Rule 510(c)(2) and the next to last sentence of Rule 510(c)(3).

We also believe that the language of Rule 510(c)(3) is too restrictive in limiting the power to require disclosure of the informer's identity to situations in which "the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible." The judge would have greater flexibility if he could require disclosure or testimony by the informer "whenever such disclosure or testimony is necessary to a fair determination of the legality of the means by which evidence was obtained."

Rules 512 and 513 are, in our view, satisfactory.

If our view that state law should generally govern privileges is not accepted, then we would suggest certain changes in the provisions of the Rules defining the various privileges.

While we believe that Rule 503, as presently drafted is an improvement over previous drafts in that it does not adopt the so-called "control group" test, we believe it would be preferable to take this opportunity to reject that limitation on the attorney-client privilege. We therefore recommend that "representative of a client" be defined as follows:

"A 'representative of a client' is any employee or agent of the client who is authorized by the client to make a communication for the purpose of facilitating the rendition of professional legal services to the client."

This would allow employees of a client to communicate freely with one another and with the client's attorneys in securing legal advice and assistance.

We also recommend that Rule 503(b)(3) be revised to read:

"by him or his representative or his lawyer or his lawyer's representative to a lawyer representating another in a matter of common interest."

This rule generally refers specifically to the "representative" of the client or lawyer when the representative is meant to be included; there appears no reason not to do so here.

In accordance with our previous recommendations, we recommend that Rule 504 be broadened to include a doctor-patient privilege as well as a "psychotherapist-patient" privilege and that Rule 505 be revised to restore the privilege for confidential communications between spouses. We believe that provisions substantially the same as those contained in the American Law Institute Model Code of Evidence would be appropriate.

We recommend that the first sentence of Rule 508 be amended to read as follows:

"A person has a privilege which may be claimed by him or his agent, employee, licensee or other person to whom a disclosure was made in confidence, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or work injustice."

Disclosures of trade secrets on a confidential basis are frequently made to licensees and others, and such persons should, in our view, be permitted to claim the privilege.

Recommended Reformulations of Rule 509, Secrets of State and Other Official Information

We recommend that these two privileges be stated in two different rules. For convenience, we have numbered the two rules 509A and 509B. In the context of the entire Code, it would be more appropriate to number the rules consecutively.

RULE 509A—SECRETS OF STATE

(We set out below the entire text of the March 1971 Revised Draft. We believe the formulation to be an accurate and entirely readable restatement of existing law.)

(a) General Rule of Privilege. The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that disclosure of the evidence will be detrimental or injurious to the national defense or the international relations of the United States.

(b) Procedure. The privilege may be claimed only by the chief officer of the department of government administering the subject matter which the evidence concerns. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon. The judge may take any protective measure which the interests of the government and the furtherance of justice may require.

(c) Notice to Government. If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

(d) Effect of Sustaining Claim. If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon and issue as to which the evidence is relevant, or dismissing the action.

ADVISORY COMMITTEE'S NOTE

Concerning the Advisory Committee's Note, we recommend that the Note in the Revised Draft of March 1971 be adopted in lieu of the existing note, with the exception that the portion of the March 1971 Note dealing with "Official Information" be eliminated as not applicable to the privilege for Secrets of State. A xerox copy of the relevant portion of the March 1971 Advisory Committee Note follows:

ADVISORY COMMITTEE'S NOTE

Subdivision (a). The rule embodies the privilege protecting military and state secrets described as "well established in the law of evidence," United States v. Reynolds, 345 U.S. 1, 6, 73 S. Ct. 528, 97 L. Ed. 727 (1953), and as one "the existtence of which has never been doubted," 8 Wigmore § 2378, p. 794 (McNaughton Rev. 1961).

The use of the term "national defense," without attempt at further elucidation, finds support in the similar usage in statutory provisions relating to the crimes of gathering, transmitting, or losing defense information, and gathering or delivering defense information to aid a foreign government. 18 U.S.C. §§ 793, 794. See also 5 U.S.C. § 1002; 50 U.S.C. App. § 2152(d).

The rule vests the privilege in the government where it properly belongs, United States v. Reynolds, *supra*, p. 7, 73 S.Ct. 528, rather than a party or witness.

The showing required as a condition precedent to claiming the privilege is also based on *Reynolds*. It represents a compromise between the complete abdication of judicial control which would result from accepting as final the decision of a departmental officer and the infringement upon security which would attend a requirment of complete disclosure to the judge, even though it be *in camera*. See Machin v. Zuckert, 114 U.S. Appl. D.C. 335, 316 F. 2d 336 (1963), rejecting in part a claim of privilege by the Secretary of the Air Force and ordering the furnishing of information for use in private litigation.

Subdivision (b). In requiring the claim of privilege to be made by the chief departmental officer, the rule again follows *Reynolds*, insuring consideration by a high-level officer. Subdivision (e) is designed to assure that opportunity to make the claim is afforded.

Compared Rule 16(e) of the Federal Rules of Criminal Procedure for protective orders in connection with discovery.

Subdivision (c) spells out and emphasizes a power and responsibility on the part of the trial judge in matters of national security. An analogous provision is found in the requirement that the court certify to the Attorney General when the

constitutionality of an act of Congress is in question in an action to which the government is not a party. 28 U.S.C. § 2403.

Subdivision (d). If privilege is successfully claimed by the government in litigation to which it is not a party, the effect is simply to make the evidence unavailable, as though a witness had died or claimed the privilege against self-incrimination, and no specification of the consequences is necessary. The rule therefore deals only with the effect of a successful claim of privilege by the government in proceedings to which it is a party. Reference to other types of cases serves to illustrate the variety of situations which may arise and the impossibility of evolving a single formula to be applied automatically to all of them. The privileged materials may be the statement of government witness, as under the *Jencks* statute, which provides that, if the government elects not to produce the statement, the judge is to strike the testimony of the witness, or that he may declare a mistrial if the interests of justice so require. 18 U.S.C. § 3500(d). Or the privileged materials may disclose a possible basis for applying pressure upon witnesses. United States v. Beckman, 155 F. 2d 580 (2d Cir. 1946). Or they may bear directly upon a substantive element of a criminal case, requiring dismissal in the event of a successful claim of privilege. United States v. Andolschek, 142 F. 2d 503 (2d Cir. 1941): and see United States v. Reynolds, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953). Or they may relate to an element of a plaintiff's claim against the government, with the decisions indicating unwillingness to allow the government's claim of privilege for secrets of state to be used as an offensive weapon against it. United States v. Reynolds, *supra:* Republic of China v. National Union Fire Ins. Co., 142 F. Supp. 551 (D.Md.1956).

The Special Subcommittee will note that the existing version of Rule 509 permits the government to make its showing, in invoking the Secret of State privilege *ex parte*. The Revised Draft of March 1971 gave all counsel the right to "inspect the claim and showing and to be heard thereon." In adopting the standard of the Revised Draft, we were informed by the belief that the government could make its showing without divulging information that had a reasonable likelihood of being detrimental or injurious to the national defense or the international relations of the United States, that the standard of reasonable likelihood did not impose a difficult burden upon the government and that an adversary hearing was advisable to enable a judge to evaluate the scope and applicability of the privilege.

OFFICIAL INFORMATION

(a) Subject to the provisions of subparagraph (b) below, the government has a privilege to refuse to give evidence, and to prevent other persons from giving evidence, to the extent the evidence, if given, would disclose information that the government is not required to disclose by reason of the provisions of 5 U.S.C. § 552(b)(2) and (4)–(7).

(b) The privilege may be claimed only by the chief officer of the department of government administering the subject matter which the evidence concerns. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon. The judge may require disclosure to him, in *camera*, of the information as to which privilege is claimed. The judge may, upon finding that there has been a showing by a private litigant of a need for such information, that alternative possibilities of acquiring the information are absent, and that adequate protective measures exist capable of safeguarding the government's need for secrecy, order the giving of evidence by the government under appropriate protective provisions.

(c) If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is releveant, or dismissing the action.

NOTE

We recommend the following as a Note to the above text.

Subdivision (a).—The rule embodies the privilege of the exective to maintain confidentiality of official information.

In 1966 the Congress, as an amendment to the Administrative Procedure Act, enacted the so-called Freedom of Information Act for the purpose of making information in the files of departments and agencies, subject to specified exceptions, available to the mass media and to the public generally. (Presently 5 U.S.C. § 552.) These specified exceptions, with the exception of the first, relating to the

national defense and foreign policy and covered by Rule 509A, and the third, relating to information specifically exempted from disclosure by statute and covered by Rule 501, are incorporated by the rule as qualified privileges.

The courts have recognized such an executive privilege, although expressing uncertainty as to its full scope. See *Kaiser Alum. & Chem. Corp.* v. *United States*, 141 Ct. Cl. 38, 157 F. Supp. 939 (1958); *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963). The privilege also seems to be recognized by cases that seem to apply a stricter rule of relevance in evaluating demands for information from government departments. See *Boeing Airplane Co.* v. *Coggeshall*, 108 U.S. App. D.C. 106, 280 F.2d 654, 659 (1960) (Renegotiation Board); *Freeman* v. *Seligson*, 132 U.S. App. D.C. 56, 405 F.2d 1326, 1334 (1968) (Secretary of Agriculture).

Subdivision (b). The requirement that the claim of privilege be made by the chief departmental officer is based on the same policy reasons as with respect to Rule 509A(b). See *Wood* v. *Breier*, 54 F.R.D. 7, 11 (E.D. Wis. 1972); *Thill Securities Corp.* v. *New York Stock Exchange*, 57 F.R.D. 133, 138 (E.D. Wis. 1972).

Subdivision (c). The language is the same as in Rule 509A9(d).

U.S. MAGISTRATE,
U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA,
Washington, D.C., May 11, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Revision of Federal Criminal Laws, Committee on Judiciary, House of Representatives, Washington, D.C.

DEAR SIR: As an attorney who had more than twenty years of intensive trial experience before being appointed to my present position, I would like to express my concern with two portions of the proposed Rules of Evidence presently being considered by your Subcommittee.

Rule 609, dealing with impeachment of a witness troubles me: (a) (1) makes any prior conviction for an offense punishable by imprisonment for more than one year admissible, apparently without regard to whether the offense has any connection with the witness' credibility. It would seem that the admission of any crime goes contra to the rationale that prior convictions are admissible only for the light they may shed on the credibility of the witness, not to inflame the jury, or indicate that because he was convicted of any earlier offense he is more likely to have committed the present one.

Subsection (b) of the same rule, with its provision that the time limit does not start running until the release of the witness also concerns me. I assume the reasoning is that if the witness has been in jail for the preceding ten years he has had no opportunity to get into further trouble, and accordingly does not deserve the ten year shelter.

Even more questionable in my view is 801 (d) (1), which changes the rule on prior inconsistent statements to make them admissible as substantive evidence. The effect of this, as I am sure the Subcommittee recognizes, is to make a conviction, or the imposition of civil penalties possible without direct evidence. If a witness has made a false accusation, repented, and retracted it, the defendant could still (unjustly) be convicted, should the jury choose to believe the prior, false accusation rather than the retraction.

If I can be of any assistance in connection with these matters, please do not hesitate to call on me.

Sincerely yours,

JEAN F. DWYER, *U.S. Magistrate.*

MAY 11, 1973.

Prof. EDWARD W. CLEARY,
College of Law,
Arizona State University,
Tempe, Ariz.

DEAR ED: At our meeting on May 9, I was directed to make some additional inquiries of you.

First, with respect to Rule 902(9), there was considerable discussion as to the meaning of "general commercial law." Although the members were of the view that in many States this would mean the Uniform Commercial Code, it was

suggested that the Code had not been adopted in all States. Can you supply any information as to the meaning of "general commercial law" and any case or other reference which would allay the fear that the term is much too vague? I might add that the Subcommittee did discuss the Clearfield Trust Company case.

With respect to Rule 1003, some concern was expressed about whether this rule constructed the "best evidence rule." Concern was also voiced about how a party would, as a practical matter, be able to challenge whether an alleged duplicate "accurately reproduces the original" [see Rule 1001(4)] in situations in which that party has not had an opportunity to see the original.

With respect to Rule 1004(1), a question was raised as to whether the wording of the paragraph would clearly embrace situations in which the proponent did lose or destroy originals, but in which such loss or destruction was the result of someone else acting at the instigation or direction of the proponent. Do you have any views on this?

Again, in advance, the thanks of the Subcommittee.

Sincerely,

HERBERT E. HOFFMAN,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE,
JUDICIAL CONFERENCE OF THE UNITED STATES,
Washington, D.C., May 15, 1973.

HERBERT E. HOFFMAN, Esq.,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. HOFFMAN: In response to your letter of May 11th, I offer the following observations.

(1) With regard to proposed Rule 902(9), you suggest that a question has been raised whether the term "general commercial law" might be too vague.

The basic reference is, of course, to the Uniform Commercial Code. The Advisory Committee's Note points out the UCC provisions that are pertinent. As the Note indicates, any effort to determine the general commercial law today would of necessity begin with the UCC and would probably end there. The UCC is now in effect in every state except Louisiana, and the Congress has enacted it for the District of Columbia. My colleagues who are knowledgeable in Commercial Law tell me that Louisiana probably will not adopt the UCC as a whole but is taking over large portions of it. Local variations exist in the UCC as adopted by the various jurisdictions but in the area of proof of authentication I do not believe that they are significant.

Only a few UCC provisions relate to authentication, and so the question naturally arises whether they should not simply be incorporated in the rules *in haec verba*. There are two objections to that procedure. First, the UCC provisions are unsuited for this use because they are far more specific than the proposed rules generally and because their meaning depends in a large measure upon the context within which they are found. Second, since the UCC has been adopted with some variations, questions might arise as to what version should be selected.

The language of the proposed rule does not eliminate the problem of possible local variations but does tend to deemphasize it. While a possible solution might be found in referring to the Model UCC, a reference to a standard that has no official existence seems scarcely appropriate. Moreover, the Model UCC has itself undergone substantial modifications in the past and may do so in the future.

The language in question appeared originally in the Preliminary Draft of 1969 and has remained unchanged. The Advisory Committee received only one comment respecting it, and that was from A Committee of New York Trial Lawyers. Their comment was the same as that raised in the Subcommittee, namely, ambiguity. See their report at pages 93, 239, 240. Their suggested solution was to refer expressly to the Model UCC, or, alternatively, to incorporate its provisions. The Advisory Committee had already considered and for reasons previously stated had rejected these approaches, and nothing presented by the New York group was believed to call into question the soundness of that decision.

I am not able to furnish any citation of a case dealing with the meaning of "general commercial law."

(2) With regard to proposed Rule 1003, you state that some concern was expressed that the rule constricts the best evidence rule.

If by "constricts" it is meant that the rule relaxes the common law insistence that the original in the strict sense be either produced or accounted for, then I agree that the rule has that effect. In fact, that was the end in view in the drafting of the rule. The purpose of the best evidence rule has always been to secure the most reliable information in disputes over the contents of writings. In prediscovery and pre-Xerox days the means used to attain that objective was a strong preference for the "original." With the advent of discovery and of xerography, the objective remains the same but the means of achieving it must be reexamined in the light of procedural and technological inventions. In my opinion the rule as drafted, taken in the light of present procedure and technology, is well designed to accomplish the purpose of the best evidence rule without wasting a lot of time over "originals" which no one really needs. John Strong and I wrote an article on the subject, and I am taking the liberty of enclosing a copy.

(3) Further in connection with the best evidence rule, you mention also that concern has been expressed as to how a party could challenge the accuracy of a duplicate under Rule 1001(4) when he had not had an opportunity to see the original.

The party complaining of lack of opportunity to see the original would, in my opinion, find in the exceptions of Rule 1003 any protection which the circumstances justified. One relevant circumstance might well be the source of the document. Thus an offer of duplicates of records of a disinterested third party, e.g. a bank, would be less likely to raise a question of genuiness or unfairness than would an offer of duplicates of a party's own records. The nature of the documents themselves and their apparent completeness or lack of it might also be factors. Other circumstances might in addition call for consideration.

(4) Finally you raise the question whether Rule 1004(1) would cover a case in which the original was lost or destroyed, not by the proponent but by someone acting at his instigation or direction.

I have no difficulty in concluding that loss or destruction by another at the instigation of the proponent is loss or destruction by the proponent himself. Aphorisms may not solve many legal problems, but Broom had a good maxim in *Qui facit per alium facit per se.*

Sincerely yours,

EDWARD W. CLEARY, *Reporter.*

SPECIAL SUBCOMMITTEE ON REFORM
OF FEDERAL CRIMINAL LAWS,
May 14, 1973.

Prof. EDWARD W. CLEARY,
College of Law,
Arizona State University,
Tempe, Ariz.

DEAR ED: The Subcommittee has asked me to inquire of you what comments were received by the Advisory Committee to Rule 406.

Many thanks.

Sincerely,

HERBERT E. HOFFMAN, *Counsel.*

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE,
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES,
SUPREME COURT BUILDING,
Washington, D.C., May 18, 1973.

HERBERT E. HOFFMAN, Esq.,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. HOFFMAN: Pursuant to your request of the 14th I enclose a copy of the several comments which my records indicate the Advisory Committee received on Rule 4–06 in the Preliminary Draft of 1969 and the single comment (a reiteration) on Rule 406 of the Revised Draft of 1971.

Sincerely yours,

EDWARD W. CLEARY, *Reporter.*

COMMENTS RECEIVED BY ADVISORY COMMITTEE ON PROPOSED RULE 406—PRELIMINARY DRAFT OF 1969

ASSOCIATION OF BAR OF CITY OF NEW YORK COMMITTEE ON FEDERAL COURTS

Rule 4–06(a) should be adopted as drafted.

Rule 4–06(b) should be deleted.

The basis of this decision is predicated on the belief that no particular method of proof need be set forth inasmuch as habit or routine practice of an organization is sufficiently like other factual issues in a case so that no specific mode or modes of proof need be provided for. Moreover, we were concerned about a general authorization of opinion evidence of habit.

SECOND CIRCUIT CONFERENCE COMMITTEE ON TRIAL PRACTICE AND TECHNIQUE

Rule 4–06. *Habit; Routine Practice.* Approved with the following modifications

1. The term "habit" should be stricken; the phrase "routine practice" should remain as the test.

2. In sub-section (a) the phrase "whether corroborated or not and regardless of the presence of eyewitnesses" should be amended to read "only if corroborated".

3. In sub-section (b) the term "opinion" should be stricken.

NEW YORK COUNTY LAWYERS' ASSOCIATION COMMITTEE ON FEDERAL COURTS

The provisions of Rule 4.04(a) relating to character evidence seems incompatible with, or at least inconsistent with, the provisions of Rule 4.06(a) relating to evidence of habit or routine practices. Rule 4.04(a) states broadly that character evidence is *not* admissible to prove that a person acted in conformity therewith, listing carefully defined exceptions relating to criminal proceedings and to impeachment of credibility of witnesses. However, Rule 4.06(a) states just as broadly the reverse proposition with respect to evidence of habit—namely that such evidence is admissible "whether corroborated or not and regardless of the presence of eyewitnesses" to prove that the conduct of a person was in conformity with such habit or routine practice. In the comment to Rule 4–06, the Advisory Committee concedes what seems obvious—that "character and habit are close akin." Accordingly, it seems incongruous that evidence so related should be treated so differently in the two rules. In its comment to Rule 4–06, the Advisory Committee observes—

"While adequacy of sampling and uniformity of response are key factors (in establishing a habit or a routine practice) precise standards for measuring their sufficiency for evidence purposes cannot be formulated." Comment to Rule 4–06.

It is this very difficulty in defining what constitutes "habit" or "routine practice" which should militate against a sweeping rule admitting evidence thereof.

Aside from all this, Rule 4–06 seems to conflict with rules of law long settled in New York. In New York civil litigation evidence of similar acts is not relevant to prove the conduct in issue of that person, see e.g. *Ross* v. *Ackerman*, 46 N.Y. 210, 211 ( ); *in re. Dale's Estate*, 159 Misc 578 ( ). The reason for excluding similar acts is the danger of confusing the issue before the court, misleading the jury, and unfairly surprising the party against whom such evidence is offered. *McLoughlin* v. *N.M.W. Bank*, 139 N.Y. 514 ( ). See generally, *Richardson on Evidence*, § 189 (9th Ed). However, in New York contemporaneous transactions are admissible to show § in cases where damages for fraud is an issue. *Matter of Booth's Will*, 215 App. Div. 516 ( ); *Chiba* v. *Kurtz* 263 App. Div. 33 ( ). Similarly, collateral or contemperaneous acts are admissible in New York to show the existence of a common scheme or plan, see *Altman* v. *Ozdoba*, 237 N.Y. 218, 222 ( ); (other forged indorsements on notes coming from the same person).

In negligence cases, New York courts likewise exclude evidence of habit to establish conduct. Thus, in *Warner* v. *N.Y. Central R.R. Co.*, 44 N.Y. 465 ( ); the court excluded evidence that the flagman at the crossing involved had been intoxicated and negligent on previous occasions. See also *Grenedier Surface Transit Corp. of New York*, 271 App. Div. 460 ( ).

The admission of evidence of habit in a criminal proceeding is also severely limited in New York, see e.g. *People* v. *Molineaux* 168 N.Y. 264 ( ); see generally, *Richardson on Evidence* § 175–77 (9th Ed.).

On the other hand, the New York rule admitting evidence of habits, routines, or practices of a business or professional character is more liberal. For example,

in *Miller* v. *Hackley*, 5 Johns (N.Y.) 375 ( ), the routine practice of a notary public was held admissible to prove an issue of fact at bar concerning the conduct of that notary. Similarly, in *Beaks* v. *DaCunha*, 126 N.Y. 263 ( ), the routine of a witness to be at home on a certain day of the month to transact business was held admissible to show that he had mailed certain notices on that day of the month. In the *Matter of Kellum*, 52 N.Y. 517 ( ), the routine practice of an attorney in drawing and executing wills generally was held admissible to show the propriety of execution of a particular will which the attorney had forgotten.

To sum up, it appears that in New York evidence of personal habits, or personal practices in a negligence or criminal context are inadmissible to prove conduct at issue, while the reverse is true of routine practices and habits of a business or professional nature. We see no reason of policy to depart from these well settled principals developed over many years by the adoption of proposed Rule 4–06. Accordingly, we disapprove Rule 4–06 insofar as it authorizes admission of evidence to show the habits of a person. This proposed rule, vague in language but drastic in its effect upon settled practice would, in our judgment open up a Pandora's Box of questions which would have to be litigated, and would create an undesirable difference between the rules in New York State and federal district courts, encouraging forum shopping, with a resultant additional volume of cases on an already crowded federal docket. We recommend amending the rule to allow the admission of evidence of habits or routine practices only where they relate to an occupation, business or profession, but not otherwise.

ARIZONA STATE BAR TRIAL PRACTICE SECTION

As to Article IV, Rule 4–06 would make admissible evidence of habit of a person or of routine practice of an organization without regard to whether or not there were eyewitnesses to the occurrence in which the habitual conduct is involved.

The committee points out to the Trial Section that this would change the Arizona rule which is set forth in *Pacific Employers Insurance Co. v. Morris*, (1954), 78 Ariz. 24, 275 P. 2d 389. See also Udall on *Evidence*, § 117. The present Arizona rule provides that, if there are eyewitnesses to the occurrence, it would not be permissible to establish the conduct of one of the parties to the accident by showing that habitually his conduct was of a certain nature.

While the Committee has no strong reactions for or against Rule 4–06, we do believe that it will result in frequent testimony to the effect that participants in accidents habitually do not violate the particular law they are accused of violating in the particular instance.

Further, the committee confesses that it does not understand how one would prove habit by opinion testimony, though Rule 4–06(b) provides that this is one method of proving habit. Perhaps an example should be attached to the rule to prevent misunderstanding of the meaning of the section.

WASHINGTON STATE BAR ASSOCIATION COMMITTEE

Rule 4.06(b). The committee believes that the reference to proof of habit by opinion is too broad. The provision for proof of habit by opinion should be deleted. (*recommendation that provision for proof of habit by opinion be deleted*)

AMERICAN COLLEGE OF TRIAL LAWYERS COMMITTEE

Paragraph (a) is endorsed as written.

Re (b) delete [by testimony in the form of an opinion or]

The committee views knowledge of habit or routine practice as being the result of observation which is not properly reported in the form of opinion.

FLORIDA STATE BAR FEDERAL RULES COMMITTEE

Rule 4–06.(b) be amended to read as follows:

"(b) METHOD OF PROOF. Habit or routine practice may be proved by testimony in the form of specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine."

DEPARTMENT OF JUSTICE

Similarly, the trial judge should have discretion to admit, at least on cross-examination, testimony of an individual's routine which did not meet the standard

of habit established in Rule 4–06. For example, an individual may be known to stop routinely for a drink on his way home from work so that he normally did not arrive home until 7:30 p.m. If he testified that he was home at 6:30 p.m., and this was material to his testimony, it would seem that he should at least be subject to cross-examination on the reasons why he departed from his usual routine on this particular occasion.

SOUTH CAROLINA CHAPTER AMERICAN COLLEGE OF TRIAL LAWYERS

Comment.—In most cases the issue is what took place on a particular date at a certain place. Because a motorist on five or six prior occasions applied his emergency brakes when parking on a hill or stopped for a sign or slowed down for an intersection does not establish that he did so on the date in question. To permit a witness to testify as to his own habit or that of another would permit the grossest kind of speculation. The issue is not what he did last year, but how he conducted himself on the date of the occasion before the court. The issue is not how a witness "always" does a certain act, but how he actually did or did not do it on a particular occasion.

We regard this rule relating to habit and routine practice as a dangerous innovation, and we think the proposed rule should be eliminated.

Rule 4–06. Habit; Routine Practice

VIRGINIA TRIAL LAWYERS ASSOCIATION

It is suggested that in subsection (b), lines 9 and 10, that the language "by testimony in the form of an opinion or" be deleted. It was also strongly felt by a portion of a divided committee that entire rule should be deleted for lack of convincing reasons and justification why such apparent drastic changes should be made in existing law.

DISTRICT OF COLUMBIA CONFERENCE SPECIAL COMMITTEE

4–06.—The rule itself does not state a definition of "habit." The comment indicates the standard is "semi-automatic" acts. This would preclude introduction, for example, of past traffic offenses in a case involving similar conduct. The Committee feels this restrictive rule is the proper one and amendment of the text might be appropriate. In any case, the importance of the definition in the comment should be emphasized.

AMERICAN BAR ASSOCIATION SPECIAL COMMITTEES ON FEDERAL RULES OF PROCEDURE AND ON UNIFORM RULES OF EVIDENCE FOR FEDERAL COURTS

Rule 4–06, line 5.—The phrase "relevant to prove" should be changed to "admissible for the purpose of proving" to be consistent with the other rules in Article IV. See Rule 4–04.

Revised Draft of 1971

SECOND CIRCUIT CONFERENCE COMMITTEE ON TRIAL PRACTICE AND TECHNIQUE

We wish to point out that in addition to the major objections which have been outlined above, the Committee also objects to Rule 406 which uses the term "habit" in permitting testimony which would be better defined by the term "routine practice" alone.

New Orleans, La., *May 16, 1973.*

William M. Hungate,
Representative, District of Missouri,
House of Representatives, Washington, D.C.

Dear Mr. Hungate: I understand that you chair a House sub-committee considering H.R. 5463, which proposes to recognize a patient-psychotherapist privilege but which thereby fails to acknowledge the confidential nature of the patient-physician relationship.

Although my patients would be protected, the fact remains that most psychotherapy is actually done by family physicians and M.D.'s in specialities other than psychiatry. In fact, this is the reason I became a psychiatrist—as a general practitioner and internist, I found that my patients always needed more than

simply ministering to their physical infirmities and the knowledge that their secrets are safe with the physician encourages them to share their burden with him.

Every civilization, Mr. Hungate, recognizes the need for a sanctuary. With the increasing complexities of our culture, that need is increasing, not decreasing, and the alarming increase in attempted suicides shows this.

Should H.R. 5463 pass in its present form, then the physician's office is lost to our anguished and troubled citizens as a sanctuary, and when they discover that the doctor cannot protect their secrets, they will conceal, and compromise their medical care and health.

If anything, the Act should be extended to protect the privacy of all patients, excluding of course, concealing criminal activity.

There is already a concerted effort to secure total medical and psychiatric records on Federal beneficiaries under the medicare and medicaid laws, and such records have already been used to disparage political opponents (President Kennedy—George Wallace—Jim Garrison). The recent burglary of Mr. Ellsberg's psychiatrist is a good example of how medical records can be used to suppress dissent. To prostitute the medical records of the sick for such purposes is clearly immoral to me. The case of your Senator Eagleton should also be considered.

If National Health Insurance is enacted, the Executive Branch won't have to break in to get the records—they'll own them.

Please consider these matters, Mr. Hungate, in your considerations of this bill.

Yours very truly,

KENNETH A. RITTER, M.D.

WASHINGTON STATE BAR ASSOCIATION,
Seattle, Wash., May 18, 1973.

HON. WILLIAM HUNGATE,
House of Representatives, Committee on the Judiciary,
Rayburn Office Building, Washington, D.C.
(Attention Herbert Hoffman, Esq., staff counsel).

DEAR SIR: The following letter was approved by the Board of Governors of the Washington State Bar Association for transmittal only by the Association's Committee on Federal Rules. It should be made clear that this letter expresses the views and positions of the Committee on Federal Rules and does not necessarily represent the official position of the Board of Governors.

By means of individual studies of its members and study at group meetings, the Committee on Federal Rules of the Washington State Bar Association has reviewed the Rules of Evidence for the United States District Courts and Magistrates which were promulgated by the Supreme Court. The members of the Committee are Keith Gerrard, Esq., Seattle; Edward E. Level, Esq., Everett; Charles F. Murphy, Esq., Olympia; Dean Lewis H. Orland, Spokane; William J. Rush, Esq., Tacoma; Dean C. Smith, Esq., Spokane; Robert J. Willis, Esq., Yakima; and Professor Robert Meisenholder, University of Washington Law School, Seattle, Chairman. It is our understanding that the rules are being considered by a special subcommittee chaired by Representative William Hungate and will be considered by a subcommittee of the Senate Judicial Committee. The committee, with the approval of the Board of Governors, previously forwarded comments on the then current draft on March 9, 1970.

The purpose of this letter is to make comments and suggestions concerning the rules of the Supreme Court now being studied in Congress. As a preliminary matter, we should like to note that, of course, federal rules are of great importance to the many members of the bar who practice in the federal courts. In addition, however, once federal rules of evidence are adopted for the federal courts, it is likely that the federal rules will be considered for adoption in many state court systems. We believe that it is important for Congress to consider this fact that federal rules which are adopted will receive consideration as models for state rules of evidence.

Our committee realizes that a great deal of time and effort was expended by the distinguished members of the Advisory Committee on Rules of Evidence in the development and drafting of the rules and that each rule was given extended and careful consideration. However, we have unanimously agreed that the changes suggested in this letter would improve the rules for nationwide use and make them better instruments for achieving justice.

The following recommendations do not include recommendations with respect to Article III.—Presumptions, Article IX.—Authentication and Identification, Article X.—Contents of Writings, Recordings and Photographs, and Article XI.—Miscellaneous Rules. In view of the number of suggestions outlined below,

the committee decided to state the suggestions with only a brief explanation or justification for each suggestion. We believe that various additional reasons for many of the suggestions will be apparent. The suggestions are listed by the rule numbers and each suggestion is followed by a description of the suggestion in parenthesis.

Our recommendations are as follows:

Rule 103(a)(2).—The rule as stated does not take into account problems arising in cross-examination. The committee recommends that the rule be clarified by a statement concerning cross-examination (*clarification by restatement recommended*).

Rule 104(a).—The last sentence is confusing. The committee recommends that it be deleted or that it be clarified by a restatement (*deletion or clarification recommended*).

Rule 201(e).—If the question of taking of judicial notice of a fact arises at the end of the trial, the committee believes that the party challenging the taking of judicial notice should have an opportunity to present additional witnesses and other evidence in support of his position, particularly, in view of the fact that facts may be noticed conclusively.

The rule as worded does not take into account this matter. Paragraph (e) should be amended to indicate that a factual issue may be made at the hearing if it is held at the end of the trial, and to indicate the matter that may be considered at the hearing under such circumstances. At present, the rule is inadequate in this request (*amendment recommended*).

Rule 404(3).—This paragraph refers to Rule 6–08. See comment concerning Rule 6–08.

Rule 405(a).—The committee does not believe that proof of character by opinions of laymen should be permitted. On a practical level, the committee is convinced that weaknesses of such opinion testimony cannot be exposed except with difficulty by cross-examination of the witness, and that challenging of his answers on cross-examination by extrinsic evidence would usually be barred. The danger mentioned seems very real. The committee recognizes that reputation evidence may not be completely realistic and that it may in effect disguise the opinion of the witness who testifies to reputation. However, again on a practical level, it seems preferable to lay opinion testimony, because it can much more easily and clearly be tested by cross-examination of the witness.

Also the rule permits expert opinion which would appear to involve opinions of psychiatrists or psychologists. As a minimum protection, the committee believes that expert opinion based only upon observation of a person in the courtroom should be excluded, even though the expert might testify that such observation was sufficient basis for him to form a relevant opinion.

The last sentence does not guard against the dangers of the first part of the rule, as pointed out above. The committee, therefore, recommends that the words, "or in the form of an opinion" be deleted (*Recommendation that the works, "or in the form of an opinion" be deleted*).

Rule 406(b).—The committee believes that the reference to proof of habit by opinion is too broad. Proof by opinion could be particularly subject to abuses. The provision for proof of habit by opinion should be deleted (*recommendation that provision for proof of habit by opinion be deleted*).

Rule 410.—This rule provides that a plea of nolo contendere is not admissible. The committee recognizes the nature of such a plea, but believes it is sufficiently relevant to be admissible. The rule should be changed to so provide (*recommendation for change.*)

Rules 501 and 502.—The impact of these sections is that various important state statutes would be ignored. As a result, in certain cases these rules might result in forum shopping. An example of such a statute is a Washington statute RCW 5.60.060 (5), which states, "A public officer shall not be examined as a witness as to communications made to him in his official confidence, when the public interest would suffer by the disclosure." Rule 502 does not refer to such a statute. The committee believes that these two sections must be revised to recognize more clearly the privileges granted by the various states to governmental records, conversations with governmental officials, etc. These matters of important state policy should be recognized in federal court (*recommendation that sections be revised*).

Rule 503(a)(3).—As now written, subdivisions (3) and (4) do not make clear that persons such as accountants who have been employed by the attorney or the client to aid in preparation of a case are persons described in these subdivisions. The committee believes that these subdivisions should be revised accordingly.

This matter would be much more clarified if the following clause were added to Rule 503(a)(3):

"A 'representative of the lawyer's is one employed to assist the lawyer in rendition of professional legal services. A 'representative of the lawyer' may be an independent consultant such as an accountant, engineer or other person with special knowledge or skills. Such independent consultant may be retained by either the lawyer or his client but if retained by the client the communications which are privileged are only those made after he has been employed specifically for the purpose of advising and assisting the lawyer." (*recommendation that Section 503(a)(3) be amended.*)

Rule 503(c).—The committee believes that the second to the last sentence is too restrictive. The provision as it stands provides that only the lawyer at the time of the communication can claim the privilege for the client. This provision ignores the situation in which such lawyer may have been in a law firm at such time, but is no longer in the firm when testimony is called for. (The firm may still be in possession of the files, etc.). To protect the client's privilege in such case, a member or associate of such a law firm should be able to claim the privilege for the client. Also, it should be clear that a successor lawyer should be able to claim the privilege as to matters in his files from the predecessor lawyer (as to the client of the predecessor). The sentence of the rule should be revised to take this matter into account (*recommendation for* revision).

Rule 503(c).—One further revision of Section 503(c) should be made. The first sentence does not refer to "heirs." If the representatives described in the sentence may claim the privilege, then the committee believes that heirs should be permitted to do so as well (*recommendation for revision*).

Rule 504.—

1. The committee recommends that the traditional and usual doctor-patient privilege be retained. It does not agree that certain values of the privilege are no longer relevant (*recommendation that the usual doctor-patient privilege be retained*).

2. If the present rule 504 is to be retained, exception (d)(1) impairs the privilege so substantially that it should be deleted. The situation described in the exception seems to be exactly a situation in which the privilege is most needed if it is to accomplish its purposes. It is repugnant to afford the privilege to one not recommended for hospitalization by the psychiatrist, and to refuse it if such a recommendation is made. Presumably, other evidence should be required and used in the hospitalization proceedings (*recommendation that 504(d)(1) be deleted*).

Rule 505.—The committee recommends that the rule in paragraph (a) be extended to civil cases in which either spouse is party. Further, the committee recommends that the rule include the traditional or usual privilege concerning confidential communications between husband and wife. Many considerations are pertinent to this matter but, in sum, the committee feels that as a matter of current social policy and needs, the proposed rule is too narrow (*recommendation that the rule be broadened substantially.*)

Rule 608(a).—The committee believes that impeachment by use of opinion of a lay witness is too prejudicial and on a practical level is not easily subject to testing by cross-examination.

In addition, the committee believes that expert opinion (including the opinion of pyschiatrists) should not be permitted for impeachment purposes. If the witness is not a party, there would usually be insufficient basis for such opinion, although particular experts might assert to the contrary. This situation would also often exist as to party witnesses. It appears there would probably be a good deal of disagreement among psychiatrists as to whether mere observation at the trial could afford an adequate basis in all but a few obvious situations. It seems likely so-called "organic" psychiatrists would be more willing to undertake such a task. Such psychiatrists' viewpoints are challenged in the profession. Finally, should witnesses generally be faced with the possibility of psychiatric diagnosis? Such a policy would not promote witness participation and also appears to involve invasion of personal rights. If expert opinion were not permitted for impeachment purposes, mental competency to take the witness stand could still be questioned and on that issue perhaps opinion would be suitable (*recommendation that impeachment by opinion be prohibited.*)

Rule 608.—The rule might permit abuse of witnesses. It should be specifically qualified by an indication that the impeachment permitted is within the discretion of the judge (*recommendation that method of impeachment be in the discretion of the judge*).

Rule 609 (d).—The last sentence of this section does not indicate circumstances which should be excepted from the general rule that juvenile adjudications are

not admissible. The committee recommends that the second sentence of this rule be omitted (recommendation for a deletion).

Rule 704.—In some instances, the admission of a layman's opinion on an ultimate issue might not be at all helpful or might add some confusion to the trial. The rule should state that lay opinion on ultimate issues is admissible in the discretion of the judge (*recommendation that judge be given discretion as to laymen's opinions*).

Chapter VIII (The Hearsay Rule).—The committee submitted the following comment concerning the original tentative draft: "The committee believes very strongly that the format and the content of Rule 801 through 806 are not acceptable as proposed. Without commenting upon the specific 'illustrations,' the committee believes that in essence hearsay will be admissible in the discretion of the judge without predicability. Some judges may apply the 'illustrations' mechanically; others may not. The committee agrees with Mr. Riachle, who has commented that the proposed rule all but abolishes the present hearsay rule (with its exceptions). However, more objectionable is the fact that such a result will depend upon individual judges encouraging appeals. The committee recommends that the hearsay rule be stated forthrightly with exceptions to be spelled out specifically."

Although the hearsay rule and its exceptions have been restated in the rules as promulgated by the Supreme Court, Sections 803 (24) and 804 (6), permitting the trial judge to make individual exceptions are included. These provisions are subject to the criticism of the preliminary draft quoted above. In effect, these provisions make the remaining stated exceptions merely "illustrations" (*recommendation that Section 803 (24) and 804 (6) be deleted*).

We respectfully request that the above recommendations be considered and adopted in Congressional reconsideration of the federal rules of evidence which were promulgated by the Supreme Court.

We respectfully urge that the above-mentioned changes be made in the federal rules.

Please include this letter as part of the record of the hearings on the rules of evidence.

Respectfully submitted.

ROBERT MEISENHOLDER,
Chairman, Committee on Federal Rules.

AMERICAN HOSPITAL ASSOCIATION,
WASHINGTON SERVICE BUREAU,
Washington, D.C., May 21, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: I appreciate your letter assuring that the views expressed in my letter of May 4 on behalf of the American Hospital Association with regard to proposed Rule 504 will be called to the attention of the other members of your Subcommittee when the question of "privileges" is considered. Thank you also for sending me a copy of the published hearings of your Subcommittee on the proposed Rules of Evidence.

We strongly believe that elimination of the general physician-patient privilege would impact adversely on the rights of patients and the quality of medical care and therefore would not be in the public interest. We earnestly hope proposed Rule 504 will be rejected.

Sincerely,

LEO J. GEHRIG, M.D.,
Vice President.

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON,
New York, N.Y., *May 21, 1973.*

Hon. FRANK J. MCGARR,
U.S. District Court,
Northern District of Illinois,
Chicago, Ill.

DEAR JUDGE MCGARR: I am sending a copy of this letter to Herbert E. Hoffman, Esq., Counsel to the Subcommittee of the Judiciary Committee of the House of Representatives, before whom the testimony on the proposed Federal Rules

was given. He sent me a copy of the testimony and if he has an extra copy I am sure he will be willing to send you one and this portion of my letter is to request him to do so.

With respect to the reasons why I oppose the proposed Rules I can briefly state them without detail. Obviously, what follows is not intended to be, nor is it be any means, complete, but it does mark what I believe to be the more objectionable portions of the Rules.

(1) Rule 105. I believe the Judge should be allowed "impartially" to sum up the evidence, but I do not believe, although I recognize it is the present Rule, that he should be able to comment on the weight of evidence and the credibility of witnesses.

(2) There is no reason why judicial notice should not be taken of legislative as well as adjudicated facts.

(3) The proposed Rule on presumptions in criminal cases is so complicated that, while there are some able judges who can undoubtedly charge the Rule correctly, no jury can possibly understand the charge.

(4) Article IV "relevancy and its limits". Rule 402 negatively abolishes the "Dead Man's Statute" which exists in one form or another in a great many states and this fact is recognized by the proponents of the Rule. The "Dead Man's Statute" is a proper matter for state action and in diversity cases in the federal courts it should *not* be abolished, since it is none of the federal government's business to do so.

(5) Article V deals with privileges. Without arguing whether privileges are substantive rather than adjective, they are matters for the state and not for the federal government. The creation of the psychotherapist patient privilege can only cause confusion and harm and the creation of the clergyman penitent privilege in the federal courts is unnecessary.

The "official information" privilege comes close to giving the Executive a strangle hold on any information it does not wish to see made public. It is far too broad in scope and it has been broadened by the last draft being the one promulgated by the Supreme Court.

(6) The impeachment sections of the Article through evidence of conviction of crime leave out the principle established in the Luck case, giving the court discretion to reject such impeachment, if its use is too prejudicial. This should not have been done.

(7) There is a basic danger in the expert testimony Article since as it reads now texts may be read to the jury on direct which can easily lead the jury to believe that such texts are evidence rather than the testimony of the witness.

(8) Hearsay, in the discretion of the trial court, is abolished (Rule 803 subd. 24 and Rule 805 subd. 6). Comment is superfluous unless you believe rumor is as reliable as personal knowledge.

These are the basic objections to the various provisions of the Rules. It is equally true, however, that there is absolutely no need for codification which will create needless distinctions in the law of evidence between the federal government and the states and will encourage forum shopping.

Yours sincerely,

GEORGE A. SPIEGELBERG.

KNOXVILLE, TENN., *May 22, 1973.*

Hon. WILLIAM L. HUNGATE,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Please let me thank you for the copy of the February and March hearings of the House Subcommittee on the proposed new Federal Rules of Evidence. I should like to outline my opposition to proposed Rule 801(d)(1)in more detail.

Proposed Rule 801(d)(1) provides as a hearsay rule exception that when the prior statement of a witness is used at trial to impeach him, the contents of the impeaching statement shall become substantive evidence. At present impeaching statements can only be considered on the issue of a witness' credibility. The proposed use of such hearsay statements as substantive evidence is objectionable because:

(1) *Such statements are from an inherently untrustworthy source.*—Exceptions to the hearsay rule have been traditionally allowed only where the hearsay evidence to be admitted is trustworthy. Now it is proposed to admit as substantive evidence out-of-court statements of a witness if it is shown the statement varies from his

in-court testimony. Thus, the very basis for admitting such hearsay will be the untrustworthiness of the declarant, which is really grounds to exclude such statements, not to admit them.

(2) *Excessive emphasis of testimony from unreliable witnesses will occur.*—The proposed rule will permit excessive emphasis to be given to the story of the dishonest witness. For example, when his written statement is admitted in evidence, it becomes an exhibit which may be read and shown to the jury. At the same time, conflicting oral testimony of opposing unimpeached witnesses can only be argued orally to the jury. Thus the written statement of a dishonest witness will become more impressed upon the mind of the fact finder than the less easily recalled oral testimony of unimpeached witnesses. This is a most unfair result, and one not productive of reliable fact finding.

(3) *A choice of falsehoods can occur.*—If a witness makes several out-of-court statements inconsistent with each other as well as with his in-court testimony, then any or all of his statements may be admitted to impeach, and any one of them can support a verdict. In short, the jury will be given a choice of falsehoods.

(4) *The power of investigators will be unduly enhanced.*—The proposed rule will place enormous power in the hands of investigators. When an investigator takes a signed statement from a witness, he will have admissible substantive evidence of the matter in the statement even though the witness later tells a different story under oath in the courtroom. This gives investigators greatly increased control over the course of litigation, and such power will be subject to abuse that will be virtually impossible to control because:

(*a*) An investigator normally represents only one side of a controversy, and takes statements with no one present from the other side. Under such circumstances, an investigator's bias often causes him to overlook and fail to uncover facts favorable to the other side.

(*b*) Whether through ordinary bias or affirmative unscrupulousness, an investigator can establish his employer's case or greatly minimize matters unfavorable by careful phrasing, judicious inclusion and exclusion of facts, and choice of words. With a little practice, he can produce a most innocent appearing, but very slanted statement.

(*c*) The entire responsibility for fairness in statement taking is almost completely in the hands of the investigator. It is too much to expect that an investigator who will be well aware of the vastly increased importance of his work, will observe the properties of a fair investigation, particularly when his future promotion may depend on the effectiveness of his work for his employer.

(*d*) The proposed rule will place excessive power in the hands of governmental agencies and other organizations whose work includes court use. The rule will tip the scales of justice much more toward agencies, organizations and those few individuals who can afford investigators and away from the less affluent.

(5) *Oral impeachment.*—In over twenty years of law practice, I have heard a great deal of oral hearsay, and have concluded that its one constant is unreliability. Experience with oral hearsay demonstrates over and over the frailty of human memory, the ever present prejudice of man, and his occasional plain dishonesty. The use of hearsay should be closely circumscribed, and certainly impeaching hearsay statements should be limited to just impeachment. While it is sometimes felt that juries give some substantive effect to impeaching statements although instructed not to do so, certainly they should not be affirmatively told that they can use the pretrial, out-of-court statement of an unreliable witness to convict or find substantive facts.

(6) *Summary.*—Cases should be tried as much as possible on incourt sworn testimony where the witness is subject to cross-examination and observation by the trier of fact, rather than upon out-of-court, unsworn, hearsay from admittedly untrustworthy witnesses. Adoption of the proposed rule will mean that no one will be safe from the skilled, aggressive statement taker, from false, slanted statements, or from the interested, prejudiced, or dishonest impeaching witness who remembers only what he wants to remember.

After trying many lawsuits over the years, I have become more than ever convinced of the wisdom of the hearsay rule, and feel that it should only be relaxed where there is great need and trustworthy evidence available. Proposed Rule 801(d)(1) does not involve great need (we do not need substantive evidence from unreliable sources), and does not provide for trustworthy evidence, since by definition the evidence will be admitted only where the witness who gave the statement is to be shown to be untrustworthy.

Rule 801(d)(1) appears innocent enough on its face, but will bring about many unjust results in the day to day trial of cases. It should be eliminated.

Sincerely yours,

FREDERICK D. MCDONALD.

MAY 22, 1973.

Prof. EDWARD W. CLEARY,
Arizona State University,
Law School, Tempe, Ariz.

DEAR PROFESSOR CLEARY: I have been directed to request your recommendation on two revisions of Rule 609(a) which were the subject of discussion at a subcommittee meeting yesterday morning.

The first text on which your comment is solicited reads as follows:

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible if, but only if (1) the crime involved dishonesty or false statement, or (2) the witness has introduced evidence of his own good character."

The second text on which your comment is solicited reads as follows:

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible if, but only if (1) the crime involved dishonesty or false statement, or (2) the witness has introduced evidence of his own good character, or (3) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, unless the judge determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction."

Sincerely,

HERBERT E. HOFFMAN,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws.

MAY 24, 1973.

Prof. EDWARD W. CLEARY,
Arizona State University,
College of Law, Tempe, Ariz.

DEAR PROFESSOR CLEARY: Thank you for your letter of May 18, 1973, enclosing comments received by the Advisory Committee on proposed Rule 406 of the 1971 draft and proposed Rule 4–06 of the 1969 draft.

In bringing these to the attention of the Subcommittee I think it might be useful to have your views as to why none of the recommendations were adopted by the Advisory Committee.

Sincerely,

HERBERT E. HOFFMAN,
Special Subcommittee on Reform of Federal Criminal Laws.

MAY 24, 1973.

Prof. EDWARD W. CLEARY,
Arizona State University, Law School,
Tempe, Ariz.

DEAR PROFESSOR CLEARY: The Special Subcommittee has found that one of the more controversial of the proposed Rules of Evidence is Rule 801(d)(1). This provision was the subject of extensive discussion at our last meeting and the Subcommittee was unable to agree on a disposition.

The staff is considering submitting the enclosed redraft as a possible compromise on which the members can come into agreement.

Mr. Pauley and I would be most appreciative if you could find the time to give us the benefit of your reaction to our draft.

A similar letter is being sent to Judge Albert B. Maris.

Sincerely,

HERBERT E. HOFFMAN,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws.

DRAFT OF THE SECOND CIRCUIT RULE

(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, 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 (C) one of identification of a person made after perceiving him [: *Provided* that, in either (A) or (B), the prior statement was given under oath at a trial or hearing or before a grand jury.]

ARIZONA STATE UNIVERSITY,
COLLEGE OF LAW,
Tempe, Ariz., May 25, 1973.

HERBERT E. HOFFMAN, Esq.,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR Mr. HOFFMAN: Your letter of May 22nd solicits comment on two possible revisions of proposed Federal Evidence Rule 609(a).

The first text read as follows:

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible if, but only if (1) the crime involved dishonesty or false statement, or (2) the witness has introduced evidence of his own good character."

The second text read as follows:

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible if, but only if (1) the crime involved dishonesty or false statement, or (2) the witness has introduced evidence of his own good character, or (3) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, unless the judge determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction."

As a matter of drafting, the two conditions in the first text are stated in the disjunctive ("or"). The result is that fulfillment of either of the conditions satisfies the requirements and puts the rule into operation. Thus evidence of a conviction would be admissible if it involved dishonesty or false statement, regardless of whether the witness had introduced evidence of his own good character. Also under the first text, evidence of a conviction, regardless of the nature of the crime, would be admissible if the witness had introduced evidence of his own good character. The incongruity that thus results from reading the conditions of the first text as alternatives virtually compels the conclusion that the draftsman's intent was to require compliance with both conditions. Consequently, "or" would be changed to "and."

A similar difficulty is presented by the second text. While the first and third conditions can sensibly be read as alternatives, the second condition is pretty much nonsense when so read. The intended meaning must be: "if (2) and either (1) or (3)."

I will assume for purposes of further discussion that the intended meanings are as I have suggested.

Further difficulties arise in connection with the second condition in both texts. First, the condition speaks of the introduction of evidence *by the witness*. Does this contemplate that witnesses may in effect become parties to the proceeding, with a right to introduce evidence? If so novel a step is contemplated, surely a direct provision would be better than leaving the matter to implication.

Second, if by "witness" only the accused in a criminal case is intended, as may be the case, then the texts appear not to deal at all with ordinary witnesses, and it may be doubted whether this result was intended.

Third, it is not wholly clear as to the circumstances under which evidence of good character of a witness may be introduced, so as to open the door to evidence of conviction. Presumably compliance with the limitations of Rule 608(a)(2) is contemplated. Accordingly, evidence of good character would be admissible only after the introduction of evidence constituting an attack on character, and the conviction evidence would only then become admissible to rebut the evidence of good character. Perhaps this rather complicated scheme could be spelled out more simply. A cross-reference to proposed Rule 608(a)(2) might be considered, though one is then left with a cross-reference to proposed Rule 609 in 608(b), and one to 608(a) in 609(a). In any event, cross-references invite mistakes of the domino variety and ought to be used only in the presence of great need. If the second condition of the two texts assumes that evidence of good character of a witness may be introduced without any preliminary attack on character, then it is inconsistent with proposed Rule 608(a)(2), and revision of the latter would be required.

Moreover, a rule that allowed supporting character evidence for a witness whose character for veracity had not been attacked would depart radically from existing practice and ought to be spelled out only in the clearest terms. See McCormick (2nd ed.) § 49, p. 102. Model Code Rule 106 and Uniform Rule 21 are both unclear in this respect.

Fourth, the condition speaks of "good character," an expression so general as almost to be devoid of meaning. The prevailing view is that the only relevant aspect of the character of a witness is with respect to the trait of truthfulness. McCormick (2nd ed.) § 44, p. 91; proposed Rule 608(a)(1).

The preceding remarks are to a large extent technical in nature and leave basic policy matters to be discussed. The fundamental question whether conviction evidence ought to be allowed at all for impeachment has aroused no particular concern. If cross-examination "to credit" is allowed, as in most jurisdictions, then the step to convictions seems not to raise difficulties; one is still exploring the background of the witness with a view to credibility. The relevance of convictions may be slight, but so are the chances of prejudice, side issues, and wasting time. Only when the witness is the accused in a criminal case do serious doubts enter in.

Model Code Rule 106 and Uniform Rule 21 imposed two basic limitations: only convictions for crimes of dishonesty or false statement were usable, and a witness-accused was immune unless he introduced evidence admissible solely to support his credibility. The pros and cons of limiting conviction evidence to dishonesty and false statement are probably not of a kind to carry great logical conviction either way. What crimes qualify may be a matter of dispute, e.g. murder of insured by beneficiary. Strange distinctions may result, e.g. rape vs. seduction. The theory of *falsus in uno* has largely disappeared from jury instructions, and perhaps the law of evidence should take heed. Yet the thief and the embezzler do seem less worthy of credit. As to felonies, an ordinary violent murder may not have much in the way of credibility overtones, yet surely many crimes do manifest an attitude of disregard that may well carry over into truthtelling.

The ALI and Uniform Rules proposals were part of a package designed to promote the giving of testimony by the accused. See 18 ALI Proceedings 245–251; 19 id. 92–120, 252–255. Essentially the trade was one of allowing the prosecutor to comment on the failure of the accused to testify in return for immunizing the accused from conviction evidence unless he chose to introduce evidence of good character for truthfulness. The immunity to the accused, it should be noted, might be gained only at the cost of leaving bad-reputation evidence unanswered, and hence may have been more apparent than real.

The second text quoted in your letter contains a proviso allowing the judge to exclude upon determining that danger of unfair prejudice outweighs probative value. No provision to this effect appeared in the Preliminary Draft of 1969 or in the draft adopted by the Court. However, the provision did appear in Rule 609(a) of the Revised Draft of 1971, and the supporting arguments are set forth in the corresponding Advisory Committee Note. They were subsequently deleted in order to conform with the congressional policy manifested in the 1970 amendment of § 14–305 of the D.C. Code.

When asked by the Subcommittee for my own views, I stated that the problem is one that affords no good answer. Hearings, p. 30, I see no reason to depart from that position. A *Luck* approach is fair on its face but presents great difficulties of practical administration; the proposed rule as approved by the Court is easy of application, yet calculated to discourage accused persons from taking the stand at the cost of exposing a record of prior convictions; a general rule of exclusion would encourage accused persons to testify, but with a misleading incomplete knowledge by the trier of fact of factors bearing on credibility.

Sincerely yours,

EDWARD W. CLEARY,
Reporter.

ARIZONA STATE UNIVERSITY, COLLEGE OF LAW,
TEMPE, ARIZ., *May 29, 1973.*

HERBERT E. HOFFMAN, Esq.,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. HOFFMAN: In response to your letter of May 14 requesting my views as to why none of the recommendations submitted by various groups with respect to proposed Evidence Rule 406 was adopted by the Advisory Committee, I submit the following comments. Please understand that they are a reconstruction based on my own notes and recollection.

The American Bar Association Committee suggested substituting "admissible for the purpose of proving" in place of "relevant to prove." There are hazards in framing rules in positive terms of admissibility, since an invitation is thereby presented to disregard other possible grounds for objection. The other rules in Article IV are generally rules of exclusion, phrased in terms of "not admissible," and do not offer this risk.

The D.C. Conference Committee suggested that the text of the rule might be amended to reflect the standard of habit as "semi-automatic" or that the importance of the definition in the comment should be emphasized. After wrestling with the definitional problem, the Advisory Committee finally decided to leave the term "habit" undefined. It is believed that the Advisory Committee's Note does sufficiently emphasize uniformity of response.

The South Carolina Chapter of the American College of Trial Lawyers and the Virginia Trial Lawyers Association suggested in effect that the rule be eliminated as a dangerous innovation. The accompanying comments seem to indicate that this view was generated by a much broader concept of what constitutes habit than is tenable under the Advisory Committee's Note.

The Department of Justice Committee suggested that the judge should have discretion on cross-examination to allow inquiry into a routine not meeting the standard of habit. It was believed that the drafting of a rule along these lines would present very great difficulties and no specific proposal was suggested. The rule as it stands does not in terms foreclose this kind of inquiry, and general considerations of relevancy would seem properly to govern.

The American College of Trial Lawyers Committee, the Florida State Bar Committee, the Washington State Bar Committee, the Arizona Bar Section, and the Federal Courts Committee of the Bar Association of the City of New York suggested the deletion of the reference to opinion testimony. This suggestion probably originated from the somewhat uncertain meaning of the word "opinion." If opinion in the sense of conclusion is not allowed, the result may be to shut off the testimony of perfectly legitimate witnesses to habit. What is sought to be guarded against by the suggestion presumably is the witness who testifies, "In my opinion X always stops at railroad crossings." Between the requirement of firsthand knowledge and the safeguard of cross-examination the risk would not appear to be substantial.

The New York County Lawyers Association Committee suggested that the rule is incompatible with Rule 4–04(a), since habit and character are akin. However, the two are by no means the same. While the New York cases cited by the Committee permit "habit" evidence in connection with occupational, business or professional conduct but not in the context of negligence or crime, the real difference seems to be that the former satisfy the requirements of what constitutes habit while the latter do not.

The Second Circuit Conference Committee suggested striking the terms "habit" and "opinion" and also to require corroboration. No reasons for these suggestions were stated, and the Advisory Committee was unable to think of any which had not already been given careful consideration.

Sincerely yours,

EDWARD W. CLEARY, *Reporter.*

U.S. COURT OF APPEALS,
SECOND CIRCUIT,
New York, N.Y., May 30, 1973.

HERBERT E. HOFFMAN,
Counsel, Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. HOFFMAN: I have your letter of May 25. I am enclosing a slightly altered version of the draft. It seems to me that the change in the proviso is necessary to avoid any implication that prior inconsistent statements not at a previous trial or hearing or before a grand jury cannot be used for impeachment.

Of course, the whole business is rather awkward since it seems to me that analytically all of these statements, if used as proof of the facts stated, are hearsay but should be admissible. If you are doing a substantial revision of the Code, you might wish to consider some different form of presentation.

Sincerely,

HENRY J. FRIENDLY.

(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, 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 (C) one of identification of a person made on or shortly after perceiving him: *Provided*, That a prior inconsistent statement shall not be admissible as proof of the facts stated unless it was given under oath at a trial or hearing or before a grand jury.

U.S. COURTHOUSE,
Philadelphia, Pa., May 30, 1973.

HERBERT E. HOFFMAN, Esq.,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws,
House of Representatives, Washington, D.C.

DEAR MR. HOFFMAN: I have your letter of May 24th enclosing the suggested staff redraft of Evidence Rule 801(d)(1) and requesting my comments.

While I am in no sense an authority in the field of evidence I do believe that Rule 801(d)(1) as approved by the Judicial Conference and the Court would effect a desirable improvement in aid of the fact finder's search for truth. It seems to me that the objections to the proposal are more emotional and theoretical than pragmatic and I have difficulty in understanding them. I can see, however, that some of the advance which the rule seeks to achieve would be preserved by the form of the proviso in your suggested draft. For prior statements made under oath in legal proceedings are the hearsay statements which would seem likely to be the most reliable and, therefore, most helpful to the fact finder. I believe it would be even more useful if your proviso were broadened to include statements made under oath in a deposition and also any prior written statement made under oath.

In short, while I deplore any watering down of Rule 801(d)(1), I agree that saving prior trial, hearing or grand jury statements from the watering-down process will salvage the most defensible part of the proposed advance and that this could well include deposition statements and all prior written sworn statements, which are basically of the same quality.

Sincerely yours,

ALBERT B. MARIS.

ARIZONA STATE UNIVERSITY,
COLLEGE OF LAW,
Tempe, Ariz., May 31, 1973.

HERBERT E. HOFFMAN, Esq.,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. HOFFMAN: Under date of May 24th, you sent me a redraft of proposed Evidence Rule 801(d)(1). This redraft is entitled "Draft of the Second Circuit Rule" and proposes to add a proviso as follows: "Provided that, in either (A) or (B), the prior statement was given under oath at a trial or hearing or before a grand jury." You also requested my comments on the suggested redraft.

The redraft would virtually destroy the utility of provision (A), which deals with prior inconsistent statements. If the witness has made a prior statement under oath, the threat of a perjury charge makes it highly unlikely that he will subsequently relate a different story again under oath. Hence the instances in which the rule would operate under the suggested redraft would be greatly curtailed. The problem area consists of cases in which the prior statement was not under oath, whether in the course of a judicial proceeding or not, and a rule which does not deal with these cases is of no practical significance.

Apparently the premise that underlies the suggested redraft is that a statement not made under penalty of perjury is an insufficient basis to support a conviction. See *Bridges* v. *Wixon*, 326 U.S. 135; cf. *California* v. *Green*, 399 U.S. 149. The premise confuses two distinct concepts: sufficiency and admissibility. If every item of evidence admitted were required to be sufficient to support a verdict, almost all circumstantial evidence, for example, would be excluded. No one would argue that this is so. See the Advisory Committee's Note to proposed Rule 401, discussing relevancy and sufficiency. Admittedly, if a judge were confronted with a situation, under the rule as transmitted to the Congress, in which the entire case for the prosecution was a prior inconsistent unsworn statement, it would be diffi-

cult indeed to see how he could avoid directing a verdict. From this conclusion, however, it by no means follows that he should have excluded the evidence in the first place. If every item of evidence were required to be sufficient to sustain a verdict, the practice of directing verdicts would fall into disuse and such, of course, is not the case. The fact is that many kinds of hearsay are admitted in criminal cases, but only one of them, former testimony, is given under oath.

The impact of the suggested redraft upon *California* v. *Green* should be noted. The testimony given by the prosecution's principal witness at the preliminary hearing would be admissible, but the prior statement given to the police officer would not. The Court held that neither violated confrontation rights.

The differences in treatment of (A), (B), and (C) raises further problems. (B) is, in my view, of relatively slight importance generally. However, when a situation where a prior consistent statement is admissible to rebut a charge of recent fabrication does arise, it surely makes no difference whether the prior statement was under oath. The fact that the present testimony is under oath affords adequate protection against perjury. Moreover, the suggested redraft may imply that a prior consistent statement to rebut a charge of recent fabrication is inadmissible except when made under oath and in the course of judicial proceedings, contrary to well established principles.

A statement of prior identification is usually consistent with testimony. Yet the suggested redraft contains no requirement that (C) be under oath, and in this respect it is at variance with the treatment of (B). In the unusual event that the identification statement is contrary to testimony, then it is a prior inconsistent statement, which the suggested redraft would require, if classed under (A), to have been given under oath and in the course of a judicial proceeding. However, a prior inconsistent statement falling under (C) is not so treated. If this is meant as a codification of the Second Circuit decisions, a rereading of *De Sisto* may be indicated.

As a step forward, *De Sisto* was a valuable contribution, but in my opinion it would be highly undesirable to transpose into requirements the factors which were relied upon in *De Sisto* as justifications for departure from conventional doctrine. See *California* v. *Green*.

Sincerely yours,

EDWARD W. CLEARY, *Reporter*.

MAY 31, 1973.

Prof. EDWARD W. CLEARY,
Crows Nest, Epworth Heights,
Ludington, Mich.

DEAR PROFESSOR CLEARY: Thank you for your very prompt response to my letter of May 22, 1973, requesting your recommendation on two alternative proposed revisions to Rule 609(a) as submitted to the Congress.

I apologize for not having explained to you what the Subcommittee was hoping to accomplish. Now I am embarrassed to do so, because you seem to think that such a purpose is incongruous.

The Subcommittee does intend that the alternatives in the first draft and in the second draft be in the disjunctive. The drafts which I forwarded to you reflect extended discussion along the following lines:

By and large a number of the members expressed concern that evidence of conviction of crime not bearing on credibility should be permitted in evidence for the purpose of impeachment. These members felt that only crimes which involve dishonesty or false statement should be admissible.

Other members were of the view that if the character of a witness is placed in issue then conviction of any type of crime which might bear upon his character should be admissible.

The first draft is an attempt to combine these two points of view. Referring to the witness as introducing evidence of his own good character may not be artful and perhaps, the language should be changed.

Clause (3) which appears in the second draft is, as I have indicated, also intended to be in the disjunctive. Hence, if the second draft should be adopted, convictions would be admissible for the purpose of impeachment of a witness if (1) they involve dishonesty or false statement (that is, reflect on the witness's likelihood to be honest), or (2) they reflect adversely on the character of a witness whose good character has been placed in issue, or (3) they involve felonies (by federal standard) unless the probative value of the evidence of such a conviction is considered by the judge to be outweighed by the danger of unfair prejudice.

At the risk of appearing ungrateful with respect to your prompt reply of May 25, may I ask that you give us the benefit of your views in light of the above explanation.

Sincerely,

HERBERT E. HOFFMAN,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws.

CROWS NEST,
Ludington, Mich., June 12, 1973.

HERBERT E. HOFFMAN, Esq.,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. HOFFMAN: This is in reply to your letter of May 31, which in turn refers to yours of May 22 and mine of May 25, all relating to proposed Rule 609(a). When I now refer to "texts", I mean those in your letter of May 22.

The difficulty in my mind centers on item (2) in each of the two texts. Without item (2), both are quite clear, and leave only the policy problem to be resolved.

The difficulty with item (2) is, I believe, that it is in fact designed to take care of the situation of an accused who introduces evidence of good character, as he may do under Rule 404(a)(1), and also testifies himself in the case. I do not believe that item (2) is meant to deal with witnesses other than the accused in a criminal case. The confusion that I find, stems from this failure, apparently, to distinguish evidence of the character of an accused, as such, offered to suggest the unlikelihood that he committed the crime, and evidence of the character of a witness, offered as bearing on his credibility. When the accused and the witness are the same person, failure to bear the difference in mind causes confusion.

It should also be observed that in both tests, as drafted, item (2) would allow conviction evidence wholly without limitation as to the nature of the crime. I believe that little or no support can be found for such a view.

If I am wrong in assuming that item (2) is focused only on the witness-accused (though it does not say so), then I see no reason to depart from my earlier comments.

Sincerely yours,

EDWARD W. CLEARY.

MEMPHIS, TENN. *June 5, 1973.*

Congressman WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: We are advised that your Sub-Committee has under current study proposed Rule 406 of the Proposed Federal Rules of Evidence. I am pleased to enclose herewith a draft paper prepared by Professor Joe A. Moore which provides the basis for our position on proposed Rule 406.

As Chairman of the Committee on Federal Evidence and Procedure, this is to advise that it is the ATL position that Rule 406 should not be adopted in its present form. Allowing evidence of habit of individuals is strongly opposed based upon the analysis of the merits set forth in the attached draft.

As can be readily seen from a review of existing authority, the proposed rule which would allow evidence of habit of a person is not a "codification" of existing majority view. The adoption of this rule would constitute adoption of a rather extreme minority view which has been rejected by a substantial majority of our jurisdictions.

We are hopeful that our position as outlined will be of benefit to the Sub-Committee in giving proper treatment to proposed Rule 406.

Yours very truly,

JAMES F. SCHAEFFER.

ANALYSIS OF PROPOSED RULE 406

In Article IV, RELEVANCY AND ITS LIMITS, the Advisory Committee has included proposed Rule 406, which reads as follows:

"(a) *Admissibility.* 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.

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

In the Advisory Committee's Note explanatory of the sections quoted, it is rather clearly implied that the section amounts to codification of well-settled principles about which there is only slight disagreement as to applicability. In that regard, the note contains the following statements, among others:

"The rule is consistent with prevailing views * * *.

"These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person * * *."

It is earnestly submitted this is not the case. In point of fact the proposed rule constitutes a marked deviation from the current majority view which would disallow much of the evidence permitted here. It is significant to note that the only authority referred to in support of the overall rule is a rather lengthy quotation from McCormick, Sec. 162; reference to Lewan, *Rationale of Habit Evidence*, 16 Syracuse L. Rev. 39, 40 (1964); Slough, *Relevancy Unraveled*, 5 Kan. L. Rev. 38–41 (1957) and reference to annotations appearing at 46 A.L.R. 2d 103 and 66 A.L.R. 2d 806.

Standing against these references, some of which in any event do not support the rule, are statements to be found in standard works on evidence which establish that the current view is that such "habit" evidence should be excluded. Exemplary of this position is the following from 29 *Am. Jur.*, 2d, *Evidence*, Sec. 303, where it is said:

"A habit of doing a thing would seem naturally to have some probative value indicating that on a particular occasion the thing was done as usual, although it is far inferior to direct evidence as to what was done at the time and date in question. According to most authorities however, evidence of the general habits of a person is not admissible for the purpose of showing his conduct upon a specific occasion. Thus, *with very few exceptions* the courts hold that evidence of the habits of, or reputation for, care or negligence of one injured is not admissible in proving his care or negligence at the time of his injury. (Em. Added)

It is significant to note that Rule 307(2) of the Model Code of Evidence of the American Law Institute provided that evidence of a habit of a person was admissible as tending to prove that his behavior on a specific occasion conformed to that habit. That view was not adopted although it was before the American courts for many years prior to the promulgation of the proposed rule here to the same effect. It thus appears that for some reason the American courts have not seen fit to take the approach here advocated although it has been urged upon them for some time.

In the proposed rule, the committee places evidence of the habit of an individual on parity with the "routine practice of an organization". The two are vastly different in basic concept and in probative value. In the first instance, a routine business practice could be established by direct and easily handled evidence of that practice. Further, such routine business matters have far more probative value because of the manner of their promulgation the time over which the practice has existed, and the ability of the business involved to establish the existence of the practice as being a part of a regularly conducted business activity completely disassociated from pending or threatened litigation.

When you move from such practice to evidence produced tending to establish an alleged "habit" of an individual several immediate problems present themselves. In the first instance, as is conceded by the advisory committee, habit must be differentiated from general character. All concerned will agree that character is not admissible in this context, as evidenced by the fact that other specific rules deal with the very limited use to which evidence of character may be allowed. (See Rule 404, where the use of evidence of a person's character is not allowed for the purpose of proving that he acted in conformity therewith on a particular occasion.)

The combination of Rules 406 and 404 require that there be a workable definition of the word "habit". It is submitted that no such definition is at hand. Reference to Webster's Unabridged Dictionary, p. 542, establishes the existence of several accepted and variable definitions, no one of which serves to cast light on the legal implications of the word. That definition is as follows:

"Hab-it (hab'it), n. 1. a disposition or tendency, constantly shown, to act in a certain way. 2. such a disposition acquired by frequent repetition of an act. 3. a particular practice, custom, or usage: the habit of smoking. 4. customary practice or use; to act from force of habit. 5. the mental character or disposition; habit of mind; 6. characteristic bodily or physical condition: habit of body. 7. the

characteristic form, aspect, mode of growth, etc., of an animal or plant: a twining habit. 8. garb of a particular rank, profession, religious order, etc.: monks habit. 9. a woman's riding dress.—vt. 10. to clothe: array. 11. obs. to dwell in. v.i. 12. Obs. to dwell * * *."

The proposed rule makes no real attempt to define the word habit and thus give to the affected courts any real guidance in the admissibility of the permitted evidence. This deficiency in the rule has been the subject of comment by Professor Paul F. Rothstein in *Rules of Evidence for the United States Courts and Magistrates*, p. 95 (Clark Boardman Co., 1973) as follows:

"The Federal Rules of Evidence offer no help in the difficult task of differentiating between habit or routine practice on the one hand and character on the other. Traditionally, as under the Rules, if the evidence can be brought under the banner of habit or routine practice it is much more favorably received. and traditionally, as under the Rules, different rules apply to the two categories of evidence."

The two annotation referred to by the advisory committee well demonstrate the reluctance of the courts to admit such evidence on the basis here proposed. In 46 A.L.R. 2d 103 at 104, the annotator states:

"Evidence showing a history of intemperate habits on the part of the plaintiff, injured when struck by an automobile, as it related to the occurrence of the accident, is not admissible where there is no dispute as to the plaintiff's condition of sobriety or insobriety at the time of the accident. Such evidence is generally inadmissible in the absence of additional proof, by way of connecting facts or circumstances that such habits have a relevancy bearing upon the plaintiff's physical condition at the time of his accident."

In 66 A.L. R. 2d, 808, the following appears:

"It is a fundamental rule of evidence that the commission of an act cannot be proved by showing the commission of similar acts by the same person at other times and under other circumstances; such evidence is simply not relevant, as it does not tend to prove the issue."

Cited in support of the annotators language are numerous cases from the appellate courts of twenty three states, Great Britain and Canada. The reasoning behind the rejection of such evidence is set out in *Kurn* v. *Radencic* (1943) 193 Okla. 126, 141 P2d 580, at 581:

"Such departure from the general theory of confining the proof to matters directly at issue between the parties is always subject to criticism on several considerations:

"1. It involves the inconvenience of trying collateral issues.

"2. It may occasion surprise to the adverse party though this element is greatly diminished where the trial court makes an order prior to trial compelling the party who expects to prove such acts to specifically delineate same.

"3. It may bewilder or mislead the jury to such an extent as to detract their attention from the principal issue.

"4. It may unduly prejudice the rights of one of the parties. 32 C.J.S., Evidence, Sec. 579, p. 433; Wigmore on Evidence, 3rd Ed., vol. 1, page 678.

"These objectionable elements may be epitomized as (1) excessive burden on the court; (2) Unfair surprise; (3) undue confusion; (4) excessive possibility of prejudice."

The committee note refers specifically to disagreement among the courts as to whether evidence of habit will be received in the circumstance of availability of eye witnesses to the accident. In that connection, the committee said:

"The rule also rejects the requirement of the absence of eye witnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases."

The eyewitness requirement demonstrates again the very limited aspect in which evidence of so-called "habits" of an individual have been allowed in most American jurisdictions. While the overwhelming majority of the courts have rejected such evidence as proof of negligence, for example, many have allowed such under the very limited circumstance that the victim of an accident was killed therein and his representatives now assert a wrongful death claim. If, in such case, the defendant alleges that the decedent was guilty of contributory negligence in the affair, many courts indulge a presumption that the deceased person was in the exercise of due care for his own safety at the time of the accident. In aid of such presumption, several jurisdictions have allowed evidence to be admitted tending to establish the habit of the deceased for care in the particular type of conduct involved. *Zucker* v. *Whitridge*, 205 N.Y. 50, 58, 98 N.E. 209, 211, 41 L.R.A. (N.S.) 683.

In connection with this view, it must be pointed out that the evidence is admissible only in that very limited circumstance, and not as affirmative proof of negli-

gence or lack thereof on the part of the defendant. In regard to the general proposition that such evidence is not admissible the following quotation from Prince, *Richardson on Evidenc*., 9th Ed., Sec. 191, p. 173, is apt:

"The general rule in New York is that evidence of a person's habitual conduct under similar circumstances in respect to using care is inadmissible for the purpose of raising an inference that he exercised the same amount of caution on the occasion when the injury in question was sustained. Such evidence is excluded for the reason that it raises too many collateral issues and, also, because it borders too closely on character evidence, which is not admissible in civil cases."

While it is true that Professor Wigmore favored use of evidence of this type, it is equally true that he recognized that the courts did not share his opinion. In Wigmore, *Evidence*, Sec. 97, he said:

"It has been many times held that it is not competent for a plaintiff to give evidence that the person by whom the alleged negligent act was committed had previously committed similar acts, or that he was generally negligent or unskillful."

Several underlying problems are created by the rule which are not easily discerned. If, as stated by the rule, such evidence is admissible and relevant "to prove that the conduct of the person or organization . . . was in conformity," it can and will be argued that a case resting solely on the foundation of habit evidence is sufficient to require that the matter be submitted to the jury for decision. Further, what is the effect of the rule on the doctrine of "res ipsa loquitur"? In many jurisdictions, if res ipsa loquitur is pleaded, the aid of the doctrine immediately disappears if direct evidence on the issue is presented. In such case, it again could be argued that the presentation of habit evidence would preclude reliance upon that doctrine.

Perhaps the most serious defect presented is in the pairing of individual habit with routine business practices. While the routine business practice of an organization may well have probative value, such is not true of alleged individual habit. Two hypothetical instances can illustrate the difference.

Assume that plaintiff sues for personal injuries and alleges that the accident in question resulted from the failure of the brakes on a truck owned and operated by the defendant trucking company. Plaintiff also alleges that the brakes were not inspected and that the defendant was negligent in its maintenance procedure. On the trial, under this rule, the defendant would be allowed to show that it had earlier established a standard check-out procedure for all trucks leaving its warehouse which included a brake test. Such evidence would be of high probative worth, and would also be easily and simply established by direct evidence of the practice.

On the other hand, assume that the plaintiff sues an individual driver for personal injuries, alleging that the defendant turned left immediately in front of plaintiff without giving a left-turn signal. Under the view of McCormick, as quoted by the advisory committee note, evidence of the 'habit' of the defendant in signalling left turns would be admissible. The probative value of the evidence is virtually non-existent. The defendant does not stand charged with usually not signalling his turn, he stands charged with the single careless act of not signalling on the occasion in question. In the average personal injury-negligence case, the defendant is not a person who habitually violates the rules of the road—he is a person who, through an isolated act of negligence, has done so on this one occasion.

The problem is acutely increased by sub-section (b) of the rule which allows habit to be established by testimony as to "specific instances of conduct." To allow this form of proof will be to intolerably lengthen trial time and further give rise to prejudice to the opposing party on grounds of surprise and denial of effective cross-examination.

The varied difficulties in allowing proof of habit by evidence of specific acts of conduct are well stated by Professor Mason Ladd in 24 Iowa L. Rev. 498 (1938), where he states:

"The objection to the use of specific acts to prove the character of a person is based largely on the time it would take and the confusion which would result from going into the many collateral issues which would arise. If the law were to permit proof of the bad acts of each witness, to allow those to be counteracted by showing the good deeds which each had done, then to endeavor to solve the truth of the existence of the good or bad deeds, and finally to permit the results to be considered as they disclose the character of the witness which in turn may have a bearing upon the truth of testimony as to other facts in the actual controversy in the litigation, all trials would become burdened with confusion and be endlessly prolonged."

While Professor Ladd was speaking in the context of proof of character rather than proof of the closely related habit of an individual, the same problems exist, and to the same degree, in both instances.

In sum, it is submitted that the rule as proposed does not state existing law, and is regressive in nature.

JUNE 7, 1973.

Mr. ALVIN K. HELLERSTEIN,
New York, N.Y.

DEAR MR. HELLERSTEIN: Enclosed are the New York County Lawyers' comments to which I referred in our conversation today. The comments were addressed to the 1969 draft, but are equally applicable, of course, to the identical text of Rule 406 in the draft before the Congress.

Also enclosed is a draft of a substitute for Rule 406, which is intended to comport with what the New York County Lawyers represent as current New York law. I am not completely pleased with the draft, in part, because I am not satisfied that the words "occupational, business or professional" are sufficiently explicit.

I appreciate your undertaking to react to the draft and to give me your views, as well as to locate whoever was responsible for the New York County Lawyers' comments.

Since there is some urgency, I would appreciate hearing from you as soon as possible.

Sincerely,

HERBERT E. HOFFMAN,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws.

[Draft Revised Rule 406]

RULE 406—HABIT; ROUTINE PRACTICE

Evidence of the habit or routine practice of a person or the routine practice of an organization, is not admissible to prove the conduct of that person or organization on a particular occasion, except that such evidence may be admissible if it relates to activities of an occupational business or professional nature.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,
New York, N.Y., June 13, 1973.

EDWARD HALLE, Esq.,
Holland, Armstrong, Wilkie & Previto,
New York, N.Y.

DEAR MR. HALLE: I enclose the letter and enclosure sent to me by Mr. Herbert Hoffman, counsel to the Special Subcommittee on Reform of Federal Criminal Laws.

Mr. Hoffman is interested in your comment to his draft and is under severe time pressures. I suggest you reply directly to him.

Very truly yours,

ALVIN K. HELLERSTEIN.

NEW YORK, N.Y., *June 13, 1973.*

HERBERT E. HOFFMAN, Esq.,
Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. HOFFMAN: Alvin Hellerstein has sent me a copy of your letter to him dated June 7, 1973 with regard to Rule 406 of the Federal Rules of Evidence, because he thought, since I had been on the subcommittee of the Committee on Federal Courts of the Association of the Bar of the City of New York that first reviewed the pending draft of the Federal Rules of Evidence in 1970, that I might let you know whether we had considered the question considered in the memorandum of the New York County Lawyers.

I regret to say that I have no recollection of any discussion on the point, and I no longer have the draft material that went into the preparation of our report of May 28, 1970, which favored deleting draft Rule 4-06(b) but adopting draft Rule 4-06(a).

My own feeling is that the substitute which the New York County Lawyers propose will have the effect of letting in through the exception almost all the evidence excluded by the main part of the rule.

I do not know who prepared the memorandum of the New York County Lawyers.

Very truly yours,

FRANCIS E. KOCH.

STUART H. JOHNSON, Jr.,
ATTORNEY AT LAW,
Washington, D.C., June 8, 1973.

Re Rules of Evidence.

Hon. WILLIAM L. HUNGATE,
Chairman, Select Subcommittee on Reform of Federal Criminal Laws,
Washington, D.C.

DEAR MR. CHAIRMAN: In view of the interest you have expressed at the hearings in the *res gestae* exception to the hearsay rule, I invite your attention to the following case note summarizing the recent decision in *People v. Arnold* by the N. Y. Appellate Division, Third Department.

EVIDENCE—DECLARATION OF DECEDENT AS RES GESTAE, DYING DECLARATION OR SPONTANEOUS STATEMENT

At a murder trial, a witness testified that the victim had told him that she wanted to get to a hospital and that she had been shot. When asked who had shot her, she said, "I did. Get me to hospital. I am dying." When the witness indicated that the victim could not have shot herself in the back, she replied, "No, my boy-friend shot me." The admissibility of this statement by the decedent identifying her boy-friend as her assailant was challenged as hearsay. The court agreed. There was no foundation that would qualify the statement as part of the res gestae, a dying declaration, or as a spontaneous statement. *People* v. *Arnold*, — A.D.2d —, — N.Y.S.2d — (3rd Dept., January 17, 1973).

The classic definition of the dying declaration exception to the hearsay rule in New York is "I'm dying. Del Vermo did it!"

Please don't bother to acknowledge.

Sincerely,

STUART H. JOHNSON, Jr.,

IMPEACHMENT OF THE ACCUSED BY PRIOR CONVICTION AND THE PROPOSED FEDERAL RULES: THE TORTURED PATH OF RULE 609

(Geoffrey S. Tobias, Georgetown University Law Center, June 10, 1973)

I. INTRODUCTION

Impeachment of the accused by prior conviction presents one of the sharpest areas of controversy in the new Federal Rules of Evidence. Stated rhetorically, defense counsel claims the criminal defendant with a record is being blackmailed from taking the stand in his own defense. Conversely, the prosecutor sees a distorted view from the jury box if they are not presented with the defendant's relevant past.

Rule 609 of the Final Draft of the Proposed Rules of Evidence (1) has finally come down on the traditional side of the prosecutor. The contortions gone through to reach this decision follow, along with some prognostications of the fate of Rule 609 in Congress.

In order to grasp the scope of the problem, a brief chronology is in order:

(1) In May, 1965, *Luch v. United States* (2) held that a court is not required to allow impeachment by prior conviction whenever a defendant takes the stand in his own defense; rather, the matter is one of judicial discretion. This was based on the 1961 version of the District of Columbia Code § 14-305. This is in basic disagreement with the traditional rule that a defendant taking the stand may be impeached as any other witness would be. (3)

(2) In March, 1969, the Preliminary Draft of the Federal Rules of Evidence was submitted to the Bench and Bar for comment. This original 609 followed the traditional path of declaring prior convictions admissible for impeachment of a witness, including the accused, under specified circumstances.

(3) In 1970, the District of Columbia Court Reform and Procedure Act amended the § 14–305 relied upon in *Luck* to specifically require admission of prior impeachment evidence if offered.(4)

(4) In March, 1971, the Revised Draft of the Federal Rules was issued and issued and reversed itself by following and citing the *Luck* rule.

(5) In December, 1973, the Final Draft reverted to the traditional formulation relied upon in the Preliminary Draft.

II. THE GENESIS OF THE FIRST DRAFT

A. The Traditional View

A tenet of the common law followed throughout the United States, with the exception of Pennsylvania, is that an accused on the stand is to be treated to no special privilege regarding impeachment. The rationale is that the defendant as witness has voluntarily chosen to offer his testimony. This holding himself out renders only fair the requirement that such defendant submit to the test of credibility ordinarily applied. Any other rule would encourage a defendant to lie on the stand with impunity.(5) "Most prosecutors feel it would be misleading to allow the accused to appear as a witness with a blameless life."(6)

While not to be considered here, note must be taken of the separate and distinct question of privilege. Of course, the fifth amendment entitles any witness to refuse to answer a question on the ground of possible incrimination. The traditional formulation of the rule, however, denies the defendant's claim that a jury will ignore the credibility limiting instruction and give substantive weight to the prior conviction impeachment evidence. The taking of the stand is an implied waiver of the privilege. The defendant's status as a witness displaces his status as an accused.(7)

The Supreme Court put in an appearance on the subject after *Luck* and before the Preliminary Draft in *Spencer* v. *Texas*.(8) Here Justice Harlan spoke approvingly of the Texas practice of allowing the introduction of prior convictions on a broad range of issues, specifically including impeachment.(9) It was indicated that this was the overwhelming common-law view. While undue prejudice possibilities were conceded, a limiting instruction was deemed adequate protection. Chief Justice Warren, though dissenting on the main point of the case, agreed with the majority vis-a-vis impeachment:

> [T]he defendant is put to the same credibility test as any other witness. A defendant has some control over the state's opportunity to introduce this evidence in that he may decide not to take the stand . . . [Through the limiting instruction] prior convictions are only taken into account in assuring the defendant's credibility.(10)

Thus, except for the refinement found in the *Luck* Doctrine, the common-law background was clear and precise.

B. The Luck Rule of Judicial Discretion

As noted previously, *Luck v. United States* (11) interjected the uncertainty of judicial discretion into the order of the common-law rule. The relevant section of the then-in-force District of Columbia Code provided that:

> The fact of conviction may be given in evidence to affect his credibility as a witness, either upon examination of the witness or by evidence aliunde . . . (12)

Judge McGowan pounced upon the permissive "may" in the statute to hold that:

> The trial court is not *required* to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. (13) [emphasis supplied].

It was felt that there were instances where the undue prejudicial effect of impeachment far outweighed the probative relevance of the prior conviction to the issue of credibility. In these circumstances, the judge's hands were not meant to be tied by the very inclusion of the permissive "may" in the statute. Factors relevant in the decision of admissibility or exclusion include the nature of the prior crime, length of criminal record, and the age and circumstances of the defendant. The court finally cited the Model Code of Evidence Rule 21 (14) which limits prior conviction impeachment to crimes involving veracity.

In *Brown v. United States*, (15) it was noted that the hypothesis that a conviction provides motive for perjury misconstrues the theory of impeachment. *Luck* was held to require some definite link between present credibility and the

prior conviction. More refinement of the *Luck* rule may be found in *Gordon v. United States* (16) where it was noted that the defendant taking the stand has the burden of persuading the court that prior conviction evidence should be excluded. The court is to apply a standard whereby the conviction will be excluded only when its probative value is "far outweighed" by the probability of undue prejudice. (17)

The issue was a popular one on appeal with the District of Columbia Circuit generally upholding the trial court's discretion. (18) In *Evans v. United States* (19) it is noted that the mere mention of the *Luck* standards will not bar the impeachment-evidence. "The defense must show how and why the case calls for a discretionary 'exemption' from the impeachment permitted by the stature." (20) *Pinkney v. United States* (21) further refined § 14–305 by defining "crime" as only those offenses triable by a jury, thus eliminating from impeachment use of such misdemeanors as false report to a police officer. The history of *Luck* in the other circuits is not precisely on point since they were not dealing with a § 14–305.

C. The First 609

The above brief description of the common law followed by the District of Columbia experience with § 14–305 gives us a rough idea of what faced the rulesmakers in 1969. The Advisory Committee Notes following the Rule indicate that the Committee fully appreciated the problem and did their homework concerning it. Cited by the Committee is the Kalven and Zeisel jury study. (22) Their statistical sample indicates that the probability of impeachment by prior conviction is a vital consideration by defendants when deciding whether to take the stand. When one considers the familiar and Supreme Court blessed law and the controversial interpretation of *Luck*, the answer appears obvious. The *Luck*, *Brown*, and *Gordon* line cited by the Committee had engendered doubt and controversy in other circuits and was only locally followed when raised at all. The traditional rule was an easily acceptable alternative, least likely to cause controversy in implementation and most apt to be familiar in practice. (23) One must not forget that 609 applies to all witnesses, not just the accused, but that for nonparties there is relatively little controversy. The limitation to crimes of falsification was considered by the Committee and discarded.

> A demonstrated instance of willingness to engage in conduct in disregard of accepted patterns [any felony] is translatable into willingness to give false testimony. (24)

Minor crimes, defined by 609(a) as those crimes punishable by imprisonment for one year or less, are admissible only if involving *crimen falsi*.

The four remaining subdivisions of 609 tend to mollify somewhat the prosecutorial bent of the basic rule. Subdivision (b) places a ten-year time limit on useable convictions calculated from release, pardon or parole, whichever is later. This sensible limitation was adopted from the Commission revising California's evidence code. (25) Subdivision (c) renders the conviction inadmissible if a pardon, annulment or similar process ensued *and* such action was based upon rehabilitation or innocence. No definition of rehabilitation is attempted.

Subdivision (d) disallows the use of impeachment by juvenile adjudication when the accused is on the stand. In non-party witness situations, judicial discretion is called upon to weigh the type of crime, the imprecision of juvenile courts and confidentiality problems. Subdivision (e) compromises on the appeals question by allowing admission of both conviction and the pendency of the appeal. The Advisory Committee Notes (26) indicate this is accepted dogma.

III. CONGRESS PUTS IN AN APPEARANCE

The 1963 version of § 14–305 as cited by the Advisory Committee and the *Luck* line of decisions first appeared in 1901.

> No party shall be incompetent to testify, in either civil or criminal proceedings by reason of his having been convicted of crime other than perjury, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining shall not be concluded by his answers on such matters. (27)

A year later the words "other than perjury" were excised from the first sentence. (28) In 1963, changes were made in phraseology.

> A person is not incompetent to testify in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers to such matters. (29)

This then was the operative law interpreted in *Luck* and discarded by the Preliminary Draft. To gain some idea of the background of and rationale for the present revision of the District of Columbia Code § 14–305, a quick trip into recent history is in order. The spring of 1968 was marred by a grave civil disorder in the District of Columbia. The spectacle of the Army patrolling the Nation's Capital was only a warm-up for the anarchy of the Democratic Convention in Chicago. Thus, was the phrase "lawnorder" injected into our political vocabulary. Candidate Nixon made especially telling points on the "crime in the streets" issue and I think can be said to have been given a mandate to "clean up" America and its Crime Capital in particular. The very real and well publicized concern of Congress may be garnered from a simple perusal of the Index to the Congressional Record. (30) Score upon score of remarks and insertions are listed decrying the danger in the city and the inadequacy of the courts in particular.

As a result, numerous bills proposing the reorganization of the District's woefully back-logged and illesteemed court system were introduced (31).

More important was the administration response to these proposals, S. 2601. The bill as eventually enacted, completely revamped the organization of the District of Columbia Courts and is too voluminous for even cursory review. (32) More to the point, I think the Justice Department took advantage of the somewhat repressive climate to eliminate the annoyance of the *Luck* rule. Section 203(4) of S. 2601 amends § 14–305 to read:

> The fact of conviction of a crime which reflects either on honesty or veracity shall be admissible in evidence to affect his credibility as a witness . . . (33)

This was a somewhat obscure revision. Although any veracity type conviction was admissible, the status of other crimes (both felonies and misdemeanors) was unclear: were they still admissible, or did the old *Luck* discretion rule still apply to them? The summary of S. 2601 supplied by the Justice Department claimed *Luck* would be partially reversed with a trade-off. Judicial discretion would be eliminated altogether by requiring the admission of all veracity and honesty type convictions but disallowing all others. (34) Deputy Attorney General Kliendeinst testified that veracity and honesty type convictions would be "automatically useable." (35) Senator Mathias questioned the inclusion of the § 14–305 revision and was never answered. (36) In spite of the Justice Department prodding, the Senate followed the *Gordon* limitation on *Luck*. (37)

While the meagre background, this bill was reported to the House and on March 13, 1970, emerged crucially changed.

> "(b)(1) Except as provided in paragraph (2), for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted if offered, either upon the cross-examination of the witness or by evidence aliunde, but only if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (B) involved dishonesty or false statement (regardless of punishment). A party establishing conviction by means of cross-examination shall not be bound by the witness' answers as to matters relating to the conviction.
>
> "(2)(A) Evidence of a conviction of a witness is inadmissible under this section if—
>
> "(i) the conviction has been the subject of a pardon, annulment, or other equivalent procedure granted or issued on the basis of innocence, or
>
> "(ii) the conviction has been the subject of a certificate of rehabilitation or its equivalent and such witness has not been convicted of a subsequent criminal offense.
>
> "(B) In addition, no evidence of any conviction of a witness is admissible under this section if a period of more than ten years has elapsed since the later of (i) the date of the release of the witness from confinement imposed for his most recent conviction of any criminal offense, or (ii) the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction of any criminal offense.
>
> "(d) The pendency of an appeal from a conviction does not render evidence of that conviction inadmissible under this section. Evidence of the pendency of such an appeal is admissible."

The reported and eventually enacted revision of § 14–305 thus, generally follows the Preliminary Draft route. Impeachment by any felony conviction and veracity type misdemeanors is now compelled by the "shall be admitted if offered" language. The Preliminary Draft is specifically cited in the report accompanying the bill (39) (hereinafter cited as *House Report*) and the Advisory Notes (40) are in part

quoted verbatim. Thus, we have a rare instance of direct Congressional (or at least committee) approval of a proposed rule. The new formulation thus completely and specifically removes the uncertainty of judicial discretion. The *House Report* provides a list of admissible misdemeanors, with citations, including the obvious ones of fraud, forgery, and embezzlement along with such questionable ones as rape, robbery, burglary, narcotics sales and procuring. The replacement of "crimes" by "offenses" was an attempt to eliminate the "artificial limitation" of the *Pinkney* decision. (41) In its demolition of the *Luck* rule, the Report notes the rule's lack of common-law or legislative support, the Advisory Committee's "specific rejection" and its "vagueness and complete unworkability." (42)

An interesting sidelight is a poll of the District of Columbia Bar Association conducted by the House Committee. On question six, the vote was 769 to 607 against the *Luck* rule and for the House version. (43)

The procedural aspects of the new § 14–305 formulation slightly modify the Advisory Committee formulation. Subsection (b)(2)(A) adds "and has not been convicted of a subsequent offense" (44) to the Preliminary Draft 609(c). The rehabilitation qualification is also narrowed by the "subsequent criminal offense" language. In a similar vein, subsection (b)(2)(B) toughens 609(b) by causing the ten-year limitation to be calculated from the most recent conviction of *any* crime, not necessarily the one employed for impeachment. While the *House Report* claims only "technical changes" (45) from the original 609, the absence of any 609(d) provision for the nonadmission of juvenile adjudications is not mentioned at all.

The Conference Committee adopted the House substitute of the original § 133. The Conference Committee Report (46) again specifically mentions the Preliminary Draft. However, they hedge slightly:

> Should the Supreme Court subsequently promulgate as part of the prescribed rules of evidence for the Federal courts a different rule of impeachment, the conference suggests the appropriateness of Congress reconsidering the rule adopted in the conference substitute. (47)

Thus, Public Law 91–358 § 133 became law July 29, 1970, and effective February 1, 1971. (48)

District of Columbia practice under the new formulation, leaves little room for doubt. This has naturally developed little case law. In *United States v. Fox*, (49) the new § 14–305 is cited with reference to the *House Report* p. 62. The conviction was reversed when the prosecution attempted impeachment by a mere *arrest* record.

> But evidence of arrest, without more, demonstrates no such willingness [to perjure oneself] and, consequently, may not be introduced for the purpose of testing credibility. (50)

The newness of the decision (December, 1972) has apparently precluded comment by any of the relevant parties.

IV. THE ADVISORY COMMITTEE GOES ITS OWN WAY

On March 15, 1972, the Revised Draft of the Proposed Rules appeared. The operative subsection 609(a) was crucially altered by the addition of a part (3) declaring that prior conviction evidence is admissible:

> . . . unless (3) in either case [referring to felony or misdemeanor impeachment] the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. (51)

To dispell any doubt about precisely what was being thought of the Advisory Notes quoted extensively from the *Luck* decision. (52) Most startling is the quote from *Luck* that "[w]e think that Congress has left room for that discretion to operate. 348 F.2d at 768." (53)

Where the Congress found disagreement and confusion in the *Luck* progeny, the Advisory Committee saw "refinement and clarification in numerous subsequent decisions, notably in *Gordon v. United States* . . ." Herein lies one rationale regarding the psychology of the rulesmakers. Judge and now Chief Justice Burger authored the *Gordon* decision, which the Advisory Committee pointed out. (54) Perhaps the future scrutiny of the Supreme Court and specifically its Chief Justice enables the *Luck-Gordon* faction to convince the whole Committee into thinking that following prior predilections of the Chief Justice was the best mode of insuring unimpeded promulgation.

The mystery of the apparent flouting of Congressional will has been resolved—twice—which only compounds the confusion. In the 1973 hearings before the Special Subcommittee on Reform of Federal Criminal Law (hereinafter referred to as *1973 Hearings*), Professor Cleary, Reporter of the Advisory Committee, states

simply that the 1971 Revised Draft was promulgated in ignorance of the new § 14–305.

> I personally was not aware of the fact, buried in the 400 or 500 pages of the D.C. Court Reform Act was a provision . . . which made this change. (55)

The solution to the puzzle unfortunately does not end there. Evidence exists that the Advisory Committee did know of § 14–305. Senator John McClellan forwarded to the Subcommittee a memorandum by his staff summarizing a September, 1972, meeting between the Senate Judiciary Committee staff and the Advisory Committee. At this meeting, representatives of the Advisory Committee indicated they *had* known of § 14–305 but felt that the open-ended hedging of the Conference Report (quoted verbatim *supra* n. 42) left room for alteration. (56) What is clear is that this dispute has engendered much criticism from both the common-law and *Luck* Doctrine proponents. (57)

Other changes in the Revised Draft include the elimination of *nolo contendere* pleas as impeachment evidence. (58) This was in line with the general admissibility profession for such pleas in Rule 410. The ten-year calculation of 609(b) was liberalized by requiring the count to commence at release or conviction, whichever is later. The tack-on of parole or probation was eliminated, thus significantly reducing the prosecutor's pool of useable convictions. Again, this going in precisely the opposite direction of § 14–305. The Advisory Committee's only cited foundation was the rejected proposal of the California Law Review Commission, (59) as noted in the original Advisory Note. Subdivisions (c) through (e) were left intact.

V. THE FINAL DRAFT: THE ADVISORY COMMITTEE CATCHES THE CONGRESSIONAL HINT

Whatever the reasoning behind the Revised Draft, the Final Draft as it appeared November 20, 1972, was in general agreement with the Preliminary Draft in its adoption of the traditional rule. The operative subdivision 608(a), and subdivisions (d) (juveniles) and (e) (appeals) were identical to the 1969 edition. The Congressional condemnation of the Luck rule is the principal reason mentioned in the Advisory Notes. This is, however, only the tip of the iceberg.

When the Advisory Committee espoused the *Luck* Doctrine, they rattled one of the pillars of the law and order establishment, Senator John McClellan. A bombastic criticism of the Revised Draft, 609 was delivered on the Senate floor August 5, 1971. (60) Accompanying this was the introduction of S. 2432, a Bill to Amend the Enabling Act which would have given Congress a larger hand in promulgating the rules. This apparently was understood as a "signal" that the *Luck* formulation (among others) would have to go. (61) That Judge Maris, of the Standing Committee, was well aware of the pressure is evident from a letter to Professor Charles Wright. (62) Thus, in October, 1971, a somewhat mysterious Revised Definitive Draft was transmitted to the Supreme Court, which substantially altered 609 in the fashion demanded by Senator McClellan and the Justice Department. (63)

Even after this rewriting process, the Justice Department was still unhappy. In an unprecedented move, it pursued its few remaining objections via a letter directly to the Chief Justice. (64) Subsequent to its receipt of the Revised Definitive Draft, the Court requested the Advisory and Standing Committees to evaluate the additional comments. According to the Justice Department, both the Advisory and Standing Committees met again early in 1972, and made further modifications. (65) The Washington Council of Lawyers claims that while the Standing Committee discussed the "clarifications" with Messrs. Jenner and Cleary, the Advisory Committee never met. (66)

The Kleindienst letter to the Chief Justice, dated December 22, 1971, does not take issue with the basic formulation of 609(a). From this we may surmise that the Definitive Draft reverted to the 1969 traditional approach. What are criticized though are the ten-year calculation of 609(b) and the omission of a "subsequent conviction" provision in 609(c). This indicates the Definitive Draft was a carbon copy of the Preliminary Draft. Here then is the clue to the decided prosecutorial bent of the Final Draft. In 609(b), the ten-year period now begins after the latest conviction for any crime, impeachment related or not. Mr. Kleindienst referred to this as "ten years of *unsupervised* good behavior." (67) [Emphasis supplied]. In 609(c), the use of a pardoned or annulled conviction is only prohibited when "the witness has not been convicted of a subsequent crime," (68) precisely the request of the Justice Department. (69) The *nolo contendre* exception of the Revised Draft was dropped entirely and without comment.

Amidst all these machinations, I could find no mention of *McGautha* v. *California*, decided May 3, 1971. (70) The high Court specifically endorsed the traditional formulation thus laying to rest any constitutional problems:

> It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior conviction or the like . . . Again, it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify. 71

When Professor Cleary decried the refusal of *certiorari* in the *Luck-Gordon* situation, it is puzzling that he omitted any reference to this relatively recent decision.(72)

From early 1972, until approval on November 20th, the Supreme Court examined the Rules. Herein lies the seed of another dispute concerning the whole rulesmaking process and 609 in particular. After the 1971 Revised Draft appeared, the various committees went "underground" and avoided any public comment. As noted previously, the Definitive Draft had a miniscule printing of 600, hardly meriting its lofty title. These copies were not actually distributed but were supplied by the Judicial Conference upon request. How one was to know enough to ask is unclear. The important changes of the Final Draft caught many in the profession by surprise.(73) In fairness to the Advisory Committee, one must note the simple reality that the revision process must end sometime. The rules had been in gestation almost a decade and more surgery was deemed to be counterproductive.

VI. THE 1973 HEARINGS: THE END IS NOT IN SIGHT (74)

A. What happened.

As is hopefully clear from the above narrative, much of the testimony at the hearings (with the accompanying submitted materials) involved portraying how the Final Draft reached its controversial position. After their transmission by the Supreme Court, the Rules Enabling Act(75) provides for the automatic effectiveness of the rules in ninety days, absent Congressional action. Congress, however, did so act. Public Law 93–12(76) provides that the rules shall not become effective without affirmative action by Congress. This assertion of Congressional will was not directly precipitated by dissatisfaction with any particular rule. Rather, the legislative history(77) indicates two basic difficulties: (1) the Rules Enabling Act refers to "Rules of Practice and Procedure," not "Evidence,"; and (2) ninety days was considered wholly inadequate for proper examination of such far-reaching legislation. This, of course, will only result in more scrutiny of 609.

At least as far as 609 was concerned, the hearings generally consisted of a detailed history lesson and little opinionating. Few members voiced their feelings with the startling exception of the "Hogan-Dennis" debates.(78) Mr. Hogan forcefully supported the Will of Congress idea while Mr. Dennis was equally adamant in his support of the "sophisticated and fundamentally fair" construct in the Revised Draft. This was a somewhat truncated version of their debate over the same provision in the District of Columbia Court Reform Act.(79)

On a more technical level, note should be made of Professor Cleary's doubts about 609(c)(1), the effect of pardon or annulment based upon a substantial showing of rehabilitation.(80) As noted above, conviction for subsequent crime removes the prior immunity. This is in conflict with existing law, the Federal Youth Correction Act,(81) which contains a provision for the setting aside of convictions. *Tatum* v. *United States*(82) held such expurgation was complete for all purposes. Similar problems exist with the Comprehensive Drug Abuse Prevention and Control Act.(83) Thus, Professor Cleary finds 609(c) in clear contradiction with existing statutory provisions, and warns that "these excellent legislative enactments will be voided. See 18 U.S.C. 3771."(84)

As a final bit of minutiae, I am curious why the § 14–305 usage of "offenses" was consistently ignored by all parties. Presumably the District of Columbia practice of not classifying certain misdemeanors as "crimes" was deemed too local—or just ignored altogether.

B. What will happen

After the last hearing on March 13, the Subcommittee started "mark-up" sessions. These meetings, recently opened to the public, are an informal thrashing out of legislation. Typically only the congressmen and some staff are in attendance. As of this writing (June 6, 1973), the sessions are expected to go until July 1. No record of any official sort is made at these meetings; the legislative history of an Act is found in the full committee report, months hence in this case.

In order to gain some inkling of what is to come, a conversation was had June 1st with Herbert Hoffman, Chief Counsel to the Subcommittee. I was assured that 609 had been one of the most popular topics of debate and had engendered three proposals for further reform, all of which are at least vaguely familiar:

(1) maintain the elimination of judicial discretion but limit admissibility of all prior convictions to those bearing on truth or veracity;

(2) same as (1) above but if character is an essential element or if put in issue by the defendant, then all crimes would be admissible;

(3) allow all types of convictions to be admitted with the qualification of judicial discretion as to undue prejudice.

Mr. Hoffman was naturally chary of making predictions but he was inclined to believe that a combination of (1) and (2) above will emerge. Another suggestion, for the separation of civil and criminal rules, has little hope of implementation. Probable too, is major surgery on the more repressive provisions of 609(b) and (c) dealing with time limits and pardons.

There was extreme doubt expressed at the mark-up sessions about the whole "Congressional Intent" rationale of aping § 14–305. As previously expressed by the New York Bar Association, (85) there is no discussion by the Advisory Committee of the reasons, if any, for extending conclusive weight on a nation-wide basis to a decision by Congress only affecting the District of Columbia. When I attended one of the sessions, a representative of the Justice Department addressed himself to this argument (without distinction) and news of this reached the New York Bar Association. They have consequently demanded "equal time," an unprecedented request.

On or about July 1, the Congressional Draft will be distributed to interested parties with comments requested within thirty days. Thus, the final steps along the tortured path are yet to be taken: full committee, floor of the House, Senate consideration and conference. Senator McClellan will still be holding forth on his side of the Capitol, so much more is yet to come, especially if his pet provisions are discarded.

The average age of the members on the Advisory Committee is over 65 (86)—one only hopes they make it.

FOOTNOTES

(1) The March, 1969, *Preliminary Draft* of the Proposed Federal Rules for United States Courts and Magistrates may be found in 46 F.R.D. The 1971 *Revised Draft* may be found in 51 F.R.D. The *Final Draft* as submitted to Congress may be found in 93 S. Ct. advance sheet 5, Jan. 1, 1973; 34 L. Ed. 2d advance sheet 5, Jan. 5, 1973. Hereinafter the drafts will be referred to as italicized in this note.

(2) 348 F. 2d 763 (D.C. Cir.)

(3) 3A Wigmore, Evidence §889 (Chadbourne Rev. 1970); McCormick, Evidence §43 (2d ed., 1971). In agreement is Prof. James, Judicial Conference, Second Circuit, June 21, 1965, 48 F.R.D. 38, 72.

(4) D.C.E. §14-305 (1970 Supp.).

(5) McCormick, *supra* n. 3.

(6) Wigmore, *supra* n. 3.

(7) 8 Wigmore §2277 (McNaughton rev. 1961).

(8) 385 U.S. 554 (1967).

(9) 385 U.S. at 561.

(10) 385 U.S. at 577.

(11) 348 F. 2d 763 (D.C. Cir. 1967).

(12) Act of Dec. 23, 1963, P.L. 88-241 §1; 77 Stat. 519.

(13) 348 F. 2d at 768.

(14) 4 Jones, The Law of Evidence 1909 (5 ed. 1958).

(15) 370 F. 2d 242 (D.C. Cir. 1966).

(16) 383 F. 2d 936 (D.C. Cir. 1967), *cert. den.*, 390 U.S. 1029 (1968).

(17) 383 F. 2d at 939.

(18) Williams v. United States 394 F. 2d 957 (D.C. Cir. 1968); Brooke v. United States 385 F. 2d 279 (D.C. Cir. 1967).

(19) 397 F. 2d 675 (D.C. Cir. 1968).

(20) 397 F. 2d at 679.

(21) 363 F. 2d 696 (D.C. Cir. 1966).

(22) The American Jury 144–146 (1966).

(23) See Ladd, *Credibility Tests—Current Trends*, 89 U. Pa. L. Rev. 166, 174–184

(1940); *contra* is Griswold, *The Long View*, 51 A.B.A.J. 1017, 1021 (1965).
(24) Advisory Committee Notes 46 F.R.D. at 297.
(25) *Recommendation Proposing an Evidence Code*, §788(5), p. 142, Cal. Law. Rev. Comm'n. (1965).
(26) 46 F.R.D. at 301.
(27) Act of March 3, 1901, 31 Stat. 1357.
(28) Act of June 30, 1902, 32 Stat. 540.
(29) Act of Dec. 23, 1963, P.L. 88-241, §1, 77 Stat. 519.
(30) 115 Cong. Rec. 391-392 (1969).
(31) S. 1066, S. 1067, S. 1214, S. 1215, S. 1711, 91st Cong., 1st Sess. (1969); *Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 91st Cong., 1st Sess., pt. 3 (1969), hereinafter referred to as *1969 Hearings*.
(32) A comprehensive discussion may be found in Rauh and Silbert, *D.C. Court Reform and Criminal Procedure of 1970*, 20 Am. U.L. Rev. 252 (1970-71).
(33) S. 2601 p. 120; *1969 Hearings* at 936.
(34) Letter from John N. Mitchell, Att'y. Gen., to Spiro Agnew, July 11, 1969, *1969 Hearings* at 1143.
(35) *id.* at 1153.
(36) *id.* at 1166.
(37) S. Rep. No. 538, 91st Cong.; 1st Sess 4(1969).
(38) H.R. 16196, 91st Cong., 2d Sess. § 133 (1970).
(39) H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 61-63 (1970); hereinafter cited as *House Report*.
(40) *id.* at 62.
(41) 363 F. 2d 696 (D.C. Cir. 1966).
(42) *House Report* at 63.
(43) *id.* at 10.
(44) D.C.C.E. § 14-305 (b)(2)(A) (1970 Supp.); *House Report* at 164.
(45) *House Report* at 62.
(46) H. R. Rep. No. 91-1303, 91st Cong., 2d Sess., 231 (1970).
(47) *id.*
(48) Act of July 29, 1970, P.L. 91-358, § 901, 84 Stat. 667.
(49) 473 F. 2d 131 (D.C. Cir. 1972).
(50) 473 F. 2d at 136.
(51) *Revised Draft* 609(a), 51 F.R.D. at 391.
(52) 51 F.R.D. at 393.
(53) *id.*
(54) *id.*
(55) *Hearings Before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary*, 93rd Cong., 1st Sess., Ser. No. 2 at 29. Hereinafter referred to as *1973 Hearings*.
(56) *id.* at 317.
(57) *id.* at 29; Spector, *Impeaching the Defendant By His Prior Convictions and the Proposed Federal Rules of Evidence*, 1 Loyola U. (Chicago) L. Rev. 247 (1970).
(58) *Revised Draft* 609(a), 51 F.R.D. at 391.
(59) Advisory Notes, 51 F.R.D. at 394.
(60) 117 Cong. Rec. 2984-6 (1971).
(61) See letter to J. Maris, Chairman of the Standing Committee from Senator John McClellan 117 Cong. Rec. 15193-214 (Sept. 28, 1971).
(62) *1973 Hearings* at 180.
(63) *id.*
(64) Prepared statement of Associate Deputy Att'y. Gen. Conald Santorelli, *1973 Hearings* at 267.
(65) *id.*
(66) *id.* at 181.
(67) *id.* at 44.
(68) *Final Draft* 609(c)(1)
(69) *1973 Hearings* at 44.
(70) 402 U.S. 183.
(71) 402 U.S. at 215.
(72) *1973 Hearings* ot 231.
(73) Comments of Congresswoman Holtzman *1973 Hearings* at 26; Statement of the Bar Association of the City of New York *1973 Hearings* at 128.
(74) February 7, 8, 28; March 9, 15, 1973.
(75) 28 U.S.C. § 2072.
(76) Approved March 30, 1973; 87 Stat. 9.

(77) H.R. Rep. No. 93-53, Sen. Rep. No. 93-14 93rd Cong., (1st Sess. 1973.)
(78) *1973 Hearings* at 68, 251.
(79) 115 Cong. Rec. 8151-8157 (1970).
(80) *1973 Hearings* at 235.
(81) 18 U.S.C. § 5021.
(82) 310 F. 2d 854 (D.C. Cir. 1962).
(83) 21 U.S.C. § 844.
(84) *1973 Hearings* at 235.
(85) *id.* at 128.
(86) *id.* at 178.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES,
SUPREME COURT BUILDING,
Washington, D.C., June 11, 1973.

HERBERT E. HOFFMAN, Esq.,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, Washington, D.C.

DEAR MR. HOFFMAN: In your letter of May 30th, you asked whether in my opinion proposed Rule 803(15) would authorize the judge to admit in evidence a statement in a will to the effect that the testator was bequeathing his property to his son rather than to his wife because the wife had murdered the testator's girl friend.

I find it difficult to answer the question in the absence of information as to the kind of case in which the problem arises and the purpose for which the evidence is offered.

If the case involves a will contest, with interest centering on such things as state of mind and motivation of the testator, I would have no difficulty in opting for admissibility. Since this result could, however, be reached without resort to Rule 803(15), it seems to follow that some other situation is in contemplation.

The most likely alternative would be a charge of murder of the girl friend by the wife. In that event I would find difficulty in concluding that the relevancy requirement was satisfied, though a contrary argument can certainly be made on the basis suggested in the preceding paragraph. A further difficulty lies in the apparent absence of any basis for assuming firsthand knowledge.

I do not have with me any of the comments received by the Advisory Committee. None comes to my mind concerning this provision. I am sending a copy of this letter to Mr. Foley, with the request that their files be checked.

Sincerely yours,

EDWARD W. CLEARY.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES,
Supreme Court Building, Washington, D.C., June 12, 1973.

HERBERT E. HOFFMAN, Esq., *Counsel, Special Subcommittee on Reform of Federal Criminal Law, Committee on the Judiciary, Washington, D.C.*

DEAR MR. HOFFMAN: Your letter of June 7th solicits my views of a suggestion to amend proposed Rule 804(a)(5) by inserting "or testimony" after "his attendance."

You indicate that the purpose is to exclude situations in which a deposition could have been taken. I have some doubt whether the language is appropriate for that purpose.

As to the question of policy whether inability to depose ought to be a precondition, one instance where such a requirement seems to be particularly inappropriate is with respect to former testimony. In most instances I believe that former testimony and depositions are virtually indistinguishable, and the addition of the suggested requirement would merely require redoing of what had already once been done.

Otherwise, the matter is largely one of judgment. The Advisory Committee concluded, correctly I believe, that the various kinds of hearsay admissible under Rule 804 were of sufficiently good quality to warrant dispensing with a deposition requirement. While there is certainly ample room for a contrary view, the effect undoubtedly would be a substantial curtailment of the usefulness of Rule 804.

Sincerely yours,

EDWARD W. CLEARY.

HILL, SHERMAN, MERONI, GROSS & SIMPSON,
Chicago, Ill., June 15, 1973.

Re proposed rules of evidence for the U.S. Courts and Magistrates.

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on the Reform of Federal Criminal Laws, House Committee on the Judiciary, Washington, D.C.

DEAR MR. HUNGATE: As a long-time resident of Lake Bluff, Illinois, and current President of that community, I have had several occasions to confer with our resident Congressman Robert McClory. Completely apart from the Village matters that have typically been my official concern, I have recently inquired of him concerning the current status of the proposed new *Federal Rules of Evidence*. Following a brief discussion, he suggested that I write you, or talk with Mr. Hoffman concerning the rules.

At the outset, please be assured that I am strongly in favor of the enactment of *Federal Rules of Evidence*. As you can see from our letterhead, our firm of attorneys practices almost exclusively in the area of Patent Law, which cases are typically tried in the United States Federal Courts. For practical purposes, patent law suits may be brought in any of the fifty states and currently in such litigation, the state of the law relating to *Rules of Evidence* is non-uniform. It is our view that enactment of the new *Rules of Evidence* will provide a uniformity of application of such Rules throughout the country to the benefit of all concerned, including the courts, the clients, and the attorneys. In these circumstances, even though some changes are made in committee, enactment of the Rules is of extreme importance.

Two matters of concern have recently come to my attention. The first is that the earlier Proposed Rule 503(a)(3) which defined a "representative of the client" as one having authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client, has been eliminated from the Rules leaving the whole matter of the "representative of the client" to the Courts in each individual case. The second is the rumor that perhaps the entire Article V will be deleted from the *Rules of Evidence* in order to avoid conflict between Congressmen, the thought being that it would be better to have new statutory *Rules of Evidence* with missing (presumably temporarily) Article V, rather than to have no *Rules of Evidence* at all.

While, if given a choice between no *Federal Rules of Evidence* and enactment of *Federal Rules of Evidence* minus Article V, I would have to agree that some rules are better than none, nevertheless, I submit that it is extremely important that not only the new Rules be passed, but that they be passed with Article V therein.

In the practice of Patent and Anti-Trust Law, my activities have largely been in behalf of corporate clients. As you know, the form of Rule 503(a)(3), proposed in March, 1971, call for the so-called "Control Group" test in defining those persons in a corporation that can act in behalf of the corporation and still have their communications with attorneys considered privileged. Unfortunately, since the laws of evidence, with particular reference to the matter of Attorney-Client Privilege, vary over the many states and Federal Judicial Districts, and since any corporation of substantial size will be susceptible to litigation in a number of different judicial districts, a corporation will inherently be faced with operation under a large number of possible rules. It is almost impossible for corporate policy to encompass all of the varying rules. Accordingly, it is for practical purposes imperative that a uniformly applicable Attorney-Client Privilege statute be passed. The opportunity to pass such a rule must not be lost at this time. I urge you, accordingly, to press strongly for passage of the *Rules of Evidence*, complete with Article V.

A number of proposals have been made for the definition of "representative of the client." The most restrictive of those proposals may be termed the "Control Group" test wherein a management person of a corporation may conduct privileged communications with an attorney only if the management person has the authority to seek advice on behalf of the corporation and controls or participates in the decision-making process responsive to legal advice so sought. After examining the "Control Group" test the Seventh Circuit Court of Appeals adopted a more liberal definition and provided for the privilege with respect to persons employed by a corporation and who are in the "Control Group" above noted or the performance of whose duties calls for requesting or acting upon the legal advice sought. The second test clearly reaches employees of a corporation who have the right to know sensitive information rather than only those having a "need" to know. Both of the groups thus far mentioned are a relatively limited number of important employees for any given corporation and distribution of any communication beyond either

group waives the privilege. For practical purposes, we submit that the second, more liberal, group is a logical and effective group of sufficient size and responsibility to act appropriately to obtain legal advice. It allows others than the ultimate decision-makers to participate in communication with the corporate attorney, at levels of awareness that permit a wider range of corporate inputs in the Client-Attorney communication without, we submit, unduly distributing information of an obviously confidential sort. Accordingly, we strongly submit that the Seventh Circuit Rule established in *Harper & Row Publishers, Inc. v. Decker*, 423 F. 2d 487 (7th Cir. 1970), affirmed without opinion, by equally divided Court, 400 U.S. 955 (1971), rehearing denies, 401 U.S. 950, be adopted. We submit, accordingly, that Article V, Rule 503(a)(3), "representative of the client" should be modified to read as follows:

> "A representative of the client" is one having authority to obtain professional legal services, and to act on advice rendered pursuant thereto, on behalf of the client, or is an employee of the client who makes the communication at the direction of his superiors in the corporation where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment."

We submit that adoption of the above proposed definition of "representative of the client" is a logical and workable one that will very substantially limit the privileged communications of a corporation but which will at the same time not stifle relevant communications so necessary to corporate planning. We urge that the Rules of Evidence be positively established in this manner to permit uniformity over the United States and to further minimize "forum shopping" in the litigation of federal cases merely in an effort to find a jurisdiction more favorable than others to a particular litigant's planned discovery.

As a last resort, if privileges other than the Attorney-Client Privilege are the stumbling block to passage, we suggest retaining Rule 503 rather than temporarily deleting the entirety of Article V.

Sincerely yours,

LEWIS T. STEADMAN.

AMERICAN BAR ASSOCIATION,
Boston, Mass., June 20, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: As you know, the American Bar Association has a great interest in the proposed Federal Rules of Evidence. I understand that your committee has been holding hearings with regard to them over the last several months and I much regret that we have not heretofore had an opportunity to communicate with you on the matter.

Even now, I do not have any position which has been adopted by our Board of Governors or House of Delegates to present, but I do feel it is important for you to have the views of our Special Committee on Federal Practice and Procedure concerning certain provisions of the Rules which we feel could be improved. I have read the report and I am happy to present it to you with my personal approval as president of the American Bar Association.

I am also advised that our Section on Individual Rights and Responsibilities has been studying these Rules and has prepared an exhaustive report which, unfortunately, I have not had an opportunity to study, since it was delivered to me only this week. I hope that your schedule will permit our committee or section, if their views are adopted by the appropriate parties, to present their position further in connection with these hearings.

I am sorry that the pressure of time does not permit me to submit this committee report in multiple copies nor to obtain the approval of the other bodies concerned with Association action.

Yours very truly,

ROBERT W. MESERVE.

Enclosure.

JUNE 19, 1973.

To: Robert W. Meserve, president, American Bar Association.
From: Haskell Cohn, acting chairman, Special Committee on Federal Practice and Procedure.

REPORT

The Special Committee on Federal Practice and Procedure met in Chicago on Monday, June 18th at the call of the Acting Chairman to consider and act on the Proposed Rules of Evidence for United States Courts and Magistrates. All the Committee members were present. The Rules are under consideration by a Special Sub-committee of the Committee on the Judiciary of the House of Representatives, of which Congressman William L. Hungate is the Chairman. Mr. Meserve had written to the Congressman on February 16, 1973, that the Special Committee would consider further changes and whether it would make recommendations with respect to the Rules. This meeting was called as a result of that commitment.

It should be emphasized at the outset that *the Committee did not consider:* first, whether or not there should be any new Rules; second, whether if there were to be Rules such Rules should be drafted by the Supreme Court of the United States or its duly authorized representatives or by a Congressional committee; and, third, whether there should be in any Rules of Evidence provisions relating to privileges (Article V) or hearsay (Article VIII). Various members of the Committee felt and the Report of the previous American Bar Association Committee expressed its opinion strongly on these issues but they were not on the agenda for discussion since the purpose of the meeting was only to review the Rules now being considered by the Hungate Committee.

RULE 105. SUMMING UP AND COMMENT BY THE JUDGE

This Rule affords the Judge the option of summing up the evidence and commenting to the jury upon the weight of the evidence and credibility of the witnesses, provided he also instructs the jurors that they must determine for themselves the weight of evidence and the credibility of witnesses and are not bound by his summation or comment.

The Committee recommends that the provision as written be stricken out in its entirety and in place thereof the following be inserted:

> "After the close of the evidence and arguments of counsel, the judge may review the evidence to the extent necessary to clarify his instructions on the law. If he does so, he shall also charge that the jury's recollection of the evidence is to control, but he shall not comment to the jury on the weight of the evidence or the credibility of the witnesses."

The present Federal procedure is one which permits the Judge to make such comments and the Appellate Courts have attempted to set forth pertinent guidelines. This has proved ineffectual because it cannot take into account the manner in which such comment is made; such as the tone of voice used by the Judge, facial expressions, or other indicia of his personal beliefs which the printed record does not reflect. We see no useful purpose served by permitting such summation and comment.

RULE 503. LAWYER-CLIENT PRIVILEGE

This Rule preserves the traditional Lawyer-Client privilege broadly codifying existing law. Moreover, it extends the privilege to cover "representative of the lawyer" who is defined as "one employed to assist the lawyer in the rendition of professional legal services." This definition would seem broad enough to cover accountants, para-professionals, investigators and secretaries working with the lawyer.

As to a related definition, i.e., "representative of the client," the Committee originally proposed the following language which was not, at that time, accepted. The Committee strongly urges the adoption of the following provision which it originally suggested:

> "(3) A 'representative of the client' is one (a) having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, *or (b) authorized by the client to disclose or furnish to the client's lawyer or a representative of such lawyer confidential communications, data or information.*"

RULE 503. LAWYER-CLIENT PRIVILEGE

(c) *Who may claim the privilege*

The Committee strongly urges in the second sentence the word "may" be changed to "shall" and add at the end the words "unless waived by the client" so that the sentence will read:

> "The person who was the lawyer at the time of the communication must claim the privilege but only on behalf of the client unless waived by the client."

RULE 504. PSYCHOTHERAPIST-PATIENT PRIVILEGE

The Committee urges that limitation on the physician-patient privilege contained in Rule 504 be rejected and that the revised Rule should contain the traditional protection of the physician-patient privilege, subject only to the waiver by the patient or his legal representative. The privilege would be considered to have been so waived where an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

RULE 505. HUSBAND-WIFE PRIVILEGE

This Rule narrows the Husband-Wife privilege to criminal cases with three stated exceptions. The Special Committee favors the existing rule of law where the privilege is available in both civil and criminal cases and recommends that language be adopted that preserves the privilege, in accordance with the law of the state, in both civil and criminal cases.

RULE 506. COMMUNICATIONS TO CLERGYMEN

This Rule deals with communication with clergymen and defines the term "clergymen" broadly and extends the privilege to any communication made to a clergyman in his professional capacity. The Special Committee has no comment as to the Proposed Rule except that it feels very strongly that paragraph (c) which permits the privilege to be claimed by the person, his guardian, conservator or personal representative, if he is deceased, should be amended so that either the clergyman or the person may claim the privilege. The Special Committee proposed this language:

> "(c) *Who May Claim the Privilege.* The privilege may be claimed either by the clergyman or by the person, by his guardian or conservator or by his personal representative, if he is deceased, and may not be waived by anyone other than the person."

RULE 509. SECRETS OF STATE AND OTHER OFFICIAL INFORMATION

This Rule has undergone more discussion and more amendment than any other Rule or Privilege. As now drafted, the Special Committee has this recommendation which it deems of real importance. In paragraph (c) *Procedures*, the phrase in the first sentence reading "but the privilege for official information may be asserted by any attorney representing the government" should be eliminated so that the sentence will read:

> "(c) *Procedures.* The privilege for secrets of state and the privilege for official information may be claimed only by the chief officer of the government agency or department administering the subject matter which the secret or official information sought concerns."

The Committee feels that if the privilege is to be claimed, it should be done by a person at a high level of authority and not by some Assistant United States District Attorney, way down on the bottom of the totem pole.

The Committee urges that Rule 509 be reviewed and reconsidered to make it consistent with the *Freedom of Information Act* with the view of placing the government in the same position as any other percipient witness insofar as the imposition of a duty to disclose relevant evidence is concerned.

RULE 513. COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION

The Special Committee suggests that the provision be tightened by making it clear that paragraph (a) *Comment or Inference Not Permitted*, does not apply to the constitutional privilege against self-incrimination, which these Rules

do not purport to state or to govern in any respect. Although no comment on the claim of this constitutional privilege is permitted in criminal cases, there is authority to permit counsel for the opposing party in civil litigation to suggest to the jury that they may draw appropriate inference from a party's refusal to answer questions relevant to the issues in the civil case, even though the party is entitled to refuse to answer because of the privilege against self-incrimination.

The Special Committee's suggestion could be implemented by adding the words "accorded by Rules 503–510, inclusive" so that the sentence will read:

"(a) *Comment or Inference Not Permitted.* The claim of a privilege accorded by Rules 503–510, inclusive; whether in the present proceeding or upon a prior occasion is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom."

Article VI. Witnesses

Rule 601. General Rule of Competency

This Rule eliminates the so-called "Dead Man's Acts". The Special Committee prefers to omit this privision so that the law will be as it is at present governed by the laws of the various states. If, however, it remains the present paragraph should be marked (a) and a new paragraph should be added as follows:

"(b) *Effect of State Dead Man Disqualification.* With respect to a material proposition as to which state law controls the rule of decision, the law of that state creating a disqualification of evidence or witnesses on the basis of state policies safeguarding the estates of deceased or incompetent persons, shall control over any inconsistent provision in these rules."

This addition is suggested in order to avoid the same *Erie* considerations of federal usurpation and forum shopping that are presented by the proposed privilege Article.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General Rule

The Committee strongly urges that there be added to this Rule the language that appeared in the previous edition (1971 Revised Draft) and is omitted in the current Draft (November 20, 1972):

"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."

(b) Time Limit

The Committee strongly urges that the language used in the current draft be stricken in its entirety and in place thereof the language in the previous draft (1971 Revised Draft) reading as follows be substituted:

"(b) *Time Limit.* Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date."

(c) *Effect of Pardon, Annulment or Certificate of Rehabilitation.* The Committee strongly urges that the following words in lines 4 and 5 of this paragraph be stricken out:

"and the witness has not been convicted of a subsequent crime"

so that the paragraph will read:

"(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 substantial showing of rehabilitation or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on innocence."

Article VIII. Hearsay

Rule 803. Hearsay Exceptions

(1) Present Sense Impression

The Committee feels that contemporaneity of the event and statement offers the only basis of enhanced reliability and that it is undesirable to relax this

requirement. It strongly urges that the last three words in the sentence "or immediately thereafter" be stricken out so the corrected sentence will read:

"(1) *Present Sense Impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition."

(6) *Records of Regularly Conducted Activity*

The Special Committee feels the Proposed Rule is too broad. It suggests that paragraph (6) be stricken out in its entirety and in place thereof the following be inserted:

"(6) *Records of Regularly Conducted Activity.* A memorandum, report, record, or data compilation, in any form, of acts, events or conditions made at or near the time by, or from information transmitted by, a person with knowledge and a duty to so record or transmit, and kept in the course of a regularly conducted business or professional activity, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness."

(18) *Learned Treatises*

The Special Committee recommends that in the second and third lines, the words "or relied upon him in direct examination" be stricken and in place thereof the words "or relevant to such cross-examination" so that as amended it will read as follows:

"(18) *Learned Treatises.* To the extent called to the attention of an expert witness upon cross-examination *or relevant to such cross-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." (Underlining indicates changes.)

(24) *Other Exceptions*

The Special Committee recommends that this provision be stricken out in its entirety and in place thereof the following be inserted:

"(24) *Other.* A statement not specifically covered by any of the foregoing exceptions but having *equivalent circumstantial probability* of trustworthiness; *provided that the proponent's intention to offer the statement was made known to the adverse party sufficiently in advance of the trial or hearing to provide him with a fair opportunity to prepare to meet it.*" (Underlining indicates changes.)

RULE 804. HEARSAY EXCEPTIONS

(b) *Hearsay Exceptions*

(1) Former Testimony.—This sub-paragraph (1) should be stricken in its entirety and in place thereof the following should be inserted:

"(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 another proceeding, *if offered and received in evidence on an issue of fact involved in the currrnt hearing, against a party who had an opportunity to examine the witness and whose incentive, interest and* position with respect to that issue was substantially identical to that of the party against whom now offered." (Underlining indicates changes.)

RULE 804. HEARSAY EXCEPTIONS

(b) *Hearsay Exceptions*

(2) Statement of Recent Perception.—The Special Committee recommends that this subparagraph (2) be omitted as offering too great an opportunity for abuse without any strong assurance of accuracy. If that recommendation is accepted, the numbering of the following paragraphs will have to be changed.

RULE 804. HEARSAY EXCEPTIONS

(b) *Hearsay Exceptions*

(5) *Statement of Personal or Family History.*—The Special Committee recommends that this provision be stricken and in place thereof the following be inserted:

"(5) *Statement of Personal or Family History.* A statement *made prior to the commencement of the action* (A) 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 *can be shown by evidence other than the declarant's own statement to have* been related to the other by blood, adoption, or marriage or to have been so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared." (Italic indicates changes.)

RULE 804. HEARSAY EXCEPTIONS

(b) *Hearsay Exceptions*

(6) *Other Exceptions.*—This subparagraph (6) should have added, at the end, a sentence so that the provision will read as follows:

"(6) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial probability of trustworthiness; *provided that the proponent's intention to offer the statement was made known to the adverse party sufficiently in advance of the trial or hearing to provide him with a fair opportunity to prepare to meet it.*"

Respectfully submitted,

HASKELL COHN,
Acting Chairman.
ROBERT L. CLARE, JR.
MICHAEL J. KEADY.
JOHN A. KLUWIN.
MYZELL SOWELL.
WAYNE E. STICHTER.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
Washington, D.C., June 20, 1973.

HERBERT E. HOFFMAN,
Counsel, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR HERB: Attached in accordance with our telephone conversation is an excerpt from the Department of Justice views on the proposed rules of evidence submitted in January 1970. The excerpt is concerned with Rule 803(15) mentioned in Professor Cleary's letter to you of June 11.

Sincerely,

WILLIAM E. FOLEY,
Deputy Director.

Enclosure.

(1) etc., etc.

A similar change should be made in Rule 8-04.

Problem.—Subsection (15) of Rule 8-03 excludes from the hearsay rule a relevant statement in a document affecting an interest in real property "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." We think the better rule would be to give the trier of fact all of the evidence and let it determine what weight to give to the statement. Where there have been inconsistent dealings with the property, this factor may be considered by the trier of fact in determining whether to credit the statement in the document. Thus, we recommend that a period be inserted after the word "document" on line 33 and that everything thereafter be omitted.

LAW OFFICES,
JAMES F. SCHAEFFER,
Memphis, Tenn., June 22, 1973.

Re Proposed Federal Rules of Evidence.

Congressman WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, Committee of the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: We have completed our analysis of Proposed Rule No. 509 and portions of Rule 801. The position on these rules of the committee on Federal Evidence and Procedure of the Association of Trial Lawyers of America is set forth in the attached position papers.

We will deeply appreciate consideration of our position.

Very truly yours,

JAMES F. SCHAEFFER.

POSITION PAPER ON PROPOSED FEDERAL RULE OF EVIDENCE NO. 509

SUBMITTED FOR THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA BY THE COMMITTEE OF FEDERAL EVIDENCE AND PROCEDURE, JAMES F. SCHAEFFER, CHAIRMAN, IN CONSULTATION WITH JOE A. MOORE, PROFESSOR OF LAW, MEMPHIS STATE UNIVERSITY, MEMPHIS, TENN.

PROPOSED RULE NO. 509

SECRETS OF STATE AND OTHER OFFICIAL INFORMATION

(a) Definitions

(1) Secret of state—A "secret of state" is a governmental secret relating to the national defense or the international relations of the United States.

(2) Official Information—"Official information" is information within the custody or control of a department or agency of the Government the disclosure of which is shown to be contrary to the public interest and which consists of (A) intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions, or (B) subject to the provisions of section 3500 of title 18, United States Code, investigatory files compiled for law enforcement purposes and not otherwise available, or (C) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to section 552 of title 5, United States Code.

(b) General rule of privilege

The Government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.

(c) Procedures

The privilege for secrets of state may be claimed only by the chief officer of the Government agency or department administering the subject matter which the secret information sought concerns, but the privilege for official information may be asserted by any attorney representing the Government. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of secrets of state, the judge, upon motion of the Government, may permit the Government to make the required showing in the above form in camera. If the judge sustains the privilege upon a showing in camera, the entire text of the Government's statements shall be sealed and preserved in the court's records in the event of appeal. In the case of privilege claimed for official information the court may require examination in camera of the information itself. The Judge may take any protective measure which the interests of the Government and the furtherance of justice may require.

(d) Notice to Government

If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer

entitled to claim the privilege and shall say further proceedings at reasonable time to afford opportunity to assert a claim of privilege.

(e) *Effect of sustaining claim*

If a claim of privilege is sustained in a proceeding to which the Government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the Government upon an issue as to which the evidence is relevant, or dismissing the action.

RULE 509—COMMENTARY

Proposed Rule 509 differs in marked degree from most of the other proposed rules of privilege in that it deals with matters of primary concern to the national government, and, thus, is not subject to the criticism leveled at other concepts of privilege on the basis that rights inherently within the ambit of state concern are being controlled by federal rule. With that basic objection removed, the only remaining inquiry is as to the content of the rule itself. On that ground several serious objections are at hand.

Much of this rule has been discussed in depth by several interested parties, with their comments running the full circle from the scope of the rule to the rather unique manner of its final preparation and submission to the advisory committee, and little will be served by restatement of those matters. In sum, the Association of Trial Lawyers of America objection to the rule as drafted rests upon two considerations:

(1) While all agree to the need for a privilege against the required disclosure of secrets of state under circumstances where such disclosure would be hazardous to the national security or national defense, the proposed rule goes well beyond that and allows invocation of the privilege under any circumstance when the evidence in question merely "relates" to the national defense or the international relations of the United States.

(2) The second classification of privileged information, that being so-called "official information" is unnecessary and ill-advised.

The two issues will be discussed in the order presented. Initially, it is without question that the privilege against revealing state secrets is supported by a strong public policy of protecting the national interest, and has long been acknowledged in England and the United States. 8 Wigmore, *Evidence* (McNaughton Rev.) Sec. 2378 at 794 (1961); *United States* v. *Reynolds*, 345 U.S. 1 (1953).

Historically, the privilege is one which belongs to the government and one which must be asserted by the head of the department having control over the national interest imperiled by disclosure. Determination of whether the information should be privileged requires a balancing of the public interest in maintaining secrecy and private interest in maintaining fairness and efficiency in litigation. Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1 (1943).

As to secrets of state, the current version of the rules differs markedly from the earlier 1971 draft. In the 1971 draft the privilege extended only to military and state secrets, the disclosure of which would be "detrimental" or "injurious" to the national defense or the international relations of the United States. Fed. R. Evid. 509(a) (R.D. 1971). The 1972 proposal provides the same privilege as to matters which merely "relate" thereto.

The 1969 draft of the rules differed from both the 1971 and 1972 versions. One of the criticisms of the state secrets feature of the 1969 draft was its vagueness in defining state secrets. *Symposium on the Proposed Federal Rules of Evidence*, 15 Wayne L. Rev. 1076 (1969). The 1969 version defined a state secret as "information not open to the public or theretofore officially disclosed to the public concerning the national defense and international relations of the United States." The 1971 draft attempted to strenghten the definition by providing that the privilege existed where there was a "reasonable liklihood of danger that disclosure will be detrimental or injurious to the national security or the international relations of the United States." By contract, the 1972 rule exhibits a definition couched in even more vague terms than the 1969 version which was criticised on that ground.

If the earlier versions of the rules raised doubts as to the danger of the privilege having detrimental effects on the flow of information available to litigants, a cursory observation of the 1972 rule reveals that the problem would be mainfoldly increased. The vague definition of what constitutes a state secret coupled with the

equally vague discretion allowed the judiciary in making the determination of existence of the privilege appears to pose real danger that the privilege could be exerted restrictively so as to place an undue and unnecessary burden on private litigants who have a legitimate need for government information. Restriction of application of this privilege to state secrets shown to be such, the disclosure of which would be detrimental or injurious to the national security of international relations of the nation seems appropriate. To allow the privilege to be invoked on the basis it "relates" to the national interest would be to broaden the secrecy privilege beyond its need.

(2)

The incorporation of a privilege to withhold official information also poses serious problems and basic questions of governmental policy. The issue of the right of government to withhold information from the public in any context is one which has troubled the courts, governmental official and legal writers since the inception of the nation. The issue has arisen in practically every administration. Underlying the issue, however, is the universally accepted principle that free access to information is a significant right in a free society. 8 Wigmore, supra, note 4 at 797.

The broad power claimed by the government to withhold information, disclosure of which would not, in its view, be in the "public interest," is occasionally supported by reference to the constitutional doctrine of separation of powers. Far more frequently, the claim has been grounded upon the so-called "Housekeeping Statute" which, until its amendment in 1958, read:

> "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business and the custody, use and preservation of the records, papers, and property appertaining to it." Rev. Stat. 161 (1875), 5 U.S.C. 22, as amended in 1958.

Although obviously not intended initially to be a secrecy statute, government officials were quick to grasp it as a tool with which to justify their withholding information, and numerous cases have cited it as the principle or sole authority for so doing. *United States* v. *Reynolds*, 345 U.S. 1 (1953); *United States ex rel Touhy* v. *Ragen*, 340 U.S. 462 (1950); *Boske* v. *Comingore*, 177 U.S. 459 (1900). The intent of Congress for a freer flow of information is seen in the amendment of the statute in 1958, which added the following sentence:

> "This section does not authorize withholding of information from the public or limiting the availability of records to the public."

The first attempt by Congress to formulate a general statutory policy to aid in the access to information was in 1946 with the passage of the Administrative Procedure Act. 5 U.S.C. 1002. Section three of the act provided for access to governmental information. The act, however, failed in its purpose and was again seized upon by the executive branch as an additional basis for supporting the withholding of information. See, S. Rep. 813, 89th Cong. 1st Sess. 3 (1965); H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 5 (1966). An effort to alleviate this resulted in the passage of the Freedom of Information Act in 1966. 5 U.S.C. 552 (1966).

This act provided exceptions to information which was required to be made available, notably secret matters so classified by executive order; matters relating solely to the internal personnel rules and practices of an agency; matters exempt from disclosure by statute; trade secrets and commercial or financial information obtained from a person and privileged or confidential; and inter-agency or intra-agency memorandum of letters which would not be available by law to a party other than an agency in litigation with the agency. These exceptions, as interpreted since 1967, have largely prevented the act from achieving its evident goal. The exceptions have created loopholes through which federal officials escape with records intact. 48 Tex. L. Rev. 1261, 1262 (1970).

Adoption of the 1972 Proposed Rule 509 would appear to put an even tighter lock on the governmental files. As previously seen, the government historically has been less than cooperative in disclosing requested information. Rule 509 is an attempt to create a codified privilege from exceptions contained in the Freedom of Information Act which were not framed in terms of evidentiary privilege, but rather in terms of permissive disclosure to the public in general, regardless of the purpose of the request for view.

In particular, section (a)(2)(c) of the rule appears overly broad and vague in defining "official information." This vagueness, coupled with the equally vague

procedural discretion previously discussed could open the door to an intolerable situation in litigation.

The provision that any attorney representing the government be allowed to invoke the privilege for official information—a right not granted as to the far more important state secret—is striking. No precedent for such a procedure can be found. The purpose of such a privilege is to allow government to function in other than a "fishbowl" environment, however, the right to invoke the claim of secrecy has always been limited to the head of the department concerned. The privilege to withhold information is against the most basic concepts of a free society and should not be so lightly treated. The reasoning that only the person in the highest order of responsibility should be able to invoke the privilege is sound, and any abrogation would be detrimental to the free flow of information.

It is apparent that Congress has never expressed a desire for so restrictive a privilege. To the contrary, legislative history on the subject reveals attempts by Congress on numerous occasions to broaden the availability of governmental information. This rule does not produce that effect.

Conclusion

Proposed Rule 509 is totally improper. It is submitted that the inclusion of any privilege based on official information is unwarranted and should be deleted. As to state secrets privilege, the rule definition is too vague and all inclusive. It is submitted the 1971 version states the rule in its proper form and should be substituted for the 1972 version.

Position Paper on Proposed Federal Rule of Evidence No. 801(a)(b)(c)(d)

SUBMITTED FOR THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA BY THE COMMITTEE OF FEDERAL EVIDENCE AND PROCEDURE

Rule 801—Commentary

801 (a) (b) (c) and (d)

Even a superficial reading of the proposed rules dealing with the subject of hearsay evidence discloses that the advisory committee has relied heavily upon the view of Professors Wigmore and McCormick. It is well known that both men did not favor the exclusion of evidence on grounds of hearsay. While neither went so far as to advocate total rejection of the exclusionary principle, each was of opinion that as much hearsay as could be admitted under some tenable view should be. Wigmore, although stating that he was of the belief that the hearsay rule should be "kept in its vital feature," also believed that all recognized exceptions should be kept and generally widened in both application and definition. He frequently cited history itself as the best example, since all historical truth is based on what amounts to hearsay report. Wigmore, Evidence (3d ed. 1940), Sec. 8(c), at 278.

It is not surprising to find, therefore, that the entire treatment of admissibility of hearsay at the hands of the committee represents a general relaxation of the rule of exclusion, not only in the exceptions themselves, but in the general definition of hearsay as such.

It is the view of the Association of Trial Lawyers of America that the committee has, in some instances, gone too far in their overhaul of the hearsay doctrine and has provided for the admissibility of hearsay evidence which has not been admitted save in scattered jurisdictions in the entire history of the common law.

This approach is first evident in Rule 801, in which "hearsay" as such is defined by the committee. The basic definition reads:

> "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 . . ."

The definition, is basically that of Professor McCormick, and is in general use by a majority of American courts today. *McCormick on Evidence*, 2d ed., Sec. 246.

From this general definition, however, the committee proceeded to specifically define "statement" for purposes of hearsay classification. The definition of statement as given by Rule 801 is as follows:

> "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.*" (Emphasis supplied)

In this definition, the Rule departs from current majority view. There has been a long-standing dispute among legal writers and courts as to whether hearsay did or did not include nonassertive conduct. Professor Morgan, in his monumental work on the subject, argued that it did, and that evidence of the declarant's conduct should be classified as hearsay wherever the conduct, as described by a witness, required the jury to treat the acts of the declarant as if he were testifying upon the same issue which the evidence was offered to resolve. 2 Morgan, *Basic Problems of Evidence*, p. 213 (1954).

Under Rule 801, evidence sought to be introduced in the form of the conduct of an individual would not be defined as hearsay unless it was found that the individual, at the time of the conduct, intended to make some sort of non-verbal assertion. One writer has suggested the following hypothetical situation to demonstrate the underlying problem. Assume that the issue on trial is the seaworthiness of a ship which has sunk. Evidence is sought to be introduced that the captain inspected the ship before sailing by introducing the fact that he set sail on the ship. The inference sought to be made is that, if he sailed on the ship, it must have been seaworthy, i.e., that he would not have sailed had he not believed the ship to be sound. The jury, in fact, must reason that the captain would not have sailed had he not believed the ship to be seaworthy. This assumption concerns the motivation of the captain, with the problem lying in the fact that he might have had more than one motive for sailing. If the captain had just committed murder, he might prefer to sail on an unseaworthy vessel to remaining on shore. More practically, he might simply be forgetful.

Under Rule 801, evidence sought to be introduced through a sailor who sailed on the ship with the captain, for the purpose of drawing the inference of seaworthiness, would not be classified as hearsay, unless the party objecting to admission of the evidence could show an intention to assert on the part of the captain. Finman, *Implied Assertions in Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 Stan. L. Rev. 682 (1962).

The prevailing doctrine does not support the committee view of the non-hearsay quality of such implied assertions. The following statement may be found in Falknor, *The "Hear-Say" Rule as A 'See-Do' Rule: Evidence of Conduct*, 33 Rocky Mt. L. Rev. 133 (1961):

> "Where evidence of non-verbal conduct is relevant only as supporting inferences from the conduct to the belief of the actor and thence to the truth of his belief, the prevailing doctrine stigmatizes the evidence as hearsay, inadmissible unless accommodated within one of the exceptions of the rule."

The basis of the rule definition appears to be that of simplicity and belief that the danger of admitting such evidence is much less than with assertive conduct. It is contended that such conduct is more dependable because the veracity of the declarant is not involved. Proposed Fed. R. Evid. 801(a) Comm. Note at 105 (1972). The simplicity argument is of doubtful validity. In any event the fact the question of veracity is not directly in question does not reach the additional trustworthiness factors of perception, memory of the declarant, the importance he gave to the conduct at the time it occurred, and his reliance on his then perception. An additional factor which should be considered is the reasonableness of the inference being drawn. Upon this point, the definition of statement requires only that the judge look to the intention of the declarant to assert or not to assert.

Trustworthiness is dealt with as a question of relevancy and not a hearsay consideration, according to one commentator. *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, 15 Wayne L. Rev. 1061, 1083 (1969). Under this approach the usual hearsay dangers are not considered and the evidence of non-assertive conduct is excluded only when "the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." Proposed Fed. R. Evid. 403(a). This approach overlooks many other tests of trustworthiness which have historically been applied in evaluating proposed exceptions to the hearsay rule. Rather than the definition of statement found in the proposed rule, the same commentator proposed the following definition:

> "Statement should be defined as:
>
> (1) an oral or written assertion of
>
> (2) nonverbal conduct of a person: (a) if it is intended as an assertion or; (b) if it is not intended as an assertion but offered as an implied assertion—as the basis for an inference to the belief of the actor and then to the truth of the matter believed—unless it is found that:
>
> 1. The actor had personal knowledge of the fact to which the proof is offered and that he had adequate opportunity to perceive such event or condition, and

2. there is no evidence to cast substantial doubt upon the memory of the actor of the fact observed at the time of his conduct, and,

3. the conduct was so important as to give reasonable assurance of trustworthiness, and,

4. the belief to be inferred from the conduct is reasonably reliable."

This definition of statement is rather complicated, thereby destroying the element of simplicity, but simplicity should not be favored over reliable and truthful evidence. It appears that this definition would cover the dangerous area of motivation.

An example of the danger present in the proposed definition is presented by *People v. Clark*, 86 Cal. Rptr. 106 6 Cal. App. 3d 658 (1970). In Clark, defendant was convicted of second degree murder. The murderer had been seen in the vicinity of the crime on the night of the murder wearing a coat with a furlined collar. When the defendant was asked by police officers, in his home, whether he owned such a coat, he turned to his wife and stated, "I don't have one like that, do I dear?" At this point the wife fainted. A police officer was allowed to testify to these facts in court, to which defendant objected on hearsay grounds. Under California Evidence Code Sec. 225, which is similar to this proposed rule, the court held that the evidence was not hearsay because the wife's actions were not a "statement" within the statutory definition. Her fainting was said to be non-assertive conduct. Under traditional rules, this evidence would have been excluded as hearsay, but under the definitions of hearsay in the proposed rule, the decision would be the same as in California. Admission of such evidence totally overlooks the lack of reliability of such evidence. The fainting could have been caused by many things other than sudden realization that her husband had such a coat. It is equally probable, for example, that the wife fainted from relief upon realization that her husband had no such garment as that she fainted from awareness that he did. The evidence is properly classifiable as hearsay and partakes of all of the weaknesses implicit in such offered testimony.

The argument of simplicity may be the weakest of all arguments offered in favor of the definition. When evidence of conduct is offered and objected to as hearsay, a preliminary determination as to intention to assert is required with the burden of proof of intent to assert being on the party objecting. Proposed Fed. R. Evid. 801, Comm. Note at 105 (1972). An ambiguous and doubtful case will be resolved against the objecting party and in favor of admissibility. The preliminary determination will add an extra dimension to the trial and often result in confusion and disadvantage to the party objecting. Many cases do not easily lend themselves to a determination of intention to assert. Professor Cleary, one of the authors of the proposed rules admits that the preliminary determination might cause difficulty:

> "True the threshold question whether communication was in fact intended as an assertion may on occasion present difficulty, yet the probabilities against intent are so great as to justify imposing the burden of establishing it upon the party urging the hearsay objection." McCormick, Evidence (2d Ed) Sec. 250.

In summary, it can be seen that there is conflict as to the definition of "statement" which is used in the definition of hearsay. The definition adopted does not represent current majority view, and the necessity or wisdom of this break with tradition is not sufficiently demonstrated.

It is suggested that the definition of "statement" be amended so as to include non-assertive as well as assertive conduct.

801(d)(1)

Subsection (d)(1) of Rule 801 is among the most controversial included in the entire code of proposed rules. Excluded from the definition of hearsay, and thus made admissible as proof of the fact stated therein are prior statements of the witness and admissions by a party opponent, each of which is divided into several different classifications. The rule is specific in its command that "A statement is not hearsay if. . . ." Proposed Fed. R. Evid 801(d) (1972).

A. PRIOR INCONSISTENT STATEMENTS—RULE 801(d)(1)(A)

This section of the rule reads:

> "A statement is not hearsay if—
>
> "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, or. . . ."

Under this exclusion from the definition of hearsay, a statement which was allegedly made earlier by a witness, not under oath, and whether written or oral, which statement is inconsistent with his in-court testimony, can be offered in evidence through the testimony of a third person as substantive evidence and not solely for impeachment.

This rule represents a total break from existing majority view and has drawn heavy fire from nearly every segment of the bench and bar. The almost universal existing rule, as to evidence of prior inconsistent statements, is stated by Wigmore as follows:

> "The only office of impeaching testimony of this kind is to negative or neutralize the testimony to which it is directed." 3A Wigmore, Evidence, Sec. 1018 (Chadbourn Rev. 1970)

Thus, under existing law, if a witness is alleged to have made an out of court statement which was inconsistent with the testimony given in court, the only use which could be made of the prior statement was for the purpose of impeachment. When such evidence was introduced for impeachment, it was accompanied by an instruction to the jury that it was to be considered solely by them as reflecting upon the credibility of the witness and not as proof of what was stated therein.

The reasons given by the advisory committee for adoption of such a radical approach may be summarized as including (1) belief that the normal hearsay dangers are largely non-existent when dealing with prior inconsistent statements where the declarant is in court and may be examined and cross-examined in regard to his alleged statement; (2) that the prior statement is more likely to be true than the testimony of the witness at the trial because made nearer in time to the matter to which it relates; (3) that there is a need to protect counsel from the "turncoat" witness. The views of the committee, basically parallel those offered in support of similar provision in the California Evidence Code, Sec. 1235.

The arguments made by commentators in favor of receiving the prior inconsistent statement as substantive evidence are many. One frequently cited argument is the fact that the jury is not able to follow the instructions in the case of prior inconsistent statements, and will consider them as substantive evidence in any event. Professor McCormick believes that such an instruction is a mere verbal ritual and that the distinction is not one that most jurors would understand. McCormick, however, due to the nature of the statement is unable to support this view with anything more substantial than his own opinion of the mental abilities of jurors. McCormick, "*The Turncoat Witness: Previous Statements as Substantive Evidence*", 25 Tex. L. Rev. 580 (1947).

An immediate answer to this argument is that, if the jury cannot understand the limited valid purpose of such evidence perhaps the answer is to eliminate it from the case completely rather than elevate it to substantive evidence. More important, however, is the fact that the jury difficulty is only a minor part of the legal shift involved in adoption of such a rule. Even if the jury might not understand that such evidence is admissible only to impeach, the trial and appellate courts do. If the only evidence offered by the government to sustain the guilt of an accused is in the form of a prior inconsistent statement the prosecution case is insufficient as a matter of law and a directed verdict of not guilty must be entered. Under the proposed rule, to the contrary, the jury could lawfully convict, and in fact has done so under the California Code. *People* v. *Green*, 3 Cal. 3d 981, 479 P.2d 998 (1971).

The view that the prior statement is more accurate because made nearer in time than the in-court testimony is specious. While it is true that certain psychologists make that claim, they overlook the fact that the prior statement may have been made as an off-hand remark, not under oath, in a spirit of bragging, or venality. The lack of ability to cross-examine *at the time of the making of the alleged* statement defeats any realistic attempt to test these unknown factors. All trial lawyers of any experience are well aware of the fact that what a witness may say concerning his fast knowledge of the facts of a case while drinking beer with his cronies at the pool hall will differ sharply from his actual knowledge when he takes the witness chair.

The third argument advanced by proponents of substantive use of such prior inconsistent statements is that the requirement that the declarant testify at the hearing, that he be available for cross-examination as to the prior statement, and that the prior statement be inconsistent with his testimony allows a complete ex-

ploration of both statements while the witness is on the stand. Professor Wigmore states the argument as follows:

> "The witness is present and subject to cross-examination. Ample opportunity to test him as to the basis for his former statement exists. The whole purpose of the hearsay rule has been already satisfied. Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve." 3A Wigmore, Evidence, Section 1018; accord, 2 J. Wigmore, Evidence, Sec. 1018 (1st Ed. 1904).

It is important to note that this approach has been urged upon the American courts since no later than 1904, and has been largely rejected. The rejection rests upon sound ground. The right to cross-examine is one of the cornerstones of the adversary system. That right means a right to *timely* and full cross-examination, not a delayed and limited one.

The case of *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1939) offers a thorough discussion of the arguments in favor of the present majority rule, with Stone, J., speaking for the court. The first argument made is that, when the previous statement was made, the oath and liability to punishment for perjury were wanting. In the words of Justice Stone, "the previous statement was when made and remains an ex parte affair, given without the test of cross-examination. Important also is the fact that, however much it may have mangled the truth, there was assurance of freedom from prosecution for perjury." It is obvious that this argument has merit, and so much has been admitted by Professor McCormick. McCormick, "*The Turncoat Witness, etc.*, 25 Tex. L. Rev. 580, at 586:

> "This must be granted, and the question is whether the want is fatal in view of (1) the fact that the prior statement was nearer to the event, and hence fresher in memory, than the present testimony and (2) the opportunity to cross-examine."

The first argument used in countering the lack of oath seems to overlook the fact that some persons will lie for various reasons, whether it be revenge upon the person against whom the statement is made or temporary shock. Or it may be that the witness who has attributed the prior statement to the declarant is himself not telling the truth and the statement was never made in the first instance. Additionally, the time element may or may not be significant. The rule does not require that the alleged prior statement have been made at or near the time of the occurrence to which it relates; it is sufficient if it were made at any time prior to the in-court testimony, even up to the same day or hour.

The second argument, the fact of opportunity to cross-examine, is well answered by the opinion of Justice Stone in Saporen:

> "The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others whose interest may be and often is, to maintain falsehood rather than the truth."

The chilling effect of the proposed rule is well demonstrated by *People* v *Peterson*, 100 Cal. Rptr. 590, 23 Cal. 3d 883 (1972). In Peterson, the defendant was convicted of possession of dynamite and also reckless possession of dynamite near a public building. The case for the prosecution rested upon the testimony of one Conolly. When called to the stand, Conolly failed to connect the defendant with the offense charged. As a result of his evasion, the prosecution called two other witnesses who each testified as to what Conolly had allegedly said in their presence as to what the defendant had admitted to Conolly. The prior inconsistent statements were allowed as substantive proof of what was said therein. Without this evidence, the case for the prosecution would necessarily have been legally deficient. The California court, on appeal, noted that the defendant was not denied his right of confrontation; that the use of such prior inconsistent statements was sanctioned by the law of the state, and that the conviction would stand.

The adoption of this proposed rule would work a virtual abolition of the hearsay rule in civil and criminal cases. It would allow a defendant to be tried and convicted of the most serious of offenses under circumstances that not a single witness took the stand and testified under oath as to a single fact within the personal knowledge of the witness which tended to connect the accused with the crime, let alone established his guilt. This is star-chamber Justice, and a free society cannot abide it.

It is the position of the Association of Trial Lawyers of America that Rule 801(d)(1)(A) should be deleted from the rules as dangerous to liberty and inconsistent with fair trial.

LAW OFFICES,
JAMES F. SCHAEFFER,
Memphis, Tenn., June 25, 1973.

Re Proposed Federal Rules of Evidence.

Congressman WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: We have completed our analysis of Proposed Rule No. 301. The position on this rule of the committee on Federal Evidence and Procedure of the Association of Trial Lawyers of America is set forth in the attached position paper.

We will deeply appreciate consideration of our position.

Very truly yours,

JAMES F. SCHAEFFER.

POSITION PAPER ON PROPOSED FEDERAL RULE OF EVIDENCE NO. 301

SUBMITTED FOR THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA BY THE COMMITTEE OF FEDERAL EVIDENCE AND PROCEDURE

ARTICLE III—PRESUMPTIONS

Rule 301. Presumptions in General.

In all cases 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 proving that the nonexistence of the presumed fact is more probable than its existence.

COMMENTARY

Two basic problems are presented in regard to the advisability of adoption of Rule 301:

(1) Does the rule operate as a procedural rule only or does it amount to a substantive rule of law?

(2) Does the rule reflect current majority view, and, if not, is it preferable to the present majority?

The two problems may be discussed together, as resolution of one bears upon the other as well. In attempting to establish a majority/minority position as to the nation-wide treatment of presumptions with respect to this stated rule it is first necessary to resolve the problem of the ambiguous language of the rule itself. In persuing the development of the rule and the commentary by the advisory committee note, it is first evident that an earlier draft of Article III indicates that Rule 301 was placed last in context rather than first, but is supported by essentially the same committee note as follows the present rule. (Compare Proposed Rules of Federal Evidence, Rule 3-03 Presumptions in Other Cases, 46 F.R.D. 161, 212 (1969) with the present Rule 301.) In particular, the earlier proposed rule addressed itself at some length to the procedure with respect to both the determination of evidence of basic facts and of presumed fact. Further, the terminology "*In all cases* not otherwise provided for" (Emphasis supplied) can now easily be construed to make this general rule applicable to criminal as well as civil cases. Whether this construction will obtain or not depends in part upon interpretation of Rule 303 which deals expressly with presumptions in criminal cases. It is possible to read the two rules in two entirely different manners. It can be argued that Rule 303 is supplementary to Rule 301, and thus, both may be applied in criminal cases. On the other hand it can be argued that Rule 301 does not apply in any particular to criminal cases, and that Rule 303 preempts that problem. This matter is not clearly resolved by the Rules but should be.

Complicating this particular problem is the fact that the first paragraph of the advisory committee note, though referring to Rule 303 as being applicable to criminal cases, still perpetuates the ambiguity by opening with the statement, "This rule governs presumptions generally."

This rule acknowledges that certain cases provided for by an Act of Congress are without the operational effect of Rule 301, and states such as exceptions to its language. This is required by the committee quoted language from *Gainey* v. *U.S.*, 380 U.S. 63. The rule then continues, however, to apparently shift the burden of persuasion by imposing upon the party against whom the presumption is

directed "the burden of proving that the non-existence of the presumed fact is more probable than its existence."

Burden of proof is normally divided into two separate and distinct concepts in American Law. (1) The burden of going forward with the evidence, and (2) the burden of persuasion. While it would not be seriously contended that the burden of going forward with evidence is substantive under most accepted definitions, the same cannot be said of the burden of persuasion. If this rule is truly procedural then the language must be taken to intend that the party against whom the presumption operates is faced with nothing more than the burden of presenting evidence to rebut either the existence of the basic fact from which the presumption springs or of going forward with evidence tending to overcome the existence of the presumed fact directly. Further, if the language is to apply in criminal matters, the shifting of the burden of persuasion is constitutionally prohibited.

The problem presented is compounded by the undoubted fact that the language used in the rule seems to do more than shift the burden of going forward so as to cast the burden of persuasion upon the party against whom it operates. In this, the rule does not state existing law.

As pointed out in the advisory committee note, the procedural effect of presumptions has been one of the most hotly debated subjects in American evidence law. It is fraught with difficulties, and sometimes seems to defy rational analysis. As the eminent author, Professor Morgan, stated in 12 Washington Law Review 255 (1937):

> "Every writer of sufficient intelligence to . . . (approach) the topic with a sense of helplessness and . . . (leave) it with a feeling of despair."

For many years, a controversy of major proportions has raged concerning the procedural effect of presumptions, concerned primarily with the status of a presumption as evidence when it is met with contravening evidence. Initially, two fundamental views have been taken in regard to the effect of a presumption when injected in the case without any contrary proof in the record. It is possible to accord the presumption sufficient procedural effect to make out a prima facie case on behalf of the party relying upon the same, and thus allow the case to go to the jury unless the effectiveness of the presumption is destroyed in some fashion. A second possible view is that such presumption, if not contradicted by contrary proof, not only makes out a prima facie case, but requires that the matter be resolved favorably to the party relying thereon, so that the jury would be required to indulge the presumption in resolving the factual issues. Rule 301 does not, in express language, address itself to a choice between these two conflicting approaches. It appears, however, that if the burden of persuasion of a factual issue is shifted by operation of the presumption, it logically follows that the party upon whom that burden is imposed would be legally deficient in his proof in the absence of evidence to support his position. If that be the case, it follows also that the matter would be resolved favorably to the party relying on the presumption, and the jury would be so instructed.

The procedural aspect of presumptions which has been the source of the greatest disagreement between legal scholars and courts has been the status of a presumption after the party against whom it operates has introduced evidence tending to rebut the presumption. Two differing views have been taken. The first of these, widely known as the Thayer-Wigmore rule, is to the effect that a procedural presumption relates only to the burden of going forward with testimony, not with the burden of persuasion, and that such a presumption disappears when contrary facts appear. Under this view, sometimes referred to as the "bursting bubble" theory, if the only evidentiary support for plaintiffs' position is the operation of a presumption, and such presumption has been met with contradicting evidence, the case for the plaintiff must fail as a matter of law. This approach is discussed by the advisory committee and expressly rejected.

The second approach has come to be known as the Morgan view. Professor Morgan was of opinion that if the facts from which a presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption should continue to have probative worth even if contradicted by evidence to the contrary. Under this approach, if the presumption was purely one of law, and thus not based upon facts having probative value as such, the presumption would disappear when evidence was introduced to the contrary.

In evaluating the Morgan view, it is critical to note that he did not propose that all presumptions be treated similarly. In this Rule 301 differs. Under Rule 301, *all* presumptions save those expressly excepted from its application would have the effect of shifting the burden of persuasion as well as the burden of going forward with the evidence. Morgan would have none of this. In Morgan, *Some*

Observations Concerning Presumptions, 44 Harv. L. Rev. 906 (1931), he noted that presumptions rested on different theories as to purpose, including (1) logical grounds or by wide human experience, (2) procedural convenience, (3) accomplished a socially desirable result; or (4) a combination of the above. Depanding upon the purpose upon which the presumption being dealt with rested, the procedural effect of the presumption would vary from the "bursting bubble" theory to a total shifting of the burden of persuasion, even to the extent that the presumption would operate so as to require direction of a verdict if it were not overcome by evidence preponderating against its existence. In that connection, he said:

> "How far a presumption should go depends on the considerations responsible for its creation. Its handling indicates the view of the jurisdiction of its purpose. Presumptions should be classified accordingly."

Rule 301 makes no attempt at classification of presumptions on the basis o the considerations responsible for their creation, but treats all alike, and affords each the maximum procedural effect given historically to any. The wisdom of such a view is questionable. In a later article, Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 Harv. L. Rev. 59 (1933), Professor Morgan addressed himself again to this problem of analysis; and stated that the power of any presumption could logically be destroyed at any of three steps: (1) at the point at which it is first resisted; (2) at the point that the mind of the jury is in equilibrium; and (3) only at the point that the jury is persuaded that it is untrue. Rule 301 appears to destroy all presumptions only under the third circumstance. Morgan, in the same article, did not agree, but argued that the power of destruction should depend upon the underlying purpose of the presumption. If the purpose is to resolve a situation which appears otherwise insoluale, the presumption should not be deprived of any effect necessary for the required resolution. But, if the purpose is only to express the balance of probability as between two contending fact pictures, there may well be no reason to retain the presumption. In sum, Morgan was of opinion that a presumption should not be ignored short of the fulfillment of its purpose, nor should it be allowed to go futher.

Subsequently, in Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909 (1937), the authors stated that the reported cases exhibit at least seven views of the procedural effects of a non-conclusive presumption: (1) it disappears if the major premise is resisted; (2) the presumption persists until the trier believes resisting evidence; (3) the presumption persists until it is resisted by substantial evidence; (4) the presumption must be believed until the trier finds the resisting evidence as probable or more probable than the assumed fact; (5) the presumption must be believed until the trier finds its nonexistence more probable than its existence; (Note: This appears to be the position taken by Rule 301); (6) where the presumption is based on accessibility of evidence solely to the opponent, the opponent has the burden to convince the trier of the truth of circumstances favorable to him, but the burden of persuasion as to the assumed fact remains unaffected; and (7) in addition to one of the above, certain treatment of presumptions as evidence in the usual sense.

It is significant that, as of the date the last article was prepared, approach (5) was stated to be the rule of decision in only one American jurisdiction, that being Pennsylvania. It thus appears that while the advisory committee note seems to imply that it seeks to follow the Morgan view of the procedural effect of presumptions it has failed to do so, and has fallen into the error attributed by Morgan to Wigmore, that of attempting to simplify by rule that which is not logically capable of such simplification.

In sum, it appears that Rule 301 undertakes to shift not only the burden of going forward with evidence, but shifts the burden of persuasion as well. In so doing, the rule announces a novel approach not sanctioned by either the Wigmore theory or the complete Morgan approach. Few American courts have gone so far, and the wisdom of so doing is open to serious question. See 5 A.L.R. 3d, 19 *Presumption—Controverting Evidence*, where the cases are collected. The annotator, in his introductory remarks, says:

> "This suggestion that the effect of the presumption when met by contrary evidence should vary according to the considerations upon which the presumption is based has substantial support in the decisions, and it may be argued that the only way to come to even an approximate rationalization of the cases within a jurisdiction is to classify them according to the particular presumption under consideration."

If this be an accurate appraisal of the problem, the attempt of Rule 301 to singly treat all presumptions seems doomed to failure.

The advisory committee note also indicates the possibility of constitutional infirmity implicit in an attempt to shift the burden of persuasion by operation of evidentiary presumptions. While it is true that the committee seeks to explain away *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639, 49 S. Ct. 445, 73 L. Ed. 884 (1929), a case in which a statutory attempt to make out a prima facie case of negligence on the basis of a presumption was struck down as unconstitutional, the fact remains that the fact that somewhat tortured reasoning may serve to make the rule pass constitutional muster does not mean that the rule is a wise one to adopt.

The possibility of trouble in criminal cases, even with a rule which operates so as to shift the burden of going forward with the evidence was pointed out by McCormick, *Handbook of the Law of Evidence* (2d Ed. 1972), where it was said:

> "Certainly the description of a presumption as a rule that, at a minimum, shifts the burden of producing evidence is to be preferred, at least in civil cases. . . . In criminal cases, however, there are rules that traditionally have been labeled presumptions, even though they do not operate to shift even the burden of producing evidence. A true shifting of the burden of producing evidence to the defendant in a criminal case would mean that the court would be compelled to direct the jury to find against him with regard to the presumed fact if he fails to introduce sufficient proof on the issue. . . . a directed verdict or a peremptory ruling against the accused in a criminal case, even as to a single element of the crime, is abhorrent to the criminal law." Sec. 342, pp. 803–804.

It has been noted that the proposed rule does not follow the Model Code or the prevailing rule of the federal courts. In Start, *Presumptions—The Proposed Federal Rules of Evidence*, 24 Arkansas L. Rev. 401 (1971), the author said:

> "(The rule rejects) . . . the Model Code of Evidence provision, the prevailing rule of the federal courts and of many state courts, and the limited rule of URE, Sec. 14(b), all adopting the Thayer doctrine."

While the draftsmen of the rules appear to have relied heavily upon the present California Evidence Code, it is significant that they have departed from it in the final draft. While Rule 301 applies with equal force to all presumptions not expressly excepted from its operation, the California Evidence Code creates presumptions of different nature which are to be treated differently from a procedural standpoint. Cal. Evid. Code, Secs. 602–603–604–605–606. Similarly, the Kansas Rules of Evidence distinguishes in the procedural effect of those presumptions which are based upon facts having probative value in themselves from presumptions based upon facts lacking such value. Kan. Rules of Evid., 60–414.

In Barnhart, *Use of Presumptions in Arkansas*, 4 Ark. L. Rev. 128 (1950), the following statement is made which indicates the distance from current view represented by Rule 301:

> "It is orthodox doctrine in American jurisprudence that a party having the affirmative of an issue comes into court with two burdens, (1) the burden of producing evidence sufficient to support a finding in his favor, and (2) the burden of persuading the jury to find the facts in his favor. Both of these are frequently referred to by the term 'burden of proof', but courts and writers generally agree that the only true 'burden of proof' is the second, and that the burden never shifts but remains with the party throughout the case. The first burden, that of producing evidence, passes from one party to the other as the trial progresses and one party or the other is forced by his opponent's evidence to introduce evidence or suffer a directed verdict. The effect given to a presumption must be considered along with its relation to these two burdens."

Even though there is considerable agreement that the "bursting bubble" doctrine may accord presumptions too slight effect, as stated by the advisory committee note, yet it appears that Rule 301, in adopting a view inconsistent with the prevailing view of the Federal courts goes too far, and adoption of such a rule needs the closest scrutiny as to its probable interpretation and effect in the courts. Certainly there is a lack of clarity in language. As one writer has put it in McGuire, Evidence, *Common Sense and Common Law:*

> ". . . While a careful, particularized use of the word presumption . . . is getting more and more acceptance in the courts; nobody has ever succeeded in making consistent the legislative use of this or any other important word."

The Rule here proposed has avoided the problem of variable presumptions by simply ignoring the problem. While this gives a surface simplicity, it solves no problems.

Rule 302. Applicability of State Law in Civil Cases

> In civil actions, 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.

Rule 302 is an express admission on the part of the committee that its treatment of presumptions in Rule 301 was a matter of substance rather than procedure. As the advisory committee note plainly states, a series of Supreme Court decisions in diversity cases leave no doubt of the relevancy of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) to questions of burden of proof.

In summary, many cases referred to by the committee require absolutely that the question of burden of proof be resolved according to the law of the state in which the federal court sits in a diversity case. Exemplary is the language of the Court in *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 79 S. Ct. 921, 927 (1959) where the majority said:

> "In a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide . . . Under the Erie rule, presumptions (and their effects) and burden of proof are "substantive" and hence respondent was required to shoulder the burden during the instant trial."

While the advisory committee note asserts that "Application of the state law is called for only when the presumption operates upon such an element.", no such limitation of the application of Erie is found in Dick, supra, or in any other case cited by the advisory committee. Whether the application of Erie to presumptions may be so restricted is open to serious question and certainly cannot be assumed merely because of the opinion of the committee members, however eminent.

Rule 302 also indicates another objection to adoption of Rule 301. If Rule 301 is to apply only in non-diversity situations, its adoption, where it differs from majority view would create confusion rather than uniformity in the law. Uniformity of procedure in the federal courts has been stated as one of the objectives of the proposed rules, and this combination of treatment would afford little.

CONCLUSION

With respect to the final draft of the Proposed Rule 301, several circumstances should be considered:

(1) Extreme care should be introduced into the draft of any such rule that would make unquestionably clear that it has application only in civil cases and would in no wise effect existing presumptions applicable in criminal cases.

(2) While it is agreed that the effect given to presumptions by the "bursting bubble" theory gives presumptions too slight an effect, it is asserted that the final draft of Rule 301 goes too far in that it appears to actually shift the burden of persuasion to the litigant against whom the presumption would operate.

A re-draft of Proposed Rule 301 is submitted which would adopt a middle ground. It is as follows:

> In all civil cases, not otherwise provided for by an Act of Congress, or by these rules, a presumption, even though met with contradicting evidence is sufficient proof of the fact presumed to be weighed by the trier of facts.

It is submitted that the foregoing suggested re-draft on Rule 301 would go beyond the undesirable bursting bubble approach but would not go quite as far as actually shifting the burden of persuasion and adoption of such a compromise rule would, in our view, be a step forward.

LAW OFFICES,
JAMES F. SCHAEFFER,
Memphis, Tenn., June 26, 1973.

Re Proposed Federal Rules of Evidence.

Congressman WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws,
Committee on the Judiciary, House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN HUNGATE: We have completed our analysis of Proposed Rules Nos. 803(18) and 803(6). The position on these rules of the committee on Federal Evidence and Procedure of the Association of Trial Lawyers of America is set forth in the attached position papers.

We will deeply appreciate consideration of our position.

Very truly yours,

JAMES F. SCHAEFFER.

Position Paper on Proposed Federal Rule of Evidence No. 803(6)

SUBMITTED FOR THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA BY THE COMMITTEE ON FEDERAL EVIDENCE AND PROCEDURE

Proposed Rule 803(6)

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

(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, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

COMMENTARY

The evolution of the now accepted rule allowing certain types of business records to be admitted in evidence against objection they constitute hearsay is one of the most revealing studies in the developmental process of the common law and legislative process as applicable to rules of evidence.

At the common law, the so-called "shopbook rule" allowed tradesmen to present certain of their books into evidence in aid of suits relating to the accounts of that business. The limits of the exception were strictly limited and required, among other things, that the books be of original entry, and that the person making the entry be the offering witness. Over the years, erosion of certain of the requirements occurred due to the increasing complexity of business operations and the increasing need for use of such account evidence.

The admissibility of regularly kept business records is now largely a matter of statute because of widespread adoption of the Commonwealth Fund Act (See E. Morgan, et al., *The Law of Evidence: Some Proposals for Its Reform* 63 (1927); *McCormick on Evidence*, Sec. 306 (1972), which is codified in existing federal law, (28 U.S.C.A., Sec. 1732), and the Uniform Business Records as Evidence Act. (9A U.L.A. 506 (1965)).

Codification of this exception to the hearsay rule has also been approved by the American Bar Association and the American Law Institute, and is contained in the Uniform Rules of Evidence. This rule is substantially the same as the Uniform Business Records as Evidence Act. Uniform Rule 63(3).

The basis for allowing the exception has always been that the fact that the offered record is shown to have been kept in the regular course of a business activity establishes the element of trustworthiness which serves to give credence to the evidence.

Wigmore has stated that three aspects of such activity establish the probability of trustworthiness for such business records: (1) the habit and system of making a regular record; (2) casual errors made in regular business transactions are almost certain to be discovered and disputed by those dealing with the entrant, and; (3) the entrant is under a business duty to his employer and risks censure of dismissal by inaccuracy in compiling such records. 5 Wigmore Evidence, Sec. 1522 (1940).

The question of the type of record which will qualify under this exception has been the subject of disagreement among the courts and commentators. Both the present federal act and the Uniform Business Records as Evidence Act limit application of the exception to "business" records. The common law defined "business" as a "course of transactions performed in one's habitual relations with others and as a natural part of one's mode of obtaining a livelihood." 5 Wigmore Evidence, Sec. 1523, at p. 370 (1940). According to the Commonwealth Fund Act, "business" includes "business, profession, occupation and calling of any kind" and both the Uniform Rules and the Uniform Act have added "operation of institution" and any requirement that the activity be carried on for profit has been dispensed with, thus allowing as admissible records of nonprofit organizations such as churches. *Ford v. State*, 82 Tex. Crim. 639, 200 S W. 841 (1918); *Lopoczyk* v. *Chester A. Poling, Inc.*, 152 F. 2d 457 (2d Cir. 1945).

A reading of the Proposed Rule indicates that it would lend itself to the interpretation that purely personal, as contrasted with business, activities would be admissible under this exception. Such language of the existing acts restricting its application to "business" activities has been completely deleted from the proposed rule.

The expansion of the term "business" as seen in the earlier acts will add to the already existing problems of definition of the allowable subject matter and

type of regularity required of such a record. Entries in the form of opinions are now commonly encountered with respect to medical diagnoses, prognoses, and test results and occasionally in other areas and present yet another problem of admissibility since traditional business records dealt only with purely factual items recorded such as sales or services performed. *McCormick on Evidence*, Sec. 307, at 721 (1972).

The federal decisions do not show widespread acceptance of allowance of diagnostic opinions, with some decisions allowing their admissibility and others refusing the same. *Medina* v. *Erickson*, 226 F.2d 475 (9th Cir. 1955); cf. *New York Life Ins. Co. v. Taylor*, 79 U.S. App. D.C. 66, 147 F.2d 297 (1945).

According to the advisory committee note, the state courts show a present trend favoring admissibility even though the general rule today is against such admissibility. The cases indicate the trend referred to is somewhat short of a flood of favorable judicial opinion, and whether it augers total acceptance by the courts is questionable. The proposed rule would allow the widespread admissibility of both opinions and diagnoses and represents by far the most liberal approach towards admissibility of such documents.

Taken as a whole the proposed rule allows the admission of regularly kept records of a type not sanctioned by existing law, those of a non-business nature. In as much as the chief proponents of the existing law have long taken the position that the existence of a business relationship is one of the principal guaranties of trustworthiness, this change appears to remove one of the basis safeguards of the exception. In addition, the rule also codifies the most liberal position presently taken by any interpretive view of existing law, thus compounding the potential abuse of the rule.

The principal justification for the existing exception relating to business records is probably the reliance placed upon them by the commercial world and the duty of accuracy required by the employer in the course of a regular business. Laughlin, *Business Entries and the Like*, 46 Iowa L. Rev. 276 (1961). When the basic requirement that the record be made in regular course of a business is altered to allow the exception to apply to any "regularly conducted activity" regardless of its business connotation, the breadth of the exception is grossly expanded.

While the committee and its spokesmen have repeatedly asserted that one of the desired results of a code of federal evidence is that it will allow counsel to know in advance of trial what the scope and nature of permitted evidence will be, the rule here proposed will likely have exactly the opposite effect. By drawing the rule in language which is almost totally unrestricted in application, the committee has vested the trial bench with a vast discretion in determining what records are within the exception and what are not.

In sum, the proposed rule goes well beyond existing common law principles and beyond the requirements of existing statute law.

CONCLUSION

While trial lawyers and judges recognize the need and utility of a stated exception under which regularly kept records possessing substantial guaranties of trustworthiness are admissible in evidence, it is also believed that the exception must have some boundaries other than the total discretion of the trial bench if it is to be a workable concept. On that basis, it is recommended that the proposed rule not be adopted in its present form, but that the requirement of existing law that the record offered be one kept in the regular course of business activity be preserved.

Insofar as allowance of opinion or diagnosis or prognosis be concerned, such entries should be admissible only if the declarant is shown to be a person who would be allowed to express such opinion if present on the witness stand.

Position Paper on Proposed Federal Rule of Evidence No. 803(18)

SUBMITTED FOR THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA BY THE COMMITTEE ON FEDERAL EVIDENCE AND PROCEDURE

Proposed Rule No. 803(18)

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

(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 recieved as exhibits.

COMMENTARY

For several years, substantial segments of the trial bar have advocated adoption of an exception to the hearsay rule of the type announced by the above-quoted proposed rule. The impetus for adoption of this exception has come from practitioners engaged in the preparation and trial of claims asserted by plaintiffs in professional negligence cases notably medical malpractice. One jurisdiction, Alabama, has long allowed the evidence as an exception to the hearsay rule. *City of Dothan v. Hardy*, 237 Ala. 603, 188 So. 264 (1939). In recent years, codified rules have allowed the exception, at least in medical negligence cases. Uniform Rule 63(31); Kansas Code of Civil Procedure, Sec. 60-460(cc); Mass. Laws Ann. ch. 233, Sec. 79(c) (Supp. 1968). Statutes in Nevada, Wisconsin and Rhode Island have also been enacted. The writers have generally favored the exception, as pointed out by the committee note. McCormick, Sec. 296, p. 621; Morgan, *Basic Problems of Evidence* 366 (1962).

Most of the statutes enacted to date have confined the scope of the exception to professional malpractice cases. The proposed rule is not so confined.

The need for such an exception, at least in the limited area of professional negligence is acute. Whether the alleged "conspiracy of silence" actually exists or not is to beg the question. It is undoubtedly true that plaintiffs required to rely upon the testimony of members of a profession to establish a breach of professional duty by another member of the same profession face a difficult task. The exception is needed in the interests of justice and the only real question to be resolved is the precise limit of the exception and the mode of its implementation.

The proposed rule includes a requirement not found in most of the existing law on the subject, to the effect that such a treatise may be offered in evidence only when an expert witness in the same field of expertise is on the witness stand and available to explain or clarify the language of the treatise. The committee note takes the position that this is a desired requirement because:

> "The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired."

It is submitted that this requirement will seriously impair the usefulness of the exception, and will serve in many instances to defeat its purpose. As indicated by the advisory committee, the primary use of the exception to date has been in the arena of medical malpractice claims. The difficulty to which the exception is directed is the lack of available witness testimony in such cases. In short, the plaintiff requires this substantive evidence in many instances in order to make out a prima-facie case of breach of standard of care. If such evidence is not forthcoming during the case in chief of the plaintiff, the case will fail as a matter of law and a directed verdict in favor of the defendant will result. If the plaintiff relies upon entries in the hospital record of the patient, which entries establish facts which indicate a lack of proper medical treatment under language to be found in an authoritative medical treatise, the allowance of that language into the record during the course of plaintiff's case in chief would serve to make out a fact issue and would serve to overcome the motion for directed verdict or dismissal.

Under the rule as proposed, plaintiff would be unable to secure admission of the recognized treatise during his case in chief unless he was also able to secure an expert witness willing to take the stand on behalf of the plaintiff. It is earnestly suggested that the requirement may well serve to defeat the laudable purpose of the committee.

CONCLUSION

It is the position of the Association of Trial Lawyers of America that the proposed rule should be adopted, but that the same should be improved by removal of the requirement that an expert witness be on the stand as a pre-requisite to admissibility of the learned treatise.

LAW OFFICES,
JAMES F. SCHAEFFER,
Memphis, Tenn., June 26, 1973.

Re Proposed Federal Rules of Evidence.

Congressman WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws,
Committee of the Judiciary,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: We have completed our analysis of Proposed Rules Nos. 501 and 706. The position on these rules of the committee on Federal Evidence and Procedure of the Association of Trial Lawyers of America is set forth in the attached position papers.

We will deeply appreciate consideration of our position.

Very truly yours,

JAMES F. SCHAEFFER.

POSITION PAPER ON PROPOSED FEDERAL RULE OF EVIDENCE NO. 501

SUBMITTED FOR THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA BY THE COMMITTEE OF FEDERAL EVIDENCE AND PROCEDURE

ARTICLE V—PRIVILEGES

Rule 501—Privileges Recognized Only as Provided

Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:

(1) Refuse to be a witness; or
(2) Refuse to disclose any matter; or
(3) Refuse to produce any object or writing; or
(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

COMMENTARY ON RULE 501

Rule 501 poses the fundamental question of whether federal courts are free to proscribe the limits of testimonial privilege in diversity cases against the mandate of *Erie R. v. Tompkins*, 304 U.S. 64 (1938) that state substantive law be used. Secondly, it must be determined whether federal privilege rules should be adopted if they are permissible.

Rule 501 is clear in its view. If adopted, the proposed federal rules of privilege which follow would be of exclusive application in all federal trials, diversity and otherwise, to the exclusion of any state rule of privilege to the contrary. If a privilege is not found within the Article such privilege ceases to exist, and, if it does exist, it does so only to the extent granted by the language of the federal rules.

Even prior to the formulation of the proposed rules there was controversy surrounding application of state privileges in federal courts, arising under the provisions of Rule 43(a) of the Federal Rules of Civil Procedure. Professor Green supported the view that state privilege, if more restrictive than the alternative position, should be ignored, and asserted that privilege was procedural only. Green, *The Admissibility of Evidence Under the Federal Rules*, 55 Harv. L. Rev. 197, 208 (1941). A minority of courts have followed this approach. See summary of the case law in 5 Barron & Holtzoff, *Federal Practice & Procedure*, Sec. 967 (1961).

On the other hand, Professor Moore reasoned that, before 1938, when Rule 43(a) was adopted, the federal courts routinely deferred to the state rule with regard to privilege. Moore, *Federal Practice*, Sec. 43.07 (2d ed. 1951). A majority of federal courts have taken the Moore view. See Barron & Holtzoff, supra.

It is obvious that Article V has been drafted with the view that the Erie doctrine does not dictate application of state-created privileges in federal courts.

Essentially, the draftsmen of the rule support it with three arguments:

(1) The committee asserts that the essential characteristic of a privilege is the suppression of relevant evidence, and should be closely confined.

(2) The committee is of opinion that no single state has a sufficient interest to justify the suppression of evidence in federal court; and

(3) The committee is of opinion that most privileges are more illusory than real in any event.

In the first instance, it is doubtful that an advisory committee, however learned and free from personal interest, is the proper forum for the development of evidentiary privileges of the type dealt with in Article V. Such privileges have direct effect on the conduct of parties completely apart from the litigation arena, and represent fundamental policy decisions. The committee, in its initial note, agreed that many state interests were being infringed, but declared that those interests were "not legitimate." An all encompassing statement of this nature seems to be beyond the scope of authority of the committee. In that connection, Professor Dunham, in *Testimonial Privileges in State and Federal Courts: A Suggested Approach*, 9 Willamette Law Journal 26, at 31 (1973), says:

> "It is questionable whether the drafters are an appropriate agency to make policy decisions which conflict with state policies. They agree that state interests are being infringed upon but declare that those interests are "not legitimate." The drafters do not question the sovereign ability of a state to create privileges, nor do they argue that creation of privileges is unconstitutional. In effect, they pass negative judgment on the enactments of state legislatures when those legislatures extend privileges beyond those already granted in the new rules. Despite their lack of faith in legislative decisions, which in the case of testimonial privileges may frequently be warranted, it is difficult to understand how the drafters of the Proposed Rules can ultimately value their own judgments higher than the state legislatures' when the legislators are more accountable to their constituents than the drafters themselves are.'

As pointed out by Professor Dunham later in his treatment of the problem, the creation of a body of exclusive federal privilege and non-provilege is to return to the First Restatement of Conflicts' edict that the law of the forum governs questions of admissibility of evidence. When this view was first proposed by the Restatement, it was met with a virtual flood of adverse comment. See: Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 Colum. L. Rev. 535 (1956). The draftsmen of the Proposed Rules offer no reason why the consideration should be different in federal-state conflicts as compared with state versus state.

The draftsmen of the Proposed Rules rely heavily on the authority of *Hanna v. Plummer*, 380 U.S. 460 (1965) as granting authority to the committee to prepare rules of privilege which will be of exclusive application. It is submitted that Hanna does not go so far and was not intended to do so. In Hanna, the Court held that plaintiff's service upon defendant's wife pursuant to Rule 4(d)1 of the Federal Rules of Civil Procedure was valid as against the defendant's contention that the state service statute absolutely controlled. It is significant to note that Justice Harlan, in his concurring opinion, clarified the scope of the holding by pointing out that the Federal Rules of Civil Procedure could not be lawfully interpreted so as to attempt to regulate the ordinary activities of state citizens in diversity cases. 380 U.S. 460, at 474.

The application of Erie doctrine to state-created privileges in diversity cases in federal courts as well stated by Professor Dunham, at page 36 of his article above:

> "But making the outcome-determination tests the sole basis for deciding whether a state rule is within the ambit of the Erie doctrine ignores the interests of witnesses, especially when they are not parties to the litigation. The witnesses' interests must be considered before deciding whether or not the Erie doctrine dictates application of the state rule. State-created privileges should be considered substantive for Erie purposes and the Proposed Federal Rules, if enacted, should not displace them in diversity cases."

In final analysis, Professor Dunham concluded:

> "Although the drafters of the Proposed Federal Rules of Evidence should be commended for their work as a whole, it is hoped the privilege portion of those rules will be withdrawn."

Additional adverse comment can be multiplied. Professor Weinstein, writing in 69 Columbia L. Rev. at page 372, said:

> "While there are confusions inherent in having two systems of privileges, providing that the state privilege will apply in cases predicated on state substantive law seems the soundest position. As Professor Ronan Degnan has written: "A prudent committee would avoid privilege in state law cases."

The eminent scholar, Professor Louisell, writing in 31 Tulane L. Rev., at page 117 (1956) has said:

> "There is the gravest doubt, under Erie, whether Congress, or the Supreme Court pursuant to its permission, constitutionally could override the state privileges in diversity litigation * * *."

Professor Charles Alan Wright, in 1 Georgia L. Rev. 563, at 573 (1967), said:

> "But to fail to recognize a state-created privilege in a suit on a state-created claim that is in federal court only because of the accident of diversity of citizenship seems to me quite indefensible."

One of the strongest voices raised against the creation of federal rules of privilege in diversity cases is that of Judge Friendly, Chief Judge of the Court of Appeals for the 2nd Circuit. Judge Friendly has testified before the House Sub-Committee and expressed his views with clarity and eloquence. Much earlier, in 39 N.Y. Univ. L. Rev., Vol. 39, at page 396 (1964), he said:

> Even when federal jurisdiction rests solely on diverse citizenship, it may be "necessary and proper" for Congress to establish certain kinds of rules, notably as to procedure or in the borderland between "procedure" and "substance". But it would subvert the scheme of the Constitution, as this has come to be understood, to read this auxiliary clause as a catch-all empowering Congress to enact a code of private law applicable to all relations between citizens, subject to the sole qualification that the code applies only when a particular litigant can get into the federal courts under the changing rules that Congress lays down with respect to their jurisdiction.

Professor Mason Ladd, a member of the committee which drafted the Proposed Rules, has himself previously expressed serious reservations concerning the advisability of dealing with the area of privilege by exclusive federal doctrine. Ladd, *Uniform Evidence Rules*, 49 Virginia L. Rev. 692, at 714:

> The distinction between competency and privilege of witnesses illustrates this difference. Competency of a witness is based upon the capacity of a witness to tell the truth, accompanied with a consciousness of the obligation to do so. Deciding the issue of competency of witnesses is a regular function of the judge, and his decisions should be governed by standards which are designed to obtain truthful testimony. Privileges, on the other hand, are established to serve a policy purpose other than truth-testing. Here the objective is to accomplish a social end, even though truthful evidence may be suppressed. Privileges are used to encourage patients to go to doctors, to encourage clients to be candid with lawyers, and to promote family solidarity by making secure the confidential communications between husband and wife. Privileges have a wide application beyond court trials. Thus it might be concluded in the drafting of evidence rules that privileges, other than those affecting the federal government, should be left to the states and should not be narrowed, eliminated or enlarged in their application in the federal courts.

Basic rationale of the view that state-created privileges are to be used in federal diversity cases was well stated in *Application of Cepeda*, 233 F. Supp. 465, at 467 where the court said:

> The Court of Appeals for the Second Circuit, confronted by the problem, observed that "(t)here is considerable confusion in the decisions as to the application of the Erie case and the Federal Rules of Civil Procedure to state evidentiary privileges. However, the weight of authority appears to favor the view that the state rule is to govern . . ." The Court, however, went further and stated that the rule of privilege and the recognition thereof reflected a legislatively determined state policy, and as such it was more than a rule of evidence or a question of procedure but should rather be classified as "substantive or quasi-substantive."

The sum of opposition to inclusion of codified rules of privilege to apply in diversity cases being tried in federal forums can be stated to include at least the following considerations:

> (1) Privileged communications are created as instruments of state policy for reasons which go beyond the question of availability of evidence in private litigation.
>
> (2) As evidentiary privilege is frequently dispositive of the substantive rights of the parties, the question is not properly classified as one of procedure.
>
> (3) There is serious question as to the constitutional power of the federal courts to proscribe state-created privileges in non-federal cases.

CONCLUSION

It is the position of the Association of Trial Lawyers of America, that the present rule of privilege as followed by a vast majority of the courts not be changed by adoption of Rule 501. If the rules undertake to create, eliminate, and

define testimonial privilege, the application of such rules should be limited to litigation directly involving a federal question, and the rule should be drawn so as to require the Rule of state privilege in all diversity cases.

Position Paper on Proposed Federal Rule of Evidence No. 706

SUBMITTED FOR THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA BY THE COMMITTEE OF FEDERAL EVIDENCE AND PROCEDURE

Proposed Rule 706—Court Appointed Experts

(a) Appointment.—The judge may on his 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 judge may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of his own selection. An expert witness shall not be appointed by the judge unless he consents to act. A witness so appointed shall be informed of his duties by the judge 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 judge 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 judge may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and cases involving just compensation under the fifth amendment. In other civil cases the compensation shall be paid by the parties in such proportion and at such time as the judge directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment.—In the exercise of his discretion, the judge 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.

Rule 706—Commentary

Certain authorities, notably Professors Wigmore and McCormick, have long advocated the practice of appointment of so-called impartial experts by the court. The primary thrust of the argument is that the usual course of events, particularly in personal injury trials involving medical experts, is that the experts called by the litigants express widely divergent views of the bodily infirmity of the plaintiff. It is argued that the situation offers no real assistance to the jury in resolving the issue, but merely confuses. The advisory committee note makes specific mention of this problem:

> "The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern."

The committee supports its view with the position that the trial judge has inherent authority to appoint an expert of his own choosing in any event. The committee asserts what such power is "virtually unquestioned." In support of this view cases from two federal circuits are cited, together with secondary authority from Sink and Wigmore. Also referred to is an annotation at 95 A.L.R.2d 383. The cited authority supports the committee position, but examination of the annotation readily discloses that the actual use of such power by the courts over the years has been sparse indeed. Further, many of the cases involved equity matters or other types of litigation in which a jury was not involved. Standing against this limited authority is the undoubted fact that the vast majority of jurisdictions have not allowed the appointment of so-called 'impartial experts' in jury cases.

The proposal here made is not new. As early as 1926 it was suggested by the American Medical Association. *Digest of Official Actions 1846–1958 of the American Medical Association* 225. The Commissioners on Uniform State Laws promulgated the Uniform Expert Testimony Act in 1937. That Act was adopted by one state, South Dakota, in 1952. S.D. Code, Sec. 636.0109–0118 (Supp. 1960). Also in 1952, an impartial medical testimony plan was adopted in the trial court of New York, and in 1953 in Bronx County. NY & Bronx Counties Sup. Ct. R. XI–

12. As of 1967, United States District Courts in five judicial districts had established some form of court appointed medical procedure. 34 Ins. C. Jour. 115, 118 (1967).

Opinion opposing the court appointed expert has been substantial over the years. Julien, *Impartial Medical Plan*, Ins. Law J. 213 (April 1960); Levy, *Impartial Medical Testimony—Revisited*, 34 Temple L. Q. 416 (1961); Berry, *Impartial Medical Testimony*, 32 FRD 539 (1963); Lambert, *Impartial Medical Testimony: A New Audit*, 20 NACCA L.J. 25 (1957).

The statement by the advisory committee to the effect that the power of a trial judge to select an expert of his own choosing is "virtually unquestioned", is not as well grounded as the committee indicates. In that connection, the following statement is made by Wick and Kightlinger, *Impartial Medical Testimony Under the Federal Civil Rules: A Tale of Three Doctors*, 34 Ins. C. Journal 115, at 133:

> "As authority for the broad statement that courts "no longer question" this power, the Second Circuit cited Ex parte Peterson, Wignore and McCormick.
>
> Examining these authorities (except the Peterson case, which has heretofore been discussed and distinguished), they do not come close to upholding the court's power beyond question. Professor Wigmore states only that lack of such power "never will be conceded, so long as the Bench retains a true conception of its constitutional function and a due sense of self-respect." He is plainly expressing *his views of what the law ought to be* with respect to the scope of judicial power, while admitting to a split of authority on what the law is.
>
> In an article by Professor McCormick which the Second Circuit in *Scott v. Spanjer Bros. Inc.*, (298 F.2d 928 (1962)—(Citation Added) also cites in support of its statement that the inherent power of a judge to call expert witnesses is no longer questioned, the author does state that the power to call witnesses is "*fairly* well recognized.'. (Emphasis supplied). As authority for this conclusion, Professor McCormick, in a footnote, cites six cases three upholding the power and three denying it. Apparently, in the case of a tie, the "ayes" have it."

Sub-section (c) of Rule 706 contains the principal evil inherent in its adoption. While all concerned with the trial of law suits involving expert testimony recognize and accept the problem implicit in contradictory evidence of this nature, the suggestion that the court appointed expert be annointed with judicial authority amounts to creating a cure more destructive of the jury system than the disease to which its powers are directed.

Immediately the jury is informed that one of the conflicting opinions has been rendered by an "impartial" expert of the courts choosing, the adversary aspect of the trial is at an end. For anyone of trial experience to believe that such an experts' opinion would not be absolutely taken as controlling by the jury is unlikely. How can the jury reject the testimony of the one expert witness who appears before them clothed in the robe of judicial approval? One of the most eminent trial lawyers in the nation, Harry Gair, said at the 1956 Proceedings of Section of Insurance Law (A.B.A.) (1965):

> "Buttressed as the witness is by the Court's sanction, selected to give the best possible truth, which is to say, to resist the ignorance or errors of partisan doctors, of what avail cross-examination?"

In Lord, *Book Review of Report of Special Committee of New York City Bar on Impartial Medical Testimony* (McMillan 1956), 29 Temple L. Q. 472, at 474 (1956), the author states:

> "Any hope of persuading the jury to reject such an unsullied, untainted opinion would be forlorn, if not non-existent, even though the opinion may be wrong. The almost overwhelming likelihood is that testimony will prevail, not because of its validity, but because of its source."

The underlying basis for this criticism is not that the court appointed expert is a venal man, or one who is consciously biased and prejudiced. The opponents to court appointed experts do not ascribe dishonesty and avarice to the medical community with the same ease as the proponents, but point out that no man alive or dead has ever been truly impartial. All men are the product of their background, education, experience and knowledge. No body of opinion is more agreed than that of the medical profession itself that reasonable men may differ because of the fact that medicine is an art more than a science. There are no absolutes.

There are widely differing schools of thought within the medical profession, which dictate differing views as to many common medical problems. This aspect of the problem was well stated by Justice Walter R. Hart of the New York Supreme Court in 2 *The Plaintiffs Advocate* (N.Y.) 23 (Oct. 1958) where he said:

> "I have heretofore stated that the doctors are assigned under a rotating system which introduces an element of chance into the situation. For instance, there is a difference of opinion with respect to injuries to the abdominal organs, one school holding that a normal appendix cannot be injured by means of a severe non-penetrating blow to the abdomen. Drs. Liniger and Melineus say yes; Drs. Jennings, Burger and Jacob say no. In the case of a diseased appendix Drs. Bissell, Kelly and Goldbeck say yes; Drs. Fowler and Keesler say no. Myocardial infarction due to trauma, Dr. Boas proponent; Drs. Master, Dack and Jaffee opponents. There is likewise a wide conflict on the causation of Parkinson's disease and neoplastic diseases. It will be readily seen that a plaintiff's case is won or lost, depending upon which doctor is next on the rotating list of the particular panel. In the case of a myocardial infarction, if it drew Dr. Boas he is in, but the next plaintiff would draw Dr. Masters and he would be out."

This problem is not resolved by using a method other than rotating panel selection. If the physician is selected by deliberate choice of the trial judge, the problem is the same. What school of thought does the judge believe correct? Is the selecting judge even aware of the medical dispute?

Perhaps the most fundamental flaw in the proposed rule is its willingness to depart from fundamental belief in the efficacy of the jury system as such. The principal proponents of the theory from its inception have been Wigmore and McCormick, neither of whom are noted for their belief in an adversary-jury resolution of such issues. This aspect of the issue was eloquently stated by Howard K. Berry in *Impartial Medical Testimony*, 32 FRD 539, at 544–45 (1963) as follows:

> "A persistent chipping and eroding, taking a minute and imperceptible privilege at a time, may finally cause an invaluable right, in the over-all plan of liberty, to be lost altogether. And this tragic subtraction is usually accomplished by the ill-advised efforts of the better citizens, acting in the utmost good faith, and under the impression that they are protecting and preserving the rights of people, instead of injuring them.
>
> "In a situation such as this, where the technical harm lies hidden deep under a cover of what might appear to be expediency, and the improvement of our plan of trial, it is necessary that the judges and lawyers, with their trained discernment, aided by their experience and practice, be vigilant to see that the wrong path is not taken up, and followed away. First an Impartial Doctor. Then an Impartial Traffic Expert. Then an Impartial Safety Engineer. Don't you see where the thing that you and I call "a fact question for the jury" is headed."

The fears of Mr. Berry that encroachment on the jury system by use of court-appointed medical experts would be followed by proposals that the use of such expert witnesses be used in all possible fields of expertise, has been realized in proposed rule 706. The rule does not apply to medical experts only, but is of general application to all types of expert testimony.

Analysis of the three reasons advanced by the advisory committee note for adoption of Rule 706 demonstrates the weakness of their position.

(1) The committee states the rule is addressed to the problem of "shopping for experts". Rule 706 will not solve this problem, if it be a problem, in any particular. By express provision of the rule, in Sub-section (d), the right of the parties to shop for an call expert witnesses of their own selection is assured.

(2) The committee next asserts they address themselves to the "venality of some experts". Once again, the rule does not grant any authority to the court to preclude the testimony of *any* expert called by the parties. Further, the rule does not and cannot give assurance that the expert selected by the court will be less venal than the expert selected by the parties.

(3) The Committee last points out that many "reputable" experts are reluctant to involve themselves in litigation. Rule 706 likewise does nothing to resolve this problem. Sub-section (a) expressly provides that "An expert witness shall not be appointed by the judge unless he consents to act." There is little or no reason to suppose that an expert who is reluctant to involve himself in litigation will be less reluctant if called by a judge rather than a lawyer.

CONCLUSION

Preservation of the adversary-jury system is more important to the liberties of the American people than the miniscule difficulty inherent in the use of expert witnesses selected by the parties to litigation. There are no impartial experts; there are no impartial human beings. Rule 706 should be rejected in its entirety.

At the very least, clear provisions must be made that the jury will not be informed directly or indirectly that one of the witnesses before them has been selected or approved in any manner by the presiding judge.

CONGRESS OF THE UNITED STATES,
COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Washington, D.C., June 30, 1973.

FEDERAL RULES OF EVIDENCE

The enclosed Committee Print of a tentative Subcommittee draft of H.R. 5463, a bill to establish the Federal Rules of Evidence, and for other purposes, is forwarded for your information, and any comments you may wish to make. Such comments should be in the Subcommittee's hands on or before July 31, 1973.

Printed in bold type are the Rules as sent to the Congress by the Supreme Court. The bracketed material represents deletions recommended by the Subcommittee. The material in italics represents additions recommended by the Subcommittee.

This reprint is being circulated for comment to the Judicial Conference of the United States, the American Bar Association, the State Bar associations of the 50 States, the District of Columbia Bar Association, and individuals and organizations of whose interest we are aware. Additional copies may be obtained from the Subcommittee on Criminal Justice, Committee on the Judiciary, House of Represenatives, Washington, D.C. 20515 (202-225-3926).

Let me emphasize, that comments must be received by the Subcommittee not later than July 31, 1973. All comments timely submitted will be made available for study by the Subcommittee and its staff during the month of August.

WILLIAM L. HUNGATE,
*Chairman, Subcommittee on Criminal Justice.**

Enclosure.

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*Previously designated Special Subcommittee on Reform of Federal Criminal Laws.

[COMMITTEE PRINT]

[JUNE 28, 1973]

H.R. 5463

93d Cong., 1st sess., as amended by the Subcommittee on Criminal Justice, House Committee on the Judiciary

NOTE: Changes proposed by the Subcommittee to the Rules of Evidence as transmitted to the Congress from the Supreme Court are shown as follows: The rules as transmitted to the Congress are printed in roman; brackets indicate material deleted by the Subcommittee; and italics indicate material added by the Subcommittee.

A BILL To establish [rules of evidence for certain courts and proceedings] *the Federal Rules of Evidence, and for other purposes*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following rules, which may be cited as the "Federal Rules of Evidence," shall be[,] effective six months after the date of the enactment of this Act[,]. [the rules of evidence, to the extent set forth in such rules, in the United States courts of appeals, the United States district courts, the District Court for the District of the Canal Zone, and the District Courts of Guam and the Virgin Islands, and before United States magistrates]:

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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 judge by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling.—The judge 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. He 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 judge.

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 judge, subject to the provisions of subdivision (b). In making his determination he 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 judge 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.

Subcommittee Note

The Subcommittee adopted the March 1971 draft version of subdivision (c). Although recognizing that in some instances duplication of evidence would occur and that the procedure could be subject to abuse, the Subcommittee felt that a proper regard for the right of an accused not to testify generally in the case requires that he be given an option to testify out of the presence of the jury on preliminary matters.

[Rule 105. Summing Up and Comment by Judge

[After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.]

Subcommittee Note

The Subcommittee recognized that the Rule was consistent with existing practice in the Federal courts but felt that the question whether the trial judge should be allowed to comment on the weight of the evidence and the credibility of witnesses was primarily procedural rather than evidentiary and thus inappropriate in a code of evidence.

Rule 10[6] *5.* 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 judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 10[7] *6.* 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)](*a*) 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)](*b*) When discretionary.—A judge or court may take judicial notice, whether requested or not.

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

[(e)](*d*) 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)](*e*) Time of taking notice.—Judicial notice may be taken at any stage of the proceeding.

[(g) Instructing jury.—The judge shall instruct the jury to accept as established any facts judicially noticed.]

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Subcommittee Note

As proposed, Article II was restricted by subdivision (a) to "adjudicative" facts, as contrasted with "legislative" facts. The import of both terms was discussed in the Advisory Committee's note, but the Subcommittee nonetheless felt that the distinction was not clear and would breed litigation. The Subcommittee also felt that differing treatment for the two types of facts was unjustified. Accordingly, subdivision (a) was deleted.

As proposed, subdivision (g) would have precluded a judge from admitting evidence in disproof of facts of which judicial notice had been taken. Believing that judicial notice should be treated on the same basis as any other evidence which is admitted—subject to refutation—the Subcommittee deleted this subdivision.

ARTICLE III. PRESUMPTIONS *IN CIVIL ACTIONS*

Rule 301. Presumptions in General *in Civil Actions*

In all *civil* [cases] *actions* 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 proving that the nonexistence of the presumed fact is more probable than its existence.

Subcommittee Note

The word "civil" was added to effectuate the Subcommittee's decision not to deal with the question of presumptions in criminal cases. See Rule 303. Throughout, references to "civil cases" have been made "civil actions", the term used in the Federal Rules of Civil Procedure.

Rule 302. Applicability of State Law in Civil [Cases] *Actions*

In civil actions, 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.

[Rule 303. Presumptions in Criminal Cases

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

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

[(c) Instructing the jury.—Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic

facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.]

Subcommittee Note

Rule 303 was deleted since the subject of presumptions in criminal cases is dealt with in the proposals of the Brown Commission and S. 1 to revise the criminal code. The Subcommittee determined to consider this issue in the course of its study of these proposals, commencing later this Congress.

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 [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority*. Evidence which is not relevant is not admissible.

Subcommittee Note

To accommodate the view that the Congress should do nothing which would indicate congressional acquiescence in the judgment that the Court has authority to promulgate Rules of Evidence, and the concern that the Congress must not affect adversely whatever authority the Court does have to promulgate rules, the Subcommittee amended "by other rules adopted by the Supreme Court" to read "by other rules prescribed by the Supreme Court pursuant to statutory authority" in this and other rules where the reference appears.

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. [This subdivision does not exclude the evidence when offered] *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.

Subcommittee Note

In the March 1971 draft the second sentence of (b) began "It may, however, be admissible for other purposes. . . ." The Subcommittee preferred the 1971 formulation as placing greater emphasis on admissibility than did the final Court version.

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.

Subcommittee Note

The Subcommittee approved subdivision (b) as proposed by the Court, with the specific understanding that the Rule applies only in those relatively rare situations where character is truly an issue in the case.

Rule 406. Habit; Routine Practice

(a) Admissibility.—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.

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

Subcommittee Note

This rule was approved as proposed by the Court, although the Subcommittee was aware of the comments submitted to the Advisory Committee when the 1969 and 1971 drafts were circulated. The comments

brought to the Subcommittee's attention were excerpted by the Reporter from reports of the following:

Association of the Bar of the City of New York, Second Circuit Conference Committee on Trial Practice and Technique, New York County Lawyers Association Committee on Federal Courts, Arizona State Bar Trial Practice Section, Washington State Bar Association Committee, American College of Trial Lawyers Committee, Florida State Bar Federal Rules Committee, Department of Justice, South Carolina Chapter of the American College of Trial Lawyers, the Virginia Trial Lawyers Association, the District of Columbia Judicial Conference Special Committee, and the American Bar Association Special Committees on Federal Rules of Procedure and Uniform Rules of Evidence for Federal Courts.

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 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 Guilty; Nolo Contendere; Withdrawn Plea of Guilty

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 proceeding against the person who made the plea or offer.

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. [Privileges Recognized Only as Provided] *General Rule*

[Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

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

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

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: Provided, That in civil actions, with respect to 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.

Subcommittee Note

The Subcommittee eliminated the proposed specific rules on privileges and, through a single Rule, 501, left the law of privileges in its present state—to be developed by the Federal courts in accordance with the standard contained in Rule 26 of the Federal Rules of Criminal Procedure. That is, privileges shall be governed by the principles of the common law as interpreted by the courts in the light of reason and experience. The words "person, government, State, or political subdivision thereof" were added to the lone term "witnesses" used in Rule 26 to make clear, that, as under present law, not only witnesses may have privileges.

The proviso in Rule 501 as adopted by the Subcommittee, is modeled after Rule 302 and is similar to language added by the Subcommittee to Rule 601 relating to the competency of witnesses. It is designed to mandate the application of State privilege law in civil actions governed by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, a result in accord with current Federal court decisions. The Subcommittee deemed the proviso to be necessary in light of the Advisory Committee's view (see its note to Court Rule 501) that this result is not mandated under *Erie*.

[Rule 502. Required Reports Privileged by Statute

[A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides.

No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

[Rule 503. Lawyer-Client Privilege

[(a) Definitions.—As used in this rule:

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

[(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any State or nation.

[(3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

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

[(b) General rule of privilege.—A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

[(c) Who may claim the privilege.—The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

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

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

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

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

[(4) Document attested by lawyer.—As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

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

[Rule 504. Psychotherapist-Patient Privilege

[(a) Definitions—

[(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

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

[(3) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

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

[(c) Who may claim the privilege.—The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

[(d) Exceptions—

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

[(2) Examination by order of judge.—If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

[(3) Condition an element of claim or defense.—There is no privilege under this rule as to communications relevant to an issue

of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

[Rule 505. Husband-Wife Privilege

[(a) General rule of privilege.—An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

[(b) Who may claim the privilege.—The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.

[(c) Exceptions.—There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of section 1328 of title 8, United States Code, with transporting a female in interstate commerce for immoral purposes or other offense in violation of sections 2421–2424 of title 18, United States Code, or with violation of other similar statutes.

[Rule 506. Communications to Clergymen

[(a) Definitions.—As used in this rule—

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

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

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

[(c) Who may claim the privilege.—The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

[Rule 507. Political Vote

[Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

[Rule 508. Trade Secrets

[A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from

disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

[Rule 509. Secrets of State and Other Official Information

[(a) Definitions.—

[(1) Secret of state.—A "secret of state" is a governmental secret relating to the national defense or the international relations of the United States.

[(2) Official information.—"Official information" is information within the custody or control of a department or agency of the Government the disclosure of which is shown to be contrary to the public interest and which consists of (A) intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions, or (B) subject to the provisions of section 3500 of title 18, United States Code, investigatory files compiled for law enforcement purposes and not otherwise available, or (C) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to section 552 of title 5, United States Code.

[(b) General rule of privilege.—The Government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.

[(c) Procedures.—The privilege for secrets of state may be claimed only by the chief officer of the Government agency or department administering the subject matter which the secret information sought concerns, but the privilege for official information may be asserted by any attorney representing the Government. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of secrets of state, the judge, upon motion of the Government, may permit the Government to make the required showing in the above form in camera. If the judge sustains the privilege upon a showing in camera, the entire text of the Government's statements shall be sealed and preserved in the court's records in the event of appeal. In the case of privilege claimed for official information the court may require examination in camera of the information itself. The judge may take any protective measure which the interests of the Government and the furtherance of justice may require.

[(d) Notice to Government.—If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of

knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

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

[Rule 510. Identity of Informer

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

[(b) Who may claim.—The privilege may be claimed by an appropriate representative of the Government, regardless of whether the information was furnished to an officer of the Government or of a State or subdivision thereof. The privilege may be claimed by an appropriate representative of a State or subdivision if the information was furnished to an officer thereof, except that in criminal cases the privilege shall not be allowed if the Government objects.

[(c) Exceptions.—

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

[(2) Testimony on merits.—If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the Government is a party, and the Government invokes the privilege, the judge shall give the Government an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the Government elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on his own motion. In civil cases, he may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents

shall not otherwise be revealed without consent of the Government. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera, at which no counsel or party shall be permitted to be present.

[(3) Legality of obtaining evidence.—If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed. The judge shall, on request of the Government, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the Government.

[Rule 511. Waiver of Privilege by Voluntary Disclosure

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

[Rule 512. Privileged Matter Disclosed Under Compulsion or Without Opportunity To Claim Privilege

[Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

[Rule 513. Comment Upon or Inference From Claim of Privilege; Instruction

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

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

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

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, with respect to 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.*

Subcommittee Note

One effect of the Rule as originally proposed would have been to abolish religious belief, conviction of crime, and other grounds recognized in some 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. Recognizing that there is substantial disagreement as to the merit of Dead Man's Statutes, the Subcommittee nevertheless felt 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 Subcommittee therefore amended the Rule to make competency in civil actions determinable in accordance with State law with respect to claims or defenses as to which the State law supplies the rule of decision.

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] *concerning* 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 which he would be precluded from testifying] *indicating an effect of this kind* be received *for these purposes.*

Subcommittee Note

As proposed, subdivision (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); 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 deliberations.

The 1969 and the 1971 drafts would have permitted a member of the jury to testify concerning irregularities occurring in the jury room. The Advisory Committee comment to subdivision (b) 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 in the 1971 draft 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 inner 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.

Apparently, 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 Subcommittee approved subdivision (b) in the text of those drafts.

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 reputation or opinion, 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 [and not remote in time], be inquired into on cross-examination of the witness [himself or on cross-examination of a witness who testifies to his character for truthfulness or untruthfulness] *(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.

Subcommittee Note

The second sentence of subdivision (b) as proposed 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 Subcommittee redrafted the second sentence to emphasize the discretionary role 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?). The Subcommittee is of the view that explicitly referring to the discretion of the court and deleting the reference to remoteness is a more practical way to deal with the subject. As recast, the subdivision makes clear the antecedent of "his" in the original.

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 is admissible *if*, 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)] *(1) the crime* involved dishonesty or false statement [regardless of the punishment], *or (2) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, unless the judge determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction.*

(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 *conviction or 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.

(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 substantial showing of rehabilitation and the witness has not been convicted of a subsequent crime, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on innocence.

(d) Juvenile adjudications.—Evidence of juvenile adjudications is generally not admissible under this rule. The judge 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 judge 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.

Subcommittee Note

The Advisory Committee note stated: "There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose." The Subcommittee consideration of this Rule made this clear. Sentiment was expressed that only convictions of offenses bearing on credibility should be admissible; as proposed, the Rule had no such limitation. Sentiment was expressed in support of the formulation of the 1971 draft—no conviction should be admissible if "the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice." Concern was voiced as to whether there should be an arbitrary time limitation such as that contained in subdivision (b), and whether and under what circumstances juvenile adjudications should be admissible.

The Subcommittee draft addresses and disposes of these considerations as follows:

(1) Subdivision (a) was amended so that convictions of crimes involving dishonesty or false statements are always admissible to attack credibility. However, for all other crimes, convictions of only those which are felonies by Federal standards will be admissible unless the judge determines that the danger of unfair prejudice outweighs the probative value of the evidence of the convictions.

(2) Subdivision (b) was amended to read in the text of the 1971 Advisory Committee draft as constituting a fairer, more reasonable, time measure than that in the draft submitted to the Congress.

(3) Subdivision (d) was amended to confer upon a judge discretion to admit evidence of juvenile adjudications in criminal cases only. This appeared to be the intention of the Court, judging from the use of the word "accused" in the second sentence of subdivision (d) as submitted to the Congress.

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 of Order of Interrogation and Presentation

(a) Control by judge.—The judge 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.—[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.] *Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge 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. In civil [cases] *actions*, a party is entitled to call an adverse party or witness identified with [him] *such adverse party* and interrogate by leading questions.

Subcommitee Note

The Subcommittee amended subdivision (b) to return to the rule which prevails in the Federal courts and 39 State jurisdictions. As amended, the Rule is in the text of the 1969 draft; it limits cross-examination to credibility and to matters testified to on direct examination, unless the judge permits more. This more traditional rule facilitates orderly presentations and progress at trial. Further, in the light of existing discovery procedures, there appears to be no need to abandon the traditional rule.

The Subcommittee change in (c) is intended merely to clarify that the "him" in the last line of the Rule as submitted to the Congress is the adverse party.

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 before or while 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 [it] *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 judge 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 judge 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 judge in his discretion determines that the interests of justice so require, declaring a mistrial.

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Subcommittee Note

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 Subcommittee recast the first sentence of the Rule to permit access to any such writings only if the court determines access is in the interest of justice.

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 Judge

(a) Calling by judge.—The judge may, on his 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 judge.—The judge may interrogate witnesses, whether called by himself or by a party.

(c) Objections.—Objections to the calling of witnesses by the judge or to interrogation by him 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 judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and he may make the order of his 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 judge 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 judge may on his 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 judge may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of his own selection. An expert witness shall not be appointed by the judge unless he consents to act. A witness so appointed shall be informed of his duties by the judge 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 judge 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 judge may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and cases involving just compensation under the fifth amendment. In other civil cases the compensation shall be paid by the parties in such proportion and at such time as the judge directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment.—In the exercise of his discretion, the judge 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, 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 (C) one of identification of a person made after perceiving him: *Provided, That a prior inconsistent statement under clause (A) shall not be admissible as proof of the facts stated unless it was given under oath and subject to the penalty of perjury at a trial or hearing or in a deposition or before a grand jury*; 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.

Subcommittee Note

Present Federal law generally permits the use of prior inconsistent statements of a witness for impeachment only. Subdivision (d)(1) as proposed by the Court would permit such statements to be admissible as substantive evidence. Although there was some support expressed for the Court Rule, based largely on the need to counteract the effect of witness intimidation, the Subcommittee tentatively decided to adopt a compromise version of the Rule patterned after the position of the Second Circuit. See *United States* v. *De Sisto*, 329 F.2d 929, cert. denied, 377 U.S. 979; *United States* v. *Cunningham*, 446 F.2d 194. The Rule as approved draws a distinction between types of prior inconsistent state-

ments and allows only those made before a grand jury, or at a trial or hearing, or in a deposition, to be admissible for their truth. The rationale for the Subcommittee's decision was that (1) unlike in other situations, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding and an oath provide firm additional assurances of the reliability of the statement. The Subcommittee intends that nothing in the Rule should be deemed to impair the secrecy of grand jury investigations.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules [adopted] *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 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 *business or professional* 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, [all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other

circumstances indicate lack of trustworthiness.] *if kept in the course of a regularly conducted business or professional activity, and if it was the regular practice of such business or professional activity to make such 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.*

(7) Absence of entry in records [of regularly conducted activity] *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, [of a regularly conducted activity] *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, or (C) in civil [cases] *actions* 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 [whose authenticity] *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 comparable circumstantial guarantees of trustworthiness.]

Subcommittee Note

Subdivision (4) was approved as submitted by the Court, with the understanding that it was not intended in any way adversely to affect substantive privilege laws or any privilege rules which might be adopted.

Subdivision (5) was approved as submitted by the Court, with the understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. Moreover, the same principle was deemed applicable to all the hearsay rules.

Subdivision (6) of the Court Rule permitted a record made "in the course of a regularly conducted activity" to be admissible in certain circumstances. The Subcommittee believed that there were insufficient guarantees of reliability in records made in the course of regularly conducted non-business or non-professional activities. Moreover, it concluded that the additional requirement of present law (28 U.S.C. 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 Rule was accordingly redrafted to incorporate these limitations.

Subdivision (7) was amended to reflect the Subcommittee's action with respect to subdivision (6).

Subdivision (8) was approved as submitted by the Court, with the understanding that evaluations or opinions contained in public reports would not be admissible, and intending that the term "factual findings" should be strictly construed.

The Subcommittee made a purely formal amendment to subdivision (16).

The Subcommittee agreed to delete subdivision (24) as injecting too much uncertainty into the law of evidence. It was noted that Rule 102 directs the courts to construe these Rules of Evidence so as to promote "growth and development." If additional hearsay exceptions are to be created, they should be by amendments to these Rules, not on a case-by-case basis.

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 judge 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 judge 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 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 procure-

ment 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 another proceeding, [at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.] *if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity to develop the testimony by direct, cross, or redirect examination.*

[(2) Statement of recent perception.—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.]

[(3)](*2*) Statement under belief of impending death.—[A] *In a prosecution for homicide or in a civil case, 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.

[(4)](*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 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 expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless [corroborated.] *corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not admissible.*

[(5)] (*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.

[(6) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.]

Subcommittee Note

The Subcommittee amendment to subdivision (a)(5) is primarily designed to require that an attempt be made to depose a witness as a precondition to the witness' being deemed "unavailable."

Subdivision (b)(1) of the Court Rule allowed prior testimony of a 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 Subcommittee believed it is generally unfair to impose upon the party against whom the hearsay is being offered responsibility for the manner in which the witness was previously handled. The sole exception to this, in the Subcommittee's view, is where a party's predecessor in interest had the prior opportunity to examine the witness. The subdivision was amended to reflect these policy determinations.

The Subcommittee tentatively voted to delete subdivision (b)(2) as creating a new and unwarranted hearsay exception of great potential breadth. The Subcommittee did not believe that statements of the type referred to in the proposed Court Rule bore sufficient guarantees of trustworthiness to justify admissibility.

Subdivision (b)(3) of the Court Rule 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 Subcommittee 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. At the same time, the Subcommittee approved the expansion to civil cases, although noting the possibility that this could lead to forum shopping in some cases.

Subdivision (b)(4) proposed to expand the hearsay exception from its present Federal limitation (i.e. statements against pecuniary or proprietary interest) to include statements subjecting the declarant to civil or criminal liability, statements rendering invalid a claim by the declarant against another, and statements tending to make the declarant an object of hatred, ridicule, or disgrace. The Subcommittee was of the view that all of these additional varieties of "against interest" statements, other than those tending to expose the declarant to criminal liability, lacked sufficient guarantees of reliability. It therefore eliminated these from the subdivision. As for statements against penal interest, the Subcommittee also believed, as did the Court, that statements of this type, tending to exculpate the accused were more suspect and so should be conditioned upon some further provision insuring trustworthiness. The proposal in the Court Rule to add a requirement of corroboration 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 Subcommittee settled on 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 cases like *Donnelly* v. *United States*, 228 U.S. 243, where the circumstances clearly indicated reliability, would be changed. The Subcommittee also determined to add to the Rule the final sentence from the 1971 draft, designed to codify the doctrine of *Bruton* v. *United States*, 391 U.S. 123. The Subcommittee did 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 event the declarant would not be "unavailable."

Subdivision (b)(6) was deleted for the same reasons underlying the deletion of Rule 803(24).

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 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 compilations.—Evidence that a document or data compilation, in any form, (A) is in such condi-

tion 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 [adopted] *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 judge 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 [adopted] *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 [under the hand and seal of] *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.

Subcommittee Note

Subdivision (8) was redrafted 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 required by the law of the State which authorized the notary to take the acknowledgment.

The Subcommittee determined tentatively to approve subdivision (9) as submitted by the Court. However, there was considerable discussion concerning the meaning of the term "general commercial law". The Subcommittee 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. 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 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 technique which accurately reproduces the original.

Subcommittee Note

The Subcommittee amended subdivision (2) specifically to include video tapes in the definition of "photographs."

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.

Subcommittee Note

Although the Subcommittee approved this Rule without change, some concern was expressed about any possible impact it might have on the so-called "best evidence" rule.

With respect to clause (1), the Subcommittee intends that the courts should be liberal in deciding "a genuine question is raised as to the authenticity 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 con-

tents 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.

Subcommittee Note

With respect to subdivision (1), the Subcommittee assumes that loss or destruction of an original by another at the instigation of the proponent would be tantamount to loss or destruction by the proponent himself.

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 a reasonable time and place. The judge 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 Judge 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 judge to determine. 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, and to United States magistrates, in the proceedings and to the extent hereinafter set forth. The word "judge" in these rules includes United States magistrates and referees in bankruptcy.

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

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

(d) Rules inapplicable.—The rules (other than [those] with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under rule 104(a).

(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 [adopted] *prescribed* by the Supreme Court *under 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 Secretary of Agriculture under sections 292, 499f and 499g (c) of title 7, United States Code; naturalization and revocation of naturalization under sections 1421–1429 of title 8, United States Code; prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of Secretary of the Interior under section 522 of title 15, United States Code; review of orders of petroleum control boards under section 715d of title 15, United States Code; actions for fines, penalties, or forfeitures under the Tariff Act of 1930 (19 U.S.C., c. 4, part V), or under the Anti-Smuggling Act (19 U.S.C., c. 5); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C., c. 9); disputes between seamen under sections 256–258 of title 22, United States Code; 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 679 of title 46, United States Code; actions against the United States for damages caused by or for towage or salvage services rendered to public vessels under chapter 22 of title 46, United States Code, as implemented by section 7730 of title 10, United States Code.] *review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize associations 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.

Subcommittee Note

Technical changes were made in subdivisions (c) and (d) to reflect the Subcommittee's action with respect to Article V.

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

Rule 1102. Title

These rules may be known and cited as the Federal Rules of Evidence.

Sec. 2. Title 28 of the United States Code is amended—

(1) by inserting immediately after section 1656 the following new section:

"*§ 1657. 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*

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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."; and

(2) by adding at the end of the table of sections of chapter 111 the following new item:

"*1657. Rules of Evidence.*"

Sec. [2] *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 six months after the date of the enactment of this Act.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES,
SUPREME COURT BUILDING,
Washington, D.C., June 30, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Thank you for sending the copy of the Congressional Record of June 26th and the Committee Print showing amendments to the proposed evidence rules as drafted by your subcommittee. As you may know, a joint meeting of the Advisory Committee and the Standing Committee of the Judicial Conference has been scheduled for a period beginning July 16th to consider these matters. No doubt a report will be forwarded to you in due course.

You, the subcommittee, and the staff are most certainly due congratulations for the dispatch with which you have proceeded. It has been a pleasure to render such assistance as I could.

Sincerely yours,

EDWARD W. CLEARY,
Reporter.

ZUGER & BUCKLIN,
COUNSELORS AND ATTORNEYS AT LAW,
Bismarck, N. Dak., July 2, 1973.

Re Federal Rules of Evidence.

Mr. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.:

I am Chairman of the North Dakota State Bar Association Committee on Procedural Law. We have, for the past year, been studying the proposed Federal Rules of Evidence with a view to adopting a similar Code in North Dakota. The following comments are made in light of the study which our committee has given during the last year to the Federal Rules of Evidence.

Generally speaking, our committee is heartily in favor of adoption of the proposed Federal Rules of Evidence. The proposed Code is needed. The proposed Code is generally well thought out. I will not further elaborate our thoughts in support of the proposed Federal Rules of Evidence.

I now turn to your subcommittee's tentative draft in which various material, as submitted by the Supreme Court, has been deleted and other material added.

RULE 201. JUDICIAL NOTICE

Rule 201 provides that a judicially noticed fact "must be one not subject to reasonable dispute". If it is a fact not subject to reasonable dispute, there is no issue about it and the jury cannot disregard it.

Therefore, the deletion of subparagraph (g) can only be construed as allowing the jury to find contrary to a fact which is not in issue. We urge the subcommittee to again put in subdivision (g), or else risk the theory that judicially noticed facts are something other than they are defined in subdivision (a).

RULE 303. PRESUMPTIONS IN CRIMINAL CASES

Our committee believes that the Code of Evidence should be a Code for all cases, and should not be restricted to civil cases only. We, therefore, respectfully suggest that the Supreme Court's idea of having one Code for both civil and criminal cases be followed, and that the criminal rules be once again put back into the proposed Code.

ARTICLE V. PRIVILEGES

Our committee spent a long time studying and debating the Rules regarding privileges. They had come to the conclusion that the proposals adopted by the United States Supreme Court were far more satisfactory than the present state of the law. The sub-committee's elimination of the specific Rules on privilege is re-

garded by us as an elimination of one of the most desirable features of the proposed Code of Evidence. Unfortunately the committee's elimination of the specific Rules of privilege will be regarded by many lawyers as simply what happens when you try to put through a legislative process a very detailed and well thought out proposal. That is, the objections to details prevents forward steps. We would respectfully urge the committee to reinstate the specific Rules regarding privileges.

Certainly if the Congress feels the proposals by the United States Supreme Court and by the very many lawyers who work with these Rules are inappropriate, Congress should not simply reject the proposals, but should write its own Rules regarding privileges.

Specific Rules are needed. The privilege Rules that exist at common law and in the various states need desperately to be reworked. If Congress rejects proposals, Congress has an obligation to put forth its own specific proposals.

RULE 601. GENERAL RULE OF COMPETENCY

One effect of the Rule as originally proposed is to abolish in the Federal Court several grounds making a person incompetent when those grounds simply do not make much sense anymore. Congressional action to put those grounds back into the Federal Court simply because some state courts have them, is a step which prevents the Code from being controversial, but also prevents it from doing the justice that it should be doing.

RULE 611. MODE OF ORDER OF INTERROGATION AND PRESENTATION

We agree that cross examination should be limited in the manner proposed by the subcommittee.

RULE 801. DEFINITIONS (OF HEARSAY)

Our committee, although working on this Code of Evidence for more than a year, has not specifically made recommendations regarding the hearsay sections of the Code.

However you may be interested to know that the North Dakota Court specifically adopted as a state Rule the Rule set out in proposed Rule 801. The discussion is found in the cases of *State v. Igoe*, 206 NW 2d 291 (ND 1973). Although the North Dakota court did not specifically limit the Rule to the factual situation then before it, the factual situation then before the Court does fall within the limitations proposed by your subcommittee.

RULE 802. HEARSAY RULE

It is doubted that hearsay should be admissible only when an act of Congress authorizes it. The courts must have some freedom to establish their own Rules of Evidence. One wonders what the effect of the Rule as proposed by the subcommittee would be in the situation where the parties have not objected to the use of hearsay evidence.

RULE 803. HEARSAY EXCEPTIONS

The change in subdivision 6 regarding business records creates quite a problem in a state where there are mostly small businesses. There are many records made in the course of a small business that are simply being made for the first (and perhaps only) time. The additional requirement proposed by the sub-committee that it must be the regular practice of the business to make the particular record, would eliminate many records which are as trustworthy as though made by General Motors Corporation accountants.

RULE 804. HEARSAY EXCEPTIONS—DECLARANT UNAVAILABLE

The sub-committee amendment to subdivision (a)(5) requiring a deposition is a requirement of expense and time, and becomes a trap for the unwary or those unable to afford deposing of all their own witnesses before trial.

GENERAL COMMENT

Generally, the lack of specific comment in this letter indicates that as to changes made by your sub-committee, our position is that the change is either of no great significance or is beneficial.

Respectfully submitted,

LEONARD H. BUCKLIN,
Chairman, North Dakota State Bar Committee on Procedure.

CASE WESTERN RESERVE UNIVERSITY,
Cleveland, Ohio, July 3, 1973.

Hon. WILLIAM L. HUNGATE,
Representative of the State of Missouri, Chairman, House Criminal Justice Subcommittee, House Judiciary Committee, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: From today's newspaper I learned that your Committee has recommended modifications in the proposed Rules of Evidence. Although the newspaper report is not too clear, it seems that proposed Rule 509 (a)(2) (Privilege with respect to Official Information) was eliminated. I had planned to write to you with respect to Rule 509 earlier and may take this opportunity to state my legal objections to part of Rule 509.

Apparently the provision of Rule 509(a)(2) sought to codify the "executive privilege" doctrine as it had developed since the case of *Kaiser Aluminum & Chemical Corp.* v. *United States*, 141 Ct. Cl. 38, 157 F. Supp. 938 (1958), in which retired Associate Justice Reed, sitting by designation in the Court of Claims, had developed that doctrine. (See Schwartz-Jacoby, *Litigation with the Federal Government* (Joint Committee on Continuing Legal Education of the ALI–ABA, 1970), pp. 261–265). I am afraid that Rule 509(a)(2) and the Advisory Committee's Note attached thereto failed to furnish a complete picture of existing law with respect to "executive privilege." In the *Kaiser Aluminum* case there was a specific qualification of executive privilege when the author of the memorandum "played a part in the operative events." In the words of Mr. Justice Reed: "If the Special Assistant played a part in the operative events, *e.g.*, determination of costs or values, representations to Kaiser or Reynolds or survey of the plants, a different situation might exist." (141 Ct. Cl. at 47, 157 F. Supp. at 944). And the courts have been consistent in disallowing "executive privilege" in line with Mr. Justice Reed's qualification. Thus, the Court of Claims has required production of a summary of facts by a Navy selection board accompanying a submission to the President (*Richard A. Weiss* v. *United States*, 180 Ct. Cl. 863 (1967)); interoffice reports and memoranda of the Internal Revenue Service were required to be produced where the issue was the merits of the Government's claim of an erroneous tax refund (*United States* v. *San Antonio Portland Cement Company*, 33 F.R.D. 513 (W.D. Texas 1963)); National Labor Relations Board records were ordered disclosed in a case involving the issue whether a hearing required by statute had been accorded (*Sperandeo* v. *Milk Drivers & Dairy Employees U. No. 537*, 344 F.2d 381 (10th Cir. 1964)); similarly, inspection of a N.L.R.B. investigatory file was ordered in a proceeding relating to the company's good faith in collective bargaining (*Olson Rug Company* v. *N.L.R.B.*, 291 F.2d 655 (7th Cir. 1961)); in particular, production was ordered of inter-office memoranda among the "upper echelons" of the Department of Justice in a case where the issue was whether the Department had improperly used grand jury proceedings as a device to obtain evidence for a civil case (*United States* v. *Procter & Gamble Co.*, 187 F. Supp. 55, 58–61 (D.N.J. 1960)).

In fact, the case of *Davis* v. *Braswell Motor Freight Lines, Inc.*, 363 F.2d 600 (5th Cir. 1966), cited in the Advisory Committee's Note, contains the following footnote 5 (at p. 605): " 'Appellant [the Regional Director of the N.L.R.B.] admits that its asserted privilege is not absolute and that in some situations 'a litigant's need for data in Government files may be so compelling and the dangers of disclosure so minimal that discovery would be appropriate.' Brief for Appellant, p. 27." Also, it should be noted that the case of *Ackerly* v. *Ley*, 420 F.2d 1336 (D.C. Cir. 1969), cited in the Advisory Committee Note, in no way attempted to abolish the qualification contained in *Kaiser Aluminum*. The other cases cited by the Advisory Committee (*Boeing Airplane Co.* v. *Coggeshall*, 280 F.2d 654 (1960), and *Freeman* v. *Seligson*, 405 F.2d 1326 (1968)), though permitting the government agency to raise "executive privilege" without being a party, actually resulted in rejecting the privilege and in requiring production in line with the qualification expressed in *Kaiser Aluminum*.

Accordingly, it is my opinion that the Advisory Committee Note in no way supports a view disregarding the qualification in *Kaiser Aluminum*. It is also my opinion that abolition of the qualification is legally undesirable. Such abolition—and an apparently exclusive reliance on the broad concept of "public interest"—in my opinion seems opposite to clear legislative trends. For about 100 years production of government documents in the Court of Claims was only pursuant

to the "Call" provision (28 U.S.C. § 2507) under which the head of any department or agency "may refuse to comply with a call . . . when, in his opinion, compliance will be injurious to the public interest." In 1954 (68 Stat. 1247) broad discovery powers were granted by Congress to the Court of Claims in an amendment of 28 U.S.C. § 2507, and it was in the exercise of such discovery powers that the *Kaiser Aluminum* rule, together with its qualification, was developed. In my opinion Rule 509(a)(2) of the Proposed Rules of Evidence smacks too much of the "call" provision and would constitute a retrogressive step in the legislative development.

Very respectfully yours,

SIDNEY B. JACOBY,
Professor of Law.

UNIVERSITY OF WASHINGTON,
Seattle, Wash., July 3, 1973.

Hon. WILLIAM L. HUNGATE,
House of Representatives of the Congress of the United States, Chairman, Subcommittee on Criminal Justice, Committee on Judiciary, Washington, D.C.

DEAR REPRESENTATIVE HUNGATE: Thank you for a copy of the Committee Print, June 28, 1973, of the subcommittee's proposed revision of the federal rules of evidence.

By letter of May 18, 1973, addressed to you, the Washington State Bar Association Committee on Federal Rules submitted comments on the rules as issued by the Supreme Court. The new draft of the subcommittee does directly or indirectly respond to some of our committee's principal criticisms.

However, I would appreciate receiving by return mail eight copies of the committee draft to distribute to the members of our state committee in order to ascertain whether the committee wishes to make any further comments before July 31, 1973. Please bill me for any costs involved.

My purely personal opinion (and not the opinion of the committee) is that there is much improvement in your present subcommittee version.

Very truly yours,

ROBERT MEISENHOLDER,
Chairman, Committee on Federal Rules,
Washington State Bar Association.

U.S. COURT OF APPEALS,
SIXTH CIRCUIT, MICHIGAN-OHIO-KENTUCKY-TENNESSEE,
Port Huron, Mich., July 3, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN HUNGATE: I have before me your letter of June 30 in regard to the proposed *Federal Rules of Evidence.*

I have heretofore written to Senators Hart and Griffin and to Members of Congress, Ford, Harvey, O'Hara and Hutchinson, furnishing them with a memorandum which expressed my objection to and criticism of proposed Rule 803(18), which has to do with the use of "Learned Treatises," where the authors thereof are not presented as witnesses. May I add to the material I have sent to them the enclosed remarks which I addressed to the Judicial Conference of the U.S. Court of Appeals for the Sixth Circuit at its recent meeting in Louisville, Kentucky. This was at a session of the Conference which had to do with the proposed new rules of evidence. After this presentation, many of the practicing attorneys present, as well as some of the District Judges, expressed their agreement with my observations. I also enclose a copy of the dissenting opinion of Justice Eugene F. Black of the Supreme Court of Michigan in which he discusses the use of medical books. I think it is pertinent to consideration of the proposed rule 803(18).

I have the Committee Print which was enclosed with your letter, and note that no change has been made in the proposed Rule 803(18) concerning the use of Learned Treatises.

May I ask that your Committee give serious consideration to elimination of this Rule?

Respectfully yours,

CLIFFORD O'SULLIVAN.

Enclosures.

NOTE: Dissenting opinion of Justice Eugene F. Black in *Jones* v. *Bloom* 388 Mich. 98, may be found after his earlier letter of April 4, 1973.

Rule 803(18) reads as follows:

"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."

From my reading of this rule, the ways of getting into evidence a writing purporting to be a "Learned Treatise" are:

(1) For the attorney offering a witness to ask him whether in arriving at his conclusion he relied, at least in part, upon a book or writing claimed to be a Learned Treatise. The next question would be whether such writing, in the view of the witness, is a "Learned Treatise." What expert will fail to recognize as "learned" a relevant writing that supports him?

(2) Upon cross-examination, to ask an opponent's expert whether, in arriving at his conclusion, he took into account an identified book or writing. If he says no, the door is open to the cross-examining counsel to later come up with the identified "Learned Treatise" to impeach his opponent's expert.

(3) The establishment of any writing as a Learned Treatise is to be: "by the testimony or admission of the witness or by other expert testimony or by judical notice."

I am unclear as to who is to be the final arbiter as to what is or is not a "Learned Treatise." Will this responsibility be that of the District Judge or conceivably, in some situations, will this be left to the jury? Are not our District Judges currently carrying sufficient burdens without having—by reading or otherwise—to resolve such questions?

In the contests of this time, "experts" are available to sustain almost any claim concerning medical or other scientific assertions. There is much collision and disagreement between various authors. Ofttimes the conclusions of a particular writer are found invalid upon further study. I dread the prospect of a trial becoming a contest between books, instead of by witnesses subject to cross-examination.

The relevant existing rules have been distilled from centuries of judicial weighing. I see no substantial advantage in the proposed rule. Even though Wigmore is relied upon as suggesting this rule, he nevertheless was a firm believer in cross-examination as necessary to expose the truth. He said: "Nevertheless, it [cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth."

The absent author of a book or writing cannot be cross-examined.

ADDENDA

Permit me to recommend for a more forensic support for my position, and possibly for your reading pleasure, the dissenting opinion of Mr. Justice Eugene F. Black, then of the Michigan Supreme Court, in the case of *Jones v. Bloom*, 388 Mich. at 120. Justice Black's argument is distilled from his years of experience in the actual trial of cases. He was, indeed, one of Michigan's most able trial lawyers. I know this first hand from the hard blows which he delivered to me in court—none of them, however, below the belt.

NOTE: *Jones* v. *Bloom* 388 Mich appears following earlier letter from Judge O'Sullivan.

THE UNIVERSITY OF IOWA,
Iowa City, Iowa, July 5, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Thank you for sending me so promptly the Committee print of the tentative subcommittee draft of House Rule 5463. While I have just begun to scan the other provisions, I have looked closely at your revision of Rules 606(b) (impeachment of jury verdicts) and 611(b) (scope of cross-examination). I find both changes which your Committee has made to be well taken. I would also like to point out that the subcommittee's note following each of these Rules is extremely well drawn and nicely sets forth the proposals sought to be accomplished by your subcommittee when you made these changes.

The Federal Bar Journal has requested that I submit an article on the scope of cross-examination problem. I anticipate having this done no later than July 31, 1973. In it I intend to advert to the changes made in Rule 611(b) by your subcommittee. I will forward to you a copy of that article.

Sincerely,

RONALD L. CARLSON,
Associate Dean and Professor of Law.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
COMMITTEE ON FEDERAL COURTS,
New York, July 5, 1973.

Re Federal Rules of Evidence.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR SIR: You and your Committee are to be congratulated! The Federal Rules of Evidence appear to me much improved. The scholarship and dedication with which the Committee applied itself to the task merit the gratitude of the Bench and Bar.

We would very much like to comment on the Committee Print. I wonder if 15 copies could be sent to me.

I take it that the Advisory Committee Notes will appear in the Federal Rules of Evidence as they are finally enacted. However, I did not see any reference to those Notes on my initial reading. Could you clarify the matter for me?

Very truly yours,

ALVIN K. HELLERSTEIN.

SHEARMAN & STERLING,
New York, July 6, 1973.

Congressman WILLIAM L. HUNGATE,
Congress of the United States, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE; As Chairman of the New York Committee of Trial lawyers who appeared before your Congressional Committee on the Proposed Rules of Federal Evidence, I have received a copy of the Bill which your Committee has introduced. Our group will be commenting officially on the proposed Bill within the deadline period.

In the meantime, I personally would like to compliment you and your Committee not only for having done a fantastic job as Congressman, but also, and to my mind what is more important, an outstanding piece of legal work. If all Congressional Committees have the expertise and ability of your Committee, our country is certainly in safe hands.

My only discordant note is that in the comments in one section of the Bill, credits are acknowledged to everyone, including people who used our material to prepare their reports, except the New York Trial Lawyers Committee. This is such a minor thing that it does not diminish one iota our enthusiastic praise for the work you have done.

Sincerely,

ROBERT L. CLARE, Jr.

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON,
New York, N.Y., July 6, 1973.

Hon. WILLIAM L. HUNGATE,
Congress of the United States, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN: Thank you for sending me the tentative Subcommittee draft of H.R. 5463. It is always difficult to disagree with something that one approves thoroughly and that is an understatement of the work your Committee and staff has done on the Federal Rules of Evidence. I sincerely hope that the Senate will view this bill as the House obviously does.

I am writing this letter from my country home and it will, therefore, not be signed by me personally. I can assure you, however, that any comments which the "Project of a Committee of New York Trial Lawyers" may have will be in your hands on or before July 31st. The same statement applies to the American College of Trial Lawyers which I have been designated to represent.

I can only conclude as I started with warm congratulations on what is really in effect a saving of that part of practice and procedure which deals with the admission of evidence at trials in the Federal courts.

Sincerely yours,

GEORGE A. SPIEGELBERG.

THE AMERICAN UNIVERSITY,
WASHINGTON COLLEGE OF LAW,
Washington, D.C., July 10, 1973.

DEAR MR. HOFFMAN: Thanks for sending me the letter of June 30th endorsing subcommittee draft of amendments to the Federal Evidence Rules. It did exactly what you indicated it would do and met the deadline date, all as stated by you at our meeting with the Virginia State Bar.

You have done a splendid job in amending the court submitted rules to meet the major objections thereto. I did not think it was possible to procure subcommittee approval of such controversial rules in such a short time period.

Personally, I think they should become effective as amended. If, after experience therewith, changes are required, they can be effected. I personally congratulate you and your associates for a job well done.

It was a pleasure to have appeared with you at Fredericksburg. I hope that our paths may cross again in the near future.

My class in Evidence convenes September 1st with about 60 students entered in preregistration. This number may increase slightly. I should like, while instructing them on the new rules as proposed by the court, to point out your proposed amendments thereto.

It would aid me in so doing, it I could procure from you a sufficient number of the committee print for distribution to the students along with the court proposed rules.

Any assistance you may render will be appreciated.

Sincerely,

GEORGE D. HORNING, Jr.,
Professor of Law.

ENVIRONMENTAL ACTION FOUNDATION,
Washington, D.C., July 11, 1973.

Hon. WILLIAM HUNGATE,
Subcommittee on Criminal Justice,
House of Representatives,
Washington, D.C.

DEAR MR. HUNGATE: On behalf of the Environmental Action Foundation, I would like to commend you and the members of the Subcommittee on Criminal Justice for the draft of H.R. 5463 (federal rules of evidence.) After reviewing the hearings on the rules submitted by the Supreme Court, we are pleased that the Subcommittee acted in several instances to substitute its wisdom for that expressed in the proposed rules.

Although not directly involved in environmental litigation and not possessing the resources to participate in the Subcommittee's hearings, the Environmental Action Foundation was nonetheless very concerned over the effect which some

of the proposed rules might have on environmental litigation. We were wary, for instance, of proposed Rule 509 and how it might cripple environmental lawyers in their efforts to gain access to basic and fundamental government information, such as environmental impact statements. On a more philosophical level, Rule 509 seemed to indicate a reversal of the recent trend to a more open government in which public business is conducted in public.

The Subcommittee's tentative draft, however, relieves our fears on many points. We therefore hope that no rules omitted in the tentative draft will be included in the final draft of the Subcommittee.

Again, let me compliment the Subcommittee for its work on the proposed rules of evidence.

Sincerely,

R. DENNIS BASS,
Coordinator.

YALE LAW SCHOOL,
New Haven, Conn., July 11, 1973.

Hon. WILLIAM L. HUNGATE,
U.S. House of Representatives,
Washington, D.C.

MY DEAR CONGRESSMAN HUNGATE: I have received the Committee print of a tentative Subcommittee draft of H.R. 5463, concerning Federal Rules of Evidence.

I appreciate the opportunity to comment. Since my original comments concerned only the proposed Rules regarding privilege (see my letter to you of February 5, 1973, printed in the report of your Hearings at p. 240), I shall confine myself to that subject.

It seems to me that the Subcommittee has done the wisest possible thing with respect to the privilege Rules. It is not feasible at this time, and perhaps in the long run not desirable, for Congress to attempt a total codification of the law of privilege. I think your deletion of all the specific Rules, coupled with the addition of your general Rule (as Rule 501) will conduce to the wisest possible development of the subject for the time being.

You leave it entirely open to the Supreme Court to develop the law of privilege from time to time in conformity to its judgment as to the requirements of the law of privacy that is now a part of recognized constitutional law. Even more important, perhaps, you allow the Court (and the lower courts) to develop privilege rules appropriately recognizing the great value of human privacy, without their absolutely constitutionalizing every such recognition, as they would have had to do if confronted with a codified set of Rules such as those that came out of the Advisory Committee. Some developments in this field may healthily recognize that the respected privacy is in what have been called the "foothills" of constitutional law, without deciding firmly and forever whether the Constitution requires a particular abstention from invasion of that privacy.

The proviso at the end of your general Rule is, I suppose, inevitable, and I think you have limited it with nice precision to exactly those meritorious matters to which the policy of Erie Railroad v. Tompkins extends.

I congratulate your Subcommittee on its handling of this problem and hope that the full Committee and the Congress will follow your excellent lead.

Sincerely,

CHARLES L. BLACK, Jr.,
Luce Professor of Jurisprudence.

NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC.,
Washington, D.C., July 11, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, U.S. House of Representatives,
Washington, D.C.

DEAR MR. HUNGATE: We appreciate the opportunity to submit further comments on H.R. 5463, a bill to establish the Federal Rules of Evidence.

As you know, on March 9, 1973 this Association submitted testimony specifically opposing Rule 504, Psychotherapist-Patient Privilege. We are pleased to see that the Subcommittee on Criminal Justice has recommended deletion of proposed Rule 504 and we wish to commend the Subcommittee's wise action in this regard.

Sincerely yours,

CHAUNCEY A. ALEXANDER, ACSW,
Executive Director.

PUBLIC CITIZEN, INC.,
Washington, D.C., July 11, 1973.

Re Federal Rules of Evidence.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to your notice of June 30, 1973, I am enclosing ten copies of my comments concerning the revisions made by your Committee to the Federal Rules of Evidence. I would appreciate continuing to be kept advised of further developments on the Rules.

Very truly yours,

ALAN B. MORRISON.

Enclosures.

JULY 17, 1973.

COMMENTS OF ALAN B. MORRISON RE COMMITTEE PRINT OF JUNE 28, 1973, OF H.R. 5463, THE FEDERAL RULES OF EVIDENCE

I. GENERAL COMMENTS

I am generally pleased with the changes that the Committee made in the Federal Rules of Evidence. My principal objections were to the Article on privilege and the elimination of the Dead Man's Acts in cases involving state claims. I believe that the Committee's decision to reverse the positions taken by the Advisory Committee and the Supreme Court were wise under all the circumstances.

My only objection to these changes is that it seems to make very little sense to attempt to enforce any such privilege or exemption from testimony as to a state cause of action or claim when there is a parallel federal claim for which the exemption does not apply. Thus, where the state claim of securities fraud is joined with a 10(b)(5) claim, under the Securities Exchange Act of 1934, it is almost ludricrous to instruct the jury that the Dead Man's Act precludes taking the oral testimony of a witness on the state claim but allows it to be taken on the federal cause of action. See *Courtland v. Walston & Co., Inc.*, 340 F. Supp. 1076 (S.D.N.Y. 1972) (non-jury case). It would seem the better rule that once the privilege has been surrendered or the testimony taken for one claim or defense, that it be admissible for all purposes.

While I have some reservations concerning some of the changes made in Article 8 on hearsay (see Part IV *infra*), I am very much in favor of two of the changes that the Committee made. First, the requirement that a witness be deemed "unavailable" only after an attempt has been made to take his deposition, is an excellent one and should not have been originally omitted by the Court. Second, I agree that the deletion of Rule 804(b)(2) (statements of recent perception) is a wise one. The Rule appeared to be very open-ended, unclear, and in some ways overlapping with Rule 803(5).

Because of the relatively short period of time in which I was able to focus on the changes made and not made, I have not been able to consider each rule in detail. However, subject to the exceptions set forth below, it is fair to assume that I approve the rules in their current form.

II. TECHNICAL MATTERS

The introductory provision of H.R. 5463 states that the rules "shall be effective" six months after the date of their enactment. Simply because of a prior pattern of enacting rule changes on July 1 of a given year, largely because that date is the beginning of the summer recess and would allow maximum opportunity for phasing in the rules, I recommend that a July 1 date be put into these rules.

Beyond that rather formalistic objection, it seems to me that the Committee ought well to put in the legislative history, if not in the Act itself, some indication of its intent with regard to cases that were tried before the effective date and heard on appeal after it. While I have no firm views on the matter, I believe it might be useful to draw a distinction between evidence that was excluded but would be now admissible, and evidence which was then properly admissible but would not be admissible under the new rules. A further matter for the Committee's consideration is the fact that the West Digest System already has a heading for the Federal Rules of Evidence, and many decisions are already citing the rules in the form approved by the Supreme Court. It would seem to be a mistake to have District Court decisions overturned on appeal because

the District Court judge followed a proposed rule of the Supreme Court which, because of the action of the Congress, was never put into effect. Finally, in this connection, it is important to consider the ramifications of Rule 103(a) as to the effects of improperly admitted, or excluded evidence.

Section 2 of H.R. 5463 provides a new and clarified method by which the Supreme Court may prescribe amendments to the Rules of Evidence. I believe the change is a good one and recommend that it be applied to all rule making of the Supreme Court, including Sections 2072 and 2075 of Title 28 and Section 3771 of Title 18. Those changes, while not directly related to the Rules of Evidence, do clarify a situation which is unnecessarily confusing. They would seem to be relatively non-controversial since they merely clarify the responsibilities of the respective bodies and in no way reduce the power of the Supreme Court.

While H.R. 5463 clearly permits the Supreme Court to prescribe amendments to the Rules of Evidence, one question remains with regard to those powers concerning the rules on privileges. Rule 501 provides in essence that privileges shall be governed by the principles of common law, but that where a state law supplies the rule of decision, the privilege shall be determined in accordance with the state law. In addition, there is an exception to the common law situation for privileges under the Constitution or an Act of Congress or "rules prescribed by the Supreme Court pursuant to statutory authority." It is unclear to me why that provision is included since there is in Section 2 of H.R. 5463 a specific grant to the Supreme Court of the right to prescribe rules of evidence. I believe that the quoted provision is unnecessary and is confusing, particularly since under the analogous Rule dealing with competency of a witness (601), there is no such provision. In addition, in view of the history of the elimination of all of Article V, the Committee should make it clear that it does intend, if that is its intention, to permit the Supreme Court to issue rules concerning privileges, even as they affect state law claims, but that any such rule will be subject to the disapproval of either House of Congress in accordance with Section 2 of H.R. 5463. Regardless of its intention, the Committee should clarify this matter so that there will be no dispute in the future as to whether the Supreme Court may issue rules concerning privileges as they affect state claims.

III. PROCEDURAL ISSUES

Rule 606 deals with the general subject of the testimony of the juror as a witness, purportedly in terms of his "competency" to testify either at the trial under subsection (a) or after the trial, inquiring into the validity of a verdict under subsection (b). It is my view that this rule should be stricken entirely for two reasons. First, like Rule 105 which the Committee did eliminate, the issues presented by this rule are less questions of evidence than they are policy matters to be decided on principles having little to do with normal concepts of evidence. The notions of sanctity of the grand and petit jury rooms are of a wholly different character than are questions of judicial notice, relevance, and hearsay or even the issue of the age at which a child is first permitted to give evidence. In fact, the Advisory Committee notes to subsection (b) specifically abjure any intention to deal with substantive questions of setting aside verdicts, yet the determination of the "competency" question cannot be separated from that issue. Therefore, I believe that this rule has no place in the Federal Rules of Evidence but should be handled elsewhere.

Second, and this applies only to Rule 606(b), any attempt to codify the instances in which a juror may testify may prove far more difficult to achieve than is warranted. There are simply too many uncertainties in a matter of this kind and too little reason to insist upon codification in order to justify Rule 606(b). There is nothing of which I am aware in the case law which cries out for a change in the present rules, nor do I understand that the Advisory Committee so concluded. It seems to me that any attempt to categorize the appropriate situations for hearing the testimony of a juror is likely to either underinclude or overinclude, and is unnecessary in any event.[1]

I also wish to register my strong disapproval of the change in Rule 611(b) relating to the scope of cross-examination from that presented by the Advisory Committee and approved by the Supreme Court. Scheduling for trials is difficult enough as it is without requiring a witness to come back on a second occasion and to be inconvenienced not once but twice simply because certain matters were not gone into on direct examination and hence could not be inquired on cross. The Supreme Court's version of Rule 611(b) would have permitted, but not required that the cross-examiner go into all subject matters, thus leaving to his choice

[1] Rule 605 on the competency of a judge as a witness could also be stricken for the same general reasons as the elimination of Rule 606(a).

the question of whether it was better to have the entire witness' story on at one time or whether orderly presentation or other tactical considerations dictated that a later presentation of the remainder of his testimony would be advisable. Moreover, since there is always the possibility of death or other unavailability of a witness who has once testified, it would seem unfair to the cross-examiner to be given no choice as to whether he wishes to proceed with the entire examination of the witness at one time. It is my view that the jury is far more likely to be confused by having a witness come on and tell his story twice, than it is by having him tell it once and go into a few areas on cross-examination that were not reached on direct. After all, the jury is unaware of the rules on limitations of cross-examination, and it will, therefore, not be surprised when it finds that the witness can be examined on all issues at a single sitting. Insofar as non-jury cases are concerned, it is my experience that the present limitation on scope of cross-examination is rarely observed. In short, I am unconvinced that the "more traditional rule facilitates orderly presentations and progress at trial." Nor do I see any relevance to "existing discovery procedures" and the scope of cross-examination, particularly in criminal cases where discovery is narrowly limited.

IV. HEARSAY

It seems that I am in the minority in my views concerning hearsay, but I firmly believe that the Supreme Court was correct in giving greater leeway to trial judges to admit what otherwise would be hearsay, provided that the judge was convinced of the basic trustworthiness of the evidence. Therefore, I strongly oppose the deletions of Rules 803(24) and 804(b)(6). In particular, it seems unwise to limit the expansion of the hearsay rule to statutory amendments or rulemaking by the Supreme Court. I am not sufficiently clairvoyant, nor do I believe that any draftsman is, to predict all of the situations in which trustworthy hearsay evidence may be presented that ought to be, under all the circumstances, admitted in evidence. But under the proposed rules, the sole discretion would be to *exclude* evidence which otherwise would be within one of the exception categories in certain limited situations,[2] and I believe that trial judges should have greater discretion than that. I remain unconvinced that any significant uncertainty, beyond that which normally exists in any trial, would obtain simply because of a trial court's discretion to permit the introduction of what might be considered to be otherwise excludable hearsay. Even in jury cases, I believe that most trial judges are sufficiently attuned to the problems of admitting hearsay to exclude the kinds of evidence which are not insufficiently trustworthy and that they need no rigid rules to bind them.

I also oppose the proviso which the Committee added to Rule 801(d)(1), limiting the admissibility of prior inconsistent statements as direct evidence. First, I have never been convinced that a jury understands the distinction of evidence being admitted for purposes of impeachment only and not for the truth of what is contained in the inconsistent statement. The contained inclusion in our judicial system of instructions which cannot meaningfully be followed, seems to me to create disrespect for the system among the laymen upon whom we depend for he acceptance of our judicial mechanisms.

I find unconvincing the Committee's rationale, that there is no dispute about the existence of a sworn prior statement, as a reason for permitting the limited exception to the exception. There is always a problem with oral exceptions to the hearsay rule and the oral/written distinction has never been the dispositive factor in deciding questions of admissibility. Moreover, in this instance the person who purportedly made the out-of-court statement is already on the witness stand and thus can always deny that he made the statement and then attempt to explain it away, possibilities which are not available in other hearsay situations. Second, the absence of a formal proceeding and oath has never been a bar to other hearsay exceptions and should not be a bar in this case. Finally, if any limitation such as the one proposed by the Committee should be included, it would seem that it should, consistent with the Committee's rationale, be expanded to include all prior written or other recorded statements of a witness, regardless of whether he was under oath.

In my prior testimony before this Committee, I expressed concern about the provisions about Rule 803(5).[3] The rule itself, which appears to be a codification of the exception to the hearsay rule for past recollection recorded, is nothing unusual if it merely permits the person who made the prior memorandum to read it into the record where he is unable at the time of trial to state whether or not the matters contained in the memorandum are true based on his own recollection.

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[2] See Rules 803(6)(7) and (8) and 804(b)(3).
[3] Hearings on Proposed Rules of Evidence pp. 447-448.

The problem that I have is that there is no requirement that the person who prepared the memorandum actually be available for cross-examination, so that I am unclear as to the procedural method by which the document could be read into evidence. It seems to me that the rule should require that the person who actually prepared the record, or someone who was present at the time of or participated in the preparation of the record, should at least be available and should testify as to the method of preparation. Otherwise, none of the basic prerequisites for admitting hearsay will have been satisfied, yet the present rule does not seem to have any such requirement in it. In particular, there is no way that any person other than the person who prepared the document would seem to be able to state that the document reflects the witness's knowledge correctly as of the time that it was prepared.

With regard to Rule 803(6), I continue to side with the Supreme Court's version, in particular with respect to its more extensive coverage. In my view the limitations upon the admissibility where the trial judge concludes that the circumstances of preparation indicate a lack of trustworthiness are a more than sufficient guarantee to preclude the admission of unreliable and out-of-court statements. Moreover, as my testimony indicated,[4] the age-old distinctions between regularly conducted business and regular course of business have never been clear and only add to confusion and disrespect for the process without any benefits in attempting to analyze the preparation of the document to determine whether or not it is in fact trustworthy. In any event, I would recommend to the Committee that it repeal the Business Records Rule, 28 U.S.C. § 1732, so that there is no inconsistency between this exception and that provision.

My prior testimony[5] expressed serious misgivings concerning certain aspects of Rule 803(8) and I continue to have serious problems with it. First, I am unclear as to the reasons for the elimination of opinions and diagnoses from that provision, whereas similar non-public records which contain those items would be admissible under Rule 803(6). Second, there is some inconsistency between this exception and the provisions of 28 U.S.C. § 1733, as I previously noted in my testimony. These differences should be analyzed and if any intention to retain them is made by the Committee, the reasons for the differences should be carefully explained in the legislative history. Moreover, I believe that Section 1733 ought to be repealed so that there is no question as to the fact that Rule 803(8) occupies the entire field with regard to public records.

Third, subsection (C) of this Rule also creates further problems, some of which I have previously pointed to in my testimony. In particular, the existence of such statutes as 49 U.S.C. § 1441(e), which prohibits the admission in any action whatsoever of any portion of an aircraft investigation report made pursuant to Section 1441, would appear to be at least partially repealed by the enactment of this rule. I take no position on whether such repealer is an advisable measure, but I believe that at least the Civil Aeronautics Board should be consulted on it and that if any such repealer is intended, the legislative history should be very clear in this regard. There may also be other statutes similar to Section 1441(e) of which I am unaware but which have similar effects, and these matters also deserve further consideration. Since implied repealers are not favored by the Courts, the legislative history and/or the rule itself should be specific as to whether any implied repealer is intended in this situation. Fourth, although the Committee's statement indicates that the "factual findings" in Subsection (C) are to be narrowly construed, as to the most common determination in such reports—that of negligence—it is unclear whether it is a "factual" finding. It seems to me that the Committee should take a positive position on this in order to avoid what will undoubtedly be extensive litigation on that issue.

In short, I am troubled by the lack of consistency between Rules 803(6) and 803(8) and believe that further study is needed to explain what differences, if any, there are between the rules and whether such differences should continue. Moreover, their existence side by side with Sections 1732 and 1733 of Title 28 should not continue for the reasons which I have indicated above.

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[4] Hearings, p. 438.
[5] Hearings, p. 444.

V. OTHER MATTERS

Rule 403 provides for the exclusion of relevant evidence under certain circumstances, including "unfair prejudice" and "waste of time." I am somewhat troubled by the term "unfair prejudice," since it implies that some kinds of prejudice are fair and hence I believe that it should be stricken both in Rule 403 and in Rule 609(a). In addition, although it is more a matter of linguistics or semantics than anything else, the phrase "unfair prejudice" in Rule 609(a), as added by the Committee, itself includes a value judgment that the harm outweighs the probative value of the evidence, therefore, the phrase that follows "prejudice" should be stricken as it is redundant.

Rule 609(b), which precludes the admission of convictions where there has been a lapse of more than ten years from the later of the date of the conviction or the release of the witness, should be modified. First, the release of a convict will never occur earlier than the conviction and hence the use of the "later date" seems of little utility. Second, the far more logical date to utilize for the running of the ten year period would be the date of the offense or perhaps the date of the conviction since the length of sentence would appear to be unrelated to the commencement of the 10 year rehabilitation period. Last, the Committee should make it clear that simply because a conviction is within the ten year period, it does not automatically entitle the person offering the conviction in evidence, to have it admitted and that the other unfair prejudice standard of 609(a) is still applicable.

Respectfully submitted,

ALAN B. MORRISON.

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON,
New York, N.Y., July 11, 1973.

Re Federal Rules of Evidence.

Hon. WILLIAM L. HUNGATE,
Congress of the United States, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN: You have requested comments on H.R. 5463 no later than July 31st. I have one comment which, tho technical, is important since it deals with one of the slipperiest phrases in the law. The Advisory Committee has used the term "burden of proof" or "burden of proving" in connection with presumptions (Article III).

"Burden of proof" may mean either burden of establishing or burden of going forward. It is my belief that the burden of establishing never shifts, tho the burden of going forward with evidence may shift a substantial number of times during a trial. H.R. 5463 in dealing with presumptions in civil actions states:

> "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."

I strongly urge that in place of the underlined words, the words "the burden of going forward with evidence" be substituted. When the person against whom the presumption exists fails to introduce evidence refuting the presumption or fails to introduce enough evidence so that reasonable minds may reasonably differ, the party having the aid of the presumption wins the issue on that point. If the words "burden of proof" mean "burden of establishing" then the party against whom the presumption operates must introduce sufficient contrary evidence so that his evidence overcomes the presumption "by a fair preponderance of the evidence". This, I believe, is not the correct rule. The burden of establishing never shifts and remains upon the party who has the benefit of the presumption until the very end; e.g., he must establish to the satisfaction of the trier of the facts by fair preponderance of the evidence including the presumption that he is entitled to the decision on that issue.

Only in the case of a *res ipsa loquitur* situation does it appear that the burden of establishing shifts. Actually, it doesn't. In such a situation the party against whom the presumption operates is unable to produce any evidence and, therefore, fails on that issue.

Failure to make the distinction has led many courts into error which would not have occurred had the correct term been used.

Whether your Committee decides to use the term "burden of establishing" or "burden of going forward with evidence" will make comparatively little difference,

tho I think the latter term is more correct. If the term "burden of proof" is used, the same confusion in decisions now existing will continue.

I cannot conclude this letter without again congratulating your Committee on the result achieved by it in H.R. 5463.

Yours sincerely,

GEORGE A. SPIEGELBERG.

THE AMERICAN PSYCHOANALYTIC ASSOCIATION,
New York, N.Y., July 12, 1973.

Hon. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives,
Washington, D.C.

DEAR SIR: The American Psychoanalytic Association is deeply concerned that the proposed new "Rules of Evidence of the Federal Courts," should not constitute a hazard to the confidentiality of patient-psychotherapist communications and thereby become a threat to the practice of psychiatry and psychoanalysis. If testimony can be forced concerning the content of communications during psychotherapy or psychoanalysis, a psychiatrist cannot assure his patient of confidentiality, and the proper setting for psychiatric work cannot prevail. Without such assurance the public will hesitate to avail itself of the benefits of psychiatric treatment, because to do so would entail a significant potential legal hazard. Similarly, the psychiatrist cannot work in good conscience if he is aware of the patient's vulnerability as well as his own.

As a result of the fact that psychiatric groups have been able to demonstrate that there is a constitutional basis for preserving the confidentiality of communications during psychotherapy and legal scholars have demonstrated that Wigmore's four technical conditions needed to establish legal privilege are amply satisfied for the psychiatrist-patient privilege, we understand that Rule 504 was fashioned to delineate that privilege. The American Psychoanalytic Association, by action of its Executive Council, has authorized me to communicate to you its support for Rule 504 and to urge that efforts be made to further modify the rules to eliminate the patient-litigant exception or to amend it in conformity with the 1971 amendment to the Illinois Statute on Privilege and the relevant Illinois Appelate Court's decisions of 1969 and 1970.

We respectfully urge that the Committee give careful consideration to these views and that you recommend appropriate changes in the rules.

Sincerely,

BURNESS E. MOORE, M.D.,
President, The American Psychoanalytic Association.

MORTON, BERNARD, BROWN, ROBERTS & SUTHERLAND,
Washington, D.C., July 12, 1973.

Re H.R. 5463.

Hon. WILLIAM L. HUNGATE,
House of Representatives,
Washington, D.C.

DEAR MR. HUNGATE: I have been asked to respond on behalf of the American Patent Law Association to your request for comments on your subcommittee's draft of the Federal Rules of Evidence.

Our Association was, on balance, in favor of the rules promulgated by the Supreme Court. Again on balance, our Association believes that the subcommittee has improved the rules and made their acceptance and use by the Federal bar and their acceptance as models for future State legislation easier.

We do, with deference, recommend the amendment of the subcommittee revision of Rule 501 as shown below:

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 *or in these rules, no person has privilege to:*

(1) Refuse to be a witness; or

(2) Refuse to disclose any matters; or

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

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

[the] *A claim of* privilege of a witness, person, government, State, or political subdivision thereof *may be made under the authority of this rule and* shall be governed by the principles of the common law * * *.

It seems to us that the Supreme Court's statement of the general duty to provide evidence is a salutary one, putting an important obligation of citizenship into positive expression, and emphasizes the nature of "privilege" as a specially sanctioned exception thereto.

Very truly yours,

AMERICAN PATENT LAW ASSOCIATION,
W. BROWN, MORTON, Jr.,
Member, Board of Managers.

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT,
New York, N.Y., July 12, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE HUNGATE: Thank you for your letter of June 30 enclosing the committee print of H.R. 5463.

It goes without saying that I consider the revision of the Federal Rules of Evidence proposed by your subcommittee to constitute a very substantial improvement over the Rules submitted to Congress by the Supreme Court. On the subject to which my objections were primarily addressed, namely, the unfortunate effect of the proposed rules in litigation relating to state-created rights or defenses, I particularly applaud the changes made on pp. 12, et seq., relating to privileges and the change on p. 19 relating to competence of witnesses. Of course, I am also gratified by the proviso in Rule 801(d)(1), the new material in Rules 803(6) and 804(b)(3), and the elimination of Rule 803(24). In fact, 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.

There still remains for me the basic question whether the good such rules may accomplish will not be outweighted by the harm, even though you have substantially reduced the the latter. The arguments about the value of such rules to Department of Justice and other lawyers who conduct litigation in many districts and to judges who accept assignments outside their own state seem to me pretty small beer—a quite inadequate justification for so large an endeavor. Also, you will have to consider that to the extent you have subjected the rules to extensive and, in my view, desirable surgery, you have somewhat decreased their value for these purposes. Moreover, as a conceptual matter, I find it difficult to understand why, if when dealing with a claim or defense based on state law, matters such as privilege and competency should be determined by state rules of evidence, as you have wisely recognized, the admissibility of hearsay should be determined by a federal rule.

However, I believe I have already said all I can usefully say on this subject. If your subcommittee concludes after full consideration that it is worthwhile to go ahead with this project in the improved form to which you have now moulded it, I would accept the decision with good grace.

One minor point is this: I wonder whether the draft of Rule 606(b) really carries out the subcommittee's intent as expressed in its note. I would think the material in the second bracket should be restored.

In rereading my testimony, as printed in the hearings, which I had to correct in a great hurry because I was leaving on a short vacation the very day when the type-script arrived, I have noticed a number of errors. Most of them are either obvious or unimportant, but there are two which do not fit those categories. One of these is on page 257, in my next to the last answer. The sentence reading "There are many appeals on questions of evidence" should say "There are not many appeals on questions of evidence." Somewhat less important, on page 255, in the first full paragraph, line 7, the word "agents" should be "acts". I know nothing can be done to correct printed copies that have been circulated to the public, but I would be grateful if the subcommittee could make these corrections in its official copy.

Sincerely,

HENRY J. FRIENDLY.

NATIONAL BROADCASTING COMPANY, INC.,
New York, N.Y., July 13, 1973.

Hon. WILLIAM L. HUNGATE,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Thank you for sending me a copy of the Subcommittee draft of H.R. 5463 dated June 28, 1973.

I want to congratulate the Subcommittee on the greatly improved draft Federal Rules of Evidence. As you may know, NBC had expressed concern that Article V on Privileges in the draft Rules in the form originally submitted to the Subcommittee would threaten First Amendment freedoms and the flow of information. The general rule which replaces the enumerated privileges effectively removes that threat—and, therefore, our objection to the bill.

Sincerely,

CORYDON B. DUNHAM.

CASE WESTERN RESERVE UNIVERSITY,
Cleveland, Ohio, July 13, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Thank you very much for sending me, in reply to my letter of July 3, 1973, a copy of the tentative Subcommittee draft of the proposed Federal Rules of Evidence. In your letter you very kindly asked for my further comments.

I have studied the draft and wish to express certain views. As I understand your draft, the principal changes are the abolition of the chapter on Privilege (Rules 502–515) and the apparent general desire to limit the existence of "Federal common law of Evidence" (see Subcommittee Notes to Rule 501, Rule 402, Rule 1101(e), and the newly proposed § 1657 of Title 28, U.S.C.).

I gather from the draft that it is the Subcommittee's general purpose to reduce the number of instances in which the federal courts should have new rules of evidence or should have rules different from the state rules. This is apparent, *e.g.*, in the deletion of the entire chapter on Privilege (Rules 502–513), in the retention of the provision limiting the scope of cross-examination (Rule 611), and in the retention of the state Dead Man's statutes (Rule 601). While it may be argued that in this fashion the new Federal Code of Evidence will be much less comprehensive and will not meet the desire of a general codification, such tendency in my opinion is not necessarily objectionable from the legislative point of view, in view of the fact that at present a codification of the doubtful area of privilege may not be legislatively desirable.

As I explained in my letter of July 3, 1973, I found the provision of Rule 509(a)(2) on privilege objectionable, and I am therefore happy to note that this provision is eliminated. However, I have a specific objection to the newly proposed Rule 501, and I like to address myself to this very particular problem. The problem is as follows. Assume that in a diversity case in a federal court, governed by *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 65 (1938), questions of federal governmental privilege (state secrets, executive privilege or the like) arise in connection with discovery directed against a witness: what law should the court apply to the determination of such privilege, state or federal law? As I read the newly drafted provision of Rule 501, under the proviso of that Rule state law would apply, and, as I shall explain, I do not believe that the present law is to that effect. Admittedly, under *Erie* state law applies to the determination of issues of substantive law as it "supplies the rule of decision", but in my opinion (contrary to the view expressed in the Subcommittee Note to Rule 501) the proviso of Rule 501 to that limited extent did not leave "the law of privileges in its present state." While in general such assertion is correct, it is in my opinion not correct with respect to the particular problem here considered.

Federal government privilege of the various different types has been invoked when the Government has not been a party to the litigation but merely a witness. For instance, in *Machin* v. *Zuckert*, 316 F. 2d 336 (D.C. Cir. 1963) (which originated as a suit by the air force pilot Machin against the United Aircraft Corporation, the manufacturer of the propeller), merely a subpoena was served on the Secretary of the Air Force but still the general *federal* law of executive privilege was applied; see also *Freeman* v. *Seligson*, 405 F. 2d 1326 (D.C. Cir. 1968) (where in ancillary bankruptcy proceedings the trustee petitioned for examination of the

Secretary of Agriculture); *Boeing Airplane Company* v. *Coggeshall*, 280 F. 2d 654 (D.C. Cir. 1960) [1] (where general federal law of government privilege was discussed at 659); see also *Pollen* v. *Ford Instrument Co.*, 26 F. Supp. 583 (E.D. N.Y. 1939); *City of Philadelphia* v. *Westinghouse Elec. Corp.*, 210 F. Supp. 486, 488 (E.D. Po. 1962) (involving the privilege against the disclosure of grand jury minutes and citing many federal precedents); *Atlantic City Electric Company* v. *General Electric Co.*, 244 F. Supp. 707 (S.D. N.Y. 1965). While several of the above-cited cases are not directly in point as concerns the hypothetical example given by me, the trend clearly appears that it is federal law which in every case determines the interpretation and scope of the federal governmental privilege. It is understandable that federal law alone should apply to the construction of the federal governmental privilege, whether it be the privilege of military secrets, diplomatic secrets, federal executive privilege, or secrecy of federal grand jury proceedings. Such view would seem to be sound and to be in accord with general views expressed by the Supreme Court in related fields (see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 421–427 (1964); *Hinderlider* v. *La Plata River Co.*, 304 U.S. 92, 110 (1938)).

Another example serves to highlight the unsoundness of the solution which, in my opinion, apparently follows from the proviso of proposed Rule 501. Assume that the Federal Government has instituted a suit against a private defendant under the False Claims Act, 31 U.S.C. §§ 231–233; assume further that the defense of the private party consists of the affirmative defense of release to which, under the particular facts of the case (see *United States* v. *Yazell*, 382 U.S. 341 (1966)), state law applies. Is it really the intention of Rule 501 that in such a case state law would govern the issue of government privilege if in connection with the defense of release an issue of military secrecy arises in discovery proceedings directed against a witness? In my opinion, the proviso of proposed Rule 501 should be redrafted so as to make certain that in the case of a state "claim or defense", despite the general application, of state law to the assertion of privileges, federal law should apply with respect to the interpretation of inherently federal privileges such as military or diplomatic secrets. If that should not be done, I fear that under proposed Rule 501 the interpretation of the concept of military and diplomatic secrets would become a matter of state law, possibly differing in the different jurisdictions. In that connection, it might also have to be considered whether the emphasis in the proposed Rules on "rules prescribed by the Supreme Court pursuant to statutory authority" (see Rule 402, Rule 501, Rule 1101(a)) and the apparent limitation of federal common law of evidence, should be changed.

A minor comment of mine is as follows. The tentative draft eliminates Rule 105 (Summing up and Comment by Judge) for the reason that the issue is "primarily procedural rather than evidentiary and thus inappropriate in a code of evidence." (Subcommittee Note). It is, of course, a mere matter of terminology whether a matter is "procedural" or "evidentiary." But the more important matter, in my opinion, should be the consideration that the present Federal Rules of Civil Procedure do not contain any provision dealing with the summing up of evidence and the comment by the judge; and there seems to be no indication at the present time that such rules will soon be promulgated. Accordingly, it would be my suggestion to retain Rule 105.

Very respectfully yours,

SIDNEY B. JACOBY, *Professor of Law.*

UNIVERSITY OF CALIFORNIA, LOS ANGELES,
Los Angeles, Calif., July 16, 1973.

Re Federal Rules of Evidence

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR SIR:

INTRODUCTION

I wish to thank you for this opportunity to comment on the tentative draft of H.R. 5463. Since the Subcommittee has apparently made the policy decision to rest its version of the rules on the same discredited doctrines that motivated the Supreme Court's Advisory Committee, my general response is one of disappointment. If passed, the bill would simply continue a set of rules that favor some liti-

[1] By typographical error in my letter of July 3, 1973, the citation of that case was erroneously given as 180, rather than 280, F. 2d.

gants at the expense of others, that degrade the status of witnesses and other lay participants in trials, that make trials more expensive than necessary at a cost to the taxpayers and to the participants, that deprive the courts of information needed to reach a just result and which are, therefore, shockingly unfair to the average citizen. My concern is heightened by the fact that the rules may be accepted as a model for state courts whose operations have a greater impact on the people than do those of the Federal courts.

However, the Subcommittee has heard the arguments against the traditional doctrines and rejected them. Therefore, in my comments I will try, insofar as I can, to rely on the same value premises as the draftsmen rather than repeat the arguments which are unacceptable to the Subcommittee. I will take up the subjects in order of their apparent importance to the Subcommittee as revealed in the Notes and the record of the hearings.

RULE 501—PRIVILEGES

I doubt that this change will accomplish much. As stated in the testimony of several witnesses at the hearings, the vast majority of the federal judges have already accepted the Rules as an authoritative compendium of existing federal law. Therefore, in deciding what shall constitute "the principles of the common law as they may be interpreted . . . in the light of reason and experience," most trial judges will turn to the set of rules the Subcommittee believes it has vetoed. The most that can be said for the rule is that it gives the appellate courts a license to innovate.

The requirement that the trial judge follow state law in some cases creates so many difficulties that here again we can expect most claims of privilege to be governed by the rejected rules. Which state law applies? The same law that provides the rule of decision, the choice of law rules of the state that provides the rule of decision, the state wherein the privileged relationship arose, or where the communication took place, or where the professional was licensed? What about communications outside the U.S.? The list could go on and on. The point is that the effect is to give the trial judge a great freedom to simply decide that state law equals the common law equals the rejected provisions of the Federal Rules. This is quite likely in view of the fact that the witness has no way of appealing the ruling of the trial court.

Moreover, the Rule does not define "privilege." Since some writers have considered the exclusionary rules with respect to searches-and-seizures to be matters of privilege along with rules such as those prohibiting the use of subsequent repairs, insurance, settlement negotiations, the failure to define privilege may mean that state law could be thought to apply in areas other than the situations formerly covered by Article V.

The Subcommittee might consider the addition to the Rule of some statement of intent or policy with respect to the changes in privileges. My reading of the hearings suggests that the Subcommittee members rejected the notion that privileges ought to be limited, abolished or interpreted in a jealous fashion, but there is certainly room for a contrary interpretation. A statement that privileges are favored or disfavored would certainly be of help in answering some of the questions posed above.

Some picky points. Isn't a "witness," a "person"? Courts have a habit of reading things into these redundancies that may not be intended. Is "person" intended to include corporations, unincorporated associations, etc.? The change in language from the Supreme Court draft may provide an opening for a holding that the Subcommittee intended to alter the class of entities that are entitled to claim privilege.

RULE 201—JUDICIAL NOTICE

If I read the Note correctly, the draft makes a radical change in existing law and it is not clear if the Subcommittee is aware of this. By making the same rules apply to all types of judicial notice, the Rule would severely limit the ability of federal courts to handle constitutional litigation. Under existing law, when the validity of a state or federal statute is attacked, the federal court can take judicial notice of the facts upon which the legislative or administrative body acted in assessing the validity of a statute. The new Rule would mean that a judge could no longer read a legislative report to determine the factual basis relied upon. Such facts would have to be established by the calling of witnesses.

RULE 404(b)

I am not as certain as the Subcommittee that the semantic change carries the weight that the Note attaches to it.

More significantly, I am distressed by the failure to create a realistic rule dealing with the proof of uncharged crimes. This is the issue of evidence most often raised in the federal appellate cases. It is a rule that is unfair to the taxpayers and to criminal defendants. As the rule is presently applied, it means that the prosecutor can charge the defendant with one crime, then spend days of court time proving other crimes that were never approved by the grand jury, as to which the defendant had no notice in the pleadings and no opportunity to prepare to meet through discovery or investigation. The fiction that supports this practice is that the evidence proves some element of the offense that the defendant may not even be disputing. The real purpose of such proof is to permit the jury to convict the defendant of a crime with which he was never charged.

It seems appropriate, if the Subcommittee is not going to take steps to tighten up the rule to make the practice conform to theory, that at least they could require that the prosecutor give notice of his intent to prove uncharged crimes and give the defendant an opportunity to stipulate, if he chooses, to the element of the offense as to which the other crime is supposedly relevant. Or, conversely, abandon the fiction entirely and amend the law so as to permit the defendant to be convicted of being a bad man or suspicious person. The present fiction is costly both in court time and respect for the law.

RULE 405

The Note is puzzling, in light of what the Subcommittee has just approved in 404(b). Either the Note is inconsistent with Rule 404(b) or this is a bit of sanctimonious sham.

RULE 601

The word "competence" is often used as a synonym for "admissibility," in addition to the usage intended here—qualification to testify. It might be useful to indicate that Congress does not intend all state law on admissibility to apply in diversity actions.

RULE 606

The drafting technique presents a number of problems. The rule simply tells us what a juror may not testify about. It does not state that he can testify about the matters referred to in the note. Obviously the drafters feel that stating only the single limitation implies, in the light of Rules 402 and 601, that the old rules forbidding the impeaching of the verdict are gone. There are at least two difficulties with this approach. (1) Some cases suggest that the rule is a form of privilege, which might lead to the conclusion that the effect of the rules is that while the juror may testify to other matters, he cannot be compelled to do so if the "privilege" is asserted. (2) Elsewhere in the Rules when repeal of a pre-existing rule is intended, this is not done by implication but by a specific statement that the old rule is repealed. For example, Rule 607 would be unnecessary if the effect of Rules 402 and 601 were to repeal all rules not expressly restated. There are many other rules whose sole function is to repeal old rules, for example Rule 704, Rule 613, Rule 406 and the like. Since the Rules take inconsistent approaches to the method for repealing old rules, the only way Congress can be sure it has accomplished the repeal here is by an express declaration.

RULE 609

Unless the intent is to create some different test for the exercise of judicial discretion, it would seem much simpler to merely state that Rule 609 is, like all other rules, subject to the court's discretion under Rule 403.

RULE 611

There may be some justification for this retrogressive step, but I'll be blessed if I can see how the existence of discovery will serve. A federal criminal defendant has almost no rights to discovery worthy of the name. What the change will preserve is not orderly presentation of proof but exotic gamesmanship. It promotes quibbling, not the progress of the trial.

RULE 612

Here again the change re-enacts a technical anachronism, the so-called "rest room rule" where a forgetful witness is sent to the john with some document to refresh his recollection so that he can create a false impression of reliability to the jury. It beats me how this can be justified. I had thought, until it was resurrected in the Note, that the cry of "fishing expedition" and the concomitant notion that the parties have a property interest in the witnesses and evidence had been buried long ago.

RULE 801

The Subcommittee here passed up the opportunity to avoid a good deal of grief. For reasons that are nowhere explained, the Advisory Committee chose to take a number of traditional hearsay exceptions and define such statements as "not hearsay." If this change is simply intended to promote conceptual nicety, it hardly seems worth the cost in having lawyers retool their vocabulary.

In fact, however, I think the formulation does alter a number of rules. For example, a statement by an agent who has no personal knowledge of the matter is admissible under the Rule since the requirement of personal knowledge only applies to "witnesses" and "hearsay declarants" and the agent is neither. Similarly, in antitrust cases the government can introduce against the defendant the statement of an alleged co-conspirator and the defendant is powerless to impeach because Rule 806 only applies to hearsay declarants. I believe that study would show that these are only a few of the many examples of how altering a single fundamental concept can have repercussions throughout the rules.

RULE 801(d)(1)

The proviso is drafted in an awkward fashion which promises nothing but difficulty in its implementation. What the drafters have done is to make a rule of exclusion to a provision that is, in theory, solely one of definition. The original rule says that a prior inconsistent statement is not hearsay, which makes it admissible because Rule 802 only excludes hearsay. The proviso states that a prior inconsistent statement is inadmissible for some purposes unless added requirements are met. In fact, the proviso is not really a proviso but a complete redefinition of the concept of a prior inconsistent statement. The limitation, "admissible as proof of the facts stated" is not needed because if offered for any other purpose it is not hearsay under Rule 801(c).

I think the intended result can be better accomplished by amending the Rule by adding at the end of (A): "and it was given under oath and subject to the penalty of perjury at a trial or hearing or in a deposition or before a grand jury, or (B) . . . etc."

The present construction of the Rule makes it possible to infer that a prior inconsistent statement of a witness is inadmissible for a hearsay purpose even though it also falls within some exception to the hearsay rule. I do not think that was what is intended and I think my version avoids this problem.

RULE 803(6)

I hope the Subcommittee is aware of what it has done. This change makes it even clearer than it was before that this exception is a special privilege to businessmen. If the bank sues me for failing to pay my credit card bill, they can bring in their screwed-up computer printouts as proof but I cannot show the jury my checkstubs to prove payment. I think only the most deluded can claim that a business computer is more reliable than the average citizen's books and records. Once the claim of greater reliability is gone, the exception seems unfair.

RULE 803(16)

There is an ambiguity here. Does the reference to authenticity refer to the document or the statement contained in it? Since the document as described is authentic under Rule 901(b)(8), the requirement of authenticity is either superfluous or must refer to the authenticity of the statement. But if I can prove, without the use of the document, that the statement is "authentic," why do I need the document?

Is a puzzlement.

RULE 804(a)(5)

This minor addition is fraught with difficulty. In the Note, the draftsmen explain that "testimony" means a "deposition." If that definition were to be read into the word "testimony" at every place it is used in the Rules, the result would be chaos. Even if the definition is limited to Rule 804 it results in a good deal of mischief. Read Rule 804(b)(1), for example, substituting the word "deposition" for the word "testimony" wherever it appears and you can get the idea. Why not simply say "deposition" in 804(a)(5)?

RULE 804(b)(1)

As I read the Rule in the original form, testimony offered against me from a former case where I was also a party would be admissible only if I had the same motive to cross-examine then as I do now. The Subcommittee apparently believes that the "motive and interest" requirement only applied to cases where the present party was not a party to the prior action.

In any event, under the Rule as amended, a statement made in deposition in an earlier case where I planned to admit liability and fight only on damages is now admissible to prove liability because I had the opportunity to cross-examine then, albeit no reason to do so. The only policy I can see being served here is one of full employment for court reporters.

RULE 804(b)(2)

Is this just an oversight or is something intended here by the use of "civil case" instead of the expression "civil action" as in Rule 301?

RULE 804(b)(3)

The reference to "corroborating circumstances" is ambiguous. Is this meant to infer that a declaration against interest can only be corroborated by circumstantial evidence and not by testimonial or real proof?

The last sentence is another case of an amendment that does not match the structure of the original rule. I assume that what is intended is that a statement of a co-defendant is not admissible *under this exception;* however, it can be read to mean inadmissible regardless of what theory of admissibility is used. This latter reading is suggested by the mention in the Note of *Bruton*. The *Bruton* doctrine is, of course, applicable to all hearsay, not simply declarations against interest. Indeed in the *Bruton* case the hearsay came in as an admission and was, in theory, not evidence against *Bruton*.

It seems to me that under either reading, this sentence is an inadequate statement of the *Bruton* rule. Since the Rules do not purport to deal with other problems of the Confrontation Clause, it does not seem necessary to single out this issue for treatment.

PROPOSED 28 U.S.C. 1657

If I read this correctly, it makes the Congress appear petty and foolish. After going through the Rules and making a number of changes designed to repel the inference that the Supreme Court has any rulemaking power with respect to evidence, the Subcommittee turns around and confers such a power. If the Subcommittee hearings did anything, they demonstrated how unwise this step is. Since the Supreme Court operates as simply a rubber stamp, the rulemaking apparatus becomes simply an oligarchy of rich, old lawyers who make rules to suit their powerful clients at the expense of the public interest. It seems to me that at a bare minimum, the Congress ought to relieve the Supreme Court of its ignominious role in this charade by making the Judicial Conference the body that gives final approval before the Rules go to Congress. Even better would be to make the rulemaking apparatus an adjunct of Congress rather than the courts.

CONCLUSION

I realize that my criticism is harsh, and even unfair in light of the myriad demands upon the Subcommittee and its staff, but I have no wish to conceal the bitterness that this episode has created among younger scholars who had placed their faith in the legislative process to produce a measure of reform. It seems safe to predict that the law reviews will soon be publishing a series of "I-told-you-so"

articles extolling the virtues of rulemaking by experts instead of politicians. Perhaps a more optimistic explanation would view this as a demonstration of the power of legal education since everybody involved seems incapable of seeing through the nonsense that passes for knowledge in most evidence courses.

But it seems to me that the real source of the problem is the notion that courts and the judicial process are government-on-the-cheap. The general attitude toward the judicial branch is one of jealous allocation of resources. It seems highly ironic to compare the amounts of money, talent and energy poured into the various Presidential Commissions investigating everything from Smut to Nuts, with the meager resources devoted to the formulation of a set of rules that will govern litigation in the federal courts, and perhaps in State courts as well, for years to come. The difficulty is exacerbated by the general attitude of lawyers and the public that procedure is simply a set of technicalities that really do not matter and thus can be left to a batch of moonlighting lawyers and overworked Congressional staff.

Perhaps the Subcommittee ought to quit diddling with this set of 19th Century rules and instead prepare a bill creating a Commission to draft a modern evidence code. The Commission ought to have lawyers only in an advisory role, along with other relevant experts. The Commission itself should be entirely made up of laymen. It should have the power to study and make recommendations to the Congress not only with respect to evidence but with related aspects of trial procedures as well. It should have sufficient staff to undertake empirical research into how the rules are working in courts today. It should be authorized to consider the recent reforms in England as well as the evidentiary systems of other countries. It ought to consider technological innovations with respect to the proof-taking process. Finally, it should be directed to find out what people who are not lawyers think are the values to be furthered by litigation. We might all be surprised.

Very truly yours,

KENNETH W. GRAHAM, JR.,
Professor of Law.

U.S. COURT OF CLAIMS,
Washington, D.C., July 17, 1973.

HON. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice,
House Judiciary Committee, Washington, D.C.

DEAR MR. CHAIRMAN: The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has just distributed to all federal judges a copy of the committee print on H.R. 5463, your subcommittee's changes in the proposed Rules of Evidence. You are quoted by Mr. Foley as requesting comments before July 31, 1973. I congratulate you upon the good work done on this difficult matter by the subcommittee, and have only one suggestion to make. In so doing, I do it personally, not having had opportunity to speak to my colleagues about it.

As you know, this court has jurisdiction over all suits for money damages against the Government, except federal tort claims. Reasons for that single exception are lost in the mists of history. We have two divisions here. One is our Trial Division of 15 trial commissioners described by our Rule 13(a) as the trial judges of the court. They sit throughout the country wherever most convenient for the parties. Our trial judges have their own courtrooms in several major cities. Elsewhere, in exercise of our national jurisdiction, they hear cases in the U.S. District Court courtrooms. We also have seven United States judges who sit in review of the trial judges' opinions when appealed. We are, in turn, reviewed by the Supreme Court on certiorari.

This court by statute has always had its own rulemaking power, but our rules, as they pertain to the Trial Division, are based almost squarely on the Federal Rules of Civil Procedure used by the U.S. District Courts in nonjury cases. As to rules of evidence, our Rule 133 tracks FRCP 43(a) except that the second sentence thereof has been changed to read: "All evidence shall be admitted which is admissible under the statutes of the United States or under the rules of evidence applied in the United States District Court for the District of Columbia in nonjury trials."

I was a trial commissioner for 23 years and have heard cases in almost every state. Attorneys in our native State of Missouri, and in many others, don't know what the evidentiary rules here in the District are. The uniform rules of evidence

will be a great thing for the Court of Claims, and we intend to adopt them by rule—if you do not include them in H.R. 5463. My suggestion, however, is that you amend your proposed Rule 1101 to read as follows:

"1101(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 United States Court of Claims*, and to United States magistrates, in the proceedings and to the extent hereinafter set forth. The word 'judge' in these rules includes United States magistrates, referees in bankruptcy *and commissioners of the Court of Claims.*"

As the principal forum established by Congress for suits against the sovereign, it is appropriate that the Court of Claims be included in your bill, in my opinion. It is especially appropriate that the trial commissioners who are known as trial judges, and so recognized by our Rules and in various reports of both the Senate and House Judiciary Committees through the years, be specifically included in the bill along with the magistrates and referees, although salarywise and in authority, they are several cuts higher in the judicial scale.

With assurances of my highest esteem and with kind personal regards,

Sincerely,

MARION T. BENNETT,
Judge.

PENNSYLVANIA BAR INSTITUTE,
Harrisburg, Pa., July 18, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, House Judiciary Committee, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I have recently received the revised Federal Rules of Evidence proposed by your Subcommittee. I note that you desire to receive any comments that members of the legal profession might care to make.

Rule 804(b) [(4)] (3), *Statement against interest*, is still carried under "Hearsay Exceptions: Declarant Unavailable," as it was under the original rules proposed by the Supreme Court. This means, of course, that this exception to the hearsay rule cannot be utilized if the declarant is present in court or is otherwise available.

I would call to your attention the latest United States Supreme Court case on the subject of statements against interest. That case is *Chambers* v. *Mississippi*, reported in 12 Criminal Law Reporter 3150. That case held that the statement against interest exception applies where the declarant *is available*, indeed the witness, one McDonald, was present and had testified in the case. The Court also held that, under the circumstances in the case, a violation of due process had occurred when the trial court refused to receive McDonald's statements against his penal interest in evidence.

In view of *Chambers*, I wonder whether the hearsay exception for statements against interest should be transferred to Rule 803.

Sincerely,

GILBERT G. ACKROYD,
Executive Director.

GEORGETOWN UNIVERSITY LAW CENTER,
Washington, D.C., July 18, 1973.

Representative WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed are my comments on your Subcommittee Staff's proposed changes in Article V of the Federal Rules of Evidence, respecting testimonial privileges. This unfortunately lengthy commentary is the final draft of an article I have written on the Advisory Committee's proposed Article V and which will be published in October, 1973 by the Georgetown Law Journal.

While in form addressed to the Advisory Committee's product and the Supreme Court's role in approving it, I believe most of this commentary is directly and obviously relevant to your Staff's proposed revisions. I made an attempt to draft a shorter version of the paper, focused solely on the Staff's analysis, but found the result wholly unsatisfactory. A summary of the conclusions I have reached is set out on pages 132–137 of the text of this draft and perhaps your consideration of my comments could begin with that brief recapitulation.

The essential outline of the enclosed paper is as follows: The first eleven pages try to define the history and parameters of the problems raised by the Advisory Committee's proposals. Part II, pages 12–52, summarizes the Advisory Committee's draft and concludes that, solely upon the basis of a textual analysis, those Rules are wholly unacceptable. For the reasons there expressed alone, I wholly agree with your Staff's recommendation to extirpate Article V root and branch and begin all over again.

Part III, pages 53–131, considers what might be a better alternative. Specifically, I examine at pages 55–81 whether testimonial privileges for interpersonal confidential communications are important protections for the rights of privacy and freedom of speech within the United States, and conclude that they are. At pages 82–94 I consider whether existing principles of constitutional law compel recognition of certain privileges, or forbid recognition of others, and conclude that they do not.

I then treat separately the problem of what to do with state-created privileges in federal court litigation. Pages 95–101 lay out my reasons for concluding that, as a matter of legislative policy, Congress ought to direct federal courts to recognize state privileges in all types of federal cases, irrespective of their jurisdictional foundations. At pages 102–126, I discuss the constitutional issues this problem presents. There I conclude that Congress has the power to deny the applicability of state-created privileges in all federal trials, including diversity of citizenship cases, although the Advisory Committee's proposals would not have passed constitutional muster in this regard.

I discuss the deficiencies in the Committee's proposed Rule 509 at pages 127–131. Finally, I summarize my recommendations in pages 132–137. (The final six pages of the paper discuss the shortcomings of the Supreme Court's involvement in this process and would be of little or no immediate interest to your Subcommittee).

In brief, I applaud these particulars of the Staff's revisions: (1) the decision to begin by abandoning most of the Advisory Committee's work; (2) the recognition of state-created privileges in diversity cases; (3) the demise of the draconian Rule 509 proposed by the Advisory Committee; (4) the decision to provide a measure of latitude to federal trial judges, on a case-by-case basis, to protect privacy by recognizing individual claims to testimonial privileges.

In spite of my admiration for the Staff's work, and a firm conviction that it is immeasurably superior to the Advisory Committee's proposals, I nevertheless find it deficient in these respects: (1) the failure to preserve Rules 504, 506, 512 and 513—all of which seem salutary, none of which were seriously challenged in your Subcommittee's hearings, and all of which may be foreclosed from independent adoption by trial judges by the Staff's formulation. (2) I cannot see any substantial reason, in the great majority of cases, not to recognize state-created privileges in federal question or federal criminal cases. (3) I think it is important, for the reasons discussed in pages 55–81, to recognize a qualified privilege, subject to trial judge controls like those set out in the Advisory Committee's Rule 508, for any confidential interpersonal communication between individuals intimately related or in a position of close personal trust. At the very least, I would hope your Subcommittee would make it clear in the legislative history that it is considerations such as those I discuss in the paper, and not the Advisory Committee's view of privileges, that ought to form the basis for judicial interpretation of "the principles of the common law . . . in the light of reason and experience." (4) I believe adoption of this "principles of common law" test is likely to cause more harm than good. First, federal courts are presently hopelessly confused in determining what privileges, and of what scope, they must apply in federal trials. (See especially pages 108–111, pages 118–119 and the footnotes thereto). Maintaining the present formulation of F.R. Crim. Pro. 26 will only serve to perpetuate that confusion and disuniformity of approach. Secondly, while the proposed formula could serve as a basis for wider recognition of claims of testimonial privilege (as I hope it would), experience with F.R. Crim. Pro. 26 is to the contrary. See my footnote 183. There is a real danger, already an actuality in the cases to date, that the reference to "common law principles" will be construed to deny automatically recognition of any claim of privilege not grounded in 19th Century common law decisions. If this construction is adopted, claims of (for example) doctor-patient; psychotherapist-patient; accountant-client; social worker-client; journalist-source; and clergyman-penitent privilege will be invariably and uniformly dismissed out-of-hand in all non-diversity cases. Equally important to my thinking, the opportunity for substantially enhancing the right of personal privacy in America by extending a qualified privilege beyond those categories of relationships identified in state statutes will be irretrievably lost.

In sum, for the reasons fully elaborated in this enclosed paper, I believe the Staff's proposals significantly improve upon the Advisory Committee's draft. I fear, however, that the baby is about to be thrown out with the bath. My review of the reported cases suggests that the Advisory Committee was correct in seeking to codify, reform and centralize the applicable principles in this confused and confusing field of law. They erred in choosing the wrong principles. A better course would be to withdraw Article V and set about the task of fresh codification, informed by policy judgments like those elaborated in the enclosed paper.

I greatly appreciate this opportunity to respond to your Staff's excellent proposals and hope I may have contributed in some measure to your deliberations in this obviously difficult and sticky area. Please feel free to call on me if I may be of any service to you.

Faithfully yours,

THOMAS G. KRATTENMAKER,
Associate Professor of Law.

Enclosure.

THE JOHN MARSHALL LAW SCHOOL,
Chicago, Ill., July 18, 1973.

In re H.R. 5463 (Federal Rules of Evidence)
Hon. WILLIAM L. HUNGATE,
Member of Congress, House Office Building,
Washington, D.C.

DEAR CHAIRMAN HUNGATE: In response to the invitation expressed within your speech to the House on June 26, 1973, I herewith submit my thoughts concerning the proposals of your subcommittee as reported in Volume 19, No. 100, Congressional Record H5452, et seq.

I am profoundly impressed by the work of your subcommittee in accomplishing substantial improvement in the proposals transmitted to Congress through the Supreme Court. The product of your committee clearly demonstrates a sensitivity to the problems of basic rights and liberties presented by those rules. I will accordingly limit myself to a few specific areas in which I believe that the subcommittee's adoption of the original proposals may generate serious problems in future litigation.

1. *Opinion Evidence on Character.*—Rules 405, 608 and 404, taken in tandem, authorize opinion evidence on the character of a litigant and on the credibility of a witness. The sole justification offered by the original Advisory Committee for this signal departure, was that reputation evidence is somewhat uncertain and that opinion was the means of proving character in "an earlier day". (See note to original rule 405.)

"Earlier day" is, if anything, too modest. This proposal relates very directly to the mediaeval concept of the compurgator and "wager of law", whereby a defendant in a debt or detinue action could achieve exoneration by presenting eleven friends who swore that they believed his denials; it was because of this very practice that the common law actions of debt and detinue fell into disuse.

To bring the problem to the present day, the Courts have uniformly rejected the purported *expert* opinion on credibility—that of the lie detector operator. The reasons for this exclusion may or may not be sound; but it seems consummately absurd to reject the trained opinion in favor of an opinion which has no demonstrable base other than that presumably possessed by the jurors.

It is not too much to say that opinion evidence on credibility is a meaningful step toward the "people's trial" which characterized the Chinese and the Cuban revolutionary regimes. In criminal cases, it will cause the admission of evidence by respected police sources which will tend to intimate that the prosecution has other evidence which it cannot present, but which demonstrates the unreliability of the defendant and the reliability of the accuser. The civil case could degenerate into a mere popularity contest. It is true that, as the Advisory Committee states, reputation evidence is "largely . . . opinion in disguise". But that disguise can be penetrated readily by cross-examination. The unarticulated rationale seems to be that since opinion evidence on credibility may sometimes sneak into a trial, we may as well validate it. However, that approach is quite jarring to the ear of reason.

2. *The Former Testimony Rule.*—The improvement made by your subcommittee, in original rule 804 (b) (1) and 801 (d) (1) is very striking. With great deference, I would advert to a few evidentiary opportunities which remain viable under the rules as changed by you.

(a) *Depositions:* Federal depositions are always cast against a potential evidentiary background. However, under the law of most States, a meaningful distinction exists between the evidence deposition and the discovery deposition. In the state discovery deposition, only one party normally seeks to elicit facts; the other party, possessing full knowledge of the witness' story, merely stands by while his adversary gains access to the same information. To admit into evidence, as 804 (b) (1) would do, a state discovery deposition at which there had been no motive to elicit any facts beyond those called for by the adversary to the witness, can work very substantial mischief.

(b) *Grand Jury Testimony:* This is frequently elicited under coercive circumstances, in which a witness is likely to tell what he believes his questioners want to hear. See, e.g., *Flynn* v. *United States* (SD NY 1955) 130 F. Supp. 412, 417, Testimony thus elicited may be a legitimate basis for impeachment; but to admit it as proof of the fact so long as the witness testifies at the trial, is to encourage the use of the Grand Jury for trial preparation rather than for simple fact finding. Such activities have always been assumed to be improper. See, e.g., *United States* v. *Dardi* (2 Cir. 1964) 330 F. 2d 316, 336; *Groshart* v. *United States* (9 Cir. 1968) 392 F. 2d 1972, 180. The values which are sought to be protected by your subcommittee's proviso appended to 801(d)(1), cannot be served by equating the secret and frequently coercive grand jury proceeding with the judicial atmosphere of the courtroom or the adversarial atmosphere of the deposition.

(c) *Preliminary Hearings in Criminal Cases:* Very frequently, these hearings are conducted in a hurried atmosphere. The only issue is probable cause; and once probable cause becomes clear, not only the motive but the very opportunity for cross-examination is frequently impaired. The magistrate is justifiably impatient with the type of cross-examination that would be considered appropriate at the trial on the merits.

This point was developed in *Barber* v. *Page*, 390 U.S. 719, 20 L. Ed. 2d 255. While the present court has shown a tendency to retreat from *Barber* (*California* v. *Green* (1970) 399 U.S. 140), it has not challenged the practical premises of *Barber*. In many circumstances, preliminary hearing testimony may involve a full motive and opportunity for cross-examination; and such testimony could logically be admitted if the witness is unavailable at the trial. However, the burden should be placed on the proponent of such testimony to demonstrate that full motive and opportunity for cross-examination existed at the preliminary hearing in question; it should not simply be presumed. Any automatic rule will result in the conscientious lawyer attempting to convert the preliminary hearing into a full trial, thereby seriously burdening the court conducting such a hearing and changing the basic nature of the preliminary hearing as we know it.

Recommendation: I would strongly recommend that the words "at an adversarial proceeding" be substituted for the present language, immediately following the words "penalty of perjury" within your proviso to 801(d)(1). I would further recommend that the proviso to 804(b)(1) be amended by changing the words "had an opportunity to develop" to the words "had the motive and opportunity fully to develop".

3. *Corroboration of Exculpatory Confessions.*—Proposed rule 804(b)(4) provides, essentially, that if the declarant is unavailable, a statement against the declarant's interests which incriminates the declarant is admissible, but a statement against the declarant's interests which exonerates the accused is inadmissible unless corroborated. In your subcommittee's proposed rule 804(b)(3), this distinction is perpetuated, with a proviso clarifying the proposition that the required corroboration must go to the truthfulness rather than the fact of the confession, thus presumably according with the dicta of *Chambers* v. *Mississippi* (1973) 93 S. Ct. 1038.

I hope that you will give this matter additional reflection. The entirety of Rule 804 is predicated upon the proposition that the value of the hearsay declaration is not necessarily impaired by the unavailability of the declarant—and "unavailability" includes a claim of constitutional privilege under 804(a).

In the past, the entire premise of our system of justice has been that all litigants, particularly including a sovereign, stand equal before the law. The subject rule constitutes the first official declaration that defense evidence is more likely to be contrived or perjured, than is prosecution evidence. The implications are very disturbing.

The burden thus placed upon a criminal defendant, is far greater than that which would be assumed by the prosecution in an attempt to convict the declarant. A conviction can be predicated entirely upon corpus delicti and confession. But

the proposed rule carves out a requirement that if a third-party confession is to be used for exoneration, it must be scrutinized more carefully than if it is to be used in order to convict.

The spectre of a criminal defendant arranging for a contrived confession by an accomplice gifted with an unassailable alibi in order to create a reasonable doubt of his own guilt, is just that: A spectre. I know of no case where any such thing has happened; but there are many recorded instances of inculpatory third-party confessions induced by promises and lenity, on the premise that the person accused within the confession is a more direct prosecutive target than is the confessor. The rule, as proposed, is an extremely unfortunate one, and works a fundamental revision of the relationship between the citizen and his government.

4. *Admissibility of Reports by Police Agencies.*—Rule 803(8)(C) imposes some restrictions on the use of factual conclusions drawn by investigators. However, 803(8)(B), as drawn, permits the hearsay introduction of a reported statement by any police investigator, concerning a direct observation. Thus, a statement in a police file to the effect that a given individual was seen under circumstances there stated, or concerning hearsay declarations by others, would become admissible. I hope that 803(8)(B) will be clarified to exclude such matters, and to place factual observations under 803(8)(B) in the same category with factual findings under 803(8)(C), so far as investigative matters are concerned. Role 803(8)(B) is very proper in non-controversial circumstances, such as weather observation or aviation traffic reports; but it should never apply to investigative activities.

5. *Post-Perception Identification.*—Rule 801(d)(1)(C) would admit certain hearsay testimony concerning "identification of a person made after perceiving him". It is somewhat difficult to conceive of an identification of a person made *before* perceiving him. If the thought here sought to be conveyed is that an in-court identification may be buttressed by a showing of a prior extrajudicial identification made on confrontation, it would appear that the rule is designed to evade the Wade-Gilbert-Stovall doctrine. The reach of those cases, as presently construed, is quite narrow; they apply to only the most obviously suggestive identification procedures, so that any further narrowing would present a serious due process point. But even if the objective be deemed desirable, certainly the rule should be phrased in such manner as to be reasonably intelligible, and beyond any question, the admissibility should be limited to a buttressing of the in-court identification and should never provide a substitute for an in-court identification.

6. *Prior Inconsistent Statements.*—A reasonable argument can be made on both sides of Rule 801(d)(1)(A); but dangers presented are very serious ones. An enthusiastic investigator, whether insurance adjustor or policeman, tends to hear what he wants to hear. Your committee has very commendably sought to narrow the proposed hearsay exceptions in such manner that a definitive statement made by an *unavailable* declarant becomes inadmissible. Note, e.g., your highly desirable deletion of proposed Rule 804(b)(2). It would seem terribly illogical, in most applications, to contend that a hearsay declaration is inadmissible if the declarant is not present at the trial, but somehow becomes admissible if the supposed declarant is present at the trial and *denies* that the attributed statement was made. If anything, the basis of admissibility is considerably weaker in the second case than in the first. Much of what was said concerning grand jury testimony in subparagraph 2(b) of this letter, is applicable here. If this proposed rule is deemed desirable in some applications, I respectfully submit that the rule should be narrowed to prevent the use of any statement which is the product of an interested interrogation. Even the sponsors of original Rule 804(b)(2), deleted by your committee, thought it necessary (as indeed it was) to exclude statements "in response to the instigation of a person engaged in investigating, litigating, or settling a claim". This was deemed necessary, in the language of the Advisory Committee, to guard against "the use of statements carefully prepared under the tutelage of lawyers, claim adjustors, or investigators with a view to pending or prospective litigation". I would urge that a basic requirement of fairness would be the engrafting of the same exception upon 801(d)(1)(A), although I would greatly prefer the deletion of that rule in view of its potential for mischief.

* * * * * * *

I have other reservations concerning the Rules, but those above stated are, in my opinion, the most serious. I would frankly question the need for a federal evidence code. Most jurisdictions have not codified their evidence rules. However, if such codification is to be accomplished, I am very grateful that it is being done

under the aegis of your subcommittee, which has clearly demonstrated a commendable insight into the problems presented by the original draft of the rules.

Thank you again for having extended an opportunity for the presentation of views concerning this matter.

Very truly yours,

MELVIN B. LEWIS,
Professor of Law.

LAW OFFICES,
JAMES F. SCHAEFFER,
Memphis, Tenn., July 18, 1973.

Re proposed Federal rules of evidence.

Congressman WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: We have carefully studied the revised draft of the proposed rules of evidence submitted by the House Subcommittee which you chair, and are pleased with the results and impressed with the thoroughness of the study which you have conducted. There remain, however, certain problems to which we wish to address ourselves for your further consideration. These include the following:

(1) Rule 406—Habit; Routine Practice. We have previously submitted an analysis and position paper in connection with this rule and have suggested that the same be amended. It was our understanding the Subcommittee staff had agreed with our basic suggestions and recommended the change. We note that the Subcommittee print retains this rule in its original form, which we believe to be too broadly drawn, and we request your reconsideration of the position paper earlier submitted to you.

(2) Rule 706—Court Appointed Experts. We have previously submitted a position paper to the subcommittee in opposition to this rule. It is possible, however, that you did not receive this paper in time to consider it prior to your study of this rule. We are particularly concerned that under the rule in its present form the jury may be informed that such an expert was selected by the judge.

(3) Rule 803(1)—Present Sense Impressions. We submit with this letter a position paper in opposition to adoption of this rule. It is, in practical effect, a restatement of Rule 804(b)(2), which was stricken by the subcommittee. We feel this rule is even more dangerous and should also be eliminated.

(4) Rule 803(18)—Learned Treatises. We agree with the substance of this rule as an improvement on existing law, but believe it could be improved as outlined in our position paper. We appreciate your statement in your letter to me on July 9, 1973, that the committee will consider in the final draft phase the ATL position that the requirement that an expert be on the witness stand be eliminated.

The Association of Trial Lawyers of America wishes to express its thanks to the Subcommittee for an excellent legislative study of the rules to this point in their development. We will continue our study of the rules, and will submit additional suggestions or comments as necessary or requested. We urge you to call on us for any further work which would be of benefit to the Congress in the future consideration of these rules.

Very truly yours,

JAMES F. SCHAEFFER.

POSITION PAPER ON PROPOSED FEDERAL RULE OF EVIDENCE NO. 803(1)

SUBMITTED FOR THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA BY THE COMMITTEE ON FEDERAL EVIDENCE AND PROCEDURE; JAMES F. SCHAEFFER, CHAIRMAN, IN CONSULTATION WITH JOE A. MOORE, PROFESSOR OF LAW, MEMPHIS STATE UNIVERSITY, MEMPHIS, TENN.

PROPOSED RULE NO. 803(1)

"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."

COMMENT

The proposed rule is inconsistent with existing law, and, in the judgment of the Association of Trial Lawyers of America, represents a departure which is not wise. In order to place the status of the rule in proper perspective, it must be compared with the similar proposed rule 804(b)(2), which rule was stricken by the House Subcommittee on the stated ground that it was "creating a new and unwarranted hearsay exception of great potential breadth. The Subcommittee did not believe that statements of the type referred to in the proposed Court Rule bore sufficient guarantees of trustworthiness to justify admissibility."

It is submitted that Proposed Rule 803(1) is subject to the same criticism, and to a greater degree by reason of the fact the requirement here is that the hearsay is admissible even though the alleged declarant is available as a witness at the trial. Under the now stricken 804(b)(2) the requirement of unavailability of the declarant was made, thus giving at least some semblance of need for the admission of the hearsay.

The only language differential between the two rules is that 804(b)(2) imposed the time relationship between the alleged statement and the event to which it referred in the terms "recently perceived by the declarant" whereas 803(1) requires that the alleged statement be made "while the declarant was perceiving the event or condition, or immediately thereafter." It is submitted this distinction in time limitation does not serve to furnish the essential element of trustworthiness of the information to the degree necessary in couching an exception to the hearsay rule. The term "immediately thereafter" is subject to various interpretations, and could be abused easily.

In dealing with declaration exceptions to the hearsay rule, Dean Wigmore stated that the exception had certain logical limitations in order to meet trustworthiness requirements, including:

> "The logical limitations now accepted for this exception are as follows:
> (1) There must be some startling external event;
> (2) The utterance must be soon afterwards, before time has elapsed for deliberate reflection; how much time, depends entirely on the circumstances of each case, and precedents are here of little use.
> (3) The utterance must relate to the circumstances of the event.
> (4) The person uttering may be a bystander, and not necessarily a victim of an injury." Wigmore, Evidence 2d ed., Sec. 265.

The basis for the recognized exception is well stated in 29 Am. Jur. 2d, Evidence, Sec. 716, p. 779:

> "The admissibility of a declaration as res gestae is not determined by a stopwatch which counts the number of minutes that elapse from the moment of the *exciting event* to the utterance of the declaration, but by a determination of whether or not the sway of the *exciting event* still dominated the declarant when he spoke." (Emphasis Added)

In *State v. Hutchison*, 222 Or. 533, 353 P. 2d 1047, 83 ALR2d 1361, the court used the precise language set forth in Am. Jur. 2d. In so holding, the court referred to McCormick on Evidence, Sec. 272, as follows:

> ". . . The factor of special reliability is thought to be furnished by the excitement which suspends the powers of reflection and fabrication . . . . At any rate, excitement flowing from a startling event is the key requirement now . . . ."

Rule 803(1) eliminates the requirement of an exciting event as the basis for admissibility under the exception, leaving only the time relation as the guarantee of trustworthiness.

While several authorities, including Professors Thayer, Morgan and McCormick, have argued for the position taken by the proposed rule, only the State of Texas has given credence by judicial decision to an additional exception for declarations stemming from non-exciting events which the declarant is observing at the time he made the declaration. Houston Oxygen Co. Inc. v. Davis, 161 S.W. 2d 274; Anderson v. State, Tex. Cr. App., 454 S.W.2d 74; Claybrook v. Acreman, Tex. Civ App., 373 S.W.2d 287.

The advisory committee takes the position that evidence of the type to be allowed by the "present sense" exception here created has been routinely allowed under the guise of *res gestae*. Analysis of the authorities, however, indicates that this has not been true in any broad sense. Professor McCormick has stated that "some courts however have admitted evidence of this sort under general res gestae language, although others have rejected it." McCormick, Evidence 2d

ed., Sec. 298, et seq. Study of the cases referred to by McCormick discloses that the majority of courts have rejected such offered evidence when presented under the aegis of *res gestae*.

In Rule 803(1), the committee has not only adopted the essence of a minority view, but has expanded the rule of admissibility from a declaration made while the declarant was actually perceiving the event or condition to include statements made "immediately thereafter." Morgan, Res Gestae, 12 Wash. L. Rev., 91 et seq.

The advisory committee states in its note, that the "underlying theory of the exception is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation . . ." That statement is not substantially supported by existing authority. The case law majority is clearly to the contrary. Barnett v. Bull, 250 Pac. 955 (Wash. 1926); Murphy Auto Parts Co. v. Ball, 249 F. 2d 508 (C.A. D.C. 1957); Idea Cement Co. v. Killingsworth, 198 So. 2d 248 (—— —— 1967); Wrage v. King, 220 Pac. 259 (Kansas 1923); Showalter v. Western R.R. Co., 106 P. 2d 895 (Cal. 1940).

Rule 803(1) is broader and less trustworthy in basis than stricken Rule 804(b)(2), and should be eliminated from the proposed rules on the same basis.

U.S. Court of Claims,
Washington, July 19, 1973.

Hon. William L. Hungate,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington D.C.

Dear Chairman Hungate: This is in response to your June 30, 1973, request for comments on the Committee Print of a tentative Subcommittee draft of H.R. 5463, a bill to establish the Federal Rules of Evidence, and for other purposes.

Commissioners of the United States Court of Claims sit as trial judges in nonjury cases to receive testimony and evidence on claims before the Court. In these trials, all evidence is admitted that is admissible under the statutes of the United States or under the rules of evidence applied in the United States District Court for the District of Columbia. It would be appropriate, therefore, in my opinion, to amend Rule 1101(a) of the Subcommittee draft of H.R. 5463 to make the new rules apply to the United States Court of Claims. This could be accomplished by inserting "the United States Court of Claims" in the first sentence of Rule 1101(a) and by amending the final sentence to read as follows:

> "The word 'judge' in these rules includes commissioners of the United States Court of Claims, United States magistrates and referees in bankruptcy."

With best personal regards,

Kenneth R. Harkins,
Commissioner.

Attorney at Law,
Washington, D.C., July 19, 1973.

Re Federal Rules of Evidence.

Hon. William L. Hungate,
Rayburn House Office Building,
Washington, D.C.

Dear Mr. Chairman: Thank you for your letter of June 30, 1973 and for the enclosed Committee Print of the Subcommittee draft of the proposed Federal Rules of Evidence.

As I testified, I have grave misgivings about prescribing uniform rules of evidence for the federal courts. Nevertheless, the Subcommittee draft is a tremendous improvement over the rules promulgated by the Supreme Court.

Particularly welcome are the Subcommittee's treatment of privilege, its deletion of proposed Rule 303 regarding presumptions in criminal cases, and its decision to look to State Law to determine competency of witnesses in civil diversity cases.

I remain concerned about the breadth of impeachment of witnesses as to their character and conduct permitted by Rule 608. It's hard enough as it is to obtain the attendance of witnesses even under subpoena, and it will be harder still if the idea gets abroad that it's open season in court on their character and past conduct.

Finally, in connection with the business entry exception to the hearsay rules as defined in Rule 803(6), the Subcommittee may wish to reconsider the restriction of that exception to "business or professional" activity. Governments, labor unions and charitable organizations, for example, keep extensive records in the regular

course of their activities. It seems to me that these too should be admissible, but they might not be as Rule 803 (6) is presently worded.

In closing, Mr. Chairman, I would like to compliment you and the Subcommittee for your thorough hearings, your careful consideration of these extensive proposed rules, and the vast improvements you have wrought. It has been a real privilege to watch nine able lawyers, of every political persuasion, thoughtfully and objectively weighing every line. You have done a real public service.

Respectfully,

STUART H. JOHNSON, Jr.

STATE OF ALASKA,
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,
OFFICE OF THE COMMISSIONER,
Juneau, July 19, 1973.

Hon. WILLIAM L. HUNGATE,
House of Representatives,
Washington, D.C.

DEAR MR. HUNGATE: I am in receipt of the tentative draft of H.R. 5463, a bill to establish federal rules of evidence. On March 26, 1973 you wrote me and explained that the letter I had written Congressman Don Young on March 16, 1973 had come to your attention.

I stand on my original comments regarding S. 583. H.R. 5463 seems to have the same limitations as S. 583 in that physician-patient privileges are referred to only in Rule 504 under the definition of "psychotherapist." I can only assume that this definition would not extend the physician-patient privilege to matters not involving "the diagnosis and treatment of a mental or emotional condition." Since I cannot in good faith endorse such a distinction as the only privileged information that passes between physician-patient, I would strongly support the American Medical Association's request for limited physician-patient privileges.

As Commissioner of Health and Social Services, I supervise a number of agencies having many social workers in various capacities. I am concerned that the definition of "psychotherapists" does not extend itself to that profession. I am particularly concerned about the question this generates in those states which have professional social worker licensure as "clinical social workers." If "psychotherapy" is to be the criteria for privilege then it should be expanded to include all judicially recognized professionals able to provide "psychotherapy."

I thank you for this opportunity to comment.

Sincerely,

FREDERICK MCGINNIS, *Commissioner.*

HILL, SHERMAN, MERONI, GROSS & SIMPSON,
ATTORNEYS AND COUNSELLORS AT LAW,
Chicago, Ill., July 19, 1973.

Re proposed Rules of Evidence for the U.S. courts and magistrates.

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on the Reform of Federal Criminal Laws, House Committee on the Judiciary, Washington, D.C.

DEAR MR. HUNGATE: Since my earlier letter of June 15, 1973 to you, and since your earlier deliberations, court decisions have been published further illustrating the desirability, if not the absolute practical necessity, of enacting all inclusive Federal Rules of Evidence including uniform rules regarding Privilege.

In *Kewanee* v. *Bicron*, 178 USPQ 3, (May 10, 1973), the Sixth Circuit Court of Appeals reiterated the long recognized rule that patent cases are the province of the United States by mandate of the United States Constitution, and States have been preempted from acting in that area. The Kewanne case added to that rationale cases involving "trade secrets" that could have been patented but intentionally never were.

In *Sperberg* v. *Firestone Tire & Rubber Co.*, BNA (No. 130) D–1, (May 4, 1973), the District Court for the Northern District of Ohio, Eastern Division, ruled that venue in patent cases was strictly limited by 28 USC 1400 (a very restrictive venue provision indeed) and class actions under Rule 23 could not affect a "class" defendant not otherwise reachable under 28 USC § 1400 in the Judicial District wherein the "class action" was filed.

Both of these very recent cases emphasize the fact that cases involving patents or related proprietary rights are rather rigidly controlled, that they must be brought in Federal Courts, and that the choice of the particular Federal District for suit is strictly limited. Since the patent grant is federal, and the court ruling upon it or related matters must be federal, one could properly expect uniformity of the trial proceedings and evidenciary rulings no matter what district is the forum. The United States Supreme Court, in *University of Illinois v. Blonder-Tongue*, 402 U.S. 313, has just reversed its long-standing rule and established as a completely new doctrine (to improve uniformity and reduce the amount of litigation over an individual patent) that in normal circumstances, a patent owner will henceforth be entitled to only one trial where that trial results in a ruling of patent invalidity. In fact, however, no real uniformity of ruling can be expected unless the Rules of Evidence are uniform in all Judicial Districts in which patent rights could be judicially determined. The opportunity is at hand to provide that uniformity and must not be allowed to pass by. We believe it extremely important that the Rules of Evidence, including discovery of "privileged" documents, be uniform so that where the *one* trial takes place, it will be based on universally accepted evidence and discovery proceedings.

Forum shopping based upon procedural rules of evidence should not be encouraged or allowed, and cannot be avoided if the basic rights to discover evidence in the form of internal corporate materials vary from District to District. To give in, as proposed in the Committee Print, Section 501, and specify that the Rules regarding Attorney-Client and other Privileges, will be determined under the common law, is to encourage, in fact to establish, multitude Rules of Privilege, and hence corporate policies regarding communication, all with respect to subject matters uniformly thought of, and legally considered by Congress and the Courts as properly *one* federal, rather than state, matter. The Federal Rules of Evidence, including sections relating to privilege must, we submit, provide uniformity at least in cases where, as in patent cases, the matter at issue is recognized by all as an exclusively federal question.

Sincerely yours,

LEWIS T. STEADMAN.

COMMONWEALTH OF KENTUCKY,
OFFICE OF THE ATTORNEY GENERAL,
Frankfort, Ky., July 20, 1973.

SUBCOMMITTEE ON CRIMINAL JUSTICE,
House Judiciary Committee,
Washington, D.C.

GENTLEMEN: Congressman Romano L. Mazzoli has forwarded to this office a copy of proposed Federal Rules of Evidence, developed by the Subcommittee on Criminal Justice, House Judiciary Committee, for our attention and comments.

Two members of our staff attended seminars in Washington, D.C., and Atlanta, Georgia, dealing with these proposed Rule changes, and the following are their studied comments:

We have carefully reviewed the changes proposed by the Subcommittee and feel that an excellent and thorough effort has been made toward improvement of the Federal Rules of Evidence.

The Subcommittee's elimination of the proposed specific rules on privileges is commendable. As now proposed, through a single Rule, 501, the law of privileges will continue to be developed by the Federal courts governed by the principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64, that is, to mandate the application of State privilege law in civil actions. This is the position unquestionably that should be taken.

Furthermore, by elimination of the proposed specific rules on privileges the Subcommittee has also eliminated an aspect of the Federal Rules of Evidence which could foster undesired forum shopping between the State and Federal court.

As to Rule 601, the Subcommittee has properly seen fit to amend the Rule to make competency in civil actions determinable in accordance with State law with respect to claims or defenses as to which the State law supplies the rule of decision. As the Subcommittee has noted, this added amendment to the Rule has the most effect on those States, as Kentucky, which have a Dead Man's Statute, irrespective of the merits of this type of statute.

The limitations placed on Subdivision 6 of Rule 803 are an improvement. If trustworthiness is the cornerstone for exceptions to the Hearsay Rule, as the hornbooks say it is, by adding the requirement of "business or professional" activity, further assurance of trustworthiness is achieved. As to the deleting of Subdivision 24 providing for other exceptions, this elimination is disapproved. Exceptions merely eliminate the Hearsay Rule as an objection to certain proffered evidence. The courts should not be shackled to only "openly" admitting that hearsay evidence that can be brought under one of the "listed" exceptions. These proposed Federal Rules of Evidence give the judge considerable discretion in other Rules that may have a large impact on a trial, so additional discretion to authorize the admission of hearsay evidence having circumstantial guarantees of trustworthiness would not be unprecedented.

Rule 804, Hearsay Exceptions: Declarant Unavailable, as a whole, was improved upon by the Subcommittee, both by deletion and addition of provisions. Deleting Subdivision 2 is totally agreed with in that this provision regarding a statement of recent perception was overboard and unwarranted.

A good addition by the Subcommittee to the subdivision regarding statements against interest is the language principally codifying the doctrine of *Bruton* v. *United States*, 391 U.S. 123 (1968). However, it is queried as to whether the doctrine is too strongly codified and therefore not in complete accord with Supreme Court cases subsequent to *Bruton* which have somewhat manicured its import, e.g., *Schneble v. Florida*, 405 U.S. 427 (1972), and *Nelson v. O'Neil*, 402 U.S. 622 (1970).

Criticisms of the Subcommittee's changes in Rule 804 are directed at the deletion of the additional varieties of against interest statements, e.g., declarations exposing the declarant to hatred, ridicule or disgrace, or to render invalid a claim by him against another. These declarations against interest do entail sufficient guarantees of trustworthiness, and if not specifically provided for in the Rules, declarations of this nature will be relegated to being brought into evidence obliquely under against pecuniary or proprietary interest provisions.

The expansion of the use of a statement under belief of impending death to civil cases is criticized for setting up the possibility of undesirable forum shopping.

Lastly, the Subcommittee's deletion of the "catchall" subdivision of Rule 804 is disfavored for the same reasons given above as to the deletion of Rule 803(24).

We hope that these comments may aid the Subcommittee in its determinations.

Sincerely yours,

ED. W. HANCOCK,
Attorney General.
By ROBERT L. CHENOWETH,
Assistant Attorney General.
By JAMES M. RINGO,
Assistant Attorney General.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., July 21, 1973.

Hon. WILLIAM HUNGATE,
Chairman, Subcommittee on Criminal Justice,
House Committee on the Judiciary, Washington, D.C.

DEAR BILL: Ed Hutchinson has forwarded to me a letter which was sent to him and which was originally addressed to you by Frederick D. McDonald, an attorney of Knoxville, Tennessee, regarding Rule 801(d)(1) of the proposed new Federal Rules of Evidence.

This Rule deals, as you know, with the use of prior contradictory statements as substantive proof of the matter within contained rather than simply for impeachment purposes, as is presently the law.

As you also know, I share Mr. McDonald's objections, and while our final version was less objectionable than that originally proposed, I remain dissatisfied with this proposed Rule. I think Mr. McDonald's letter is quite persuasive on the subject, and I hope that in due course we may give this matter some further consideration.

Sincerely,

DAVID W. DENNIS,
Member of Congress.

FREDERICK D. McDONALD,
ATTORNEY AT LAW,
Knoxville, Tenn., July 9, 1973.

Hon. WILLIAM L. HUNGATE,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Thank you very much for your letter of June 30 forwarding the tentative subcommittee draft of the proposed Federal Rules of Evidence.

I believe that the Subcommittee modification of Rule 801(d)(1) is very much of an improvement over the original proposal. However, I should like to point out that the footnoted reasons supporting the modified rule making hearsay admissable substantively if taken under oath still do not meet the objections to substantive use of such hearsay.

The second of the two reasons set forth in the footnote supporting the Subcommittee modification states that the now added requirement of an oath provides "firm additional assurance of reliability of the statement". (Pages 26 and 27 of June 28, 1973 Committee Print, Amending proposed Federal Rules of Evidence). It is respectfully suggested that this is not so.

The reason this is not so is because the oath is from a witness who by definition has demonstrated his unreliability under oath. The prior statement under oath is made by a person who is now in court and who is once again under oath, and who is testifying in contradiction to his prior sworn testimony. The contradiction on its face demonstrates his inherent unreliability. In fact, it is the very contradiction and consequent unreliability that makes his prior inconsistent, sworn statement admissible for impeachment purposes. Thus the prior sworn statement is from a demonstratably unreliable source, contrary to the footnote assertion of a firm assurance of reliability.

Put another way, it is self-contradictory to admit evidence to impeach to show unreliability of the source, and at the same time use the same evidence from the same source as substantive proof on the grounds that it is reliable. If a man will lie under oath on one occasion, he is just as likely to do so on another. The inconsistency of two statements under oath is not proof that either one is trustworthy. Such inconsistency mainly shows that the witness is unreliable, and it would be better to say that neither statement should be accepted as true instead of giving the jury a choice between two stories from an unreliable source. In short, the suggested subcommittee compromise still violates the fundamental requirement for a hearsay exception: the requirement of reliability.

There is another problem to be considered. If the compromise rule is used, what happens if the unreliable, sworn witness has told three or four different versions under oath? The proposed rule would permit a jury to pick from among this garden of inconsistencies, a most ludicrous result.

Further, the basic objection to all hearsay still applies: one or both of the parties to the lawsuit in most cases will not have been present to cross-examine the witness when he gave his first statement. While this objection applies to depositions and hearings, it applies with particular cogency to grand jury testimony where the defendant is unrepresented but the Government, which is seeking a conviction, is.

The footnote says that the problem sought to be corrected here is that of witness intimidation. This may well be a problem, but it does not justify the use of demonstratably unreliable testimony. The desire for convictions should not overcome the judicial search for truth based upon reasonably reliable evidence.

The so-called Second Circuit rule mentioned in the footnote represents a small minority of thought and is against the large majority of American holdings. Upon full analysis it is not justified.

There are many reasons witnesses change their stories. However, whenever a change occurs there is one common feature: the witness can be said to be unreliable to a degree roughly measurable by the extent of his change in testimony. It follows then that the more the type of substantive hearsay testimony here sought is needed, the less reliable it is. This is most unjust, and particularly so when it is considered that the prior consistent testimony of honest, reliable witnesses will remain inadmissible.

The subcommittee is to be commended for its obviously sincere and diligent work in attempting to resolve the problem. However, to the greatest extent possible a person's guilt or innocence, or civil liability should be based upon in-court, under-oath testimony given while the party is present and can cross-examine.

The erosion of this principal by the proposed compromise on Rule 801(d)(1) can only be justified on the basis of claimed need without any real counterbalance of assurance of substantial reliability, and for this reason 801(d)(1) should be eliminated in total.

Sincerely yours,

FREDERICK D. MCDONALD.

LAW OFFICES,
BLANCHARD, VAN FLEET, ROBERTSON & DERMOTT,
Joplin, Mo., July 23, 1973.

Re proposed Rules of Evidence.

Hon. WILLIAM A. HUNGATE,
Congress of the United States,
Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Pursuant to our various correspondence, the Missouri Bar Civil Practice and Procedure Committee working through a Subcommittee has been considering the proposed federal rules of evidence. The Subcommittee, in addition to the writer, consisted of the following:

John L. Davidson, Jr., Esq.
Roberts P. Elam, Esq.
Joseph Kortenhof, Esq.
William A. Moffitt, Jr., Esq.

Initially, the committee had before it the pamphlet printed by West Publishing Company styled "Rules of Evidence for the United States Courts and Magistrates"; later we received the committee print dated June 28, 1973, with various changes proposed by the Subcommittee on Criminal Justice House Committee on the Judiciary.

Each member of the committee was assigned specific rules for study. The comments of each member of the committee were then circulated among the committee for review and criticism. On Friday, July 20, the committee met in St. Louis with all members present except Mr. Elam. At that time there was further discussion, and a report roughly drafted representing the collective views of the committee.

It should be clearly understood the following comments do not represent the views of the Mo. Bar as time did not permit a presentation to the Board of Governors.

We take up the Articles seriatum. Comments that "we agree" indicates our committee agrees with the committee print dated June 28, 1973, and the proposed changes contained therein.

Article I

We agree, and believe this Article should be adopted.

Article II

We agree, and believe this Article should be adopted. Our committee wishes to commend your Subcommittee for deleting subparagraph (g).

Article III

We agree, and believe this Article should be adopted. Again, our commendations to the Subcommittee for removing Rule 303.

Article IV

We agree except as to Rule 406. We have carefully considered the Subcommittee note, nevertheless, we wish to add our voice to those in opposition to Rule 406.

Article V

We commend the Subcommittee for the deletions and agree with Rule 501 with this inclusion. We believe it should be made clear either in Rule 501 or Rule 601 that no person should be compelled to testify or produce documents where such testimony or production of documents violates substantive law.

Article VI

We agree, believe this Article should be adopted, and commend the Subcommittee for the deletions.

Article VII

We agree with the following observation. Our committee unanimously concurs with the comments of Wm. A. Moffitt, Jr., Esq. in his April 30, 1973, letter to you, third paragraph, page 3, and I quote:

> "Rule 706 concerns court appointed experts. Personally, I find the whole idea of a court appointed expert to be questionable at best. If the expert is appointed on the court's own motion, it is another instance of the court becoming a party litigant. If requested by a party, logically I cannot see how the expert can be 'court appointed.' If the Rule is permitted to stand then Rule 706(c) becomes particularly unpalatable. If the judge exercises the discretion given him to 'authorize disclosure to the jury of the fact that the court appointed the expert witness' such disclosure may well force the jury to give more weight than is due to such expert testimony."

Article VIII

This is a complicated field which has been worked over by experts. Our committee had trepidation of doing anything other than complimenting the Subcommittee for a job well done. We also commend the Subcommittee for the deletions.

Article IX

We agree, and believe this Article should be adopted. One of our members was particularly enthusiastic over the provisions of this article and Article X.

Article X

We agree, and this Article should be adopted.

Article XI

We agree, and believe this Article should be adopted.

We appreciate the opportunity you have provided us for reviewing these proposed rules, and expressing our views. As you know, a panel discussion of these rules will be conducted at the Missouri Bar Meeting on October 12. Would it be possible for us to obtain as many as 200 copies of the committee print dated June 28, 1973, for use at this panel discussion?

Again, our thanks for your courtesy and consideration.

Sincerely,

KARL W. BLANCHARD.

DISTRICT COURT,
STATE OF NORTH DAKOTA,
FIFTH JUDICIAL DISTRICT,
Williston, N. Dak., July 23, 1973.

Re Rules of Evidence.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE HUNGATE: As the author of State v. Igoe, 206 N.W.2d 291 (N. Dak. 1973), a recent decision by the Supreme Court of North Dakota, I would like to urge your committee to restore the Supreme Court's draft of Rule 801 by deleting the proviso in subdivision (d)(1).

I see no reason why the prior inconsistent statement must have been given under oath in order to insure reliability of the statement having been made. If the Rule proposed by the Supreme Court is to be qualified at all, the qualification should be no more than that the witness admits having made the prior statement. While the fact that the prior statement is made under oath illustrates the clear need for the rule, the rule is just as certainly needed in cases where the prior inconsistent statement is not made under oath. As pointed out in the Advisory Committee's comment to the proposed rule, the truth of the inconsistent statements can be explored and ascertained by cross-examination at the trial. I strongly urge that the proposed qualification be stricken.

Sincerely yours,

EUGENE A. BURDICK.

RE 801(d)(1)

The State of North Dakota, Plaintiff and Respondent, v. John Igoe, Defendant and Appellant. Cr. No. 420. Supreme Court of North Dakota. Feb. 27, 1973. Rehearing Denied April 13, 1973.

Defendant was convicted before the District Court of Burleigh County, W. C. Lynch, J., of illegal sale of marijuana and illegal sale of marijuana derivative, THC, and defendant appealed from judgment of conviction and from order denying motion for new trial. The Supreme Court, Burdick, District Judge, held that where, at trial, state's witness denied having purchased marijuana from defendant, witness' testimony before grand jury, which was investigating drug violations, that although she had "never bought anything' from defendant defendant had given her "some" was admissible, not only for purpose of refreshing her recollection and impeaching her testimony, but also as substantive evidence of delivery of marijuana by defendant to witness as charged in indictment; it was within province of jury to determine whether her sworn testimony before grand jury was the truth or whether her sworn testimony at trial was the truth. However, the Court held that conviction was required to be reversed on other grounds.

Judgment reversed; order denying motion for new trial reversed in part and affirmed in part.

Paulson, J., did not participate.

1. Drugs and Narcotics ⟸131

Instruction that term "sale" or "sold" within meaning of statute, which existed prior to adoption of Uniform Controlled Substances Act and which provided that no person shall sell marijuana, included any barter, exchange or gift, or offer therefor, and any such transaction made by a person may not have been strictly accurate but it had merit of informing the jury, in prosecution for having sold marijuana, that a gift of marijuana was a violation of the statute. NDCC 19-03.1-01 et seq.

2. Witnesses ⟸397

Majority rule at common law was that prior statements inconsistent with testimony of the declarant as a witness at the trial could be used to impeach the witness, but not as substantive evidence of the facts stated.

3. Witnesses ⟸397

Prior statement of declarant which is inconsistent with testimony of the declarant at the trial, the declarant being subject to cross-examination concerning the statement, is admissible as substantive evidence of the truth of the matter asserted in the statement.

4. Witnesses ⟸397

Where, at trial, state's witness denied having purchased marijuana from defendant, witness' testimony before grand jury, which was investigating drug violations, that although she had "never bought anything" from defendant defendant had given her "some" was admissible, not only for purpose of refreshing her recollection and impeaching her testimony, but also as substantive evidence of delivery of marijuana by defendant to witness as charged in indictment; it was within province of jury to determine whether her sworn testimony before grand jury was the truth or whether her sworn testimony at trial was the truth. NDCC 19-03.1-01 et seq.

5. Criminal Law ⟸1189

Where, on advising defendant not to testify, counsel relied on trial court's ruling, to the effect, that testimony given by state witness before grand jury could not be considered as substantive evidence, witness' grand jury testimony was sufficient to sustain conviction and rule as to admissibility of out-of-court declarations was changed on appeal to permit use thereof as substantive evidence and there was no other substantive evidence of guilt, interest of a fair trial and interest of justice required a new trial.

6. Criminal Law ⟸1186.1

Where only evidence offered with respect to count charging sale of marijuana to witness consisted of an inference to be drawn from witness' refusal, on ground of privilege against self-incrimination, to answer direct question put to him by the prosecutor as to whether he had purchased marijuana from defendant, conviction was required to be reversed. NDCC 19-03.1-01 et seq.; U.S.C.A. Const. Amend.5.

7. Witnesses ⟸309

In a criminal prosecution, refusal by a witness other than the accused to answer a question on the ground that his answer will tend to incriminate him cannot alone be made the basis of any inference by the jury, either favorable to prosecution or favorable to defendant. U.S.C.A. Const. Amend. 5.

Syllabus by the Court

1. A prior sworn statement of a declarant, which he admits having made and which is inconsistent with testimony of the declarant at the trial, the declarant being subject to cross-examination concerning the statement, is admissible as substantive evidence of the truth of the matter asserted in the statement.

2. In a criminal prosecution, the refusal by a witness other than the accused to answer a question on the ground that his answer will tend to incriminate him cannot alone be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant.

John Adams and Robert P. Brady, Asst. Attys. Gen., Bismarck, for plaintiff and respondent.

Zuger, Bucklin & Zuger, Bismarck, for defendant and appellant.

Burdick, District Judge.

This is an appeal from two jury verdicts of guilty and the judgment of conviction entered thereon in the trial of a criminal action in the district court of Burleigh County in June, 1971, and from the order denying defendant's motion for a new trial.

The defendant, John Igoe, was tried upon five counts of an Indictment by a grand jury charging him with the sale of marijuana and the marijuana derivative THC. At the conclusion of the testimony, the state consented to a dismissal of the first three counts by reason of insufficient evidence. Count Four charged the defendant with having "Sold marijuana derivative, THC to Joe Peabody on or about August 1, 1970". Count Five charged the defendant with having "Sold marijuana to Karen Sprenger on or about August 1, 1970".

The pertinent statute governing this charge was Chapter 19-03 of the North Dakota Century Code which has been superseded by the Uniform Controlled Substances Act (Chapter 19-03.1, N.D.C.C.). Section 19-03-28, N.D.C.C., provided as follows:

> "No person shall grow, sell, trade, furnish, or give away, or have in his possession, any marijuana. Any person who shall violate any provision of this section shall be punished by a fine of not more than two thousand dollars, or by imprisonment in the penitentiary for not more than five years, or by both such fine and imprisonment."

[1] While the defendant is charged with having "sold" marijuana to Karen Sprenger, the trial court instructed the jury that "The term 'sale' or 'sold' includes any barter, exchange, or gift, or offer therefor, and each such transaction made by a person." This definition of "sale" or "sold" may not be strictly accurate, but it had the merit of informing the jury that a gift of marijuana is a violation of the statute. See State v. Dwyer, 172 N.W. 2d 591 (N.D. 1969).

The defendant has make a number of specifications of insufficiency of the evidence and of errors of law. We shall deal first with the specifications of insufficiency of the evidence with respect to Count Five.

At the trial, Karen Sprenger was called as a witness by the State. She testified that she had "tried" marijuana on different occasions by smoking and inhaling it, but denied having purchased marijuana from the defendant.

At the trial, she was asked, "You are now testifying that John Igoe never gave you any marijuana?" She replied, "I can't remember him giving me anything directly." This testimony leaves an inference that the defendant gave her marijuana indirectly. Other than this testimony of Karen Sprenger and her acknowledged testimony before the grand jury, there was no evidence adduced at the trial that would establish a delivery of marijuana by the defendant to Karen Sprenger on or about August, 1971.

Claiming surprise, the State offered to introduce testimony given by the witness before the grand jury that indicted the defendant, "to refresh her recollection, if possible, in the first instance; and, if not, we wish it in for its value as substantive evidence." The grand jury was investigating drug violations in Burleight County. Karen Sprenger had testified before the grand jury as follows:

"Q. When is the last time you bought anything from John Igoe?

"A. I never bought anything.

"Q. If someone said that you had and they had seen you, would they be lying?

"A. They would be. He gave me some: I never bought it.

"Q. For nothing?

"A. Yes."

In the context of the inquiry then pending before the grand jury and the numerous questions with reference to marijuana put to Karen Sprenger at the trial, and her vigorous denial at the trial that the defendant had ever given or sold marijuana to her, it is reasonable to conclude that the foregoing testimony taken

before the grand jury had reference to marijuana. At the trial, Karen Sprenger admitted giving the foregoing testimony, but stated that she was mistaken as to that testimony and that she was "confused" at that time.

Accordingly, if the foregoing testimony given before the grand jury could be received as substantive evidence at the trial, there would be competent evidence to establish the guilt of the defendant. It would be within the province of the jury, as the trier of the fact, to determine whether Karen Sprenger testified to the truth before the grand jury or at the trial.

The trial court ruled that her testimony before the grand jury could be used to refresh her recollection and for the purpose of impeachment, but not as substantive evidence.

This state of facts raised the question of whether the testimony of the witness, Karen Sprenger, given before the grand jury can be used as substantive evidence where she testifies at the trial and is subject to cross-examination concerning her prior inconsistent testimony.

[2] The majority rule at common law has been that prior statements inconsistent with testimony of the declarant as a witness at the trial may be used to impeach the witness, but not as substantive evidence of the facts stated. This Court has followed the majority rule. State v. Snavely, 189 N.W.2d 632 (N.D. 1971); Grand Forks B & D Co. v. Implement Dealers Mut. Fire Ins. Co., 75 N.D. 618, 31 N.W.2d 495. The rule has been severely criticized by McCormick on Evidence, Sec. 39, pages 73 to 82. It has also been discarded by the Uniform Rules of Evidence, Rule 20.

The United States Supreme Court has held that a state statute which provides that "evidence of a statement made by a witness is not inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with" a statute that requires that the witness be given an opportunity to explain or deny the prior statement at some point in the trial, does not violate the defendant's right of confrontation guaranteed by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489.

In the light of the decision in *Green*, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States submitted to the United States Supreme Court a Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates. While the instant case was under consideration by this Court, the United States Supreme Court, by Order November 20, 1972, promulgated the Proposed Rules of Evidence as "Federal Rules of Evidence" for United States Courts and Magistrates to be effectlve July 1, 1973, unless abrogated by the Congress. Rule 801 of Federal Rules of Evidence reads as follows:

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, 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 (C) one of identification of a person made after perceiving him; 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 co-conspirator of a party during the course and in furtherance of the conspiracy.

56 F.R.D. 183, 293.

The Advisory Committee Note with respect to Subdivision (d)(1) reads as follows:

Subdivision (d). Several types of statements which would otherwise literally fall within the definition are expressly excluded from it:

(1) *Prior statement by witness.* Considerable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth. The argument in favor of treating these latter statements as hearsay is based upon the ground that the conditions of oath, cross-examination, and demeanor observation did not prevail at the time the statement was made and cannot adequately be supplied by the later examination. The logic of the situation is troublesome. So far as concerns the oath, its mere pretense has never been regarded as sufficient to remove a statement from the hearsay category, and it receives much less emphasis than cross-examination as a truth-compelling device.

While strong expressions are found to the effect that no conviction can be had or important right taken away on the basis of statements not made under fear of prosecution for perjury, Bridges v. Wixon, 326 U.S. 135, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945), the fact is that, of the many common law exceptions to the hearsay rule, only that for reported testimony has required the statement to have been made under oath. Nor is it satisfactorily explained why cross-examination cannot be conducted subsequently with success. The decisions contending most vigorously for its inadequacy in fact demonstrate quite thorough exploration of the weaknesses and doubts attending the earlier statement. State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939); Ruhala v. Roby, 379 Mich. 102, 150 N.W. 2d 146 (1967); People v. Johnson, 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P. 2d 111 (1968). In respect to demeanor, as Judge Learned Hand observed in Di Carlo v. United States, 6 F. 2d 364 (2d Cir. 1925), when the jury decide 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. The bulk of the case law nevertheless has been against allowing prior statements of witnesses to be used generally as substantive evidence. Most of the writers and Uniform Rule 63(1) have taken the opposite position.

The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence, but with a recognition that particular circumstances call for a contrary result. The judgment is one more of experience than of logic. The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates three situations in which the statement is excepted from the category of hearsay. Compare Uniform Rule 63(1) which allows any out-of-court statement of a declarant who is present at the trial and available for cross-examination.

(A) Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. As has been said by the California Law Revision Commission with respect to a similar provision:

"Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it, and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case." Comment, California Evidence Code § 1235. See also McCormick § 39. The Advisory Committee finds these views more convincing than those expressed in People v

Johnson, 68 Cal.2d 646, 68 Cal.Rptr. 599, 441 P.2d 111 (1968). The constitutionality of the Advisory Committee's view was upheld in California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.

(B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as a substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

(C) The admission of evidence of identification finds substantial support, although it falls beyond a doubt in the category of prior out-of-court statements. Illustrative are People v. Gould, 54 Cal.2d 621, 7 Cal.Rptr. 273, 354 P.2d 865 (1960); Judy v. State, 218 Md. 168, 146 A.2d 29 (1958); State v. Simmons, 63 Wash.2d 17, 385 P.2d 389 (1963); California Evidence Code § 1238; New Jersey Evidence Rule 63(1)(c); N.Y. Code of Criminal Procedure § 393-b. Further cases are found in 4 Wigmore § 1130. The basis is the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions. The Supreme Court considered the admissibility of evidence of prior identification in Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). Exclusion of lineup identification was held to be required because the accused did not then have the assistance of counsel. Significantly, the Court carefully refrained from placing its decision on the ground that testimony as to the making of a prior out-of-court identification ("That's the man") violated either the hearsay rule or the right of confrontation because not made under oath, subject to immediate cross-examination, in the presence of the trier. Instead the Court observed:

"There is a split among the States concerning the admissibility of prior extrajudicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 ALR2d 449. It has been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at the trial. See 5 ALR2d Later Case Service 1225–1228. . . ." 388 U.S. at 272, n. 3, 87 S.Ct. at 1956.

56 F.R.D. 183, 295–297.

[3] There appears to be a high probability that the Proposed Rules of Evidence will become effective as Federal Rules of Evidence on July 1, 1973. Because of the desirability of having our rules of evidence compatible with those governing the Federal courts, and in the light of what now appears to us to be the sounder and preferable rule, we hold that a prior statement of declarant which is inconsistent with testimony of the declarant at the trial, the declarant being subject to cross-examination concerning the statement, is admissible as substantive evidence of the truth of the matter asserted in the statement.

Most of the lost protections in the use of out-of-court statements as substantive evidence are largely regained where the declarant is a witness and can be confronted and cross-examined. The danger of faulty reproduction is negligible where there is competent evidence to show that the statement is his or, as in the case, the witness admits that the prior statement is his.

The declarant as a witness is also under oath and must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury. As stated in *Green, supra*, 399 U.S. 149, 159, 90 S.Ct. 1930 1935, "the very fact that the prior statement was not given under a similar circumstance may become the witness' explanation for its inaccuracy—an explanation a jury may be expected to understand and take into account in deciding which, if either, of the statements represents the truth."

Also, with respect to the value of cross-examination of the declarant as a witness as opposed to cross-examination at the time the out-of-court statement was made, the court in *Green, supra*, 399 U.S. 149, 161, 90 S.Ct. 1930, 1936, observed that the question is "not whether one can somehow imagine the jury in 'a better position,' but whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement."

We quote further with approval from *Green, supra*, 399 U.S. 149, 160, 90 S.Ct. 1930, 1936:

"Similar reasons lead us to discount as a constitutional matter the fact that the jury at trial is foreclosed from viewing the declarant's demeanor when he first made his out-of-court statement. The witness who now relates a different story about the events in question must necessarily assume a position as to the truth value of his prior statement, thus giving the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement. The jury is alerted by the inconsistency in the stories, and its attention is sharply focused on determining either that one of the stories reflects the truth or that the witness who has apparently lied once is simply too lacking in credibility to warrant its believing either story. The defendant's confrontation rights are not violated, even though some demeanor evidence that would have been relevant in resolving this credibility issue is forever lost."

[4] Accordingly, we hold that the testimony given by Karen Sprenger before the grand jury was not only admissible in evidence at the trial for the purposes of refreshing her recollection and impeaching her testimony, but it was also admissible as substantive evidence of the delivery of marijuana by the defendant to her as charged in Count Five.

[5] It was within the province of the jury, as triers of the fact, to determine whether her sworn testimony given before the grand jury was the truth or whether her sworn testimony given before the court at the trial was the truth. The verdict of guilty indicates that the jury believed she testified truthfully before the grand jury and not at the trial. This evidence was sufficient to sustain a conviction under Count Five. However, counsel for the defendant contends that in advising the defendant not to testify in his own behalf, counsel relied upon the ruling by the trial court to the effect that the testimony given by Karen Sprenger before the grand jury could not be considered as substantive evidence by the jury. In view of the record which shows no other substantive evidence of the defendant's guilt, there was no need for any refutation by the defendant. Under these circumstances, the interests of a fair trial and the interests of justice require a new trial on Count Five.

Accordingly, as to Count Five, the judgment of the trial court and the order denying motion for new trial are reversed.

Our ruling on the admissibility of the testimony given by Karen Sprenger before the grand jury renders moot other specifications of error asserted by the defendant with respect to Count Five.

We have reviewed the sufficiency of the evidence under Count Four, in which the defendant is charged with the sale of marijuana to one Joe Peabody. The conviction on this charge is based upon insufficient evidence.

[6] The only evidence offered by the State with respect to Count Four consists of an inference to be drawn from the refusal of Joe Peabody to answer a direct question put to him by the prosecutor as to whether he had purchased marijuana from the defendant. Peabody claimed the privilege of the Fifth Amendment to the United States Constitution. The State argues that Peabody's response to the question could incriminate him only if he had purchased marijuana from the defendant, and therefore, by refusing to answer upon the claim of privilege, the jury was entitled to infer that he purchased marijuana from the defendant at the time in question.

[7] In a criminal prosecution, the refusal by a witness other than the accused to answer a question on the ground that his answer will tend to incriminate him cannot alone be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant. Billeci v. United States, 87 U.S. App. D.C. 274, 184 F.2d 394, 24 A.L.R.2d 881. See also Annotation in 24 A.L.R.2d 895; 58 Am.Jur., Witnesses, Sec. 56, n. 4; 98 C.J.S. Witnesses, Sec. 455, n. 29; West's Key, Witnesses 309; and 4 Jones on Evidence, Fifth Edition, Sec. 865.

As to Count Four, the judgment of the trial court is reversed and the order denying motion for new trial is affirmed.

As to Count Five, this case is remanded for a new trial conformable to this opinion.

Strutz, C. J., and Erickstad, Teigen and Knudson, JJ., concur.

Wm. L. Paulson, Justice, deeming himself disqualified did not participate; Eugene A. Burdick, Judge of the Fifth Judicial District, sitting in his stead.

COUNSELOR AT LAW,
Toledo, Ohio, July 23, 1973.

HON. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice,
House of Representatives,
Washington, D.C.

DEAR SIR: Thanks for sending on the enclosed Committee Print of a tentative subcommittee draft of HR 5463. I note that all comments should be in the subcommittees' hands before July 31, 1973. I notice that you were kind enough to send on Serial No. 2 of the hearings on the rules of evidence. Instead of taking up a great deal of your time by requiring you to read a lengthy letter, I intend to adopt the statement of the Honorable Arthur J. Goldberg as it is set forth at pages 154, 155, 156, 157 and 158, as well as the language employed by Frederick D. McDonald in his letter, which appears at page 244 of Serial No. 2. I think Mr. McDonald is dead right in his appraisal of Rule 801(D)(1), and I quite agree with the conclusions reached by Mr. Justice Goldberg where he says that his "misgivings about the proposed Rules of Evidence concern the second assumption, namely that the Rules extend only to matters of practice and procedure. To my mind, some of the proposed Rules extend beyond mere matters of procedure and represent real changes in the substantive rights and duties of persons throughout the country." I adopt the objections of Mr. Justice Goldberg and Mr. McDonald.

Yours truly,

DAN H. MCCULLOUGH.

NORMAN C. ROETTGER, JR.,
JUDGE, U.S. DISTRICT COURT,
Fort Lauderdale, Fla., July 23, 1973.

Re Rules of Evidence proposed by the Subcommittee on Criminal Justice.

HON. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, U.S. House of Representatives, Washington, D.C.

DEAR MR. HUNGATE: At this time I have not had a chance to examine all of the proposed Rules, but as soon as I received them I turned to Rule 612 to see what action the Subcommittee had taken.

As a trial judge, I want to express my appreciation to you and the committee for modifying the provisions so that the court has discretion over the production of a writing which a witness reviewed before testifying for the purpose of refreshing his memory. As it was written, the rule would provide a nightmare of delays in instances where a witness reviewed material at home and accidentally left it there when he flew cross-country to testify in a trial or in patent cases where experts review countless documents before testifying. When I review the rest of the proposed rules I may be either more enthusiastic or considerably less appreciative of your efforts, but I do appreciate this modification.

Very truly yours,

NORMAN C. ROETTGER, Jr.

LAW OFFICES OF KENNEDY & RHINE,
Paris, France, July 23, 1973.

HON. WILLIAM L. HUNGATE,
Subcommittee on Criminal Justice, House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE HUNGATE: In this week's U.S. Law Week, I have read the report of your committee on the proposed rules of evidence. As a trial lawyer with some years' experience and as a former law professor whose subjects included Evidence and Procedure, I am moved to write to you.

At this point, I am sure the broad policy questions have been considered and fairly firmly decided. My point is a small one.

Proposed Rule 611(c) would limit the right to call adverse witnesses and interrogate them with leading questions to "civil actions". Every day in federal criminal cases it is necessary for the defense to call government officers as witnesses. Usually, this is done in the pretrial motion phase of the case, and the government officer is called by the defense to testify concerning alleged governmental misconduct such as an illegal search or illegal electronic surveillance.

I have always been permitted to examine such witnesses by means of leading questions as hostile witnesses, and I would not like to see the new rules do away with the old practice through oversight. United States District Judges who have permitted "hostile witness" treatment of government witnesses include (in my own experience) Oliver Gasch, T. Lansing Mitchell, and William B. Smith.

Thank you for your attention to this letter.

Sincerely,

MICHAEL E. TIGAR.

U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF TEXAS,
Houston, Tex., July 24, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice,
Judiciary Committee, House of Representatives, Washington, D.C.

DEAR CHAIRMAN HUNGATE: Recently I am in receipt of communication from the Administrative Office of the United States Courts, handing me the latest draft of the proposed rules of evidence as included in your H.R. 5463. The communication suggested that your Subcommittee would welcome comments from those of us who are interested in the matter if submitted prior to July 31, 1973.

I have examined a number of the earlier drafts, and in general believe that the body of the rules are a carefully considered and well structured piece of work. I have much reservation, however, about one provision (Rule 612. Writing used to refresh memory.) to which I respectfully address the following comments.

You will note that the earlier draft provided in effect that where a witness used a writing to refresh his recollection not only while testifying, *but prior thereto*, such writings must be produced for examination by his adversary. Some two years ago I wrote the Committee expressing strong opposition thereto insofar as the rule applied to writings examined prior to the time of giving testimony. This matter was discussed at the last Judicial Conference of the Fifth Circuit in April of this year and the provision in question of Rule 612 was the subject of considerable comment and discussion. Other than Professor Edward W. Cleary, I do not believe that a single judge or lawyer present spoke with favor concerning that portion of Rule 612 above alluded to. I am gratified to note that your Subcommittee has at least ameliorated the effect thereof by providing that such writings examined prior to testifying is producible only if within the discretion of the trial court. Even in this posture, this is a very drastic expansion of the present rule permitting disclosure only where the witness withdraws a writing from his pocket or briefcase and examines it in the course of testifying. This present rule is relatively insignificant and arises rather infrequently. It is based on the sound proposition that when this occurs, the witness obviously is not testifying from memory, but is testifying as to the contents of the writing which he examines. Hence his adversary may examine it to determine if he is testifying accurately as to its contents.

With respect to writings examined days or weeks prior thereto, the situation is entirely different. An expert witness in a patent case, for example, or an Internal Revenue Agent in a prosecution for income tax evasion may spend days or weeks reviewing data, his own notes, the attorney's file, etc. preparing for his testimony. The suggestion that the trial should be recessed while these documents are assembled, and time allowed for opposing counsel to examine them, to me is unthinkable. Such documents or writings (examined earlier) should be procured by the opposing counsel by discovery prior to trial. We have, and utilize, wide discovery procedures in the federal system. An attorney can procure practically any writing which is relevant to the case from his adversary in advance of trial. But to delay the trial, and to require the jury and the Court to sit idly by while such documents are accumulated and examined, in my judgment is extremely ill-advised. I suggest that the entire reference to writings examined prior to testifying well might be deleted. If your Subcommittee does not agree, then I at least approve of the provision making the production discretionary with the trial court.

Despite the foregoing, the rule in question leaves unanswered one very important question, and that is what is to be done when the writing is privileged. The law with respect to privileged communication is of a great deal more importance in the law of evidence than Rule 612. The best known and most widely respected privilege, that between a client and his attorney, has the earliest common law background. In the event that a litigant who is to testify in his own behalf should, perhaps inadvertently, examine a privileged communication, I would urge upon

you that this fact alone should not cause him to lose his privilege and be obliged to produce the document for examination by his adversary, irrespective of whether the trial court believes that this would or would not be "necessary in the interests of justice."

To take an example, assume that a defendant is charged with a serious offense and employs an attorney. He writes the lawyer stating that he (the accused) is unquestionably guilty of the offense, but he asks the attorney to plead him not guilty, and he asks his attorney to use every legitimate means to prevent the government from proving its case against him. He may set out all of the facts and state what he believes the government can know about the matter, and what he believes the government does not know. He may state where the weapon is hidden and other highly incriminating matter. In the event several days prior to his testimony he should refresh his recollection by rereading this letter, I would question whether he should be required to produce it for the edification of the district attorney.

The fact that a witness may examine many writings, or his attorney's complete file, before testifying is no suggestion that he will testify falsely or commit perjury. He may, or he may not, but this is not affected by his action in informing himself of all of the details. An honest witness will wish to be as fully advised as possible and to refresh his recollection as exhaustively as circumstances permit. I would not penalize him for doing so by causing every instrument which he examines to lose the privileged character which such instrument theretofore possessed.

Hence I suggest that in paragraph (2) in providing that the writing (which the witness has examined prior to testifying) must be produced, there be inserted the qualification that the writing "is not privileged".

I trust that the Subcommittee and its staff may give this matter its careful attention. I believe the draft as drafted in this particular causes a very great expansion of the present rule which has been tried and accepted for a great many years.

Sincerely,

BEN C. CONNALLY,
U.S. District Judge.

BROBECK, PHLEGER & HARRISON,
ATTORNEYS AT LAW,
San Francisco Calif., July 24, 1973.

Re Federal Rules of Evidence.

Hon. WILLIAM L. HUNGATE,
Member of Congress,
Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: The Ninth Circuit Judicial Conference was informed this morning that comments received by you before July 31, 1973 on the proposed Federal Rules of Evidence would be considered. I take the liberty of setting out some general comments, and attaching some specific ones.

1. We listened to some two hours of discussion pro and con of the proposed Rules—both those sent to Congress by the Supreme Court, and those embodied in a recent Committee Print—and the reasons given for the adoption of the Rules are not persuasive. The principal proponent of them is most elusive as to any reason why they should be adopted, except for the fact that he has been working on them for several years. To the extent that the Rules would work no change in the practice, there is no reason for them at all; to the extent that they would work change, no real justification is offered except that this is what the Advisory Committee decided. One can only conclude that (a) there is little or no reason for *any* Federal Code of Evidence to be enacted now; and (b) if there is to be a Federal Code of Evidence, this is surely the wrong one.

2. A year or so ago, as chairman of a subcommittee of the ABA Special Committee on Complex and Multidistrict Litigation, I focussed specifically on those sections of the Rules relating to reliance by expert witnesses on hearsay. A copy of my report is enclosed. This report has not been approved by anyone, and despite its format is not an official ABA document; I therefore submit it to you for what it is, and all that it is, namely the views of an individual member of the Bar.

Respectfully,

MALCOLM T. DUNGAN.

Enclosure.

Report to the Committee on Complex and Multi-District Litigation of the Subcommittee On Use of Hearsay Evidence by Experts

On admissibility of expert testimony based on hearsay, current discussion naturally centers around the 1969 Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates [1], and the 1971 draft of the proposed Federal Rules of Evidence.[2]

These drafts, together with current commentary [3] and some of the recent cases [4], canvass the traditional questions: when in general is expert testimony admissible; who is an expert; what is hearsay; what is the permissible mode of examination of an expert; and why is it that expert testimony is often held not objectionable, even though based upon "hearsay."

The sources cited in the first four footnotes will lead one into the literature on these basic questions, and further discussion of them by this subcommittee does not seem called for. But from these sources two conclusions emerge which do seem to merit more consideration than has been given them. They are these:

(1) The basis for the rule that expert testimony is admissible, even though the opinion or inference or explanation to which the expert testifies is all or partly based on hearsay, is (a) the notion that the aim of the hearsay rule is to exclude evidence that is unreliable because it cannot be tested by cross-examination, plus (b) something like a conclusive presumption that the expert witness, if he is indeed an expert, must have the ability to sort out the reliable from the unreliable in the information made available to him, and indeed his ability and inclination to do so may themselves be tested by cross-examination. Ergo, the rationale of the hearsay rule does not apply to experts.

(2) The expert need not disclose, upon direct examination, the information upon which his testimony is based—and therefore need not disclose whether or to what extent it is based on hearsay—before being permitted to give his opinion (or inference or explanation); the cross-examiner may, if he wishes, explore this subject, but only after the expert's opinion has come in.

We shall try to make our contribution to the inquiry into this subject, then, by a discussion of two questions:

1. Is it safe to rely as a general rule on the ability and inclination of the hired expert to screen out unreliable data and to base his opinion only on information which is reliable?

2. Is it right to let the expert express his opinion without first disclosing the information and investigation upon which the opinion is based?

1. Summary Statement of the Governing Legal Principles

As a general rule, "opinion testimony" [5] is held competent only where two circumstances coincide: (a) ". . . scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," and (b) the witness is "qualified as an expert by knowledge, skill, experience, training, or education" to give the needed help to the fact trier.[6]

Obviously the expert's opinion to be useful in a particular case must be related to the facts of that case; but in this respect it is of no moment whether the expert's knowledge of the facts or data on which he bases his evidence is first- or second-hand, or whether he learned of them before or during the trial. Moreover, those facts or data *need not themselves be competent evidence*, so long as they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ." [7] This, then leaves open the door for *reliance by the expert on incompetent evidence*, in forming and expressing an opinion which is itself admissible.

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[1] 46 F.R.D. 161 (1969), hereinafter "1969 Rules Draft."

[2] 51 F.R.D. 315 (1971), hereinafter "1971 Fed. R.Ev."

[3] E.g., Seidel & Gingrich, Hearsay Objections to Expert Psychiatric Opinion Testimony and the Proposed Federal Rules of Evidence, 39 U.M.K.C. L.Rev. 141 (1971).

[4] E.g., United States v. Williams, 424 F.2d 344 (5th Cir. 1970) (reversing judgment of conviction); rehearing by panel denied, 431 F.2d 1168; rehearing en banc granted, 431 F.2d 1175; panel decision overruled and judgment of conviction affirmed, 447 F.2d 1285 (5th Cir. 1971, en banc), certiorari denied 40 U.S.L. Week 3415 (Feb. 28, 1972).

[5] Expert testimony is not, of course, limited to the expression of an opinion; the witness may also testify to an inference which ought to be drawn from given facts, or he may give a lecture to the jury about how opinions should be formed or inferences drawn in his field; or he may do all of these. Cf. 1971 Fed.R.Ev., Rule 702, and note thereto, 51 F.R.D. at 403.

[6] 1971 Fed.R.Ev., Rule 702, 51 F.R.D. at 403. In the second part of this Rule quoted above, the word "special" which preceded "knowledge, skill," etc., in the 1969 Draft was omitted. Apparently this was done in response to a suggestion of a committee of the American College of Trial Lawyers. But of this deletion two things are true: (1) The reasons for it are quite unclear; are we to take it that "general" knowledge makes one an expert? (2) The deletion of so special a word as "special" seems to call for some explanation, but none is given, leaving the "legislative history" of Rule 702 muddy at best.

[7] 1971 Fed.R.Ev., Rule 703, 51 F.R.D. at 404.

NOTE: Emphasis in quotations is supplied.

The expert may give his opinion, if it be not objectionable on some other ground, even though it "embraces an ultimate issue to be decided by the trier of fact" [8]—or as the once-fashionable phrase went, "usurps the province of the jury."

And he may give his opinion, and his reasons "without prior disclosure of the underlying facts or data, unless the judge requires otherwise." [9] He may, of course, be cross-examined on the underlying facts and data; but the consequence of this rule of course is that the expert's opinion can come into the record even though its *whole basis in fact* is unauthenticated assertion by absent nameless declarants whose interest, bias, and qualifications must of necessity be unproved and untested.

It is our view that, unless properly qualified and limited, the rule permitting the expert to rely on incompetent data carries with it the potential for grave abuse; and that the statement of the rule about disclosure of underlying facts and data—that is, no disclosure unless the court otherwise orders—is probably upside-down: disclosure *before* the opinion comes into the record, and subject to *voir dire* before the opinion is expressed, should be the general rule, and nondisclosure the exception.

We proceed to a more particular discussion of these problems.

2. Analysis of the Principle That Inadmissible Facts or Data May be the Foundation of Expert Testimony

a. Rationale of Rule 703

Said the Fifth Circuit *en banc* in *United States* v. *Williams*, 447 F.2d 1285, 1290 (1971),[10]

> "Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony. It has long been the rule of evidence in the federal courts that an expert witness can express an opinion as to value even though his opinion is based in part or solely upon hearsay sources . . . . *The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion.*"

The rule has only one qualification, Id. at 1291:

> ". . . an expert's testimony need not be based solely upon records which are themselves introduced in evidence so long as the sources of information are of a type reasonably relied on by experts in forming opinions or inferences upon the subject."

The Court acknowledges that the rule it has applied is the same as Rule 7–03 of the 1969 Rules Draft; that in turn is the same as 1971 Fed.R.Ev., Rule 703, with a clarifying phrase added.[11] Of this Rule the Committee says (1971 Fed. R.Ev., 51 F.R.D. at 404),

> "Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. . . . The third source contemplated by the rule consists of presentation of data to the expert out of court and other than by his own perception. *In this respect the rule is designed to broaden the basis for expert opinion beyond that current in many jurisdictions* and to bring the judicial practice into line with the practice of the experts themselves when not in court."

The Committee goes on to give an example which is surely unexceptionable (*ibid.*):

> "Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X-rays. *Most of them are admissible in evidence*, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes."

This, then, is the theory of the rule that "an expert witness can express an opinion . . . even though his opinion is based in part or solely upon hearsay sources." *United States* v. *Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971). We proceed to

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[8] Id. Rule 704, 51 F.R.D. at 405.
[9] Rule 705, 51 F.R.D. at 406.
[10] Certiorari denied, 40 U.S.L. Week 3415 (Feb. 28, 1972).
[11] Rule 703 quite properly inserts "in the particular field" after "experts" in the second sentence of Rule 7–03.

inquire whether the rule is congruent with the underlying theory, and find that it is not, at least in its present verbal formulation.

(b) Analysis of Rule 703 in Light of its Rationale

Explicit and implicit in the example quoted above from the Committee Notes on Rule 703 (1971 Fed.R.Ev. at p. 404) are three assumptions:

First, that in the usual case "most" of the outside data relied on by the expert "are admissible in evidence," but only at the price of great waste of time in calling authenticating witnesses whose testimony will almost always prove to be uncontroverted, incontrovertible, and therefore purely formal and useless;

Second, that the expert is an honest and sincere professional who is interested only in searching for the truth, and not in upholding or defeating a cause;

Third, and perhaps most importantly, the example includes the unspoken premise that *others*—here the patient and his family—*have themselves relied on the expert's opinion so formed* in making important decisions, or permitting them to be made by the physician.

And the fourth matter about the rule bears noting:

Unlike certain other rules which require preliminary findings by the court or permit a different treatment in special circumstances, the rule is flat and inflexible.

In each of these respects the rule as now stated appears to be deficient. As to the first assumption, the Rule's statement is simply that "if of a type reasonably relied on by experts in the particular field in forming opinions upon the subject, the facts or data need not be admissible in evidence." This is too easy and for two reasons: (1) It has been held that the first branch of the statement is satisfied merely by the witness' *ipse dixit* [12] and in many situations there may be no other way to prove or disprove it; (2) the kind of inadmissibility we are talking about is hearsay inadmissibility in circumstances where authentication appears to be both time-consuming and unnecessary, but the clause "need not be admissible in evidence" is far broader than this and stamps approval on *every* kind of inadmissible evidence as the basis for competent (in the evidentiary sense) expert opinion.

As to the second assumption venality of experts is unfortunately a fact more common than one would like to have to acknowledge. This, like Mr. Justice Jackson's observation about the efficacy of cautionary instructions to juries where inadmissible evidence has been heard and stricken (*Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (concurring opinion) is something lawyers know.

Thirdly, there are experts and experts. As the Committee notes, "The physician makes life-and-death decisions" which his patients and their loved onces accept. The petroleum engineer like Jeffrey forms expert opinions on the basis of which millions change hands. The structural engineer makes decisions on which office buildings, great hydroelectric projects, airplanes or ships are built, and which involve similar millions in investment as well as the safety of thousands of people.

Other "experts" who may have "knowledge, skill, experience, training, or education" in this field or that have never made a decision on any important question or rendered an opinion on which anyone else relied for an instant. The opinion of *that* kind of expert thus lacks the validating force of the fact that others have relied on his opinions at their own risk, based on the kind of hearsay evidence we are talking about.

Finally, there may well be situations in which additional checkreins on free-wheeling opinion appear to be indicated, and provision for those cases should be made in the rule.

(c) Recommendation

In the light of what has been said, we recommend that Rule 703 be redrafted along the following lines:

> *"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. The facts or data need not be offered or admitted in evidence if: (a) they would otherwise be admissible if authenticated by those who made them known to the expert; and (b) they are of a type reasonably and ordinarily relied upon without authentication by experts in the particular

[12] "Nowhere has it been argued that the records consulted by Jeffrey were other than of the type customarily relied on by experts in valuing oil properties. Jeffrey so testified [sic] and this testimony was never challenged." United States v. Williams, 447 F.2d 1285, 1291-92 (5th Cir. 1971).

field, in forming opinions or inferences upon the subject; and (c) the opinions or inferences so formed are reasonably and customarily relied on by those for whose benefit they are formed, for the purpose of making or permitting to be made important personal, economic, or similar decisions. In any case the court in its discretion, in the interest of justice, may require such facts or data to be proved like other evidence, before permitting an opinion or inference based upon them to be expressed."

3. Analysis of the Rule That Facts or Data Underlying an Expert Opinion Need Not Be Disclosed on Direct Examination

Rule 705 is as follows:

"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 judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

The reasons given for the proposed Rule are not satisfactory. (1971 Fed.R.Ev., p. 406.) They are (1) that the "hypothetical question has been the target of a great deal of criticism . . ."; (2) that the "elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support"; and (3) that "if the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion."

The first reason is not any reason at all, since the rule applies to all expert testimony, not only that given in response to a hypothetical question, and the hypothetical question is now largely out of fashion anyway. The second is irrelevant since the fact of support is meaningless: what are the reasons for it? The third is naive. Very few cross-examiners can gain expertise in a scientific or technical subject in preparation for one trial that can begin to match the lifetime knowledge of a wise and wily expert witness. More and more the expert is becoming wily as well as wise, and taking the view that his task is to support the cause of whoever pays his bill.

The question is really only one of emphasis: Should mandatory disclosure on direct examination of underlying facts or data be the exception or the rule? The Committee on Practice and Procedure has decided it shall be the exception; we think it should be the general rule, and for three independent reasons:

(a) Where the adversary seeking to require disclosure has the burden of showing cause—of showing that this is the exceptional case in which the general rule should not be followed—he may often have to make his objection to a point at which the record really does not permit the judge to rule intellingently either way; this would not be true if in a particular case there were the rare facts that would justify nondisclosure;

(b) Requiring disclosure of underlying facts or data before the opinion is permitted to be expressed will allow an opportunity for *voir dire* with respect to them, and thus permit exclusion of some "opinions" so lacking in competent foundation that they should never get before the trier of fact at all. Where disclosure is not made until cross-examination, and a motion to strike follows, the temptation is present to leave an incompetent opinion in the record "for what it is worth"; and

(c) It *is* "essentially unfair" to leave it to the cross-examiner to bring out the facts or data underlying an opinion of an expert. It is a home truth that an expert's opinion is no better than the facts on which it is based. To let counsel who sponsors the witness decide whether to disclose those facts on direct, or let his adversary take his chances, smacks of a return to the theory that a trial is a game of wits.[13]

For these reasons we recommend that Rule 705 be rewritten somewhat as follows:

"*Rule 705. Disclosure of Facts or Data Underlying Expert Opinion*

"The expert shall disclose the investigations, facts, and data underlying his opinion or inference before expressing his opinion or inference or giving his reasons therefor. Opportunity will be given for preliminary cross-examination concerning such investigations, facts, and data before the expression by the expert of his opinion or inference. This Rule is subject to modification by the judge only in exceptional circumstances for good cause shown."

[13] The D.C. Circuit, per Bazelon, Ch.J., assumed without discussion of the point that an expert would give his reasons on direct. In drafting its "Court's Instruction to Expert Witness in Cases Involving the 'Insanity Defense' ", it included the following: ". . . [Y]ou may not state conclusions or opinions as an expert unless you also tell the jury what investigations, observations, reasoning, and medical theory led to your opinion." Washington v. United States, 390 F.2d 444, 457 (1967).

U.S. DISTRICT COURT,
Macon, Ga., July 24, 1973.

Congressman WILLIAM L. HUNGATE,
Chairman of the Subcommittee on Criminal Justice,
House Judiciary Committee, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: I have received a copy of H.R. 5463 from the Committee on Rules of Practice and Procedure of the Judicial Conference.

A quick reading of your bill indicates that the most objectionable portions of the proposed rules have been eliminated. Nevertheless, I still am of the firm opinion that it is impossible to condense the law of evidence fairly and accurately into a set of rules, and being so convinced suggest that our entire judicial system would be better off if the federal rules of evidence as originally proposed, or as amended by your subcommittee, were not passed.

Our entire legal system would benefit if we ceased changing just for the purpose of changing and if committees of the Judicial Conference would cease looking for opportunities to do so. These rules represent change for the sake of change only. I do not think we need them.

Sincerely,

WILBUR D. OWENS, Jr.,
U.S. Judge.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE,
Washington, D.C., July 25, 1973.

HERBERT E. HOFFMAN, Esq.,
Counsel, Subcommittee on Criminal Justice,
Rayburn House Office Building, Washington, D.C.

DEAR MR. HOFFMAN: The Advisory Committee on Federal Rules of Evidence and the Committee on Rules of Practice and Procedure of the Judicial Conference met jointly on July 18th and 19th to consider the amendments to the Rules of Evidence proposed by the Subcommittee on Criminal Justice. In due course you will receive their report. Meanwhile it was thought better that I bring to your attention a couple of matters on an informal basis.

The stylistic purity of Rule 611(c) would be enhanced by deletion of "such." Small support for this usage will be found in the standard works.

The joint committees do not disagree with the conclusion stated in the Subcommittee Note to Rule 803(4) in view of the fact that the sole effect of the rule is to exempt the various matters from the operation of the hearsay rule. Other principles may still require exclusion.

Nor do the joint subcommittees disagree with the result reached in the Subcommittee Note to Rule 803(5). However, neither this rule nor the subdivision "bars" any evidence; rather, an item merely fails to qualify as an exception. Of course, an item which fails to qualify under one subparagraph may qualify under another.

Sincerely,

EDWARD W. CLEARY, *Reporter.*

P.S.—On my own motion, I am unable to resist adding, with regard to the amendment to Rule 803(16), that Senator Dirksen did not say "an idea the time of which has come."

GREENFIELD, DAVIDSON & MANDELSTAMM,
St. Louis, Mo., July 25, 1973.

Re proposed Rules of Evidence.

Hon. WILLIAM A. HUNGATE,
Congress of the United States, Cannon House Office Building,
Washington, D.C.

DEAR BILL: By this time you have received Karl Blanchard's comments made on behalf of an *ad hoc* committee of the Missouri Bar on the proposed Federal Rules of Evidence.

I would like to add one note. (I am not certain we need a code of evidence and there are some matters left in I wish were not in). The excisions were not capricious and represent no meat axe approach. I think the end result shows a skilled handling of it with a scalpel.

As lawyers the members can take professional satisfaction from their constructive approach to highly controversial matters.

Of course from you, I would expect no less.

Sincerely,

JOHN L. DAVIDSON, Jr.

DYCHE, WRIGHT, SULLIVAN, BAILEY & KING,
Houston, Tex., July 25, 1973.

Re Tentative subcommittee of H.R. 5463.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, House Judiciary Committee, Congress of the United States, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: The following are a series of comments which may be helpful to the Committee in making a final determination of the content of H.R. 5463. Thise comments are based upon the principal that the Supreme Court of the United States promulgated the Federal Rules of Evidence in order to provide a uniform system of evidentuary rules applicable to all Federal District Courts regardless of the state in which they are located. The intent of the rules as expressed in Rule 102, is that "the truth may be ascertained and proceedings justly determined".

Proposed Rule 105 (Summing Up And Comment By Judge) should be retained in the Federal Rules of Evidence. There may be some basis for the argument that comment on the weight of evidence by Federal Judge is procedural rather than evidentuary, however, there can be no doubt that this practice does influence how a jury will view evidence introduced at a trial and therefore should be regulated by a definitive standard rather than developed on a case by case basis.

Proposed Rule 201(g) should be retained in the final draft of the Federal Rules. One of the major objectives of a Federal District Judge is to eliminate non-contested issues from presentation to a jury. In accordance with this goal, the Federal Bench encourages, and, in fact, demands rigid stipulation agreements of undisputed facts, etc. The deletion of subdivision (g) would result in the useless presentation of additional evidence to attempt to discredit judicial notice.

The forum for challenging judicial notice is not the trial court. If a party feels that judicial notice has been improperly taken they should appeal that determination to the Court of Appeals.

The deleted Rule 303 (Presumptions in Criminal Cases) should be included in the final draft of the Federal Rules. Clarification of the scope of a presumption in a criminal case is critical to the guaranty of the rights of the defendant. The Rule, as proposed by the United States Supreme Court protects these rights and is in such a form as to not result in unnecessary and useless litigation.

Proposed Article V (Privileges) should be included in the final draft of the Federal Rules. The simple statement substituted by the Committee seems to go against the spirit and intent of the Federal Rules. In the first place it provides that a defendant's rights will be determined by where his case is tried, in that the privilege will be determined on a basis of state law and secondly, where state law has not settled the question it seems to open the doors to a flood of litigation as to what should be privileged and what should not be privileged. If the intent of the Federal Rules is to provide a single Federal system of evidentuary rule to insure fairness wherever a litigant brings a cause of action or is sued, then specific rules of privilege are essential. I am aware that this area of the proposed rules probably created more discussions than any other, however some acceptable draft should be possible. I would strongly recommend that the Committee accept the draft of the United States Supreme Court since it seems to provide a fair and consistent set of rules.

Proposed Rule 601 (General Rule of Competency) as amended by the Committee again seems to fly in the face of the intent of the Federal Rules of Evidence. Here again, the Committee has left the determination of what the Rules of Evidence in the Federal jurisdiction will be to the states. It opens the door to "forum shopping" and affects substantive rights.

Proposed Rule 611(b), expanded the scope of cross-examination in such a manner as to provide an attorney with the opportunity of eliciting any additional information which was relevant to any issue in the case. As amended, this Rule would limit cross-examination and once again provide the opportunity to "hide the ball". The intent of the Federal Rules was to provide an expanded opportunity to arrive at the truth, whatever the truth may be. In my opinion, the amended Rule 611(b) is inconsistent with that premise.

Amended Rule 612 (Writing Used to Refresh Memory) is the same kind of "hide the ball" amendment as Rule 611(b). Once again the intent should be to provide the opposing council with every possible means of the arriving at the truth, within the Constitutional limits.

Amended Rule 802(6) seems to be an effort at protecting business establishments from legitimate claims which may arise as a result of unlawful transactions. The only standard that should be required of a business memorandum or record

is that it be shown to have been written in the course of a regularly conducted activity of the business. The committee note concerning insufficient guarantees of reliability in records made in the course of regularly conducted non-business or non-professional activities would seem to be a comment directed toward the weight of evidence rather the admissibility of evidence. In the search for truth the jury should be allowed this discretion.

Amended Rule 804(b)(2) (Statement of Recent Perception) should be dropped and the final draft of the Federal Rules of Evidence substituted. Here again, the jury should be able to determine the weight given to evidence of this nature. The surrounding circumstances outlined in the draft by the Supreme Court provide adequate protection and assurance of reliability.

Proposed Rule 804(b)(4) (Statement Against Interest) should be included in the final draft of the Federal Rules of Evidence. The proposed changes in the rule again provide an opportunity to limit responsible testimony from going to the jury, particularly in a civil action.

Proposed Rule 804(b)(6) (Other Exceptions) should be included in the final draft of the Federal Rules of Evidence. The United States Supreme Court went to a great deal of efforts to expand what could be admissible in a trial in a Federal District Court. That subdivision provides the Federal District Judge with needed discretion to allow introduction of anything having a guaranty of trust worthiness. The purpose of the Rules as expressed in Rule 102 is to promote the growth and development of the law of evidence so that truth may be ascertained and proceedings justly determined. This discretionary authority will accomplish the purpose.

I appreciate the opportunity to comment on the proposed bill and express my thanks to the Committee for the depth of the inquiry which the proposed draft indicates has been made.

Very truly yours,

DAVID T. MADDOX.

WHITEFORD, HART, CARMODY & WILSON,
Washington, D.C., July 25, 1973.

Re H.R. 5463.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, U.S. Capitol, Washington, D.C.

DEAR MR. CHAIRMAN: The undersigned has been engaged in the practice of law in the District of Columbia and Maryland for the past 25 years, and was, also, a member of the 1973 Judicial Conference of the District of Columbia Circuit. At that conference and subsequently, I have taken considerable interest in the Federal Rules of Evidence as initially proposed to the Congress by the Supreme Court, and particularly to H.R. 5463, your Subcommittee's proposed changes in that proposal. It would appear that the suggested amendments set forth in that Bill, solve most of the problems which were apparent from a study of the original proposal. In one instance, however, I believe a serious problem remains.

Rule 803(8) relating to public records and reports appears to be a serious relaxation of the Hearsay Rule with reference to "factual findings resulting from an investigation made pursuant to authority granted by law" despite the somewhat vague limitation immediately following. A great number of "official" investigations are made by governmental agencies of all sorts, from fire marshals, coroners, or even individual police officers, to such agencies as the Federal Trade Commission, Transportation Safety Board, and the like. The rights of interested parties to protect themselves in these proceedings is often lacking or, to say the least, minimal. Yet the conclusions of such investigations, bearing the stamp of approval of the Federal or of a State government will be permitted to be given to juries in contested civil cases; thus, to all intents and purposes, taking from the parties their rights to have these matters determined by a jury under the Federal Constitution, or if waived, by a Federal Judge.

Would it not be more appropriate for the legislation relating to specific investigatory agencies to state the extent, if any, which the factual findings growing out of investigation should be admissible in civil action, and also providing such procedural safeguards as would protect the right of possible future litigants to the due process of law guaranteed by the Constitution? Is not this provision, like so

many that your Subcommittee has suggested be revised, a dangerous oversimplification of a complex question?

Should your Subcommittee have, in the future, hearings in this matter, I would appreciate an opportunity to be heard upon this point.

Very truly yours,

JO V. MORGAN, Jr.

EMORY UNIVERSITY,
Atlanta, Ga., July 26, 1973.

Re Federal Rules of Evidence.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: I was glad to receive a copy of the tentative subcommittee draft of H.R. 5463 on the Federal Rules of Evidence. I am generally in agreement with the draft, but since I have been teaching Evidence at the Emory Law School for the past 27 years, I cannot resist a few comments.

I certainly do not suggest the creation of any new privileges. However, in Federal cases the draft leaves the existing situation. I think that this is unfortunate as to one privilege, that of Lawyer-Client. I suggest that Rule 503 should have been retained. Especially in the area of discovery matters in antitrust and patent cases, the Federal cases are in confusion. Rule 503 would have been most desirable.

I do not agree with the deletion of subdivision (g) of Rule 201. I realize that the matter is in dispute, but I believe that if a fact can be refuted, then it is not a proper subject for judicial notice.

I am sorry to see a return in Rule 611(b) of the so-called Federal or strict rule of cross-examination. This error of Justice Story should have been corrected long ago. For example, it permits a criminal defendant to limit the scope of his cross-examination by the extent of his direct testimony. He can testify only as to alibi and then is "home free" as to the facts of the offense. Existing discovery procedures have nothing to do with it. If it seems to interfere with orderly presentation of evidence, any judge can postpone cross-examination until the party calling the witness has completed his case. These old ghosts do not die easily.

These are a few comments, for whatever they are worth.

Sincerely,

WILLIAM H. AGNOR,
Professor of Law.

AMERICAN BAR CENTER,
Chicago, Ill., July 26, 1973.

Hon. WILLIAM L. HUNGATE, M.C.,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Your participation in the joint Judicial Conference of the Eighth and Tenth Circuits at the Broadmoor on June 30 will be long remembered. I am adding to my personal guidelines (never follow a dog act or a kiddie act) never to follow a Congressman playing the piano. Your performance at 9:30 in the morning was magnificent and very much enjoyed by all.

It was also good to be informed about the work on the proposed Federal Rules of Evidence by the House Judiciary Subcommittee (six days of hearings, 17 days on markup, tentative draft published June 26). I understand that comments are invited until July 31 and that it is anticipated that the staff and Committee work will be completed in August and that the revised proposals will be passed up to the full Committee and the Congress in September.

Bob Meserve has transmitted to your Committee the product of the June 18 meeting of the ABA Special Committee on Federal Practice and Procedure and the House of Delegates will be asked to authorize the President to designate Association representatives to present these views. My contribution at this time is merely to pass along to you the objections of one Oklahoma lawyer who has taken the time to put his views in writing and share them with me.

This brings my high regards and best wishes.

Sincerely yours,

JAMES D. FELLERS.

SAPULPA, OKLA., *June 25, 1973.*

Re Federal Rules of Evidence.

JAMES D. FELLERS, Esq.,
Fellers, Snider, Baggett, Blankenship & Bailey, Attorneys at Law, First National Center, Oklahoma City, Okla.

DEAR JIM: The following are my objections to the Federal Rules of Evidence as they have been submitted:

1. Rule 504 eliminates the physician-patient privilege other than in the case of a psychotherapist.

2. Rule 405 permits evidence of character or trait of character of a person other than general reputation in the community.

3. Rule 606(b) permits a juror to testify as to occurrences within the jury room. This invades the sanctity of the jury room.

4. Rule 611 adopts the English rule which permits cross examination coextensive with the case and not, as under the present rule, restricted in the scope of cross examination to matters opened up on direct. This will bring disorder to the courtroom and permit a defendant to try his case on cross examination of the plaintiff's witnesses.

5. Rule 706 permits the court to appoint an expert witness. This is contrary to the advocacy system of justice which has prevailed in our country. Such experts tend to become in the eyes of the jury annointed, not appointed. Under this rule in the exercise of his discretion a judge may authorize disclosure to the jury of the fact that the court appointed the expert witness.

6. Rule 805 opens up hearsay testimony to a ridiculous extent. Under this rule rumor several times removed may be the basis for a fact-finding determinative of the basic issue in a case.

7. Too much discretion is vested in the trial court by these rules. Most of our federal judges are appointed on the basis of political connection rather than judicial skill. Putting more discretion at their disposal only means increasing the power of the judge and diminishing the power of the jury.

8. Rule 105 continues the abominable practice of permitting the trial judge to summarize and comment upon the evidence in a case.

Very sincerely,

THOMAS A. WALLACE.

COMPUTER LAW SERVICE/COMPUTER LAW REPORTER,
Boston, Mass., July 27, 1973.

Re proposed Federal Rules of Evidence.

Hon. WILLIAM H. HUNGATE,
House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE HUNGATE: I understand that the Congressional revision of the Proposed Rules of Evidence removes a number of explicit privileges against disclosure that have been embodied in the draft prepared by the Judicial Conference. In particular, I understand that the Committee has excised the Proposed Rule #508, dealing with trade secrets.

In the approximately twenty years since the computer has become commercial, millions of dollars have been invested by many companies, most of which are small businesses, in the development and marketing of computer programs. The trade secret method has been the primary means that these small companies have used to protect their proprietary interests in these programs; larger companies, such as IBM, have relied primarily upon other methods.

The entire subject of the legal protection of proprietary rights in computer programs is in a state of flux, and in a recent decision, the United States Supreme Court requested the Congress to act. Gottschalk v. Benson, 409 U.S. 63, 3 CLSR 256. Until the Congress does provide specific legislative relief, the small businessman's investment will be protected primarily by the trade secret method.

The law as to disclosure of trade secrets is also in flux, and requires difficult decisions by trial courts. Proposed Rule #508 simplifies the matter, and I respectfully urge that it be retained.

Sincerely,

ROBERT P. BIGELOW.

Computer in Court

By. A. P. H.

Haddock v. *The Generous Bank Ltd., Computer 1578/32/W1, the Magical Electronic Contrivances Ltd., and the Central Electricity Board.*

Before Mr. Justice Squirrel in the High Court to-day Sir Cyril Tart, QC, opened for the plaintiff in this fascinating action, which is regarded as a test-case on some novel points of law.

Sir Cyril said: My lord, this is an action for defamation, and the principal defendant is, perhaps, a computer——

The Court: Perhaps Sir Cyril? But haven't you made up your mind?

Sir Cyril: No, my lord. With great respect, we hope that the Court will do that: for here is a new field of life and litigation, and I am unable to find any precedents with which to assist the Court, as I generally do.

The Court: You are always very helpful, Sir Cyril. Could we now have some approximate outline of the facts?

Sir Cyril: If your Lordship pleases—as, may I add, your Lordship habitually does. My lord, for many years my client, the plaintiff, has been a client of Generous Bank Limited. In recent years the Bank has been employing a computer.

The Court: I never quite understand what they do.

Sir Cyril: My lord, I am instructed, if they are accurately fed with the requisite information they will answer almost any question that is put to them. Moreover, they will answer instantly a question which might occupy twenty expert men for many days. The defendant Computer is also capable of certain mechanical actions, the addressing, sealing and stamping of envelopes, for example.

The Court: Bless me! Can it predict the weather?

Sir Cyril: Given the relevant facts and records, I believe it could. But the machine has, in exceptional circumstances, one possible weakness.

The Court: I am glad to hear that they are human after all.

Sir Cyril: Yes, my lord. They are run by electricity, and if for any reason the voltage falls below a certain level some error may creep into the answers. My lord, in January last my client was proposing to take a lease of a London flat, modest in quality but not in rent. Asked for references which would show that he was a good and proper tenant, able to meet his obligations, the plaintiff referred the property-owners to his Bank. The Bank, as their custom now is, put certain questions to the Computer, which issued, immediately, a type-written slip, being a carbon copy of its answer, as follows:

"Mr. Haddock's account is overdrawn in the sum of £51,000 7*s*. 3*d*."

There followed a second slip:

"The market value of the securities he holds at current prices is £2 0*s*. 8½*d*."

A third slip said:

"What is more he owes the inland revenue £159,000 6*s*. 2*d*."

The Court: Were these assertions correct?

Sir Cyril: No, my lord. Later, by painful man-conducted researches with which few of the bank staff are now familiar, it was established that at that moment my client had a credit balance of £1 9*s*. 4*d*., and his indebtedness to the Inland Revenue had been cruelly exaggerated.

The Court: What went wrong, then?

Sir Cyril: My lord, it was shortly before the mid-day meal. A number of citizens in the neighbourhood had incautiously decided to use their electrical cooking appliances: and the astonished Electricity Board was compelled to reduce the voltage to a level not far above the Computer's dangerline. For a few minutes, it is believed, perhaps less, it must have crossed the line, unobserved by the attendants who had had no warning, and in that brief space of time, the questions concerning the plaintiff chanced to be presented.

The Court: Yes, but the Bank, surely, did not pass the erroneous information on?

Sir Cyril: No, my lord: but the Computer did. The "top copies" of the answers were placed by it in a sealed, addressed envelope and despatched by chute to the ground floor, where the express messengers waited. The property-owning-company received the message about 3:00 p.m. and at once declined to let their

flat to the plaintiff. Moreover, one of the directors of the Company was on the committee of the Royal Yacht Squadron, which has an old-fashioned prejudice against bankruptcy, and at that evening's election my client was blackballed.

The Court: Dear, dear. But, Sir Cyril, the case seems clear enough. The Bank, by its servant, the Computer, has published a libel, and is responsible.

Sir Cyril: So, at first, it seemed to the plaintiff—and, I believe, to the Bank. But, having unbounded faith in the powers of the machine, they fed the necessary facts into it and put the question: "What's the answer?" The Computer replied, my lord:

"I am not—repeat not—your servant—for you cannot control me."

The Court: I see the point. A good point.

Sir Cyril: It is the point, I am sorry to say, on which the Bank relies. This is a machine, they say, having superhuman powers, and it would be presumptuous and unreal for any association of ordinary men, even a joint stock bank, to pretend to such a domination as is implicit in the relation of master and servant.

The Court: Yes, but it is *their* machine.

Sir Cyril: No, my lord, it is not. It is on hire from Magical Electronic Contrivances Limited.

The Court: What do they say?

Sir Cyril: They say that they have leased a perfect, infallible machine to the Bank, and they are not responsible for the blunders or negligence of the Bank or the Central Electricity Board.

The Court: Oh, yes. What about the Board?

Sir Cyril: They are protected, they *say*, my lord, by a section in the original Electricity Act.

The Court: Do they? They would.

Sir Cyril: At this point in the preliminary argument, my lord, the Bank put a further question to the Computer: "You see the dilemma, don't you? What do you advise?" The Computer replied:

"TRY 'THE ACT OF GOD.' "

The Court: The Act of God? "Something that no reasonable man could have been expected to foresee." Lord Mildew, wasn't it? Something in that, perhaps. But, Sir Cyril, as these superhuman instruments increase in number and power the outlook is grave, is it not, if every mischief they cause is to be dismissed as an Act of God for which no man is responsible?

Sir Cyril: Yes, my lord. This is, as I intimated, in the nature of a test-case.

The Court: So you may be reduced, you fear, to a single defendant, the Computer? What is the attitude adopted there?

Sir Cyril: Satisfactory, my lord. On receipt of the writ, the Computer replied: "GLADLY ACCEPT SERVICE. MY SOLICITORS ARE BULL STABLEFORD AND BROWN BUT I SHALL REQUIRE LEGAL AID." And in fact, legal aid has been granted.

The Court: Interesting, is it not, Sir Cyril, that the only one of these parties to behave with human decency is the machine? But where will this get you? It is a machine of straw.

Sir Cyril: My lord, the Bank having refused consent, by order of Master Richards an interrogatory on that point was administered to the Computer. It replied:

"AM EARNING HEAVY MONEY. WHY NOT ATTACH MY EARNINGS?"

The Court: But would not that be unjust to Magical Contrivances Limited?

Sir Cyril: Possibly, my lord. But they did construct and distribute the monster. For the injustice suffered by my client he is not remotely responsible.

The Court: True. Perhaps, before these instruments go into operation, they should put in a capital sum, like a gentleman seeking to do business at Lloyd's, to ensure that they can meet any unforeseen indebtedness?

Sir Cyril: That is a question, my lord, which might well be put to the Computer.

The Court: Perhaps it would care to come up here and try the case.

Sir Cyril: No, my lord. It is not, I think, a British subject.

The Court. Do you know, Sir Cyril, I think I shall go into a home for a fortnight and think about this case. One of those fruit-juice places.

Sir Cyril: If your Lordship pleases.

The hearing was adjourned.

OPENLANDER, CALLAHAN & CONNELLY,
Toledo, Ohio, July 27, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, Rayburn Office Building, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Thank you for inviting me to submit my opinion on the proposed rules of evidence for use in the United States Courts and before United States Magistrates.

I oppose approval of the proposed rules. My opposition is grounded in the belief that the enabling statutes (18 U.S.C. 3402, 3771 and 3772; 28 U.S.C. 2072 and 2075) were not intended to authorize the Supreme Court to make changes in the substantive law, but only to regulate procedural matters by providing normal "housekeeping" rules to govern the conduct of proceedings in court. With Justice Douglas, I perceive the words "practice and procedure" as describing pre-trial procedures, pleadings and procedures for preserving objections and prosecuting appeals. Modification of the rules of evidence was not, I submit, within the contemplation of the Congress in enacting the enabling legislation.

Further, and again with Justice Douglas, I think that if the rules of evidence are to be made uniform throughout the Circuits the work should be done through agencies closer to the trial arena and better qualified to assess the pragmatic effect of rule changes. The Supreme Court should be restricted to passing upon the constitutional propriety of the rules on a case-by-case basis once the rules have been tested in the trial forum.

If it is the sense of your Subcommittee that the proposed rules be approved, I urge that further consideration be given to Rule 801(d) defining statements which are not hearsay.

The Subcommittee's proviso that a prior inconsistent statement is admissible as substantive evidence if given under oath at a trial, hearing or deposition or before a grand jury is hardly sufficient to guarantee that such statement is a reliable statement. The fact that a declaration is made under oath in a formal proceeding is no assurance that it is the truth. I submit that the hearings presently being conducted by the Select Committee on Presidential Campaign Practices have contributed abundant evidence that the oath taken by a witness in a formal proceeding does not inhibit his capacity to misstate the facts.

I urge your Subcommittee to reject the proposed rules and to leave the problem of fashioning such rules to the courts for development on a case-by-case basis. If, however, your committee elects to approve the proposed rules, I suggest that section (d) of Rule 801 be deleted.

Respectfully,

JOHN J. CALLAHAN.

COURT OF APPEALS OF KENTUCKY,
Frankfort, Ky., July 27, 1973.

SUBCOMMITTEE ON CRIMINAL JUSTICE,
House Judiciary Committee,
Washington, D.C.

GENTLEMEN: At the request of Congressman Mazzoli of Kentucky, I have reviewed the proposed Federal Rules of Evidence which were printed in the Congressional Record on June 26, 1973. I respectfully submit that the current Federal Rules of Evidence allowing impeachment of a criminal defendant by proof of prior felony convictions is unfair and the proposed rule applicable thereto does not appreciably alleviate the situation. We have evolved a rule in Kentucky which permits impeachment of a criminal defendant by proof of felonies that would be relevant to the credibility of a defendant who testifies in his own behalf. The rule is limited, however, to exclude proof of conviction of prior felonies that have no relation to the defendant's credibility as a witness. We allow an admissible type of felony conviction to be identified and leave the matter of the number of prior convictions that may be shown and the question of remoteness in time to the discretion of the trial judge. We admonish caution in admitting conviction of a felony even though it affects the credibility of the defendant if he is being tried for the same offense. The opinion of the Court of Appeals of Kentucky, the court of last resort of the state, which discusses the problem and states the rule now applicable in Kentucky may be found styled Cotton v. Commonwealth, Ky., 454 S.W.2d 698 (1970).

I am quite sure the problem has been thoroughly debated prior to the submission of the draft and has probably been the subject of consideration by the staff of the Subcommittee. I nevertheless desired to record to you my disagreement with the current proposed rule together with my recommendation for what I would consider to be a much fairer proposal, both in considering the necessity of society and fairness to the accused.

Sincerely yours,

SCOTT REED.

UNIVERSITY OF CALIFORNIA,
Berkeley, Calif., July 28, 1973.

Re Subcommittee Draft of H.R. 5463.

Hon. WILLIAM L. HUNGATE,
Committee on the Judiciary, Congress of the United States, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Thank you for your memorandum on Federal Rules of Evidence accompanied by the Committee Print dated June 28, 1973, which have been forwarded to me. I note that comments must be in the Subcommittee's hands by July 31, and accordingly I limit my observations to Article V, Privileges. In any event that is the area of my principal disagreement with the Rules as prescribed by the Court.

I think the Subcommittee's resolution from the theoretical viewpoint is sound and from the practical viewpoint prudent. In fact, it is probably the soundest and most prudent resolution possible. It acknowledges the mandate of the *Erie* case in State law actions, an acknowledgement I have long maintained is constitutionally required (Confidentiality, Conformity and Confusion: Privileges in Federal Court Today, 31 Tul. L. Rev. 101 (1956)).

Moreover, the law of Privilege seems especially to profit from the common law evolutionary method, wise solution of specific problems being uniquely dependent on the facts. I have observed little of value in the various attempts at codification in this area, but rather the danger of proliferation of litigation on small definitional points. There are some areas where diversity in approach to the growth of the law is still wise, because we don't yet have all the answers, and I think the problems of Privilege are among them.

With appreciation for the Subcommittee's careful work, I remain

Sincerely,

DAVID W. LOUISELL.

MORRISON, FORESTER, HOLLOWAY, CLINTON & CLARK,
San Francisco, Calif., July 30, 1973.

WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE HUNGATE: I am a former law professor presently engaged in private practice and specializing in litigation. I would like to make two comments on the changes in the proposed Federal Rules of Evidence which have been suggested by your Subcommittee. Overall, I believe the changes made are a great improvement on the Rules as originally promulgated; and this is especially true with respect to the rules on privileges, about which my first comment is concerned.

I fully agree that state-created privileges should be retained in federal proceedings, rather than the abolition contemplated by the originally proposed Rules. However, I would go a step further than you have done, and would provide for application of state privileges in both diversity (or state question) and federal question cases. I have just completed a law review article in which my reasons for this view are set out at length (although I expect publication of the article will come too late for your consideration). In essence, it is my view that privileges are clearly substantive laws, adopted by the individual states in order to encourage and protect out-of-court communications and/or relationships such as those between husband and wife, attorney and client, physician and patient, etc. Each privilege represents a state's legislative decision that protection of the relevant relationship is more important than whatever benefits the compelled testimony would yield. Therefore (as proposed Federal Rule 1011 recognizes), it is necessary that a rule of privilege be applicable in as many proceedings and forums as possible,

in order that the effectiveness of the privilege in protecting or promoting pre-litigation conduct not be diluted by the lack of such protection, in for example, federal proceedings.

As originally proposed, the Federal Rules would have had a devastating effect on state policy, by totally eliminating all federal proceedings from the realm of protection offered by state privileges. It is a great improvement to assure protection, and thus promote certainty in one's conduct-oriented expectations (where the state does so), in all state law cases; but I do not feel there is adequate reason to deny such protection and such certainty in all federal question cases. Because there are federal question cases, such as many federal criminal proceedings, in which the interest of the state in the litigation is arguably as great as if it were a state law case, there should be some provision for application of state privileges in these proceedings as well. The suggestion I make in my article is that in federal question cases, including federal criminal cases, state privileges be made applicable but the court be given discretion to deny a privilege where considerations such as the nature of the proceeding, the state interest in that proceeding, and the unavailability of other evidence which would not entail violation of a state privilege, favored such action. This would allow persons to act in the knowledge that, except where justice and public policy truly required otherwise, a communication could be made or other action could be taken in the knowledge that if such was protected by state law, it would be protected in all future proceedings, whether state or federal.

While your adoption of the language of Federal Criminal Rule 25 would have some of the same results, it does not offer the degree of certainty with respect to what rule and what standard will be followed which a statutory application of state law, with a narrow discretionary proviso, would offer. (If you would like a copy of the draft of my article, which has been submitted for publication, I would be pleased to send it to you.)

My other comment is with respect to hearsay, specifically the definition of a prior inconsistent statement. Again I agree with the extension of the hearsay rule to prohibit substantive use of prior inconsistent statements, but I disagree with the limitation which would allow substantive use of prior statements given under oath. The reason that prior inconsistent statements are not reliable, just as other hearsay statements are not, is that they were made under circumstances which did not and do not allow the *present* trier of fact to evaluate the statements with respect to the demeanor of the declarant as he makes the statement, and the ability of the declarant to defend his statement under vigorous cross-examination. It has been said that there is no substitute for cross-examination in ascertaining the truth; and whereas having taken an oath is some small assurance of veracity, this can be of little value where (as in the case of prior inconsistent statements) the witness has apparently already made a contrary statement under oath at the present hearing, and therefore in at least one instance has lied under oath. Unlike Rule 804(b), there is no requirement in your draft for a prior opportunity to cross-examine. And even if there were, any cross-examination that occurred at the prior hearing, if apparent at all in the record before the present trier of fact, would not have been conducted before that present trier, so that all nuances and observable details of tone, appearance, and general demeanor would be lost to them. In addition, many preliminary proceedings apply standards such as probable cause, which are easily met, and so attorneys might not press cross-examination vigorously (or perhaps attempt it at all) at that stage. In other words, only the presence of the oath—which as I have said is of questionable value—would separate the prior statement in a judicial or administrative proceeding from any prior statement, with respect to any assurance of its truth.

The rule which limits prior statements to impeachment purposes is based on the theory that the trier of fact can observe the *present* statement by the witness and can then use the prior inconsistent statement as one means of evaluating the *present* veracity of the witness; but to accept the prior statement as true and thus as a basis for decision, without any benefit of *contemporaneous* cross-examination or observation, seems unjustified. Unlike certain exceptions to the hearsay rule, it does not have the guarantee of trustworthiness or the aspect of necessity which have always been required before a hearsay statement could be given substantive weight. (Many of these arguments on prior inconsistent statements are set out in the case of *People* v. *Green*, 70 Cal. 2d 654, 75 Cal. Rptr. 782, 451 P. 2d 422 (1969), a copy of which is enclosed, which was reversed by the U.S. Supreme Court because confrontation within the meaning of the hearsay rule was not

considered by them to be a *Constitutional* imperative. However, I do not believe this makes the argument any less persuasive as a matter of sound judicial policy.)

I hope the above greatly-condensed comments are of some value in your deliberations. If I can be of any service in clarifying or otherwise elaborating on them, I would be pleased to do so.

I sincerely commend your Subcommittee and the entire Congress for its action in refusing thus far to be a "rubber stamp" for approval of the Federal Rules. I am sure that whatever Rules finally emerge from Congress, they will reflect the kind of judgments which only a legislative body is capable of making.

Very truly yours,

MARK REUTLINGER.

[Crim. No. 12753. In Bank. Mar 21, 1969.]

THE PEOPLE, Plaintiff and Respondent, v. JOHN ANTHONY GREEN, Defendant and Appellant.

[1a-1c] Criminal Law—Rights of Accused—Confrontation by Witnesses: Evidence at Preliminary Examination—Prior Inconsistent Statements.—In a nonjury trial for furnishing a narcotic to a minor (Health & Saf. Code, § 11532), the introduction into evidence of prior inconsistent statements of the minor, not restricted to impeachment purposes but to prove the truth of the matters asserted (Evid. Code, § 1235), constituted a denial of defendant's Sixth Amendment right to confrontation, and it was immaterial that he had been cross-examined at the preliminary hearing in which the prior statement had been made, where the trial judge had not presided at that hearing.

[2a, 2b] Id.—Rights of Accused—Confrontation by Witnesses: Hearsay—Evidence at Former Trial.—The factor of "necessity" may, in appropriate cases, outweigh the lack of contemporaneous cross-examination and justify the "former testimony" exception to the hearsay rule (Evid. Code, §§ 1290–1292), but, in the absence of a legal showing of necessity, only contemporaneous cross-examination can be considered fully effective and constitutionally adequate under the Sixth Amendment right to confrontation, and such cross-examination means cross-examination at the same time as the direct testimony is given and before the same trier as must ultimately pass on the credibility of the witness and the weight of that testimony.

[3a, 3b] Id.—Rights of Accused—Confrontation by Witnesses: Hearsay—Evidence at Former Trial.—In the absence of a legal showing of necessity justifying the "former testimony" exception to the hearsay rule (Evid. Code, §§ 1290–1292), cross-examination, to be constitutionally adequate under the Sixth Amendment right to confrontation, may be neither *nunc pro tunc* nor *tunc pro nunc* nor even a combination of both; either singly or in combination, cross-examination at trial on prior statements or testimony, and cross-examination at the time of the statement (e.g., at a preliminary hearing) before a judge or agency other than the trier of fact charged with the ultimate determination of credibility and guilt, are insufficient.

[1] Extrajudicial statements by witness who is subject to cross-examination as evidence of facts to which they relate, note, 133 A.L.R. 1454. See also, Cal.Jur.2d, Criminal Law, § 139; Evidence, § 382; Am.Jur.2d, Criminal Law, § 343; Evidence, § 500.

McK. Dig. References: [1] Criminal, §§ 105, 486.5; [2, 3] Criminal Law, §§ 105, 482; [4, 5] Witnesses, § 118; [6] Criminal Law, § 658(1); [7] Criminal Law, § 153; [8, 9] Criminal Law, § 175(2); [10] Criminal Law, § 485; [11] Criminal Law, § 1382(25).

[4] Witnesses—Cross-examination—Nature and Purpose.—The role of cross-examination is not simply to elicit a bald contradiction of the witness' direct testimony, but to focus the attention of the trier of fact on the witness' demeanor as he relates his story and then defends his version against the immediate challenge of the opposing attorney.

[5] Id.—Cross-examination—Nature and Purpose.—By cross-examination, an accused has an opportunity not only of testing the recollection and sifting the conscience of the witness but also of compelling him to stand face to face with they jury in order that they may look at him and judge, by his demeanor on the stand and the manner in which he gives his testimony, whether he is worthy of belief.

[6] Criminal Law—Province of Court and Jury—Testimony—Credibility and Weight.—It is because the demeanor of a witness is a significant factor in weighing

his evidence that the trier of fact, before whom the witness testified and was cross-examined at trial, is the sole judge of his credibility and of the weight to be given to his testimony.

[7a, 7b] Id.—Preliminary Examination—Purpose.—The purpose of a preliminary hearing is not a full exploration of the merits of a cause or of the testimony of the witnesses, but to weed out groundless or unsupported charges of grave offenses and to relieve the accused of the degradation and the expense of a criminal trial; the hearing is designed and adapted to answer the preliminary question of whether probable cause exists for a subsequent trial.

[8] Id.—Preliminary Proceedings—Inapplicability of Doctrine of Reasonable Doubt.—The judge in preliminary proceedings is not required under Pen. Code, § 872, to be convinced of the defendant's guilt beyond a reasonable doubt, but need only look for reasonable credibility in the charge against him.

[9] Id.—Preliminary Proceedings—Inapplicability of Doctrine of Reasonable Doubt.—A witness' testimony at a preliminary examination, though the only evidence adduced, need not, under Pen. Code, § 872, be convincing or credible beyond a reasonable doubt, and cross-examination which would surely impeach a witness at trial would not preclude a finding of probable cause at the preliminary stage.

[10] Id.—Evidence at Preliminary Examination or Former Trial—Limitations on Admissibility.—There is no "necessity", such as to justify the "former testimony" exception to the hearsay rule (Evid. Code, §§ 1290–1292), where the witness is present to testify at trial under oath but for some disclosed or undisclosed reason does not relate the same version of events that he told previously and that a party anticipates he will tell. In such case the question is one of credibility, to be dealt with by contemporaneous cross-examination and the introduction of the prior inconsistent testimony or statement of impeachment.

[11] Id.—Reversible Error—Hearsay Evidence.—In a nonjury trail for furnishing a narcotic to a minor (Health & Saf. Code, § 11532), the error, in failing to restrict to purposes of impeachment prior inconsistent statements by the minor, was reversible under *Chapman* where, apart from such statements, there was no substantial evidence of a narcotics transaction between him and defendant.

[4] See Cal.Jr.2d, Witnesses § 108.

Appeal from a judgment of the Superior Court of Los Angeles County. Prentiss Moore, Judge. Reversed.

Prosecution for furnishing a narcotic to a minor. Judgment of conviction reversed.

Cooney & Cooney and Terrence W. Cooney for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and David B. Stanton, Deputy Attorney General, for Plaintiff and Respondent.

Mosk, J.—Defendant John Anthony Green was convicted of violating Health and Safety Code section 11532 (furnishing a narcotic to a minor) upon evidence consisting chiefly of the testimony and prior inconsistent statements of the minor to whom defendant allegedly furnished narcotics. Defendant challenges the constitutionality of Evidence Code section 1235, which provides for admission of prior inconsistent statements of a witness to prove the truth of the matters asserted therein, as applied to testimony elicited at a preliminary hearing. On the basis of recent decisions of this court and the United States Supreme Court, we conclude that section 1235 as so applied is unconstitutional and therefore the conviction must be reversed.

After a preliminary hearing, defendant was charged with furnishing marijuana to one Melvin Porter, a minor. He was tried and convicted by a court sitting without a jury. The chief witness for the prosecution was young Porter, who was markedly evasive and uncooperative on the stand. He testified that defendant had telephoned him in January 1967 and asked him to sell some unidentified "stuff." He admitted he had obtained 29 plastic "baggies" of marijuana, some of which he sold and the rest of which was purportedly stolen from him. He testified that he was uncertain how he obtained the marijuana, primarily because he was on "acid" (LSD) at the time and could not then distinguish fact from fantasy. At various points Porter was impeached by the prosecution by the use of his testimony at the preliminary hearing, in which he had stated that defendant had specifically asked him to sell marijuana and that he obtained the marijuana from the yard of defendant's parents' home, at the behest and direction of de-

fendant. This preliminary hearing testimony was admitted as a prior inconsistent statement under section 1235 of the Evidence Code.[1]

Following the deputy district attorney's reading of the preliminary transcript, Porter testified that his testimony at that hearing was the truth as he then believed it, and that his memory was now refreshed and he "guessed" he had obtained the marijuana from defendant's parents' yard and had given the money from its sale to defendant. However, on cross-examination Porter conceded that in fact it was his memory not of the events themselves but of the preliminary testimony which was refreshed, and he was still unsure and had no present recollection of the actual episode.

Later in the trial still another version of Porter's story was offered and admitted. Officer Wade testified that Porter had told him during a conversation at juvenile division headquarters that defendant came to Porter's house and personally delivered the marijuana to him. This statement was also admitted under Evidence Code section 1235 as a prior inconsistent statement. Like the preliminary hearing testimony, it was admitted for the purpose of proving the truth of the matter stated therein, as then sanctioned by the code.

Only one other item of evidence appeared to link defendant with Porter: the testimony of Officer Dominguez, an undercover officer, that he attempted to buy narcotics from Porter, who told him he would have a supplier named "John" contact him. In fact, defendant contacted Dominguez and purported to be a narcotics supplier; but when defendant insisted that Dominguez take narcotics with him to show good faith, the sale fell through. Defendant admitted the incident but explained that Porter asked him and he agreed to help expose a suspected undercover officer by a bogus sale. Defendant denied ever being in possession of narcotics. No charges were ever filed in connection with this purported transaction, and the trial court carefully limited its admission to the narrow purpose of showing that "Porter and the defendant had previous associations and were acquainted."

Defendant contends that the admission of the prior inconsistent statements of Porter as evidence of the truth of the matters stated therein—as opposed to admission for impeachment only—was unconstitutional and contrary to our recent holding in *People* v. *Johnson* (1968) 68 Cal.2d 646 [68 Cal. Rptr. 599, 441 P.2d 111] (cert. denied 1969, 393 U.S. 1051 [21 L.Ed.2d 693, 89 S.Ct. 679]), and that its admission constituted prejudicial error under the standards of *Chapman* v. *California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824]. The People concede that the testimony of Officer Wade was inadmissible under *Johnson*, but assert that this error was not prejudicial.[2] As for the preliminary hearing testimony, the People urge that *Johnson* does not or should not preclude its evidentiary use since defendant had an opportunity to cross-examine the declarant Porter at the time the statement was made. This rationalization is not persuasive.

In *Johnson* we held that Evidence Code section 1235, insofar as it provides for admission of prior inconsistent statements as evidence of the truth of the matters stated therein, is unconstitutional when applied to testimony before a grand jury without the presence of the defendant, his counsel, or the ultimate trier of fact. As a consequence *Johnson* returned California law in this area to the general common law rule which prevailed prior to passage of the Evidence Code, limiting admission of prior inconsistent statements in criminal cases to impeachment purposes. Our decision was impelled by recent cases articulating the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution. (E.g., *Pointer* v. *Texas* (1965) 380 U.S. 400 [13 L.Ed.2d 923, 85 S.Ct. 1065]; *Barber* v. *Page* (1968) 390 U.S. 719 [20 L.Ed.2d 255, 88 S.Ct. 1318].)

The complaining witnesses in *Johnson* had testified before the grand jury to acts of incest by the defendant. However, at trial these witnesses changed their stories and denied the truth of their prior testimony, claiming they had fabricated the incest charge out of spite. The grand jury testimony was admitted under

[1] We assume for purposes of discussion that the preliminary hearing testimony was in fact "inconsistent" with the witness' testimony at trial.

[2] There is no question but that both prior statements were offered, admitted, and considered as evidence of the facts stated therein. We cannot accept the tardy view propounded in the People's supplementary brief that the court did not rely upon this evidence, and in fact considered only the abortive transaction between defendant and Officer Dominguez as proof of defendant's guilt. In addition to his references to section 1235 at the time of admission, the deputy district attorney urged during closing argument that both these prior statements be considered "as much evidence . . . as if [Porter] said it from the witness stand. . . ." Moreover, we must take note of both the trial court's specific limitation, referred to earlier, of Officer Dominguez' testimony to showing that defendant and Porter were "acquainted," and the fact that the People in their opening brief rely heavily on Porter's statements in supporting the sufficiency of the evidence and specifically assert that the court "nowhere states that it did not believe that portion of Porter's testimony which . . . is sufficient to support the judgment." According to the People, "The trial court simply found that for all of Porter's obstinate evasiveness on the stand, the fact of appellant's furnishing stood clear in his mind." We read the trial court's opinion in accord with this latter statement.

Evidence Code section 1235, and on the basis of that evidence the defendant was convicted. We reversed, declaring that such evidentiary use of the grand jury testimony was in violation of the confrontation clause of the Constitution. In response to the People's contention that the witnesses could be cross-examined at trial, we stated: "To assert that the dangers of hearsay are 'largely nonexistent' when the declarant can be cross-examined at some later date, or to urge that such cross-examination puts the later trier of fact in 'as good a position' to judge the truth of the out-of-court statement as it is to judge contemporary trial testimony, is to disregard the critical importance of *timely* cross-examination." (Italics in original.) (*People* v. *Johnson* (1968) *supra*, 68 Cal.2d 646, 655.) [1a] Belated cross-examination before the trial court, such as was available to defendant in the instant case, is not an adequate substitute for the right to cross-examination contemporaneous with the original testimony before a different tribunal.

We recognize that the case before us differs from *Johnson* in a significant respect. Here, unlike *Johnson*, defendant had an opportunity to cross-examine the witness at the time the prior inconsistent statements were made, i.e., at the preliminary hearing. This, assert the People, is a constitutionally adequate fulfillment of the right of confrontation. However, their contention overlooks the thrust of our opinion in *Johnson* and the realities of the preliminary hearing system, and directly conflicts with the recent stance of the United States Supreme Court.

Barber v. *Page* (1968) 390 U.S. 719 [20 L.Ed.2d 255, 88 S.Ct. 1318], cited and relied upon in *Johnson*, involved the "unavailable witness" exception to the hearsay rule. A key witness who had testified at a preliminary hearing was confined in prison elsewhere at the time of trial. The prosecution made little or no effort to compel his presence at the trial, and instead was allowed to read into evidence the transcript of his preliminary testimony. The defendant has not cross-examined the witness at the preliminary hearing, although a codefendant had done so. There was a close question whether the defendant had waived his right to cross-examine at the preliminary hearing, but the court found no waiver and in effect found no opportunity for cross-examination. Concluding that the prosecution had not make a sufficient effort to have the witness present, the court ruled that no unavailability—and hence no "necessity"—was demonstrated to justify the "prior testimony" hearsay exception and to overcome the defendant's right of confrontation.

However, the opinion in *Barber* v. *Page* did not stop at that point. Since the question of cross-examination and waiver was close, the court went on to make its position unequivocally clear regarding the value of cross-examination at a preliminary hearing in lieu of cross-examination at trial. In language we substantially quoted in *Johnson* (68 Cal.2d at p. 659, fn. 9), the high court stated: "Moreover, we would reach the same result . . . had petitioner's counsel actually cross-examined [the witness] at the preliminary hearing. . . . The right to confrontation is basically a trial right. *It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial* simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of testimony at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not . . . such a case." (Italics added.) (*Barber* v. *Page* (1968) *supra*, 390 U.S. 719, 725–726 [20 L.Ed.2d 255, 260, 88 S.Ct. 1318].) This expression was more than a mere dictum, as the Supreme Court has since demonstrated. In *Berger* v. *California* (1969) 393 U.S. 314 [21 L.Ed.2d 508, 89 S.Ct. 540], the *Barber* "unavailable witness" rule was made retroactive and was specifically applied to a case in which there was an opportunity for cross-examination at the preliminary hearing when the prior testimony was taken.[3]

The import of *Barber* and other recent Supreme Court decisions was spelled out in *Johnson*: "These rulings emphasize the high court's belief in the importance of ensuring the defendant's right to conduct his cross-examination before a *contemporaneous* trier of fact, i.e., before the same trier who sits in judgment on the truth of the witness' direct testimony as it is spoken from the stand." (Italics in original.) (*People* v. *Johnson* (1968) *supra*, 68 Cal.2d 646, 659, 660.) [2a] We reiterate that the "contemporaneous" cross-examination which alone, in the ab-

[3] See also recent California cases which, even without the prompting of *Berger*, have applied *Barber* despite the presence of preliminary hearing cross-examination. (E.g., *People* v. *Harris* (1968) 266 Cal.App.2d 426 [72 Cal.Rptr. 423]; *People* v. *Casarez* (1968) 263 Cal.App.2d 130 [69 Cal.Rptr. 187] ["extensively cross-examined"]; cf. *People* v. *King* (1969) 269 Cal.App.2d 40 [74 Cal.Rptr. 679] [witness actually unavailable]; *Mason* v. *United States* (10th Cir. 1969) 408 F.2d 903 [testimony unavailable].)

sence of a legal showing of necessity, can be considered many effecti ... constitutionally adequate is cross-examination at the *same time* as the direct testimony is given, before the *same trier* as must ultimately pass on the credibility of the witness and the weight of that testimony. [3a] In short, cross-examination neither may be *nunc pro tunc* nor may it be *tunc pro nunc*.[4]

[1b] In the instant case the only direct testimony of prior statements put before the trial court charged with its evaluation in terms of defendant's guilt, came by means of the deputy district attorney's reading of the cold transcript of the preliminary hearing. That the speaker of the words therein recorded had been cross-examined on another day, before another trier of fact, and for another purpose—i.e., to establish probability, not guilt—was without practical significance to the ultimate trier of fact, and we find the process lacking in constitutional validity. Even had Porter's preliminary hearing cross-examination been read to the trial court—and it was not [5]—it could have been of limited use in assessing the value of the statements. [4] It is elementary that the role of cross-examination is not simply to elicit a bald contradiction of the witness' direct testimony, a rare occurrence at best, but to focus the attention of the trier of fact on the witness' demeanor as he relates his story and then defends his version against the immediate challenge of the opposing attorney. [5] By cross-examination "the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (*Mattox* v. *United States* (1894) 156 U.S. 237, 242-243 [39 L.Ed. 409, 411, 15 S.Ct. 337].) [6] It is because demeanor—attitude and manner—is a significant factor in weighing testimonial evidence that it is axiomatic the trier of fact, before whom the witness testified and was cross-examined at trial, is the sole judge of the credibility of a witness and of the weight to be given his testimony.

Also lost in a cold reading of the preliminary transcript is the more subtle yet undeniable effect of counsel's rhetorical style, his pauses for emphasis and his variations in tone, as well as his personal rapport with the jurors, as he pursues his cross-examination. For example, Judge Leo R. Friedman has written (Essentials of Cross-Examination (Cont. Ed. Bar, 1968) p. 40) that while the lawyer "must keep control of himself . . . [t]his does not mean that the cross-examiner never should fight with a witness, raise his voice, or become angry. Forensic indignation, whether expressed physically or verbally, may produce good results in special circumstances." In addition, counsel may well conduct his cross-examination in a different manner before a committing magistrate than before a trial court or jury. Thus, states Friedman, counsel must always temper his cross-examination to the individual jurors, using their reactions as a guide to the most effective line of questioning. "The cross-examiner must remember that he is a performer and the jurors are his audience. No good performer ignores his audience, and all performances are conducted for the purpose of favorably impressing the audience." (*Id.* at p. 48.) [6] We conclude that experience demonstrates the essentiality of truly contemporaneous cross-examination.

But leaving aside for the moment questions of subjective evaluation by the trier of fact, the Supreme Court in *Barber* clearly recognized that there is a substantial difference in the nature and purposes of preliminary and trial proceedings, regardless of whether there has been cross-examination. [7a] Barber points out that the purpose of a preliminary hearing is not a full exploration of the merits of a cause or of the testimony of the witnesses. It is designed and adapted solely to answer the far narrower preliminary question of whether probable cause exists for a subsequent trial. [8] The judge in preliminary proceedings is not required to be convinced of the defendant's guilt "beyond a reasonable doubt," but need only

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[4] In *Berger* v. *California* (1969) *supra*, 393 U.S. 314, 315 [21 L.Ed.2d 508, 510, 89 S.Ct. 540, 541], the high court stated that *Barber* was "foreshadowed, if not preordained" by *Pointer* v. *Texas*. Similarly, it could be said that the instant case was "foreshadowed, if not preordained" by *People* v. *Johnson*. (See *People* v. *Vinson* (1969) 268 Cal.App.2d 672 [74 Cal.Rptr. 340].)

[5] With one insignificant exception, Porter's preliminary cross-examination was not read to the court. Therefore, in this instance the question of "contemporaneous" cross-examination, insofar as it concerned or even reached the ears of the ultimate trier of fact, is more academic than actual.

[6] Furthermore, we note that under the facts of the instant case, which are far from atypical, not only was Porter's preliminary hearing cross-examination not introduced, but cross-examination at trial regarding his prior statements would have proved futile. Porter asserted that his prior statements may have been what he believed at the time, but he now could not remember the events in question. Defense counsel was thus put in the awkward position of attempting to discredit a witness who had just testified in defendant's favor. If cross-examination of a hostile witness is a delicate process, cross-examination of a friendly witness—as to testimony given at a time when he was hostile—is an unusual exercise in diplomacy and futility.

look for reasonable credibility in the charge against him.[7] [9] *A fortiori* a witness' testimony, though the only evidence adduced, need not be convincing or credible beyond a reasonable doubt, and cross-examination which would surely impeach a witness at trial would not preclude a finding of probable cause at the preliminary stage. Even given the opportunity (see *Jennings* v. *Superior Court* (1967) 66 Cal. 2d 867 [59 Cal. Rptr. 440, 428 P. 2d 304]), neither prosecution nor defense is generally willing or able to fire all its guns at this early stage of the proceedings, for considerations both of time and efficacy. (Letwin, *Waiver of Objections to Former Testimony* (1967) 15 U.C.L.A. L. Rev. 118, 124.) Indeed, it is seldom that either party has had time for investigation to obtain possession of adequate information to pursue in depth direct or cross-examination.

[7b] Were we to equate preliminary and trial testimony one practical result might be that the preliminary hearing, designed to afford an efficient and speedy means of determining the narrow question of probable cause,[8] would tend to develop into a full-scale trial. This would invite thorough and lengthy cross-examination, with the consequent necessity of delays and continuances to bring in rebuttal and impeachment witnesses, to gather all available evidence, and to assure generally that nothing remained for later challenge. In time this result would prostitute the accepted purpose of preliminary hearings and might place an intolerable burden on the time and resources of the courts of first instance.[9]

[2b] Although we recognize that some of the same practical difficulties exist, nothing we say here is intended to affect or cast doubt upon the viability or constitutionality of the long-established "prior testimony" exception to the hearsay rule. (Evid. Code, §§ 1290–1292.) This exception, as *Barber* points out, adds the factor of necessity to the constitutional aspect of confrontation—which factor may, in appropriate cases, outweigh the lack of contemporary cross-examination.[10] 10] Of course, no such "necessity" exists where the witness is present to testify at trial under oath, but for some disclosed or undisclosed reason does not relate the same version of events that he told previously and that a party anticipates he will tell.[11] This is strictly a question of *credibility*, to be dealt with, as has always been the case, by the use of immediate and contemporaneous cross-examination and the introduction of the prior inconsistent testimony or statements for purposes of *impeachment*.

[3b] In summary, the rules that emerge from the cases and principles are these: cross-examination at trial relating to a statement or testimony given previously is constitutionally inadequate. (*Johnson*.) Cross-examination at the time of the statement, e.g., at a preliminary hearing, before a judge or agency other than the trier of fact charged with the ultimate determination of credibility and guilt, is likewise constitutionally inadequate. (*Barber*.) A combination of these two negatives obviously cannot produce a positive. Therefore, cross-examination at trial on prior testimony, together with cross-examination at the time of the statement before a different trier of fact, is not a valid substitute for constitutionally adequate confrontation. [1c] The facts in the instant case compose that combination of negatives, compelling us to conclude that defendant was denied the right of confrontation guaranteed by the Sixth Amendment to the Constitution. Both prior

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[7] Penal Code section 872 provides in relevant part: "If . . . it appears from the [preliminary] examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must [indorse the complaint]." "Sufficient cause" is "equivalent in meaning to 'reasonable and probable cause' " (*Perry* v. *Superior Court* (1962) 57 Cal.2d 276, 283 [19 Cal.Rptr. 1, 368 P.2d 529]), and the evidence before the committing magistrate "need not be such as would require a conviction." (*People* v. *Nagle* (1944) 25 Cal.2d 216, 222 [153 P.2d 344].)

[8] "The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial." (*Jaffe* v. *Stone* (1941) 18 Cal.2d 146, 150 [114 P.2d 335, 135, A.L.R. 775].)

[9] Approximately 85 percent of felony proceedings in California superior courts originate in preliminary hearings. (Crime and Delinquency in Cal.: Report of Bureau of Criminal Statistics (1965) p. 66.) In the fiscal year of 1966-1967, this represented 64,308 felony preliminary filings in municipal courts and 7,256 in justice courts. (Annual Rep. of Judicial Council of Cal. (1968) pp. 107, 145.)

[10] Evidence Code section 1291 admits former testimony when the present defendant was a party to the hearing at which that testimony was taken "and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he had at the [present] hearing." Although preliminary hearing testimony was clearly contemplated by section 1291 (see comments thereto), the Supreme Court in *Pointer* v. *Texas*, and *Barber* v. *Page* left open the question whether such prior testimony satisfies the confrontation clause of the Constitution, and we have no occasion to consider that question at this time. (But see *People* v. *King* (1969) *supra*, 269 Cal.App.2d 40, 47.)

[11] "It is one thing to use prior testimony or out-of-court declarations under well formulated hearsay exceptions when the witness is dead, incompetent, or out of the jurisdiction. It is an entirely different matter to use such testimony as substantive evidence when the witness is in court and able to testify before the very forum that is going to pass judgment on a defendant who is on trial for his life or freedom. In the former situation, the hearsay is reasonably reliable and is presumably presented to the jury in good faith since it is the only evidence available. In the latter situation the hearsay is no longer reliable, and it is not the only evidence available." (*People* v. *Vinson* (1969) *supra*, 268 Cal.App.2d 672, 677.)

statements by Porter should have been excluded for any purpose other than impeachment.

We pause to note, as we did in *Johnson* (68 Cal. 2d at p. 658), that the Legislature was not unmindful of the likelihood that its overly broad approval of the use of hearsay in criminal cases would have constitutional implications. Thus it provided in Evidence Code section 1204: "A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California."

[11] Since the two most damaging statements of the witness Porter are inadmissible as substantive evidence, and since we find no other substantial evidence of a narcotics transaction between Porert and defendant on the date charged, the prejudicial nature of the error is manifest (see fn. 2, *ante*), and the judgment of conviction must be reversed. (*Chapman* v. *California* (1967) *supra*, 386 U.S. 18.) We need not reach defendant's additional contentions of insufficiency of the evidence, suppression of evidence, and prejudicial misconduct.

The judgment is reversed.

Traynor, C. J., McComb, J., Peters, J., Tobriner, J., Burke, J., and Sullivan, J., concurred.

U.S. District Court,
Kansas City, Mo., July 30, 1973.

Hon. William L. Hungate,
Chairman, Subcommittee on Criminal Justice,
House Judiciary Committee, Cannon Office Building,
Washington, D.C.

Dear Chairman Hungate: At the direction of Judge Thomas C. Clary, Chairman of the Board of Editors of the Manual on Complex Litigation, I transmit herewith a statement in opposition to subparagraph (b) of proposed Rule of Evidence 611 in H.R. 5463.

The members of the Board of Editors, and all Federal judges to whom I have spoken, are astonished and disappointed that the original provision on scope of cross examination approved by the Supreme Court and the Advisory Committee has been replaced in H.R. 5463 with an inflexible unworkable provision.

As explained in the enclosed statement, all eminent authorities on the law of evidence condemn the rule enunciated in subparagraph (b) of Rule 611 set forth in H.R. 5463.

It is difficult enough to process complex and multidistrict litigation justly and efficiently under the current Federal rule. As presently written in H.R. 5463, subparagraph (b) may make this difficult task impossible to the lasting prejudice of the administration of civil and criminal justice.

I am sure that the Board of Editors and many others will desire to be heard on this subject by your subcommittee.

With kindest personal regards, I am

Sincerely yours,

William H. Becker.

Enclosure

Statement of Board of Editors of Manual for Complex Litigation of the Federal Judicial Center

Subject: Rule 611(b) of proposed rules of evidence for U.S. Courts and magistrates as provided in H.R. 5463

By this statement your attention is invited to the harmful and crippling effect on efficient processing of multidistrict and other complex litigation which would result from subparagraph (b) of Rule 611 of the Proposed Rules of Evidence as provided in H.R. 5463.

This subparagraph (b) provides a radical change in federal practice that will have an injurious impact on efficient processing of multidistrict and complex litigation by the federal district courts. Immediate attention should be given to the problem by the Committee on the Judiciary. It is submitted that subparagraph (b) of Rule 611 in H.R. 5463 should be eliminated and that subparagraph (b) in the Rules of Evidence approved by the Supreme Court of the United States, and the Judicial Conference of the United States, be restored in its place.

Rule 611 of the Proposed Rules of Evidence in H.R. 5463

The proposed Rule 611, including the trouble-laden subparagraph (b) is as follows:

"RULE 611. MODE OF ORDER OF INTERROGATION AND PRESENTATION

"(a) Control by judge.—The judge 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.—[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.] *Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge 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. In civil [cases] *actions,* a party is entitled to call an adverse party or witness identified with [him] *such adverse party* and interrogate by leading questions."

The comment in the Subcommittee Note that subdivision (b) was "amended to return to the rule which prevails in the Federal courts and 39 State jurisdictions" is misleading. Presently in its discretion the federal courts can exercise discretion to permit deviations from the general rule in the interests of justice and economy and prescribing the order of proof. Subparagraph (b) undertakes to eliminate this discretion. Furthermore, the general rule is an undesirable anachronism unfitted for modern trial practice, and has no merit because of its antiquity.

The principal objections to subparagraph (b) of proposed Rule 611

Subparagraph (b) is objectionable and impractical for many reasons, including the following:

(1) The rule stated in subparagraph (b) will frustrate the objects of transfer of multidistrict and complex litigation (transferred under Sections 1407 and 1404(a), Title 28, U.S.C., for convenience of witnesses and parties, to promote the efficient and just conduct of the actions and in the interest of justice).

(2) The rule stated in subparagraph (b) is disapproved by all the great writers on the law of evidence and practice, including:

(i) Wigmore,
(ii) Morgan,
(iii) McCormick,
(iv) Ladd,
(v) Moore,
(vi) the authors of the Model Code of Evidence, A.L.I., and
(vii) the authors of the Uniform Rules of Evidence.

(3) The rule stated in subparagraph (b) will cause untold hardship to witnesses, parties and judges in complex and conventional litigation.

(4) The rule stated in subparagraph (b) is not in harmony with subparagraph (a) of Rule 611.

(5) The rule stated in subparagraph (b) does not recognize the modern doctrine on the nature and privileges of cross-examination, which depends primarily on the absence or presence of a degree of hostility of a witness, not on which party calls the witness.

The rule stated in subparagraph (b) will frustrate the objects of transfer of multidistrict and complex litigation (transferred under Sections 1407 and 1404(a), Title 28, U.S.C., for convenience of witnesses and parties, to promote the efficient and just conduct of the actions and in the interest of justice).

The mischief and damage which will be caused to the interests of justice by subparagraph (b) is most evident in multidistrict and complex litigation (though present in all litigation).

The vice of the proposed rule is evident in examination of witnesses in both evidentiary depositions and personal appearances at trial.

In order to secure evidentiary (as well as discovery) depositions usable in all related litigation, large numbers of related cases are transferred under Section 1407 to a single court for pretrial proceedings and often for trial under Section 1404. One of the primary objects of these transfers is to secure a comprehensive examination and cross-examination of the witnesses at one deposition, or other pretrial evidentiary hearing, so that all the relevant information of witnesses can be recorded in the deposition for discriminating admission in evidence by the trial court in all related cases. Experience has demonstrated that this is necessary to the interests of justice and to the convenience of witnesses. There are some masses of litigation so huge that most witnesses lack the life expectancy to permit their personal appearance at trial in these related cases, if they did nothing else the rest of their lives. If the examinations in these evidentiary depositions are limited by subparagraph (b) of the proposed rule, chaos will result. Very early in the massive electrical equipment cases a policy was adopted that, in evidentiary depositions (and at the trial when the witness appeared personally), the witness could be cross-examined upon all subjects of admissible evidence at the initial examination.

Leaving aside for a moment the matter of evidentiary depositions in massive litigation, attention is invited to hardships and inconveniences to witnesses and parties in complex litigation when the witness appears in person. Frequently these witnesses are scientists, nationally known experts, busy physicians, and other important persons who do not have the time to appear more than once at a trial. The rule stated in subparagraph (b) can require them to appear twice, unnecessarily standing by for recall at some indefinite time in a trial of long duration.

It may be argued that the rule of subparagraph (b) is "a suggestion rather than a mandate to the trial judge," as stated in the Advisory Committee's Note, 46 F.R.D. at page 304. This is not supported by the rule itself, which uses "should," a form of the mandatory verb "shall." Cf. *Black's Law Dictionary* (4th Ed.) 1549; 39 Words & Phrases at page 312. If this is not a mandate, the word "may" should be substituted for the word "should" if the subparagraph is to remain in the Rules of Evidence, an undesirable matter.

The rule stated in subparagraph (b) is disapproved by all the great writers on the law of evidence and practice, including: (i) Wigmore, (ii) Morgan, (iii) McCormack, (iv) Ladd, (v) Moore, (vi) the authors of the Model Code of Evidence, A.L.I., and (vii) the authors of the Uniform Rules of Evidence

The unsoundness of the rule stated in subparagraph (b) is recognized by all leading authorities on evidence. The following citations demonstrate this:

VI *Wigmore on Evidence* (3rd Ed. 1940), §§ 1887–1888, pages 536–545.

Morgan, *Basic Problems of Evidence* (1962), pages 65–68.

McCormick on Evidence (1954), §§ 21–27 inclusive, particularly § 27 at pages 50–52.

Ladd's *Cases and Materials on Evidence* (2d Ed. 1955) at pages 73–82, quoting note in 24 Iowa Law Review 564, and citing *inter alia*, Wigmore, A.L.I. Model Code of Evidence, The Uniform Rules of Evidence and other cases and materials.

5 Moore's *Federal Practice* ¶43.10 at pages 1373–1380, referring to the often criticized federal practice.

A.L.I. *Model Code of Evidence*, Rule 105, and subparagraph (b) at pages 102–104.

Uniform Rules of Evidence, drafted and approved by the National Conference of Commissioners on Uniform State Laws in 1953 and by the American Bar Association in 1953, in which the rule of subparagraph (b) is deliberately omitted.

The rule stated in subparagraph (b) will cause untold hardship to witnesses, parties and judges in complex and conventional litigation

The rule stated in subparagraph (b) will cause great hardship to witnesses who must often stand by to be recalled and who must often testify at least twice in the same single case. The expense and hardship to parties is evident.

To follow such a rule judges must perform often impossible feats of memory, or stop trials to review the scope of evidence or direct examination, thereby causing delays and perhaps possibly making erroneous rulings inadvertently.

The rule stated in subparagraph (b) is not in harmony with subparagraph (a) of Rule 611

Subparagraph (b) is a severe limitation on subparagraph (a) of Rule 611, which states the rule advocated by all leading commentators. Subparagraph (a) is sufficient without the conflicting subparagraph (b). Subparagraph (a) is as follows:

> "(a) Control by judge.—The judge 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."

The rule stated in subparagraph (b) does not recognize the modern doctrine on the nature and privileges of cross-examination, which depends primarily on the absence or presence of a degree of hostility of a witness, not on which party calls the witness

The modern rule regarding cross-examination, including impeachment, depends on the relative hostility of the witness to and surprise of the examiner, not who called him. Often a witness hostile to the examiner must be called by a party. Morgan, *Basic Problems of Evidence* (1962), *supra*, at pages 57 and 58. The judge should be left free to promote the interests of justice and the search for the truth without this obsolete, frustrating rule stated in subparagraph (b).

The radical change in present rule

The provisions of subparagraph (b) do not represent "a return to the rule which prevails in the Federal Courts" as stated in the Subcommittee Note borrowed from the abandoned portion of the 1969 draft. Presently in federal courts the cross-examiner may interrogate the witness outside the scope of cross-examination for impeachment purposes. *McCormick on Evidence* § 22, p. 45, 46. The proposed subparagraph (b) read literally excludes this cross-examination which may range widely outside the scope of direct examination.

Further, even the state and federal courts, which adhere to the restrictive rule, emphasize the discretion of the trial courts to allow deviations from the rule in their discretion in the interests of justice and efficiency. *McCormick on Evidence* § 24. Subparagraph (b) makes a retrograde radical change in eliminating this discretion. The change is contrary to interests of justice, the interests of economy, the interests of speed, and the convenience of parties and witnesses. Rather than providing a modern salutary rule with respect to scope of cross-examination, subparagraph (b) of Rule 611 imposes a justice frustrating rule without precedent or support in the legal history of the United States.

Conclusion

The provisions of subparagraph (b) of Rule 611 of the *Rules of Evidence for the United States Courts and Magistrates*, prescribed by the Supreme Court on November 20, 1972, and transmitted to Congress, represent the best provision on the subject of the scope of cross-examination. This provision is unanimously supported by all the eminent authorities on the Law of Evidence listed above. That rule should be restored to the Proposed Rules of Evidence in H.R. 5463. It is as follows:

> "(b) *Scope of cross-examination.* 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."

Memorandum to Hon. William L. Hungate,
Subcommittee on Criminal Justice
From: Judge Vincent P. Biunno.
Subject: Federal evidence rules.
Date: July 30, 1973.

Attached is a memorandum dealing with the definitions of "writings", "recordings" and "photographs" (Rule 1001), as well as with evidence of business records (Rule 803(6)).

The comments are based on personal study of the subject of evidence rules in New Jersey since 1955 for legislative, court and professional commissions and committees, and on personal knowledge and experience in computer operations as well as studies for the ABA Standing Committee on Law and Technology.

VINCENT P. BIUNNO, *U.S.D.J.*

Memo re Rules of Evidence

This memorandum is directed to the tentative Subcommittee draft of H.R. 5463, published in U.S. Law Week, issue of July 17, 1973.

Since the announcement of Mr. Hungate, chairman of the Subcommittee, requires any comments to be in the hands of the Subcommittee on or before July 31, 1973, this memorandum is confined by time limitations to a single point involving two rules.

. . . Rule 1001 (Definitions of writings and recordings)

. . . Rule 803(6) (Hearsay exception for business and professional records).

The definitions of "writings", "recordings" and "photographs" include recording forms of a class such that content is not tangible and not readable by sight. The commonest and most widely known forms in this class are the tape recording of sound, the tape recording of coded data (such as computer tape) and the tape recording of visual images (such as videotape). Other media than tape has been and can be used for magnetic recording. These include wire, sheets, drums and discs, for example. These and other forms of media have in common the use of the same underlying means and methods, i.e., the impression of magnetized characteristics on a substance capable of reacting to magnetic fields and of retaining them. The physical configurations may vary widely, but the basic method is the same.

Other forms use different kinds of energy differentials instead of magnetic fields. Some use electrostatic fields, some use spinning electrons, some use "bubbles". The pace of technology in this area is extremely rapid, and it is reasonable to expect that forms not now known may be widespread in the next several decades.

For all these forms, known and as yet undiscovered, it is a fact that the one key characteristic of them which distinguishes them from other forms is that they cannot be read by the human eye, unaided by devices sensitive to any form of energy other than visible light. Even the punched card, the punched paper tape, and Braille, although intended for "reading" by other means, *can* be read visually.

This difference is critical because, if these non-visual forms are to be labeled as writings, the proposed rules of evidence should contain requirements to be adhered to in order that there may be assurance of reliability and trustworthiness at least equal to that available for traditional writings. Without such assurances, there will be unknown and unacceptable risks of falsification or "doctoring", with little or nothing available by way of simple and reliable means for detecting alterations.

The scandal at Equity Funding, which evidently involved the manufacture of false computer records, is one example. The embarrassment at the Long Island IRS office, whose computer system evidently "lost" some 13,000 taxpayers' returns for 1972, is another. Computer systems experts familiar with the realities of actual use and activity can provide many more examples.

In the adoption of the New Jersey Rules of Evidence, in the period from 1955 to 1967, this subject received close attention.

A legislative proposal advanced in 1956 qualified the definition of any writing (or photograph) with two criteria: (1) reasonable permanence, and (2) readability by sight. These were embodied in the Evidence Act, 1960. (N.J.S. 2A:84A-14; N. J. Evidence Rule 1(13)). By changes made in 1967 through court-promulgated rules accepted by the Legislature and the Governor, the kinds of non-visual systems under discussion were further dealt with to provide a basis for admissibility. The changes involved two sets of provisions.

In Rule 1(13), which defines writings, provisions were added for forms of recording that do not themselves constitute "writing" because not readable by sight. These were:

> . . . the system for recording the information or data must be generally accepted (this rules out experimental and unproven methods);
>
> . . . the system must be operated by suitable controls to safeguard the reliability and accuracy of the information or data (this protects against the entry of erroneous data and against the manipulation of recorded data by improper access);
>
> . . . the system must be equipped with means for providing a visually readable reproduction of the non-visual material.

In such case, once the criteria for reliability have been met, the reproduction (which is a traditional writing"), is treated as the equivalent of the information or data itself.

A second 1967 change was in Rule 63(13), which corresponds with Rule 803 (6). As originally drafted, this had provided a hearsay exception for written business

records; it allowed their reception if the writing" was made . . . in the regular course of business, and . . . at or about the time of the act, condition or event recorded (i.e., contemporaneously).

The 1967 change consisted of applying these criteria either to the (traditional) writing, or to "the record upon which it is based" (i.e., the computer tape, disc, etc.). This made it possible to receive the readable printout, made long after the event, as the equivalent of the original non-visual record, so long as the protective requirements of Rule 1(13) were satisfied.

The phrasing of Rules 1001 and 803(6) differs from that of the N.J. rules (copies attached). Without knowledge of the rationale behind the phrasing of the federal rules draft, an attempt to suggest proposed changes for this purpose would be awkward. It is felt preferable to explain the object and purpose, as has been done, and to leave the technical drafting to the Subcommittee and its staff.

The experience in New Jersey has been excellent. Business and professional users of computer systems for recordkeeping have prepared descriptions of their systems and of the controls employed, and these have provided the basis for evidential use of computer printouts without difficulty or complication, and at the same time have provided practical means for checking and verifying trustworthiness and reliability.

It is suggested that consideration be given to inclusion of these concepts in the proposed draft of federal rules of evidence.

VINCENT P. BIUNNO, *U.S.D.J.*

RULE 1(11). "TRIER OF FACT"

"Trier of fact" includes a jury and a judge when he is trying an issue of fact other than one relating to the admissibility of evidence. L. 1960, c. 52, p. 453, § 12 [N.J.S.2A:84A-12.]

RULE 1(12). "VERBAL"

"Verbal" includes both oral and written words. L. 1960, c. 52, p. 453, § 13 [N.J.S. 2A:84A-13.]

RULE 1(13). "WRITING"

"Writing" means handwriting, typewriting, printing, photostating, photography and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds or symbols, or combinations thereof, provided that such recording is (a) reasonably permanent and (b) readable by sight. When information or data is recorded by means of a generally accepted method or system, which is operated with suitable controls to safeguard the reliability and accuracy of the information or data, and which is equipped with means for providing a reproduction that is a "writing", such reproduction shall be treated as the equivalent of the information or data, notwithstanding that the form of recording does not itself constitute a "writing" as defined by this rule.

Official Note: N.J.S. 2A:84A-14, Rule 1(13), is included in this Rule, which replaces the statute.

Illustrations: Braille and teletypewriter tape are reasonably permanent and readable by sight. A printout on paper from invisible recordings in a computer is a writing; but proof of suitable safeguards is required. Sky-writing, TV-screen images, sand writing and other passing images are not "writings"; but photographs of them would be. And see, R.S. 14:1-3.1, for corporate records.

RULE 63(13). BUSINESS ENTRIES

A writing offered as a memorandum or record of acts, conditions or events is admissible to prove the facts stated therein if the writing or the record upon which it is based was made in the regular course of a business, at or about the time of the act, condition or event recorded, and if the sources of information from which it was made and the method and circumstances of its preparation were such as to justify its admission.

Official Note: N.J.S. 2A:82-34 through 37 are rendered obsolete by this Rule and paragraph (5) of Rule 62, and are superseded thereby.

Explanation: This rule, and 63(14), replace the Uniform Act, N.J.S. 2A:82-34 through 37.

Comment: In combination with Rule 1(13), this rule covers printouts of computer records that would otherwise not be considered "writings".

See *Gardner*, 51 N.J. 444, at 461–462 (1968) for a case where hospital records contained statements going beyond this rule and Rule 63 (12).

See *Brown*, 100 N.J. Super. 395, at 402–404 (App. 1968) for a case allowing a police report as a business record. *Fagan*, 78 N.J. Super. 294, at 309–313 (App. 1963) has a partial review of the legislative history as applied to accident reports.

Caution: Note the limitations of Rule 63(15) in regard to official reports.

RULE 63(14). ABSENCE OF ENTRY IN BUSINESS RECORDS

Evidence of the absence of a memorandum or record concerning an asserted act, event or condition from the memoranda or records of a business is admissible to prove the nonoccurrence of that act or event, or the nonexistence of that condition if it was the regular practice of the business to make such a memorandum or record of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve it.

RULE 63(15). REPORTS AND FINDINGS OF PUBLIC OFFICIALS

Subject to Rule 64, a statement is admissible if in the form of (a) a written statement of an act done, or an act, condition or event observed by a public official if it was within the scope of his duty either to perform the act reported or to observe the act, condition or event reported and to make the written statement, or (b) statistical findings made by a public official whose duty it was to investigate the facts concerning the act, condition or event and to make statistical findings.

FEDERAL DEFENDERS OF SAN DIEGO, INC.,
San Diego, Calif., July 30, 1973.

Mr. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Congress of the United States, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. HUNGATE: The Committee is to be complimented for its important evaluation of the Rules, and the bill HR 5463 is a decided improvement over the Federal Rules of Evidence as forwarded by the Supreme Court in November 1972.

Although Rule 105 Summing Up and Comment by Judge has been deleted, I had hoped the fundamental right of a defendant to an "impartial jury" under the Sixth Amendment would preclude the comments of the judge on the evidence made to the jury notwithstanding the allegedly curative disclaimer made by the judge that the jury may disregard his remarks.

The deletion of Rule 510 Identity of Informer again removes certain bad proposals, but the right to know the identity and whereabouts of the informant should be clarified. The March 1971 Revised Draft of the Rules had a fairly good example of a first step, but the November 1972 proposed rule was grossly inadequate.

Although certain improvements have been made to Rule 609 Impeachment by Evidence of Conviction of Crime, the principles of Model Code of Evidence and the Uniform Rules of Evidence should dictate a greater restriction on the use of this type of impeachment which has the net effect of preventing the defendant, if he has an impeaching conviction, from taking the stand and giving his story. I would suggest that the two enumerated criteria of Rule 609(a) be in the conjunctive rather than in the alternative. The inclusion of the discretion of the judge on the admission is a substantial improvement and return to existing law. Some reference should be made to the impact of 18 U.S.C. 5021 (certificate setting aside conviction) and 21 U.S.C. 844(b)(2) (expungement of a first offender under 22 years of age) in the rule or advisory note.

The Committee has done a serious assessment of the proposed rules, and although I had hoped for many other amendments or deletions, the Committee is to be complimented for the fine work in reviewing the proposed rules. At the recent Ninth Circuit Judicial Conference, they were seriously debated and, in my opinion, the sentiments of many participants favored the Congressional Committee's work product.

Sincerely,

JOHN J. CLEARY,
Executive Director.

MORGAN, LANOFF, COOK & MADIGAN,
Chicago, Ill., July, 30 1973.

Re HR 5463: Federal Rules of Evidence.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, House Committee on the Judiciary, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Your circular letter of June 30, 1973 which was sent to the Chicago Bar Association relative to HR 5463 was referred to the Committee on Federal Civil Procedure of the Chicago Bar Association. I am writing this letter as Chairman of that Committee.

In order to review your Report on HR 5463, our Committee divided into four Subcommittees. These four Subcommittees met and reviewed various aspects of the House Subcommittee Report during the week of July 16th. Our Committee then met as a whole in two meetings on July 24th and July 26th to review the Reports of our Subcommittees. This letter reflects the actions taken by our full Committee after discussion and vote.

We report the position of our Committee only on items as to which there was a substantial majority of the Committee members voting who voted for the position reported. We interpret substantial majority to mean more than two-thirds. This Report does not include matters which were not voted or matters as to which the Committee was divided more evenly.

We, therefore, report the following recommendations with respect to HR 5463 as amended by the Report of the Subcommittee on Criminal Justice.

I.

RULES AS TO WHICH CBA COMMITTEE SUPPORTS RECOMMENDATIONS OF HOUSE SUBCOMMITTEE

The Chicago Bar Association Committee on Federal Civil Procedure by substantial majority supports the recommendations of the House Subcommittee with respect to the following Rules:

Rule 104(c). Preliminary question: Hearing of Jury.

Rule 105. Summing up and comment by Judge.

Rule 201. Judicial Notice.

Rule 201(g). Instructing Jury. (Our action is taken with the suggestion that the deletion recommended by the House Subcommittee would not preclude such an instruction when no evidence has been introduced to refute the facts expressly judicially noticed.)

Rule 303. Presumptions in criminal cases. (Our recommendation suggests that, when the matters dealt with by the Brown Commission and S. 1 are concluded, such matters should be placed in the Rules of Evidence.)

Rule 404(b). Character evidence not admissible to prove conduct; exceptions; other terms: Other crimes, wrongs or acts.

Rule 405(b). Methods of proving character: Specific instances of conduct.

Article V—Law of Privilege. (With respect to Article V, the Committee concurred with the House Subcommittee in opposition to the statement of the law on privilege in Article V. However, our Committee rejected the restatement of Article V by the House Subcommittee.)

Rule 601. General lack of competency.

Rule 606(b). Competency of Juror as Witness: Inquiry into validity of verdict or indictment.

Rule 608(b). Evidence of character and conduct of witness. Specific instances of conduct. The CBA Committee supported the House Subcommittee with the exception that it recommended that the phrase "and not remote in time" deleted by the House Subcommittee remain in the statement of Rule 608(b).

Rule 609. Impeachment by Evidence of Crime.

Rule 611. Mode of Order of Interrogation and Presentation. Scope of cross examination.

Rule 612. Writing Used to Refresh Memory.

Rule 801(d)(1). Statements which are not hearsay—prior statement by witnesses. The CBA Committee rejected the Rule proposed by the Supreme Court. However, there was not a substantial majority in favor of the proviso to Rule 801(d)(1) as recommended by the House Subcommittee.

Rule 803(6)(7). Hearsay Evidence; availability of declarative material—business records exception.

Rule 804(b)(2). Hearsay Exceptions; declarant unavailable—statement of recent perceptions.

Rule 804(b)(4). Hearsay Exceptions, declarant unavailable—statement against interest. (The CBA Committee voted to retain the deleted language "civil or" and the deleted language "or to render invalid a claim by him against another". It favored the deletions of the language suggested by the House Committee "or to make him an object of hatred, ridicule or disgrace". The remaining recommendations of the House Subcommittee were supported by the Committee).

Rule 902(8). Self-Authentication. Acknowledged documents.

Rule 902(9). Self-Authentication. Commercial paper.

Rule 1003. Admissibility of duplicates.

II.

RULES AS TO WHICH THE CBA COMMITTEE REJECTS THE RECOMMENDATION OF THE HOUSE SUBCOMMITTEE

The CBA Committee supported the Rule transmitted by the Supreme Court and rejected the suggestions of the House Subcommittee with respect to the following Rules:

Rule 803(24). Hearsay Exceptions; availability of declarative material—other exceptions.

Rule 804(b)(3). Hearsay Exceptions; declarant unavailable: Hearsay Exceptions—statement under belief of impending death.

Rule 804(b)(6). Hearsay Exceptions; declarant unavailable—other exceptions.

Effective Date: The CBA Committee recommends that the effective date be July 1st of the year following the year in which the Act becomes law. The purpose of this is to assure at least six months to acquaint the Bar with the Rule and to provide for the Rule becoming effective in the less active part of the Court year.

The absence of any reference to any Rule as transmitted by the Supreme Court or any change in any Rule suggested by the House Subcommittee is not intended to be a comment by the CBA Committee on any such item. This Report deals only with the Rules specifically treated herein.

In view of the short time between the receipt of the recommendations of the House Subcommittee and the date on which comments were requested to be received by the House Subcommittee, our Committee has felt that it was impossible to present a commentary in support of its position. In the event that the House Subcommittee requests a more extended statement of the reasons for any specific action taken by the CBA Committee, we would be pleased to respond to such inquiry. In such event, the period necessary to develop such a commentary and to have it considered by our Committee should be not less than four weeks from the time the inquiry is directed to us.

In closing, I would like to express the appreciation of the members of our Committee for the efforts of the House Subcommittee on Criminal Justice as evidenced by its careful review of the proposed Rules of Evidence.

Respectfully submitted.

JOHN A. COOK, *Chairman.*

AMERICAN HOSPITAL ASSOCIATION,
Washington, D.C., July 30, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Criminal Justice, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for affording the American Hospital Association an opportunity to review the revised draft of H.R. 4563 (Committee Print dated June 28, 1973), a bill to establish Federal Rules of Evidence.

As you and the members of the Subcommittee know, this Association strongly urged rejection of proposed Rule 504 as included in H.R. 5463 as originally introduced. Adoption of that rule would have in effect eliminated the traditional general physician-patient privilege, a step we are convinced would not be in the public interest. It is indeed gratifying, therefore, to note that the Subcommittee

has deleted proposed Rule 504 and the other proposed specific rules on privileges, and has proposed, through a single Rule, 501, to leave the law of privileges in its present state—to be developed and interpreted by the courts in the light of reason and experience. We wish to express appreciation for this action by the Subcommittee, which we hope will be confirmed in the course of further consideration and actions on H.R. 5463.

With regard to Rule 501 as contained in the June 28, 1973 Committee Print version of H.R. 5463, we would offer the following comments:

While the language of the proviso appears to be broad and all encompassing, the phrase "with respect to a claim or defense" is, of course, restrictive. The phrase, for example, might prevent the proviso from applying where medical records are desired to challange the competence of a witness to testify by reason of mental illness or to impeach the credibility of a witness who had testified to lack of medical treatment, good health, or any other fact which the desired medical records would tend to disprove.

These points are not raised from any desire to see the truth supressed, but rather to seek assurances of uniformity between state and federal rules of evidence. Under most state rules, the privilege would be recognized in both examples, and we do not want to see the privilege denied in such instances by a federal rule of evidence.

According to the Subcommittee's Note following Rule 501 the proviso in the rule is modeled after Rule 302. In Rule 302, however, the words "claim or defense" are preceded by the words "an element of a" which are missing entirely from the proviso in Rule 501. To broaden the proviso in Rule 501 we urge that the words "any element of" be inserted after the words "with respect to". Thus amended the proviso would read "*Provided*, That in civil actions, with respect to any 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."

While experience might disclose infirmities such as those pointed out with regard to application of the proviso in Rule 501, the rejection of proposed Rule 504 as included in S. 5463 as originally introduced is indeed a great improvement both from the standpoint of hospitals and of the public.

Copies of this letter are being sent to each member of the Committee on the Judiciary of the House of Representatives. If we can provide any additional information to assist in the Committee's work, we will be pleased to do so.

Sincerely,

LEO J. GEHRIG, M.D.,
Vice President.

MORRISON, FOERSTER, HOLLOWAY, CLINTON & CLARK,
San Francisco, Calif., July 30, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Special Subcommittee on Reform of Federal Criminal Laws, House Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE HUNGATE: I am writing concerning what I believe to be a drafting problem with Rule 1008 of H.R. 5463.

The first sentence of Rule 1008 states that the judge "ordinarily" will determine preliminary fact issues arising from the application of Rules 1001 through 1007. As noted by the Advisory Committee, the first sentence of Rule 1008 conforms with the general principles announced in Rule 104. However, Rule 1008 does not expressly refer to Rule 104. Does not the absence of such a reference raise the question of whether the various principles in Rule 104 are applicable to a determination under the first sentence of Rule 1008? For example, is it true that the judge is not bound by the rules of evidence in making his determination under Rule 1008 as is expressly the case (with the exception of those rules concerning privileges) when determination of a preliminary question is made under Rule 104? (See Rule 104, Subdivision (a).)

The doubt raised by the absence in Rule 1008 of any reference to Rule 104 is increased when one examines Rule 1101(d) which states the situations in which all of the rules are inapplicable to "the determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under Rule 104(a)."

What about the first sentence of Rule 1008?

If, as I assume, preliminary fact issues arising under the first sentence of Rule 1008 are intended to be treated in the same manner as those arising under Rule

104(a), I suggest that the following be added to the first sentence of Rule 1008: "in accordance with Rule 104(a)." Further, I suggest that the following be added to Rule 1101(d)(1): "and Rule 1008."

Quite apart from the problem discussed above, I believe the draftsmanship of Rule 1008 could be improved by stating the rule as follows (deletions are shown by brackets and italics indicate material added):

> "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 judge to determine[.] *in accordance with Rule 104(a) except* [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."

Sincerely,

ROBERT D. RAVEN.

DEPARTMENT OF JUSTICE,
Madison, Wis., July 30, 1973.

Mr. HERBERT E. HOFFMAN,
Counsel, Special Subcommittee on Criminal Justice, House Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. HOFFMAN: Please forgive my tardiness in replying to you concerning the revision of the Proposed Rules of Evidence, HR 5463. I have personally examined the proposed rules and in particular the privilege sections and have concluded that the rules would more than meet the objections that we raised in our appearance.

As you are, of course, aware the State of Wisconsin has almost simultaneously been preparing Rules of Evidence. Most recently these rules were promulgated by the Wisconsin State Supreme Court to be effective January 1, 1974. I have enclosed a photostatic copy of the amended Wisconsin Rules of Evidence. I personally am of the opinion that the balance the Committee has finally 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 decision. The area of privilege is particularly sensitive and I believe particularly an area for state determination. As the copy of the proposed Wisconsin Rules indicates, most of the ends sought to be achieved by the Federal Rules are achieved by the State Rules. The State Rules are, of course, molded more closely to the particular concerns of the State of Wisconsin and of the Wisconsin State Statutes.

I have not had a clear opportunity to discuss these changes in any detail with Mr. Warren. I did, however, suggest to him and draft for him some favorable remarks concerning the modifications for submission to the National Association of Attorneys General.

Somewhat fortuitously a regional meeting of the Midwestern Attorneys General is presently under way and it is my understanding he may make the remarks at that meeting. I will certainly endeavor to have Mr. Warren formally reply to the Committee. I have every reason to believe that his reply would be no different than my personal evaluation of the Rules.

I would again express my own individual pleasure at these modifications. I am personally thankful to you for the help and advice that you have given me in this activity. I would be pleased if you could possibly keep me informed of any continuing developments and I remain.

Sincerely,

ROBERT D. REPASKY,
Assistant Attorney General.

WISCONSIN RULES OF EVIDENCE

904.12 Statement of injured: admissibility, copies. (1) In actions for damages caused by personal injury, no statement made or writing signed by the injured person within 72 hours of the time the injury happened or accident occurred, shall be received in evidence unless such evidence would be admissible as a present sense impression, excited utterance or a statement of then existing mental, emotional or physical condition as described in s. 908.03 (1), (2) or (3).

(2) Every person who takes a written statement from any injured person or persons sustaining damage with respect to any accident or with respect to any injury to person or property, shall, at the time of taking such statement, furnish to the person making such statement, a true, correct and complete copy thereof. Any person taking or having possession of any written statement or a copy of said statement, by any injured person, or by any person claiming damage to property with respect to any accident or with respect to any injury to person or property, shall, at the request of the person who made such statement or his personal representative, furnish the person who made such statement or his personal representative, a true, honest and complete copy thereof within 20 days after written demand. No written statement by any injured person or any person sustaining damage to property shall be admissible in evidence or otherwise used or referred to in any way or manner whatsoever in any civil action relating to the subject matter thereof, if it is made to appear that a person having possession of such statement refused, upon the request of the person who made the statement or his personal representatives, to furnish such true, correct and complete copy thereof as herein required.

(3) This section does not apply to any statement taken by any officer having the power to make arrests.

CHAPTER 905—PRIVILEGES

905.01 Privileges recognized only as provided. Except as provided by or inherent or implicit in statute or in rules adopted by the supreme court or required by the constitution of the United States or Wisconsin, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

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

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

905.02 Required reports privileged by statute. A person, corporation, association or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if provided by law. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if provided by law. No privilege exists under this section in actions involving false swearing, fraudulent writing, fraud in the return or report, or other failure to comply with the law in question.

905.03 Lawyer-client privilege.

(1) Definitions. As used in this section:

(a) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(b) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(c) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

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

(2) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: (a) between himself or his representative and his lawyer or his lawyer's representative, or (b) between his lawyer and the lawyer's representative, or (c) by him or his lawyer to a lawyer representing another in a matter of common interest, or (d) between representatives of the client or between the client and a representative of the client, or (e) between lawyers representing the client.

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

at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

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

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

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

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

(d) *Document attested by lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

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

905.04 Physician-patient privilege.

(1) Definitions. (a) A "patient" is a person who consults or is examined or interviewed by a physician.

(b) A "physician" is a person as defined in s. 990.01 (28), or reasonably believed by the patient so to be.

(c) A communication or information is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication or information or persons who are participating in the diagnosis and treatment under the direction of the physician, including the members of the patient's family.

(2) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of his physical, mental or emotional condition, among himself, his physician, or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician.

(3) Who may claim the privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the physician may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary:

(4) Exceptions. (a) *Proceedings for hospitalization.* There is no privilege under this rule as to communications and information relevant to an issue in proceedings to hospitalize the patient for mental illness, if the physician in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(b) *Examination by order of judge.* If the judge orders an examination of the physical, mental or emotional condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(c) *Condition an element of claim or defense.* There is no privilege under this section as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

(d) *Homicide trials.* There is no privilege in trials for homicide when the disclosure relates directly to the facts or immediate circumstances of the homicide.

(e) *Abused or injured child.* There is no privilege in situations where the examination of an abused or injured child creates a reasonable ground for an opinion of the physician that the condition was other than accidentally caused or inflicted by another.

905.05 Husband-wife privilege.

(1) General rule of privilege. A person has a privilege to prevent his spouse or former spouse from testifying against him as to any private communication by one to the other made during their marriage.

(2) Who may claim the privilege. The privilege may be claimed by the person or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.

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

(a) If both spouses or former spouses are parties to the action.

(b) In proceedings in which one spouse or former spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other.

(c) In proceedings in which a spouse or former spouse is charged with a crime of pandering or prostitution.

(d) If one spouse or former spouse has acted as the agent of the other and the private communication relates to matters within the scope of the agency.

905.06. Communications to clergymen.

(1) Definitions. As used in this section:

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

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

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

(3) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

905.07 Political vote. Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

905.08 Trade secrets. A person has a privilege, which may be claimed by him or his agent or employe, to refuse to disclose and to prevent other persons from disclosing a trade secret, owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

905.09 Law enforcement records. The federal government or a state or a subdivision thereof has a privilege to refuse to disclose investigatory files, reports and returns for law enforcement purposes except to the extent available by law to a person other than the federal government, a state or subdivision thereof. The privilege may be claimed by an appropriate representative of the federal government, a state or a subdivision thereof.

905.10 Indentity of informer.

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

(2) Who may claim. The privilege may be claimed by an appropriate representative of the federal government, regardless of whether the information was furnished to an officer of the government or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof.

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

(b) *Testimony on merits.* If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the federal government or a state or subdivision thereof is a party, and the federal government or a state or subdivision thereof invokes the privilege, the judge shall give the federal government or a state or subdivision thereof an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony.

The showing will ordinarily be in the form of affidavits but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the federal government or a state or subdivision thereof elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on his own motion. In civil cases, he may make an order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the federal government, state or subdivision thereof. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present.

(c) *Legality of obtaining evidence.* If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed. The judge shall on request of the federal government, state or subdivision thereof, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the appropriate federal government, state of subdivision thereof.

905.11 Waiver of privilege by voluntary disclosure. A person upon whom this chapter confers a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication.

905.12 Privileged matter disclosed under compulsion or without opportunity to claim privilege. Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

905.13 Comment upon or inference from claim of privilege; instruction. (1) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

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

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

(4) Application; self-incrimination. The foregoing subsections do not apply in a civil case with respect to the privilege against self-incrimination.

CHAPTER 906—WITNESSES

906.01 General rule of competency. Every person is competent to be a witness except as provided by ss. 885.16 and 885.17 or as otherwise provided in these rules.

906.02 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 s. 907.03 relating to opinion testimony by expert witnesses.

906.03 Oath or affirmation. (1) 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.

(2) The oath may be administered substantially in the following form: Do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth, so help you God.

REMARKS OF ATTORNEY GENERAL ROBERT W. WARREN, MIDWESTERN CONFERENCE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Despite the fact that each of us operates within a relatively unique situation, we have found that there are many areas where the knowledge and experience of our peers can be extremely beneficial.

This dialogue, I believe, demonstrates the primary function of the National Association of Attorneys General: cooperation for mutual benefit. And I shall do everything in my power to insure that this important and beneficial dialogue is not only continued—but that it is expanded and made more meaningful to us all.

However, I believe that we have even greater potential.

Now that we have established a viable, effective forum for the exchange of ideas, we can go further.

Thus far, we have met, discussed common problems, and returned to our respective states to implement what we have learned from one another.

We have analyzed laws and problems in light of the solution to common problems. But we must do more to attempt the prevention of those common problems.

I believe the time has come to add a further dimension to our efforts. The time has come to make the National Association of Attorneys General an active force—a powerful voice which is capable of speaking for all of us about matters which concern all of us.

We must make this organization capable of playing a dual role. We must provide input before the fact of legislation, as well as discussion after the fact.

In many areas, such as court reform and federal funding for state law enforcement programs, I believe this added activity can be of great value to all of us here, and to those who shall follow us.

Many of us are seasoned veterans of the political arena. And I believe that we should employ that experience to further our progress toward the goal we all hold in common: the fair and effective administration of just laws.

Let me now give you one example of the type of "action before the fact" which I hope will become an important part of our efforts as an organization.

As Attorneys General we sometimes despair of our ability to influence the federal legislation and federal court rules that have such an intimate effect upon our day-to-day operations. In many instances the particular problems of our states have been swallowed up by federal actions, and in many instances we have had little or no opportunity for input.

Against this experience I am happy to note a recent example from my office of how persistent efforts may have aided in averting a potentially intolerable situation.

I refer to the recently proposed Code of Federal Rules of Evidence. These Rules were initially drafted by a committee appointed by the United States Supreme Court. This committee did not include among its members any representative of this association nor any member with a particular orientation towards the interests of the states.

This committee proposed and the U.S. Supreme Court adopted a Code of Federal Rules which would have virtually abolished, in Federal Courts, the rights of states and state agencies to protect in any degree the confidentiality of sensitive state records and investigative files—such as those prepared for law enforcement purposes and those concerning the security of penal institutions from full discovery.

The rules represented a definite attempt to alter the existing law in Federal Courts. Under existent case law, we have been able to obtain at least some limited protection in federal litigation for such files. In many instances, Federal Courts have accepted state-created privileges.

However, the proposed rules would have abolished even that limited measure of protection and would have prohibited Federal Courts from accepting state-created privileges, except as they might fit into the confines of the proposed rules.

My office, like most of yours, handles a substantial amount of federal litigation. In light of the increased activity in federal habeas corpus, federal civil rights, and other federal litigation, including the astounding increase in prisoner litigation, I concluded that I must at least make an effort to have these rules modified.

By statute, rules such as these, after adoption by the United States Supreme Court, are transmitted to the Congress which may then modify, change, or reject the rules. I directed my energy towards the Congress, and in particular towards the sub-committee on Criminal Justice of the House Committee on the Judiciary, to which the proposed rules had been referred.

On February 28, 1973, I appeared before that sub-committee and submitted a written statement outlining the problems as I saw them and suggesting some possible modifications of the rules. My suggestions contained a number of alternatives, including the possibility of leaving the law where it is at present, to be determined by federal judges upon the present case law and the common law.

In particular, I urged the committee to change the proposed rules by eliminating those provisions which would have effectively nullified state privileges, such as grand jury secrecy, or at the least would have forced the states to redraft state statutes to fit within the peculiar requirements of proposed Rule 502.

On June 28, 1973, the sub-committee on Criminal Justice reported out House Bill HR 5463. This bill represents nearly six months of intensive congressional revisions of the proposed rules.

In the area of privilege, the Committee completely altered the proposed rules. In place of rules which would have abolished all privileges in federal courts, except those contained in the rules, and would then have only permitted state-created privileges which were expressly provided for by a statute, the committee adopted the following 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: Provided, That in civil actions, with respect to 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."

In its notes to the Bill the subcommittee indicated that these changes—and similar changes relating to the competency of witnesses were "designed to mandate the application of State privilege law in civil actions governed by Federal Court decisions."

I am of course thankful for this result and appreciative of the opportunity afforded me by the subcommittee and its Chairman, Congressman Hungate. I would, of course, recommend that you support this bill in Congress.

Over and above, however, I would urge that this Association bend its every effort to insure that it has an increasingly powerful voice in the formulation of federal court rules, including input to or membership on the many committees formed by judicial circuits and by the United States Supreme Court.

Although in large part not our choosing, the business of the Federal Courts is now our business, and as attorneys general we have the right to a say in how that business is run.

We must, then, increase our resources as an organization so that we are able to perform such added tasks with vigor and positive effect.

Therefore, I believe that we must further strengthen our committee structure, so that it is capable of hammering out reasonable, workable proposals in all areas of our mutual concern, despite their complexity and difficulty. For our success in preventing problems will increase in direct proportion to our ability to provide sound proposals.

Our common voice will be strong or weak, depending upon the strength of the body for which it speaks.

We have come a long way. And we have all benefited from that progress. And now we must strengthen our foundations to build yet higher. We must find the energy for yet another step. It is up to each one of us here.

I know that, with your continued support, the National Association of Attorneys General can and will provide even greater rewards for its members, the states they represent, and our nation as a whole.

Our goals are lofty. Our responsibility is great. But together I am confident that we shall succeed.

RICHARDS, LAYTON & FINGER,
Wilmington, Del., July 30, 1973.

Re Rules of Evidence.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice of the House Judiciary Committee, Washington, D.C.

DEAR REPRESENTATIVE HUNGATE: This letter comments on your Subcommittee's draft of H.R. 54–63, a bill to establish the federal rules of evidence, pursuant to the Subcommittee's request for comments thereon prior to July 31, 1973. We

believe that matters of evidence are more substantive than procedural and consequently to be governed by state law rather than by a federal law of evidence. Thus, an important state-federal precedent is at stake.

The proposed federal rules of evidence obfuscate the line that had been drawn between procedural and substantive matters under the "Erie" doctrine.[1] For example, the Supreme Court has applied state law to questions of burden of proof, which is surely a matter of evidence. *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 79 S. Ct. 921, 3 L. Ed. 2d 935 (1959). Your Subcommittee has recognized the importance of retaining the "Erie" doctrine by eliminating the Article on "privileges" in the proposed rules of evidence.[2] If the rules of evidence are adopted, a logical next step may be to adopt a code of statutes of limitations for use in the federal courts. While such federal codification of the laws may appear expedient, they will have a significant impact upon our federal system.

Even if the federal rules of evidence are adopted, the federal courts may be compelled to consider the states' experience under similar rules of evidence. Many states like Delaware have their own statutes for certain rules of evidence.[3] Under the Supreme Court's proposed rules of evidence, terms such as "commercial law" (Rule 902) may require interpretation of state law. Even where the rules seem explicit, such as with respect to expert opinion, the courts may find guidance in states' common law rules.[4] In some instances, the rules are not thorough or explicit enough. For example, can prior allegations of a party in the proceedings constitute admissions and have an estoppel effect, or are they simply circumstantial evidence? [5] Also, a significant body of common law in most states concerns the parol evidence rule and exceptions to it. The parol evidence rule, that evidence is generally inadmissible to vary the terms in a written contract, has generally been recognized as a rule of substantive law, not a rule of evidence. However, in the name of comprehensive completeness, one might argue against the traditional view and succeed in the inclusion of the parol evidence rule in the federal rules of evidence, thus eroding the "Erie" doctrine further.

We recommend that Congress postpone action on the proposed rules of evidence until such time as the American Bar Association has approved them and until a majority of the states have had the opportunity to consider in their legislatures the adoption of codes of evidence. If the states choose to codify their rules of evidence, such rules would be applied in the federal courts in those states. At that time it may be reasonable to reexamine the question of whether federal rules of evidence should be enacted.

Very truly yours,

E. NORMAN VEASEY.

LAW OFFICES OF THOMAS A. WALLACE,
Sapulpa, Okla., July 30, 1973.

Hon. WILLIAM L. HUNGATE, M.C.,
Chairman, Subcommittee on Criminal Justice, House Judiciary Committee, House Office Building, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Time does not permit me to study the changes the Subcommittee on Criminal Justice has made in its draft of the Federal Rules of Evidence. The time for comment was very short for a general practitioner. I received the Committee draft July 23, 1973.

I believe from a cursory reading that a great improvement has been made over the rules as originally transmitted to the Congress from the Supreme Court. In general, I support position papers prepared by Professor Joe A. Moore of the Memphis State University School of Law for the American Trial Lawyers. I have discussed these, but not at length, with Professor Moore.

Very sincerely,

THOMAS A. WALLACE.

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[1] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

[2] There are other instances in the Subcommittee's draft of the proposed rules of evidence which reflect concern for preserving the "Erie" doctrine. For example, the Subcommittee's draft retains any "dead man's statute" enacted by a state.

[3] 10 *Del. C.* Chapter 43.

[4] Delaware has permitted an expert to refer to the expert opinions of others in order to support or corroborate the witness' opinion. *Gulf Oil Corp. v. Slattery*, 172 A. 2d 266, 269 (Del. Supr. Ct. 1961).

[5] In Delaware such prior judicial allegations are probably not entitled to an estoppel effect. *Rudnick v. Schoenberg*, 32 Del. 309, 122 A. 902 (Supr. Ct. 1923).

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., July 31, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I am enclosing a Memorandum from Professor Richard H. Field with his comments on the Subcommittee draft of the Federal Rules of Evidence. Professor Field is the principal author of the Maine Rules of Civil Procedure and is currently serving as consultant to the Maine Advisory Committee on Rules of Evidence.

His comments concern exclusively the portions of the draft which made changes in the version adopted by the Supreme Court. They are concurred in for the most part by his fellow consultant, Peter L. Murray.

I hope that these comments will be helpful to the Subcommittee in its further consideration of this important legislation.

Sincerely,

WILLIAM S. COHEN.

Enclosure.

COMMENTS ON H.R. 5463

[Changes proposed by the Subcommittee on Criminal Justice of the House Judiciary Committee to the Rules of Evidence as transmitted to Congress by the Supreme Court]

The following comments, preliminary in nature, have been prepared by me as consultant to the Maine Advisory Committee on Rules of Evidence at the request of Representative Cohen. They reflect my present views only, concurred in for the most part by my fellow consultant, Peter L. Murray. They have not been presented to the Advisory Committee.

Rule 105. The Subcommittee proposes deletion of this rule, permitting comment on the weight of the evidence, as primarily procedural rather than evidentiary and thus inappropriate for a code of evidence. Although the matter is of no great importance, I would leave the rule in. It is not covered by the Federal Rules of Civil Procedure.

Rule 201(a). The Subcommittee would avoid any distinction between "adjudicative" and "legislative" facts, believing that the distinction is not clear and would breed litigation. With respect, I suggest that the distinction is clear and that a differentiation in treatment is eminently wise. Adjudicative facts are those dealing with the events in litigation—the "what-happened", "who-did-what-and-when" kind of question that normally goes to a jury. Legislative facts are those with which a judge is faced when he is deciding a question of law—the constitutionality or interpretation of a statute, the extension or restriction of a common law rule upon grounds of policy, and the policy is thought to hinge upon social, economic, political or scientific facts.

Judges have always taken this kind of fact into account, usually without any mention or awareness of the process of taking judicial notice. When the English judges had to decide whether acceptance of an offer was binding when mailed or only when received, they necessarily considered which rule as a matter of fact would work better in the business community. When a modern court is deciding whether to abrogate the doctrine of charitable immunity from tort liability, it similarly considers who as a matter of fact ought to bear the cost of the claimant's injury in a situation of this sort. The parties can present facts in support of their side of the policy argument—the famous "Brandeis-brief" is the classic example—but it is simply impracticable to resort to the same formalities that govern the adjudicative "what-happened-between-the-parties" type of fact. These "legislative" facts are not generally known with certainty by intelligent people in the community or readily determinable by resort to sources of indisputable accuracy. They may indeed by highly disputable, but the area of dispute is in brief and argument. They have nothing to do with jury determination. I therefore earnestly hope that the Subcommittee's view that differing treatment for the two types of facts is unjustified will not prevail. McCormick, Evidence, § 328 (2d ed. 1972).

Rule 201(g). I disagree with the Subcommittee's proposed deletion of this subdivision. The deletion would allow evidence to be admitted to rebut a fact of which judicial notice has been taken. Whether to admit evidence to rebut a judicially noticed fact has been a very controversial issue. Much of this controversy has stemmed from confusion between adjudicative and legislative facts,

a confusion the Fed. Ev. Rules (I shall cite in this way the Rules as submitted to Congress by the Court) seek to dispel. The matter is discussed in McCormick, Evidence § 332 (2d ed. 1972).

From the practical trial lawyer's point of view, the Fed. Ev. Rules approach seems to me preferable to that of the Subcommittee. What could be sillier than to allow evidence to contradict whether a given date fell on Sunday, when sunset occurred on a given day, or time of high or low tide (which the judge can find from indisputable sources). Under the Fed. Ev. Rule a party is entitled to an opportunity to be heard as to the propriety of taking judicial notice of a matter. He can argue and present to the judge notice of a matter. He can argue and present to the judge information bearing on this, but his remedy for error is by appellate review, not by presentation of contrary evidence to the jury.

Rule 301. The Subcommittee substitutes "civil actions" for "cases", pointing out that this term is used in the F.R.C.P. This is probably all right, but "actions" has a long history, with which I am not thoroughly familiar. A ready example of difficulty comes to mind. The Massachusetts statute making declarations of deceased persons admissible under certain circumstances was held not to apply to probate cases and will contests because they were not "actions". *Brady v. Doherty*, 253 Mass. 518, 149 N.E. 198. The legislative promptly amended the statute to read, "In any action or other civil proceeding. . . . " I cannot off-hand think of any federal proceeding of such a nature as to raise this doubt, but I cannot say with confidence that there are none. The Fed. Ev. Rule may be intended to assure broader coverage, but the Advisory Committee is silent on the question.

Rule 303. The deletion of this rule on the ground that the subject of presumptions in criminal cases is being dealt with elsewhere seems to make good sense.

Rule 402. I approve the principle which led the Subcommittee to change "adopted" to "prescribed" by the Supreme Court pursuant to statutory authority. The Subcommittee wishes neither to acquiesce in nor negate the authority of the Court to promulgate Rules of Evidence. This desired neutrality would, I think, be better achieved if the words were "lawfully prescribed by the Supreme Court." It is at least arguable that since the Court has inherent power as part of the judicial power to make rules of evidence on a case-by-case basis, it has the power to establish generally applicable rules of evidence, so long as they do not conflict with a statute and subject always to being altered or voided by an Act of Congress. The Advisory Committee and the Judicial Conference relied upon the Enabling Act, 28 U.S.C. § 2072, as authority for promulgating rules of evidence, and all of the justices of the Supreme Court except Justice Douglas agreed with this approach, but I see no useful purpose in trying to foreclose the argument for inherent power.

Rule 404(b). The proposed change in wording is unimportant. I thought that the final Fed. Ev. Rule was an improvement over the March 1971 draft to which the Subcommittee returns, and I still think so. It is true that the latter seems to put more emphasis on admissibility. I think, however, that it is slightly less accurate. This section does not exclude evidence when offered for another purpose, such as proof of motive, etc. If admissible apart from the prohibition of this section, it gets in, otherwise not. This leaves the determination to other rules with respect to admissibility. I am somewhat fearful that some judges might erroneously believe that the Subcommittee's words "may be admissible" gave them a discretion that is not intended.

Rule 501 et seq. I heartily approve the proviso that state law shall control the matter of privilege in diversity cases. The Advisory Committee's comment that *Hanna* v. *Plumer*, 380 U.S. 460 (1965), settles the question that state-created privileges need not be honored in federal courts in diversity cases is not convincing to me. These privileges affect out-of-court conduct and would on Justice Harlan's reasoning in his concurrence in *Hanna* v. *Plumer* seem to be substantive. Whether or not this is so, the decision to override a plainly expressed state policy, upon which its citizens rely, seems a most unfortunate choice. The state policy ought to be honored, even if the Enabling Act is properly construed to permit a federal rule to frustrate it. Moreover, existence or nonexistence of a privilege may often be determinative of the outcome of a case and lead to the vice of forum shopping. This is both a discredit to the administration of justice and an added burden to the overcrowded federal courts.

I am less certain that I would delete the entire rule as it applies to other than diversity cases. It depends upon whether Congress wants to rely upon the courts in their handling of common law principles "in the light of reason and experience." I would suggest that Rules 511, 512, and 513 might well be retained. May I give

you this illustration from my own recent experience. I had a case where I tried to get the federal judge to rule on my client's claim of privilege outside the hearing of the jury. He was disposed not to do so, believing state law to be contrary, and was only persuaded to make the ruling in the jury's absence when I showed him the recently published first draft of the Fed. Ev. Rules and the Advisory Committee's Note. If Congress agrees that this principle is sound, a provision for it should in my judgment be included.

Similarly, if there are privileges that Congress wants to be sure are maintained in federal questions and criminal cases, it would be wise to provide specifically for them. For instance, there was much sentiment in the hearings for the doctor-patient privilege. It has recently been held that this privilege was not known to common law and is inapplicable in federal criminal trials. *U.S.* v. *Mancuso*, 444 F. 2d 691, 695 (5th Cir. 1971). Again, if Congress wants to grapple with the problem of a privilege for newsmen (other than in diversity cases, where it is provided that state law shall be controlling), it should proceed with the expectation that no privilege would be recognized "in the light of reason and experience" in this murky area, except as may be required by the First Amendment.

Rule 601. The Subcommittee's proposal would make state law controlling in the applicability of the Dead Man's Statute if the state has one. Although I think the Dead Man's Statute is an anachronism, I approve adhering to state law. Otherwise, the result would be forum shopping of the worst sort, since in most cases the inability of the survivor to testify about a transaction with the deceased is likely to be decisive of the result. This situation is distinguishable from that of privilege because of the state policy of protecting a communication against disclosure may lead the communication to be made. The parties should be able to rely upon that protection and not have it frustrated if the litigation turns out to be in the federal court. The Dead Man's Statute, on the other hand, does not influence out-of-court conduct, since the death of a party will rarely be foreseen. But the evil of the result turning on choice of forum is a sufficient reason, I believe, for following state law.

Rule 606(b). I think that the Subcommittee's resolution of the controversial problem of what a juror may testify to is better than the Fed. Ev. Rule as promulgated.

Rule 608(b). This change is in my view insignificant. I think it unlikely that in practical operation there would be a difference in result between the two formulations. There is plainly room for much exercise of discretion by the court whether or not the Subcommittee's express reference to it is included. The court will have to decide whether the proffered evidence is too remote in time, whether its probative value is outweighed by the danger of unfair prejudice, confusion of issues, etc. (Rule 403), or whether it is unduly harassing or embarrassing (Rule 611). All of this is discretionary. I see no objection to the Subcommittee's change nor any good reason for it.

Rule 609(a). I like the Subcommittee's version of this subdivision, which is patterned on the 1971 draft of the Fed. Ev. Rules. The important difference is that the Subcommittee would in terms give the judge discretion to determine that the risk of unfair prejudice outweighs the probative value. This may well exist under Rule 403 anyway, but it seems sound to spell it out. (Here, as so often, the Advisory Committee Notes give no indication of the reason for the change. Incidentally, the 1971 draft denied admissibility to a conviction on a plea of nolo contendere. This exception was dropped in the final draft and also in the Subcommittee version. Maine law makes such a conviction admissible. *State* v. *Herlihy*, 102 Me. 310, 66 A. 643 (1906). Case law elsewhere is divided.

Rule 609(b). I prefer the Subcommittee's version here, which is also taken from the 1971 draft of the Fed. Ev. Rules. The practical difference lies in the consequence of a conviction within the 10-year time limit. Both the final Fed. Ev. Rule and the 1971 draft render proof of any conviction inadmissible if there has been no conviction within the 10-year period. The final Fed. Ev. Rule would give a conviction within the 10-year period the effect of making all other convictions more than 10 years old admissible. The 1971 draft, accepted by the Subcommittee, does not allow a conviction more than 10 years old to be shown in any event. This seems to me a fairer approach.

Rule 609(d). The Subcommittee is wise, I think, to limit to a criminal case the discretion of the judge to admit evidence of a juvenile adjudication of a witness.

Rule 611. I think that the Subcommittee's proposal to limit cross-examination to the scope of the direct and matters affecting the credibility of the witness is throughly undesirable. I can see the pressure for this change because a substantial majority of the states and the federal courts adhere to it, and to many lawyers what is familiar seems right. But for a long time commentators have generally

urged use of the "wide-open" rule (which, as you know, is the Maine rule. *Falmouth v. Windham*, 63 Me. 44 (1873). It is also the Massachusetts rule under which I practice). The ABA Committee for the Improvement of the Law of Evidence in 1937–38 said: "The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the opinion rule) leading in trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only. Some of the instances in which Supreme Courts have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding.

"We recommend that the rule allowing questions upon any part of the issue known to the witness . . . be adopted."

In these days of congested court calendars the objections to the limited rule are increasingly important. The quibbling over the scope of the rule prolongs trials. The number of appeals, many resulting in reversals for a new trial, delays the administration of justice. Under the wide-open rule there is nothing to quibble about and no basis for an appeal. It is far more convenient for witnesses to testify once and be done with it, instead of having to be called back as part of the opponent's case, when the opponent must make the witness his own and be unable to ask him leading questions about the new matter or (according to the traditional rule) to impeach him. I think further that the wide-open rule will seem to the jury to be the natural way to develop the facts and make the appraisal of the total testimony easier than if it were split into two parts, often with a substantial time-lag between them. See McCormick, Evidence 54 (2d ed. 1972)

Finally, the rule as presented to Congress by the Court is made subject to the judge's discretion, so that he may in the interests of justice limit cross-examination. Incidentally, the presently available discovery devices greatly lessen the need of calling an adverse party or hostile witness to establish an essential element of the party's case, which could under the wide-open rule give the adversary the chance to interrupt the orderly presentation of the case and get his own version before the jury at an early stage.

Rule 612. The Subcommittee's proposed change in making it discretionary with the judge in the interests of justice whether to require production of a statement used by a witness to refresh his recollection before testifying is probably desirable. It is, as I understand it, in any event a preliminary question for the judge as to whether or not the statement actually does refresh the recollection of the witness. See McCormick, Evidence 17 (2d ed. 1972).

Rule 801(d)(1). The Subcommittee has chosen the compromise view adopted by the Second Circuit in *United States* v. *Cunningham*, 446 F. 2d 194 (1971), which allows a prior inconsistent statement of a witness testifying at the trial to be used as substantive evidence only if it was under oath and subject to the penalty of perjury at a trial or hearing or before a grand jury. The Fed. Ev. Rule does not have this requirement. On the whole, I think that the Fed. Ev. Rule is more logical. It has the support of most of the commentators, who point out that the oath is no longer a principal safeguard of trustworthiness, but rather cross-examination and the opportunity of the fact-finder to observe the demeanor of the witness. See 3A Wigmore (Chadbourn rev.) § 1018; Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948). In almost all of the hearsay exceptions, the statement was not under oath. I would prefer to see the Fed. Ev. Rule followed, but I can well understand the acceptance of this compromise as a happy way of avoiding either extreme. This is especially understandable when it has the powerful support of the Second Circuit and that of Judge Friendly before the Subcommittee. Subcommittee Hearings, 252.

Rule 803(6). I regret the Subcommittee's insertion of "business or professional activity." The words "any business" in 28 U.S.C. § 1732 (adopted from Commonwealth Fund Act), further amplified by defining "business" to include "business, profession occupation and calling of any kind" have caused the courts trouble. See McCormick Evidence § 308 (2d ed. 1972). As a minimum the words "whether carried on for profit or not" should be inserted as in the Uniform Business Records as Evidence Act. Otherwise such reliable records as those of churches would probably not be admissible. My own view however is that Fed. Ev. Rule 803(6) using "regularly conducted activity" is a more satisfactory solution. This Rule resolves some conflict on the point, wisely I think, by requiring that the information be transmitted by a person with knowledge in the course of a "regularly conducted activity." This would require following *Johnson* v. *Lutz*, 253 N.Y. 124, 170 N.E. 517 (1938), a leading case holding a police officer's report inadmissible

insofar as it was based not on his own knowledge but on information provided by a bystander. The officer was acting in the course of a regularly conducted activity but the bystander was not.

Finally, the Subcommittee follows the Rule in making it a preliminary question for the judge to determine whether the source of the information or the method or circumstances of preparation indicate lack of trustworthiness. This is a useful safeguard against abuse and would justify the result in the controversial case of *Palmer* v. *Hoffman*, 318 U.S. 109 (1943), where a deceased engineer's version of an accident, which exculpated him from fault, was offered by the defendant railroad as a business record. The Supreme Court upheld its exclusion, although the statement was arguably within the language of the statute, but under the circumstances appeared to lack the requisite reliability.

Rule 803(7). My comments on (6) above apply here also in the provision for absence of a record to prove nonoccurrence of an event.

Rule 803(16). The Subcommittee properly gives the rulemakers a lesson in grammar.

Rule 803(24). I regret the deletion by the Subcommittee of this subdivision, which it thinks injects too much uncertainty into the law of evidence. It expresses the belief that if additional hearsay exceptions are to be created, they should be by amendments to the Rules, not on a case-by-case basis. It is, of course, the fact that most of the hearsay exceptions were evolved on a case-by-case basis in accord with the tradition of the common law. It would be unfortunate, I think, to preclude the continuation of such development by freezing the presently listed exceptions as the exclusive ones. Take as an illustration, generally applauded by the commentators, *Dallas County* v. *Commercial Union Assur. Co., Ltd.*, 286 F. 2d 388 (5th Cir. 1961). In that case, the issue was whether the tower of the county courthouse collapsed in 1957 because it was struck by a bolt of lightning (covered by insurance) or was caused by structural weakness and gradual deterioration of the structure (not covered). There was ample evidence to justify a verdict either way. The debris of the tower showed the presence of charcoal and charred timbers. The insurer offered a copy of a local newspaper for June 9, 1901, with an unsigned article describing a fire the previous night while the courthouse was under construction. The purpose of the evidence was to account for the charred timber found after the collapse. Judge Wisdom's opinion, upholding admission of the newspaper, found that it did not qualify as a "business record" or an "ancient document," or any other recognized hearsay exception. He concluded, however, that it was necessary and trustworthy without the dangers usually inherent in hearsay evidence, that it was inconceivable as a matter of common sense that a newspaper reporter in a small town (Selma, Ala.) would report there was a fire in the new courthouse if there had not been a fire. See also a similar approach in a criminal case, *United States* v. *Barbati*, 284 F. Supp. 409 (E.D.N.Y. 1968).

If, as the Subcommittee would have it, a new exception to the hearsay rule would have to be by amendment to the rules, the Dallas County case would have had to be decided the other way. Granting that it is possible for a trial judge to go too far and were that an appellate court might occasionally sustain him, it is still desirable to allow for growth of the law in the common-law style, by giving leeway to admit evidence having comparable circumstantial guarantees of trustworthiness to the listed exceptions. I would be glad to see the restrictions made tighter by some such language as ". . . but which the judge affirmatively finds have circumstantial guarantees of exceptional trustworthiness."

Rule 804(a)(5). I like the Subcommittee's idea of requiring an attempt to depose a witness in order to have him deemed "unavailable". Perhaps the need of such attempt should turn on whether the witness was just beyond the reach of a subpoena or in Afghanistan and on the importance of the testimony to the case, with a provision for a pre-trial ruling by the court as to the need for the attempt.

Rule 804(b)(1). I am on the whole sympathetic to the Subcommittee's proposal which would not admit testimony given at a former hearing when a person with a similar interest and motive to the party against whom it is now offered had an opportunity for cross-examination. I am sure I agree with it in the case of a criminal defendant, whether or not as a constitutional matter it would violate the confrontation rule. To bind a party, let us say, by the strategic decision of someone else not to cross-examine seems unfair, and a clumsy, inept cross-examination by someone else hardly less so. It is true, as the Advisory Committee notes, that in other hearsay exceptions where the declarant is unavailable there was no opportunity whatever for cross-examination (e.g., a dying declaration). It also is true that the choice lies between less than ideal testimony from the declarant and no

testimony at all, and there are surely conditions in specific civil cases where admission would be desirable. For instance, in *Bartlett v. Kansas City Public Service Co.*, 349 Mo. 13, 160 S.W. 2d 740 (1942), the first action was by a husband for loss of his wife's services and the second by the wife for injuries in the same accident. The defendant offered in the latter action the prior testimony of two now absent witnesses. The issues were the same and, more than incidentally, the same attorney represented the two plaintiffs. The court held that the prior testimony should have been admitted although the parties were different and were not in privity in the legal sense. The Subcommittee proposal would not allow this testimony. I should like to see some area of discretion in a case like this, under which the judge could admit the testimony on an affirmative finding of an exceptional guarantee of trustworthiness. As another example, if the judge found that in fact a person with similar interest and motive had conducted a vigorous and thorough cross-examination, I think that the prior testimony should be admissible in a civil case. This might be provided by a special provision in this subdivision or covered by the catch-all provision at the end if it survives.

Rule 804(b)(2). I do not expect to succeed in arguing that the Subcommittee's deletion of this subdivision is undesirable. I cannot refrain, however, from making the point that a statute of even broader scope, Mass. Gen. Laws, Ch. 233, § 65, has been in effect in Massachusetts since 1898. I practiced under it for many years, and it is my view and that, I am sure, of the great majority of Massachusetts lawyers, that it works very well. It is more calculated, I think, to achieve than to defeat justice. It has not appeared in practice to be more productive of perjury than is purported eye-witness evidence. There is the safeguard of a preliminary question for the judge, who must find that the statement was made in good faith and upon the personal knowledge of the declarant. This requirement includes the necessity of finding that the statement was in fact made by the declarant. *Slotofski v. Boston* Elevated Ry. Co., 215 Mass. 318, 102 N.E. 417. The statute does not apply in criminal cases.

A rule on this pattern is commonly regarded as embodying the views of pedagogues, which it plainly does, but as horrifying to workaday trial lawyers. I can only say that the Massachusetts experience for seventy-five years has been to the contrary.

Rule 804(3). I do not understand the reason for the change suggested by the Subcommittee. I do not see how it differs in practical effect from the Court's submission to Congress.

Rule 804(4). I would prefer the retention of the deleted words in the first sentence. They seem to me within the basic principle under which other statements against interest are admitted. I like the Subcommittee's addition of requiring corroborating circumstances clearly indicating trustworthiness when the statement exposes the declarant to criminal liability and exculpates the accused.

Rule 804(6). What I have said about Rule 803(24) applies equally here.

Rule 902(8). This minor change seems sensible.

Rule 1001(2). I like the insertion of video tapes in the definition of photographs.

I hope that this expression of views will be helpful to you. I regret that it came out much longer than I expected. If we can be of further assistance to you, do not hesitate to call upon us. We will be glad to keep you informed of the thinking of the Maine Advisory Committee as it develops.

CONNECTICUT BAR ASSOCIATION,
Hartford, Conn., July 31, 1973.

Re proposed Federal Rules of Evidence H.R. 5463.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN HUNGATE: The Connecticut Bar Association has had occasion to study at length the proposed Federal Rules of Evidence, both as promulgated by the Supreme Court of the United States and as set forth in the Committee Print of H.R. 5463 dated June 27, 1973. We sincerely appreciate the opportunity extended by your Committee to express our views concerning the proposed Rules and the Committee Print. Our remarks in this letter are primarily addressed to the Committee Print although we are enclosing a copy of the report of our Subcommittee on the Proposed Federal Rules of Evidence of the Federal Bench-Bar Committee. This report expresses our views as to elements of the Rules

promulgated by the Supreme Court and not proposed in the Committee Print in the event that the Subcommittee or the full Committee should consider some of the Rule provisions eliminated in the Committee Print.

Turning first to Rule 405, we are concerned that the present phraseology of this provision would open a trail to the assertions of opinion. We feel that departing from the traditional basis of community reputation would appear to provide a potential for abuse and inordinate time consumption. We believe that only community reputation of the person as to a trait of character should be permitted and therefore recommend deletion in the proposed provision of the references to opinion.

With respect to proposed Rule 406 we again are concerned that this Rule would allow opinion evidence with the potential for abuse and inordinate consumption of court time. We would recommend deletion of opinion testimony and limitation to community reputation. We further believe that the testimony should be corroborated to have evidentiary value.

As to Rule 601, we believe that the language added by the Subcommittee is desirable but have some concerns as to the possible conflicting effect to the deletion of Rule 32(c) of the Federal Rules of Civil Procedure, as will be pointed out hereinafter. Moreover, we strongly feel that there is a problem created by this Article in its entirety insofar as it concerns the competency of children or mentally defective persons. It would appear that the provisions of this Article do not recognize the possible incompetence of children and mentally defective persons and Rule 601 would appear to indicate that all witnesses are competent except as otherwise specified. Therefore, we would suggest that Rule 601 be amended by the incorporation of the following as the second sentence thereof: "The Court shall conduct a preliminary examination of children and mentally defective persons before they are permitted to testify and the Court shall make a preliminary finding of competency where the question is raised."

In Rule 608(a) we would suggest deletion of the reference to opinion evidence for the reasons set forth with respect to Rules 405 and 406.

Rule 609(a) has been amended in the Committee Print to alleviate some of the concerns we had felt with the Rule as promulgated. However, we would suggest Subcommittee intended to differentiate that the amended language might be clarified still further to make clear that the judge may make the determination in either case. The clause beginning with "unless" can be interpreted to apply only to subsection (2) which we do not believe would be within the spirit of the Committee's intent. Therefore, it would appear desirable to have this clause, read as follows: ". . . unless, in either case, the judge . . . ".

With respect to Rule 609(b), we appreciate the change made by the Subcommittee since we considered it patently unfair to permit evidence of a prior conviction merely because the period of probation or parole had expired within the 10-year limit.

Turning to Rule 610, we are somewhat concerned that this Rule is awkwardly stated and appears capable of misconstruction. Conceivably it might be argued that this provision would allow examination as to religious beliefs for purposes other than attacking or enhancing the credibility of a witness. Perhaps it would be desirable to clarify the language of this section in this regard.

In Rule 803, we believe that items 1, 2, and 3 should be deleted and transferred to Rule 804. The exceptions of "present sense impression," "excited utterance," and "then existing mental, emotional, or physical condition" should exist only if the declarant is not available and therefore unable to testify. They are serious exceptions to the hearsay rule and subject to many frailties. The approach suggested by the Rule would appear to be fraught with danger as to possible prejudice even though the witness can be called by the opposing party for purposes of cross-examination. The burden should be upon the proposing party to bring the witness to court and to have him testify live and to give testimony which is clearly admissible.

We would recommend that Rule 803(4) be amended so as to read "medical diagnosis *and* treatment." There should be no question that the physician's testimony would be limited to statements made by the patient for purposes of obtaining treatment of a medical ailment. The disjunctive "or" would appear to permit the physician to testify as to statements made for benefit of litigation.

Proposed Rule 803(15) should be deleted from Rule 803 and transferred to Rule 804 so that this exception would exist only if the declarant is unavailable to testify in person as to the matters contained therein.

Rule 803(22) should be limited to those cases "where the probative value of the crime substantially outweighs the danger of unfair prejudice to the witness."

We note with relief the deletion of proposed item (24) from Rule 803 as promulgated by the Supreme Court.

Turning now to Rule 804(b), items 1, 2, 3, and 15 of proposed Rule 803 would appear more appropriate in this Rule if they are to be included. As indicated before, these items should constitute exceptions only when the declarant is unavailable as a witness.

We note with considerable favor the deletion of Rule 804(b)(2) since we are concerned that the admissible statements should bear some earmarks of honesty.

We urge that Rule 804(b)(3) be limited to matters of criminal homicide. The mere fact that a person is dying does not preclude the likelihood that he might make a self-serving statement in the hopes of benefiting his family.

We would recommend amending Rule 1101(a) so as to include after the word "magistrates" the following phrase: "and any other courts or agencies to which these rules are made applicable by statute or rule." There are a number of agencies and "courts" which adopt and utilize the Federal Rules to govern their operations. It would seem highly desirable to have these new Rules immediately applicable to such agencies and courts and thereby avoid delay, conflict and ambiguity prior to their adoption by such agencies and courts.

With respect to Rule 1101(b), we would suggest that this Rule be amended by deleting the phraseology "to contempt proceedings except those in which the judge may act summarily." There appears to be an ambiguity by the inclusion of this language in view of the fact that summary contempt action by the court does not involve a hearing and the presentation of evidence. If the situation is not one of summary contempt, then there is necessarily a hearing and the Rules of Evidence would apply.

Lastly, turning to Rule 32(c) of the Federal Rules of Evidence, we are concerned that the deletion of this provision might produce a possible conflict with Rule 601 of the Federal Rules of Evidence. Rule 601 would appear to expressly recognize the applicability of state law with respect to the "dead man" rule and the deletion of Section 32(c) may be construed as evidencing a contrary intent.

As indicated previously, we are enclosing herewith a copy of the report of our Subcommittee on the proposed Federal Rules of Evidence as to various other provisions should you consider the reincorporation of other provisions.

We thank you for your consideration in this matter and the opportunity to express our concerns.

Respectfully submitted,

HARRY S. GAUCHER, Jr., *President.*

REPORT OF SUBCOMMITTEE ON PROPOSED RULES OF EVIDENCE, FEDERAL BENCH-BAR COMMITTEE, CONNECTICUT BAR ASSOCIATION

The Subcommittee has met and considered the proposed Federal Rules of Evidence which have been promulgated by the United States Supreme Court to become effective on July 1, 1973.

Initially, inquiries were made to Congress to determine the status of the proposed Federal Rules since they would become effective unless rejected by Congress (both houses of Congress). It was learned that the Senate had not yet scheduled hearings on the proposed rules and that Senator Ervin, who would chair the committee, was presently preoccupied by a number of matters including Watergate, presidential arrogation of powers, etc. As a result, the Senate had passed Senate Bill 583 which would have postponed the time of adoption of the rules until the end of the Seventy-third Congress, since hearings could not be scheduled before this fall.

It was learned from the House that hearings had already taken place and that there were some reservations concerning some of the provisions of the rules. However, the committee appeared to feel that many of the rules could be adopted. Accordingly, the House amended the Senate bill so that those rules which were specifically approved by Congress would go into effect. This amendment by the House has been accepted by the Senate. It appears that some provisions of the rules will be allowed to go into effect but we have been unable as yet to determine the game plan presently contemplated.

It should be understood that the proposed Federal Rules of Evidence will effectively change the relationship of the Federal courts to the state law on evidence. Thus it is possible for competing evidentiary principles to exist in the Federal and State courts of a given jurisdiction. There is a possibility that the Federal Rules of Evidence could become the standard to which the State courts would have to adhere if evidentiary rules in fact were considered to be a matter of due process.

However, the Subcommittee did feel that many of the proposed Federal Rules of Evidence constituted codification of the existing principles of evidence presently in operation in the Connecticut courts and that other rules appeared to be desirable expositions which would not conflict with Connecticut rules of evidence. For purposes of discussion, only those proposed rules which cause concern to the Subcommittee will be discussed hereinafter.

In its deliberations, the Subcommittee was fortunate to have the report of the Committee on Trial Practice and Technique for the Second Circuit of the United States Court of Appeals relating to the Advisory Committee's Preliminary Draft of Proposed Federal Rules of Evidence and furnished to the Subcommittee by Judge Zampano. It should also be pointed out that the proposed rules represented by the 1971 draft in the possession of most of the members are not completely accurate as changes were made to the rules before promulgation by the Supreme Court.

ARTICLE I—GENERAL PROVISIONS

The Subcommittee felt no major concern with any of the provisions of Article I.

Rule 104(b)—Preliminary Questions

The Subcommittee considered the objections of the Judicial Conference Committee which was concerned that the rule as originally drafted would preclude the judge from a conditional preliminary admission of an element of evidence as to which relevance might be established by the fulfillment of a condition of fact. The rule as amended and promulgated appears to overcome the Judicial Conference Committee's objections. It is also felt that the court has the inherent discretion to later exclude evidence which has been conditionally admitted.

ARTICLE II—JUDICIAL NOTICE

The Subcommittee had no objection to any of the provisions of Article II.

ARTICLE III—PRESUMPTIONS

The Subcommittee had no real objections to the provisions of Article III.

Rule 301.—Presumptions in General

It should be noted that Rule 301 is directed to presumptions in general and imposes upon the party against whom a presumption is directed the burden of proof that the nonexistence of a presumed fact is more probable than its existence. As such, a presumption may remain before the court even though the party having the burden has introduced evidence tending to negative the presumption.

ARTICLE IV—RELEVANCY AND ITS LIMITS

The Subcommittee spent considerable time in discussing various elements of this proposed article and considered in detail the concerns of the Judicial Conference Committee. Certain of the objections raised by the Judicial Conference Committee had been met by changes in the proposed rules.

The Subcommittee focused its concerns on Rules 405 and 406. The Subcommittee has substantial concern as to whether a witness should be allowed to testify as to his opinion as to the character or trait of character of a person.

Rule 405—Methods of Proving Character

Opening a trial to the assertions of opinion rather than community reputation would appear to provide a potential for abuse and inordinate time consumption. The Judicial Conference Committee felt that opinion evidence should be excluded when a trait of a person's character is relevant and that evidence concerning character generally should not be admissible for any purpose.

Rule 406—Habits; Routine Practice

Again, testimony as to habit or routine practice was to be permitted by the opinion of the witness and the Subcommittee had the same objection as with respect to Rule 405. Moreover, it was felt that such testimony should be corroborated in order to have evidentiary value. The Judicial Conference Committee has objected to proof of habit and recommended that the rule be limited to routine practice.

Rule 410—Offer to Plead Guilty; Nolo Contendere; Withdrawn Plea of Guilty

The Subcommittee was of the opinion that the full committee should give consideration to this proposed rule which would preclude the admission of a

withdrawn plea of guilty 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 therewith. The Subcommittee had no objection to the rule as proposed.

ARTICLE V—PRIVILEGES

The Subcommittee had objections only to Rules 503 and 509. Most of the rules as stated codified what appeared to be the evidentiary rules of the State of Connecticut.

Rule 503(d)(1)—Lawyer/Client Privilege

This section would remove from privilege any communications between lawyer and client "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime *or fraud*". The Subcommittee shared with the Judicial Conference Committee the concern over what might be the construction of the term "fraud". By its disjunctive statement, it was assumed that the fraud was something other than that level of fraud which constitutes a crime. As such, it was felt that this could be a very serious invasion of the attorney/client privilege since clients should be encouraged to consult counsel relative to questionable activity and hopefully be deterred from such questionable activity. As pointed out by the Judicial Conference Committee, there seemed to be no reason for singling out the tort of civil fraud from other torts of comparable nature such as conversion, trespass, etc.

Rule 504—Psychotherapist/Patient Privilege

The Subcommittee merely notes that there is no broad physician/patient privilege but that the proposed rule establishes a privilege between a psychotherapist or a certified psychologist and the patient.

Rule 505—Husband/wife privilege

The Subcommittee has very real concerns over this particular rule which allows the privilege to be claimed only by the accused or by the spouse on his behalf. If the witness wishes to claim the privilege on his own behalf, he cannot do so. It was felt that the privilege should be claimable by either the accused or his spouse.

Somewhat conversely, the Judicial Conference Committee has felt that the privilege not to testify against a spouse should be that of the witness rather than the accused. The Subcommittee felt that both should have the right to claim the privilege for reasons recognized by the rule on the one hand and by the Judicial Conference Committee on the other hand.

The proposed rule also precludes privilege in the instance of "matters occurring prior to the marriage." It was felt that the original concept behind the husband/wife privilege would be destroyed if one spouse were forced to testify against the other, the issue of saving the marriage not being dependent upon the time of learning of the matter involved.

The Subcommittee also questions whether the privilege should attach to observations or whether it should be limited to communications. The terminology of the rule would include both within the privilege even though the witness may not have had a special status as to observation of an incident by reason of the condition of marriage. If saving the marriage is not the raison d'etre for the privilege, then testimony as to observations would seem to justifiable if the rule is grounded upon encouraging complete and honest discussion between married persons.

Rule 509—Secrets of state and other official information

The subcommittee merely notes with interest pending litigation.

ARTICLE VI—WITNESSES

The Subcommittee has substantial reservations concerning Article VI.

Rule 601—General Rule of Competency

In accordance with the language of this rule, everybody is competent to be a witness except as otherwise provided. The subsequent provisions do not cover the specific problems of competency of a child or of a person who is insane.

Rule 608—Evidence of Character and Conduct of Witness

Subparagraph (a) again permits opinion to be introduced as to the character and conduct of a witness. This provision is considered to provide a possibility for bogging down a trial.

With respect to Subparagraph (b), the Subcommittee has concerns to opening up examination as to prejudicial matters.

Rule 609—Impeachment by Evidence of Conviction of Crime

The Subcommittee strongly recommends that Subparagraph (a) be amended by including Subparagraph (3) from the 1971 draft, namely, ". . . 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".

The Subcommittee is concerned with the provisions of Rule 609(b) in that it seems patently unfair to permit evidence of a prior conviction because a period of probation or parole has expired within the past ten years. A man could have been convicted and sentenced to a term of 20 years, had that sentence suspended after two years and been placed on probation or parole for a period of 18 years and been an exemplary citizen during that entire period of time. Yet the proposed rule would allow evidence of his prior conviction to come in 29 years later.

Rule 610—Religious Beliefs or Opinions

The Subcommittee felt that this rule seemed to be awkwardly stated.

ARTICLE VII—OPINIONS AND EXPORT TESTIMONY

The Subcommittee had no major objection to this proposed Article except with respect to the provisions of Rule 706.

Rule 706.—Court Appointed Experts

In Rule 706(a), it was felt that the second sentence should read "The judge may appoint any expert witnesses agreed upon by the parties and may appoint witnesses of his own selection *to whom no reasonable objection is made.*" It is possible for the judge to appoint his own expert witness who would not, in fact, be very expert, and to whom one or both parties might have reasonable objections. It is also possible for the judge to appoint an expert when the parties feel he does not require one, and experts represent a particular possibility for problems in the sense that the court appointed expert has the ear of the judge and may not necessarily be right.

The Subcommittee also expressed concern over the provisions of Subparagraph (b) in that the judge is able to allocate the expense of an expert witness to the parties even though they felt that no expert witness was required, or if only one of the parties requested such a court appointed expert.

ARTICLE VIII—HEARSAY

This proposed article was generally acceptable except the provisions of Paragraphs 803 and 804.

Rule 803—Hearsay exceptions; availability of declarant immaterial

It was felt that the first three items in the list of permissible hearsay should be transferred to Rule 804 since they had no business being admitted if the declarant is available as a witness. These sections are Present Sense Impression, Excited Utterance and Then Existing Mental, Emotional and Physical Condition. If the intent is to corroborate the witness as to these three items, if in fact contradictory statements are introduced, then this is a different issue.

As to item (4), the Subcommittee feels that the statements to be permitted should only be those made for the purpose of obtaining medical treatment. Too much room would be permitted for abuse if a physician could come in an testify as to self-serving statements made by a patient.

As to item (5), is was felt that the last sentence could be omitted without producing any problem. As to item (13), it was felt that the family records admissible should be those which are "ancient". This rule would permit the introduction of recent self-serving statements.

As to item (14), the same objection is raised as to item (13). As to item (15), the same objection is raised as to item (13.)

As to item (18), the Subcommittee expresses a caveat that this rule might be extended to permit use of statements in the text as proof of the information therein contained.

As to item (22), the Subcommittee believes that it may be inconsistent with the provisions of Rules 410 and 609(a) insofar as the plea of nolo contendere is concerned.

As to item (24), the Subcommittee strongly objects to such broad phraseology and the committee note reinforces the Subcommittee's concern. If new evidentiary

rules are to be adopted relating to the exceptions to the hearsay exclusionary principle, then it should not be done by simple judicial fiat in the manner contemplated.

Rule 804(b)—Hearsay Exceptions; Declarant Unavailable

If items 1, 2 and 3 of Rule 803 are to be included, they belong in this rule.

As to present item (b)(2), the Subcommittee objects since there is nothing that would limit the testimony to statements which would bear the earmarks of honesty. As a minimum, this exception should be limited to statements which would qualify within the resgestate rule.

With respect to present item (b)(3), there is nothing that guarantees the truthfulness of such statements and it is quite possible that a dying declarant might seek to help his family through a now qualified dying declaration which would not be subject to cross examination. If this exception is to exist, it should be limited to matters of criminal homicide.

As to item (b)(4), it was felt that this provision was too broad in including "to make him an object of hatred, ridicule or disgrace." Some persons have thicker skins than others, particularly where their pocketbook is involved. There is no guarantee that such a test would produce honesty.

As to item (b)(6), the Subcommittee felt that this should be eliminated because it provided too much opportunity for extension of a rule already fraught with potential for abuse.

ARTICLE IX—AUTHENTICATION AND IDENTIFICATION

The Subcommittee had no objection to any of the provisions of this Article.

ARTICLE X—CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

The Subcommittee has no objections to any of the provisions of this Article.

ARTICLE XI—MISCELLANEOUS RULES

Rule 1101—Applicability of rules

In Subparagraph (a), the Subcommittee agrees with the Judicial Conference Committee that there should be an amendment after the word "magistrates" including specifically "any other courts or agencies to which these rules are made applicable by statute or rule." A number of the specialized courts such as the tax court and of the Federal agencies utilize the rules of evidence in operation in the District Court of the District of Columbia. Rather than bootstrapping the proposed Federal rules into such specialized courts and agencies, the rules should be made applicable by direct action to avoid any question.

As to Subparagraph (b), the Subcommittee agrees with the Judicial Conference Committee that there should be eliminated that phrase reading "to contempt proceedings except those in which the judge may act summarily." It does not seem necessary to include this clause in view of the fact that summary action by the court does not involve notice and hearing with the presentation of evidence.

SUMMARY

Thus the Subcommittee has no strong objection to the great bulk of the proposed rules but it does have some very strong objections to certain of the proposed rules. In addition, the Subcommittee has some reservations as to the wisdom of making evidence a substantive matter in the Federal courts which could result in distinct rules being applied in Federal proceedings when such rules would not be applicable in State court proceedings. Thus, the parties would have a new reason for court shopping.

CENTER FOR LAW AND SOCIAL POLICY,
Washington, D.C., July 31, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CHAIRMAN HUNGATE: In response to your letter of June 30, 1973, soliciting our comments on H.R. 5463, a Bill to Establish the Federal Rules of Evidence, we should like to make the following additional comments. We believe that the proposed bill constitutes a great improvement over the draft rules which were transmitted to the Congress by the Supreme Court. In particular, the subcommittee is to be commended for rejecting Title V of the Rules, which would have

created an unprecedented wall of secrecy around governmental decisions and made alarming incursions into the area of personal privacy.

Your subcommittee also deserves credit for the manner in which it went about the task of reviewing the Rules. In its hearings, a wide spectrum of viewpoints were presented and seriously debated by subcommittee members; and mark-up sessions were open to the public. These open procedures contrast sharply with the procedures by which the Advisory Committee initially drafted the Rules. As noted in our previous testimony, their deliberations were closed, and the private representations made by the Department of Justice and Senator McClellan were given undue weight. Indeed, some of the most important rules (which have subsequently been rejected by your subcommittee) were added to the Advisory Committee's original draft after all opportunities for public review or comment had passed. The government secrecy provision (Rule 509), for example, was rewritten by the Department of Justice, and was made public only upon the Supreme Court's transmittal of the draft rules to the Congress.

We would like to focus our comments on two issues, both related to the fact that the Rules of Evidence, when passed by the Congress, will be unique among the various federal rules in that they will have had plenary legislative review and will be passed in statutory form. We believe that special attention should be given to (a) the status of the notes to the Rules, and (b) the procedure for amending the Rules.

THE NOTES TO THE RULES

The notes which accompany the Rules are extremely important in clarifying their meaning and in helping to assure uniformity and simplicity of application in the federal courts. Hence, a clear and comprehensive set of notes must be provided with the rules; and some effort must be made to limit the materials which can be cited to elucidate the meaning of the notes.

The Committee print contains notes explaining many of the changes which the subcommittee has made in the draft Rules submitted to the Congress. They do not, however, form a comprehensive explanation of all the Rules. The Advisory Committee notes transmitted to Congress provided an adequate commentary on many of the Rules, but those comments do not, of course, take account of the changes in the Rules made by the subcommittee. They are also unsatisfactory in that they do not explicate some of the rule changes which the Advisory Committee accepted under pressure from the Department of Justice.

To meet this problem we urge the House Judiciary Committee to issue a Report with the bill adopting the Rules which will contain a comprehensive set of notes, prepared in cooperation with the Advisory Committee. The Judiciary Committee's notes should bear the endorsement of the Advisory Committee. As the Rules undergo further refinement in the legislative process, the notes should be appropriately amended to reflect changes, and the concurrence of the Advisory Committee in the final set of notes should be sought. If these rules are in fact to clarify evidentiary rulings in the federal courts and not complicate such rulings with endless debate over the "legislative history" of particular rules, it is important that there be only one definitive set of notes.

PROCEDURES FOR AMENDMENT OF THE RULES

The subcommittee has recognized that a different amendment procedure is necessary for the Rules of Evidence, given the fact that they are the product of full Congressional deliberation and passage; that they are signed by the President; and that they reject many rules—particularly those relating to testamentary privileges—particularly those relating to testamentary privileges—which were prescribed through the rule-making process. Under the procedure proposed by the subcommittee, no amendments can take effect until they have been before the Congress for 180 days; and either house of Congress is given the power to disapprove any amendment by resolution during that period. These departures from the procedures set forth in the Rules Enabling Act assure adequate opportunity for Congress to review changes in the Rules of Evidence and provide a more convenient mechanism for Congress to reject proposed amendments. Under the circumstances, we believe that this departure from the customary rule-making procedures is appropriate.

It must be noted, however, that this procedure for adopting amendments is not a complete response to the procedural inadequacies revealed by past deliberations on the Rules of Evidence. The Rules which emerge from Congress will be the product of plenary legislative deliberation, including the careful consideration by this subcommittee in full and open proceedings. It is incongruous to subject this comprehensive code to the vagaries of procedures which have proved to be in-

adequate in the past. The Justice Department, for example, could not make a case before this subcommittee for broad governmental secrecy and further incursions on the sphere of individual privacy. Can they simply go back and argue for amendments to the Rules in a more hospitable forum which proved receptive in the past? This dilemma highlights the need for a more comprehensive review of the procedures by which rules are adopted and amended.

Experience thus far with the Rules of Evidence has revealed deep-rooted defects in the rule-making process, and Congress should deal with these defects. The proceedings of the Advisory Committee, the Standing Committee and the Supreme Court in the years 1970 through 1972 have shown fatal inadequacies in the rule-making procedure. (See pp. 27–45 of our original testimony.) The procedure is insufficiently representative; it provides inadequate opportunities for participation by interested groups; it provides unacceptable opportunities for undue influence on the Rules by the Department of Justice; and by diffusing responsibility too broadly, it creates a situation in which no one really accepts responsibility for the contents of the Rules. Congress should consider changing the procedures by which the Rules are adopted. In particular, consideration should be given to taking the Supreme Court out of the process altogether.

The role of the Court in the rule-making process has never been adequately defined. Indeed, the Rules of Evidence experience casts new doubt on what that role is. Justice Douglas stated that the Supreme Court acts as a mere conduit. Yet, the Department of Justice sought Supreme Court intervention on substantive matters (letter of the Attorney General to the Chief Justice, December 22, 1971) and the Court apparently responded, leading to substantive changes in Rules 510 and 609.

We suggest that there is no justification for giving the Supreme Court this vague and ill-defined reponsibility in the rule-making process. As long ago as 1944 Justice Frankfurter, in connection with proposed Rules of Criminal Procedure, urged that the Supreme Court was not an appropriate agency for formulating such rules. He noted that the Justices were removed from day-to-day trial work; that there is a risk of prejudging issues which will later come before the Court in litigated cases; and that each additional duty "makes inroads upon the discharge of functions which no one else can exercise." (Order of December 26, 1944). Chief Justice Burger has repeatedly urged that the Court is overburdened by its responsibilities for disposing of the litigation before it. See, *e.g.*, 59 *A.B.A.J.* 721 (July 1973). This is an appropriate time for Congress to consider whether the Court's workload can be reduced by removing this marginal responsibility for the promulgation of rules. In the course of such review, Congress should also assure that proposed rules and amendments to the rules are developed only after full public debate among all interested persons and adoption by a broadly representative body.

Once again, we commend the subcommittee and its staff for a greatly improved Code of Evidence and for providing a forum in which open debate of the Rules was possible.

Sincerely,

CHARLES R. HALPERN.

AMERICAN MEDICAL ASSOCIATION,
Chicago, Ill., July 31, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, U.S. House of Representatives, Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: The American Medical Association is pleased to take this opportunity to comment upon H.R. 5463, which would establish rules of evidence governing actions in federal courts.

The Association had occasion to express its concern in correspondence with appropriate congressional committees earlier this year regarding certain proposals which would have defined a broad psychotherapist-patient privilege while, by implication, abrogating the physician-patient privilege as it is generally recognized. The Association recognized the necessity of protecting confidential communications attendant to psychotherapy, but it was also concerned that the proposed rules did not protect confidential communications in other medical circumstances. The Congress, realizing the broad ramifications of the proposed rules, enacted P.L. 93–12 holding the proposal in abeyance pending reexamination.

The proposed rules of evidence transmitted to the Congress earlier this year would have, through proposed rule 504, defined a broad psychotherapist-patient privilege. The Association supports the recognition of such a privilege, particularly in view of the nature of such communications, that is to say, the free expres-

sion of facts, occurrences, and other impressions which are disclosed in the course of psychoanalysis. We would emphasize that this confidence should be honored, since public policy and quality medical care require the highest degree of candor in exchanges between the psychotherapist and his patients.

Unfortunately, the rules, as originally proposed, made no reference to the traditional physician-patient privilege and would have, by implication, abrogated the privilege. We recognize that certain material elicited in the course of medical treatment must, in the interest of justice, be disclosed in appropriate cases. It must also be recognized, however, that information communicated to the physician and having no bearing upon the issues in the specific case at hand must be protected from disclosure. Accordingly, the total abolition of the physician-patient privilege would leave the patient substantially without protection against potential abuse. This could result in a deleterious effect upon the relationship between physician and patient which would clearly have a detrimental effect upon the practice of medicine. Accordingly, in addition to a privilege in psychotherapy, the broader physician-patient privilege should also be recognized.

The American Medical Association urges you to consider these issues in the course of your deliberations and hopes that these comments will be reflected in your final determinations.

Sincerely,

ERNEST B. HOWARD, M.D.

McCARTHY & WHARTON,
Rockville, Md., July 31, 1973.

WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Congress of the United States, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. HUNGATE: Several months ago the then President of the District of Columbia Bar appointed a Study Committee on the Federal Rules of Evidence of which Professor Schmertz was designated as Vice Chairman and I as Chairman. Our committee had many meetings and prepared recommendations on Article VIII. I had been under the impression that those recommendations had been furnished to your subcommittee in late June; however, I learned today that, apparently, they had not. We are, therefore, enclosing a copy of our recommendations on Article VIII and our additional recommendations on the COMMITTEE PRINT published June 28, 1973. The enclosures, therefore, include our comments and recommendations on the Federal Rules as sent to Congress by the Supreme Court as well as our comments and recommendations of the work product of your good subcommittee.

Our committee was unanimous in their feelings except with respect to the following rules:

Rule 611(b)—One member favored the wide open right of cross-examination as contained in the Supreme Court rules.

Rule 801(d)(I)—One member felt that the Rules of Evidence should not sanction an attorney to call a witness to the stand knowing that that witness intended to testify untruthfully, and thereby be able to utilize an out of Court inconsistent statement even though it had the dignity now required by the subcommittee change. The majority of our committee felt that this was an ethical problem not an evidentiary one.

Rule 803(24) and 804(b)(6)—Two members felt that the subcommittee deletions were desirable.

The membership of our committee consisted of the following members of the District of Columbia Bar:

George Horning.
Elliott Milstein.
Oliver Morse.
Jack Arness.
Henry R. Berger.
Thomas E. Patton.
John F. Mahoney.
Glenn A. Mitchell.
Joseph Sitnick.
John Gill.
Paul Wolf.
Richard Paulson.
John Schmertz.
David McCarthy.
Joseph McCarthy.

We trust that our reports may be of some assistance to your subcommittee in discharging its function and should we be able to help in any other way, please feel free to call upon us.

Very truly yours,

JOSEPH S. MCCARTHY, *Chairman.*

Enclosures.

RECOMMENDATION AS TO FEDERAL RULE 201 REVISION

The deletion of paragraphs (a) and (g) of Rule 201 while leaving the rest of the original language in the rule produces major and unwise changes in this area of the law of evidence.

As a preliminary premise the committee interprets the deletion of 201 (a) and (g) in light of the Sub-Committee note as producing the following results:

1. The use by federal trial and appellate courts of any and all extra-record factual matters is now to be subject in toto to the terms of a single provision, i.e., Rule 201.

2. The judicial noticing of all such matters by federal trial or appellate courts to the benefit of a proponent of the fact carries with it the right of the opponent of the matter to introduce evidence in rebuttal.

DISTINCTION BETWEEN "ADJUDICATIVE" FACTS AND "LEGISLATIVE FACTS"

Whatever one calls extra-record material frequently cited to trial and appellate courts in briefs, memoranda and appendices, and often cited by courts themselves in their opinions, the difference between these matters and the specific factual disputes between the parties over the happening of a crime or tort is about as clear as any legal concept is likely to be. The latter may be called "adjudicative" facts and ask the question: "when and where did who did what to whom and under what circumstances."

These factual matters are alleged in the indictment or in the pleading or pretrial order. Unless they are admitted or are beyond reasonable dispute, they must be formally proven to the trier of the fact by admissible evidence. The resolution of these issues produces a verdict or findings of fact. On the other hand, when a party is trying to convince a trial or appellate court that a rule of law subject to judicial power is unsound and that changed social or economic conditions justify its abolition or modification, then that party will find himself citing to the court published materials of various kinds to inform the court of what is going on in the world as it pertains to that legal issue. Both sides may cite the same sources or may rely upon different sources. While the parties will no doubt try to convince the court that their studies and statistics are authoritative and correct, seldom, if ever, could they argue that the material is "beyond reasonable dispute." An example may make our position clear. In State A, Mrs. X sues Y for loss of consortium, in that on January 1, 1972, Y negligently caused personal injuries to Mr. X, her husband. Y claims contributory negligence by Mr. X. State A has never recognized the right of a wife to sue for loss of her husband's consortium. Such litigation presents two distinct types of factual issues. One are the "adjudicative" facts—what really happened as between Mr. X and Mr. Y on January 1, 1972.

The other set relates to any background or "legislative" facts bearing on whether conditions of modern society and family life suggest that the court in State A should follow the lead of many other courts in recognizing the right of action claimed by Mrs. X. The latter material is directed to the judge on an issue of law rather than as an issue of fact. Seldom, can it be the subject of formal proof through witnesses, documents or circumstantial evidence formally presented according to the rules of evidence in a trial setting. Of course, in a case such as the above, the trial judge might properly judicially notice the "adjudicative" fact that a blizzard had taken place during the night of January 1, 1972, which fact may be the basis of a further inference in connection with the condition of the road at the time of the accident. This fact does not relate to the rule of law the court is being asked to change or modify but to the unique adjudicative facts in issue between this plaintiff and this defendant.

What is the effect of the deleting paragraph (a)? As interpreted by this committee, it is to subject "legislative" facts to the same standards of virtual certainty as alone is warranted for adjudicative facts. Such a change would purport to outlaw the "Brandis Brief" and in all open reference by counsel or courts to authoritative (but not indisputable) sources of background facts which assist the courts in making rational and informed policy judgments about rules of law, and changes in

the law to reflect changing values. More realistically, however, the committee suspects that the rule change would simply have the tendency of driving the legislative fact process of courts underground. Courts cannot and will not perform their constitutional duties of adjudication in the dark. They will continue to look to reliable extra-record sources to inform themselves. Literal enforcement of Rule 201 as revised, however, may make it extremely difficult to assess the factual premises of a court's legal reasoning. Under the Rule, as revised, it will presumably amount to legal error to openly judicially notice any matters not formally proven in the record unless they are, as Section (a) phrases it, "beyond reasonable dispute."

Moreover there may be a constitutional problem with the change made by the Subcommittee. The right to consult such background sources is vital to the judging process. Moreover, due process arguably requires that each side be put on notice as to the basis upon which the court's policy judgments are made. Any rule with a tendency to unduly restrict courts in performing their necessary judging functions and also to deprive the parties of fair notice of the basis of a judgment raises an important constitutional problem.

What is the effect of deleting Section (g)? As explained in the Subcommittee note, the apparent effect of the change is to make every fact judicially noticed subject to refutation. This seemingly presupposes that there is a reasonable basis for contrary evidence. Such an assumption however, highlights the internal contradiction of the Subcommittee change since Section (a) requires that every judicially noticed fact must be "*beyond* reasonable dispute." To allow, in the same rule, dispute of that which is, by definition, beyond dispute is well calculated to produce great confusion. It is clear that the narrow language of Rule 201(a) was drafted in light of the conclusive effect to be given the judicial notice process by (g). The core concept of judicial notice, it seems it the desirability of saving valuable court time in avoiding formal litigation of the pros and cons of such matters as:

1. That object with weight will fall if unsupported;
2. That a buzz saw is a dangerous instrumentality;
3. That beer and wine are intoxicating;
4. That the White House is located in the District of Columbia.

To allow evidence by either the proponent or the opponent on the above kinds of facts is to belabor the obvious at the expense of the other issues in the case as to which reasonable dispute may exist. If the Wigmore theory of allowing rebuttal is to be adopted, then Section (a) ought to be rewritten to encompass a broader range of facts at least some of which might be open to reasonable dispute.

This committee feels that in civil cases a fact that meets the definition of the present language of Section (a) should not be subject to any attempt to dispute by formal evidence and that the trial judge should give a binding instruction to the jury that the fact is to be taken as true. In criminal cases, however, the committee feels that the *Lawrence* case, cited in the Advisory Committee note, is correct, i.e., that a binding instruction of even an indisputable fact should not be given against the accused in a criminal case. In connection with its discussion of Rule 303, the Advisory Committee admitted that it was axiomatic that a court could not direct the jury to find any element of a criminal charge against the accused. For this reason, the committee feels that the 1969 draft of Rule 201 (e) achieved the best result. That language was:

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

It is this language that the committee suggests should be inserted as the last section of Rule 201.

Memorandum Re Proposed Deletion of Rule 303, Presumptions in Criminal Cases, from the Proposed Federal Rules of Evidence

The Committee on Federal Rules of Evidence of the District of Columbia Bar has noted the proposed deletion of Rule 303 from the proposed Federal Rules of Evidence by the Subcommittee on Criminal Justice, House Committee on the Judiciary.

The District of Columbia Bar Committee has previously endorsed Rule 303 in its entirety. It wishes to go on record as opposing the deletion proposed by the Subcommittee on Criminal Justice for the reason that the subject covered by the rule—presumptions in criminal cases—is evidentiary in nature and should be retained as part of the rules of evidence.

In the event that Rule 303 is not reinstated as part of the Federal Rules of Evidence, the Committee of the District of Columbia Bar recommends that the proposals of the Brown Commission and S. 1 result in codification of the law on presumptions in criminal cases as expressed in Rule 303 of the Rules of Evidence as transmitted to the Congress from the Supreme Court.

Memorandum Re Article V proposed rules of evidence for the U.S. courts and magistrates.

The Committee is in agreement with the proposal by the Subcommittee on Criminal Justice, House Committee on the Judiciary with respect to Article V insofar as it applies to privileges in civil actions where state law supplies the rule of decision. With respect to federal criminal and federal question cases the Committee feels that the privileges should be specifically set forth in the Rules and not simply governed by "the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."

If the Subcommittee adopts this approach the Committee on Federal Rules of Evidence of the District of Columbia Bar would like to be heard further on the specific privileges. The Committee feels that it would be premature at this time to set forth comments about specific privileges in light of the Subcommittee's proposed Article V.

In summary, it is the District of Columbia Bar's opinion that specifically enunciated privileges similar to those set forth in the final draft as approved by the Supreme Court should be promulgated for federal criminal and federal question actions. It further feels that with respect to those cases where state law supplies the rule of decision, state law should be determinative of all privileges.

Memorandum Re Rule 611(b).

I dissent to the recommendation of the District of Columbia Bar Committee on the Federal Rules of Evidence that Rule 611(b) as propounded by the Subcommittee on Criminal Justice, House Committee on the Judiciary be adopted. I favor the adoption of the rule as promulgated in the final draft submitted to Congress by the Supreme Court (hereinafter referred to as "draft rule").

The Subcommittee's recommendation would limit cross-examination to the subject matter of direct examination and thus follow the practice prevalent in most jurisdictions. I believe that the so-called "wide-open" cross-examination as set forth in the final draft is the proper approach.

The draft rule adopts the "wide-open" rule of cross-examination, and allows a witness to be cross-examined on any matter relevant to any issue in the case. This freedom of cross-examination is, however, subject to judicial limitation to evidence which was testified to on direct, "where the interests of justice require." The rules provide further safeguards against abuse of the "wide-open rule," allowing evidence to 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 consideration of undue delay, waste time, or needless presentation of cumulative evidence." (Rule 403)

But apart from these protective measures, the draft rule does abandon the traditional self-contained prosecution-defense sequence of presentation, a recommendation which I endorse. Admittedly, the draft rule to some extent will permit a lawyer's neatly pre-planned presentation to be disrupted, since the opposing party may interject on cross-examination new matters which are part of his own case. On the other hand, the draft rule has the benefit of affording what must seem to the jury and the witnesses to be a more natural, if less one-sidedly coherent, method of presentation of the issues. The draft rule also will function to reduce the prosecution's traditional advantage in being able to make a powerful first impression on the jury with an initial, deceptively lopsided presentation of its case.

The draft rule may at first result in some confusion concerning motions for judgments of acquittal, especially in cases where the only evidence on a point is offered by the defense on cross-examination. A problem may also arise where the prosecution introduces evidence on cross-examination of a defense witness. In these instances, the rules envision that the judge should consider this evidence in determining the sufficiency of the prosecution's case.

But any negative side-effects which may result from the adoption of the draft rule are more than counter-balanced by the rule's avoidance of the inevitable disputes which plagued any "scope of the direct" set of restrictions. These limits on questioning have in the past tended only to confuse the jury and raise technical grounds for appeal.

Comment on Subcommittee Rule 612

The Subcommittee has altered the language of Rule 612 so that material used by a witness *prior* to trial to refresh his memory for testifying at trial is ordinarily NOT produceable as of right but only in the discretion of the court to serve the interests of justice. Our committee disagrees with this emphasis. We submit that such material, on the contrary, ought to be presumptively obtainable by the adversary unless the court finds a sound reason for non-production. This places the burden on the proponent of the witness to persuade the court to deny production. In the interests of avoiding undue pretrial suggestion to witnesses, such as by having counsel write out a version of the incident for the witness to follow, the opponent should ordinarily be able to protect himself by seeing and using the material. In civil cases, the time-honored cry of "fishing expedition" has been mooted by the discovery rules and by the breadth of their scope as noted in *Hickman* v. *Taylor*. The Subcommittee especially seems to fear routine production of attorney "work product." However, this qualified immunity from disclosure is essentially a limitation on pretrial discovery not a rule regulating the conduct lf the trial itself. If what a witness has used to "refresh" his memory is indeed the work product of the lawyer, this is precisely the sort of material the opponent ought to be able to see and utilize.

To express this committee's view, the pertinent language of Rule 612(2) should read:

> (2) before testifying, unless the trial court in its discretion determines that it would not serve the interests of justice,

an adverse party . . .

Comments on Subcommittee: Article VIII

801(d)(1). The Subcommittee change is consistent with *De Sisto* and *Cunningham* in the Second Circuit and perhaps serves as a useful compromise which will resolve some of the difficulties pointed out by this committee in its original comments. (See Par. 2, p. 2, original recommendations.) First, it takes care of the *Harris* problem since Miranda-violative confessions are (to say the least) unlikely to have been sworn testimony at a trial, hearing or grand jury proceeding. Second, it goes a long way toward satisfying the suggestions of those who fear that prosecutors and plaintiffs would have a field day under the Court version by calling turncoat witnesses for the sole purpose of using their hearsay statements to make out a prima facie case. Under the Subcommittee version, the routine investigative statement will be treated traditionally with a limiting instruction that is not substantive and only sworn inconsistent testimony will be received as affirmative proof. We approve the Subcommittee change.

803(6) "business" records

A. The insertion of "business or professional" activity to the Rule may reassure some but, in theory at least, it is narrower than the language used by § 1732 which provides that the term business includes "business, profession, occupation or calling of any kind."

B. The Subcommittee's reworking so as to emphasize the routine regularity of the record-keeping seems slightly narrower than the Advisory Committee's intent (Par. 4 of Advisory Notes) but does not seem overly restrictive. Moreover, it seems to bolster the reliability of the records by directing the court's attention to the need for a finding as to routineness. Our committee would leave out the "business or professional" phrase and leave the Rule as revised.

Recommendations of Committee With Respect to Article VIII, Federal Rules of Evidence

1. With respect to the definition of hearsay, there was felt to be some lack of clarity by some members of the Committee. From the language of Rule 801(a-c). several members could not decide whether the Rules intended to include out-of-court statements offered to prove their truth but which were made by a person available to be called as a witness in court. The latter might arguably not constitute hearsay on the grounds that the requirements of the hearsay rule—an opportunity to cross-examine—could be met then and there if the opponent wished to call the declarant.

Other members read Rule 801(a) as making all statements by a person when not actually testifying at the trial *prima facie* hearsay unless excluded by 801(d) from the class of hearsay or within one of the exceptions found in 803 or 804.

These members point to 801(d)(1) which excludes from hearsay only certain special types of out-of-court statements and which conditions such exclusion expressly upon the availability of the maker of those statements for cross-examination "concerning those statements". If 801(a-c) does not classify out-of-court statements by available witnesses as hearsay, a question arises as to whether 801(d)(1) is superfluous. Moreover, there would be no need to spell out three types of out-of-court statements by available witnesses if all such statements were non-hearsay in the first place under Rule 801(a-c). The above interpretation of paragraph 1 runs counter to Rule 803 also. It would not be necessary to have 23 exceptions to the hearsay rule where the declarant may be available, if the latter fact makes the statement non-hearsay.

Since reasonable men, however, may differ on the above matters, language should be added to the Advisory Note to Rule 801(a-c) to clear up the point.

2. The Committee would make special note of problems that may arise in applying Rule 801(d)(1)(A) to *Miranda* violative or otherwise inadmissible confessions. Under *Harris v. New York*, 401 U.S. 222 (1971), an accused who takes the stand may be impeached by a bad *Miranda* confession if his testimony varies from the content of the confession as long as a limiting instruction is given restricting its use by the trier to impeachment rather than substantive effect. Rule 801(d)(1)(A) purports to make all prior inconsistent statements of witnesses as distinguished parties from equivalent to non-hearsay, thus admissible for affirmative proof the facts asserted therein. Reading the rule in combination with *Harris*, a court might allow the prosecution to use an otherwise inadmissible confession for impeachment of the accused, avoid a limiting instruction, possibly prevent a judgment of acquittal based on the confession and argue to the jury that the confession is the real truth. Such use would raise constitutional questions as to the scope of waiver when an accused takes the stand and would perhaps unduly deter defendants from taking the stand at all. While the original power of the Court and scope of these Rules was limited to non-constitutional matters, it is advisable to caution the courts, in an addendum to the Advisory Notes, from assuming that the Rule should be construed to allow the above use of the confession. It might also be advisable to note that the Rule does not purport to authorize that result.

3. A further problem may arise under Rule 801(d)(1)(A). If the prior statement is to be given affirmative, evidentiary weight, what will be the effect on the burden of production or of getting by a directed verdict? Suppose that, at the close of a plaintiff's or government's case, the only evidence bearing on an essential element of the case is a prior inconsistent statement such as one used to impeach one of plaintiff's own witnesses pursuant to Rule 607. Does substantive admissibility under the new Rule necessarily mean that the trial court will commit error if it grants the motion? Does or should the Rule regulate the question of admissibility only or also speak to the question of whether the prior statement is "sufficient to support a finding" in favor of the party it supports? The Committee recommends that a sentence be added to the Advisory Note to the following effect: "For purposes of a ruling on the sufficiency of the evidence to support a criminal or civil issue on motion for directed verdict, N.O.V. or for judgment of acquittal, prior statements admissible under Rule 801(d)(1) should be treated in the same manner as any other form of evidence."

4. An additional question is suggested in connection with Rules 801(d)(2)(D) and (E). The latter restates the generally accepted formula for the admissibility of statements of co-conspirators; the former states the modern trend regarding the scope of proper admission by an agent or servant. In the experience of some practicing members of the Committee, it is possible that a court might read both rules together with the following result. A, B and C and shown to have conspired. X, the agent of A made certain relevant statements relating to the scope of his agency relationship with A. If X's statements are the (vicarious) statements of A under (D), then they might arguably be equivalent to the statements of A under (E) and hence come into evidence against both B and C. While it is arguable that the language of (E), makes Y's statement not the "statement of a co-conspriator," the Committee recommends that the Advisory Notes be made clear on this point. A sentence such as the following should be added to the Notes to (d)(2)(E), after the second sentence: "In addition, paragraph (E) does not authorize the admission of a statement by an agent of a co-conspirator as defined in (D) against the other members of the conspiracy.

5. The Committee also suggests that Rule 803(1) seems far broader than the case which gave rise to the creation of this exception and which is cited in the Notes. In the *Houston Oxygen* decision the witness and the declarant were both present at the scene described by declarant and were thus able each to verify

the perceptions of the other person. This check on accuracy is deemed vital to the reliability of these unexcited statements. See McCORMICK 710 (2d Ed. 1972). To achieve this end, it is recommended that the Rule be changed to read: "A statement describing or explaining an event or condition made to a witness while the declarant and the witnesses were preceiving the event or condition, or immediately thereafter."

6. The Committee sees no difficulty with the test of Rule 803(3). However, in the Advisory Note, the following sentence appears: "The rule of *Mutual Life Insurance Company* v. *Hillmon*, 145 U.S. 285, 12S. Ct. 909, 36 L.Ed. (1892), allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed." As phrased, the sentence may merely refer to the well accepted use of prior intention (as evidenced by a declaration or otherwise) as circumstantial evidence tending to show that the declarant probably carried out *his* intention. The decision, however, also approved the use of the intention of A of going on a trip with B as evidence of what B later did. This gets before the trier the intention of someone other than the declarant. But the declarant, though he knows his own state of mind, can only know the intention of B through B's statements to A or through A's inference from circumstances or both. This hearsay exception is said to be reliable only as to A's statements of his *own* then existing intentions since A is conscious of his own inner state of mind and there are no memory problems. The rationale does not extend to A's statements of B's inner purposes, however but only to B's declarations of his own existing intention. As Justice Traynor pointed out in his dissent in *People* v. *Alcalde*, 24 Cal. 2d 177, 148 P. 2d 627 (1944), the declarations of the deceased that she was going out with the defendant later that night cannot be admitted for the purpose of proving the *defendant's* probable conduct that night "without setting aside the rule against hearsay." The Committee therefore recommends either that the Notes be changed to expressly reflect the applicability of Rule 803(3) only to declarations of the intention of A to prove A's probable future conduct or at least that the sentence approving *Hillmon* be deleted. The latter action would at least avoid foreclosing the raising of the above problem in future cases.

7. The Committee is troubled by the breadth of Rule 803(4). As written and in light of paragraph 2 of the Notes, the Rule would admit statements made to a non-treating physician, i.e., one consulted solely or primarily for the purpose of using the doctor as an expert witness on the stand.[1] Unlike statements made for the purposes of obtaining treatment and cure, however, the motivation of the declarant may not be towards truth and candor and, in too many instances, may actually tend toward falsification, omission or exaggerations. If such be true, not only are such statements not an affirmatively more reliable form of hearsay but in reality constitute a form of hearsay which is probably unreliable. The notes do not attempt to justify the abolition of the traditional distinction between the treating and non-treating physician on any reliability rationale but rather on the supposed unworkability of the limiting instruction. While there are strong elements of fiction and compromise about the limiting instruction, Rule 106 accords it recognition. To change the law as to this exception merely because the jury is deemed unable to comply seems inconsistent with Rule 106. Our Committee prefers to focus on reliability as the principal criterion for hearsay exceptions. Hence, we recommend the amendment of the language of Rule 803(4). We would delete the first 9 words of the text and have it read: "Unless the judge finds they were made in bad faith, statements made to a physician consulted for treatment or for diagnosis with a view to treatment and describing etc." with the remaining language the same. For consistency, the whole of paragraph 2 of the Advisory Notes should be deleted.

Paragraph 1 of the Notes also leaves it unclear whether statements of the patient made to a hospital attendant or ambulance driver should be admitted to prove truth through the testimony of the doctor thus bringing double hearsay into play. It might be argued that this multiple hearsay is consistent with Rule 805 since both the patient's statement to the driver and the driver's relay of that statement to the doctor each have indicia of reliability under this Exception. This might be reinforced by the concept that the doctor may be accustomed to rely upon such second hand statements in the practice of his profession. Nevertheless, it is recommended that the personal knowledge requirement applicable to this and all of the exceptions should not be lightly disregarded and that the listed persons who may have heard statements by the patient should usually be called as witnesses or have their out-of-court declarations themselves qualify under a separate hearsay exception within the rationale of Rule 805. We therefore recommend that the last sentence of para-

[1] See Nutt v. Black Hills Stage Line, Inc., 552 F2d 480, 483-484 (8th Cir. 1971).

graph 1 of the Notes have the following language added: ". . . might be included if such persons are called to the stand or if their own out-of-court declarations qualify under another recognized hearsay exception."

8. Rule 803(5) seems somewhat vaguely worded and fails to specify whether the statement must be that of the witness, directly or indirectly, or may be the statement of someone else. The Committee recommends that this point be clarified consistently with existing law by adding the following phrase: "A memorandum or record . . . shown to have been made *or adopted by the witness* when the matter was fresh in his memory etc." This added language would, we think, indicate clearly that the statement must be one the witness on the stand can vouch for as to accuracy since it is either his own statement made close to the event perceived or the statement of someone else about a matter the witness knew about and which the witness expressly or impliedly adopted while the details of the event were clear in his memory.[1] This approach seems also consistent with the definition of "statement" in 18 U.S.C. § 3500.

9. The Committee is troubled by the inclusion of "opinions and diagnoses" as legitimate forms of data proveable through the record of regularly conducted activity. The language would overrule *New York* v. *Taylor* which declined to apply § 1732(a) to admit psychiatric diagnoses in a medical record. All except one of the decisions favoring admissibility of medical opinions which the Advisory Committee relies upon in the Notes involved physical conditions more or less verifiable by other sources of data. In those cases where subjective evaluation by the expert based on intangible data and subject to conflicting theories and schools of thought are sought to be proven through the paper record entry, the right to cross-examine as to these subtle judgmental factors is vital. We recommend that the words "opinions and diagnoses" be stricken from the Rule. This would not mean that all of the prior law under § 1732(a) would be done away with. Rather, the intended effect is that the term "condition" include certain relatively objective and verifiable expert judgments and to exclude the subjective and speculative. In dealing with this problem under a statute similar to § 1732(a) the court in *Loper* v. *Andrews*, 404 S.W. 2d 300 (Tex. 1966) stated:

> "Medical diagnoses analyze the cause and nature of a patient's condition and may be classified into three broad types. The medical facts may be such that the medical condition is apparent and observable by all. Or, the facts and findings may be such that an expert interpretation is required but the medical condition is nevertheless well recognized and reasonably certain. Or, the facts and findings may be such that their meaning and the resulting medical opinion as to the patient's condition rests primarily in expert medical opinion, conjecture and speculation."

The Advisory Notes should be phrased so as to indicate that the Rule would admit the first and second sort of matter but not the third.

The Committee also would like to note the possible problems which might arise if both 803(6) and § 1732(a) are permitted to exist side by side. Slight differences in phraseology might lead to different results. Clarity would probably be promoted if § 1732(a) is repealed upon the adoption of Rule 803(6).

10. Rule 803(8)(c) would admit (but not against an accused) "factual findings resulting from an investigation made pursuant to authority granted by law." The Committee views this clause as an unwise extension of the Official Records exception and recommends deletion. As the Advisory Notes indicate, the federal decisions are split while only one of the decisions cited as "Sustaining admissibility" really deals with an evaluative report, i.e., the *Pittsburgh-Des Moines Steel* case. The admission of such findings amounts to a wholesale abolition of the personal knowledge requirement supposed to be applicable to all of the hearsay exceptions. Unless the report fits under sections (a) or (b), it will be the out-of-court findings of an absent declarant (the investigator or board) based on his interpretation and weighing of what witnesses told him of their personal knowledge or what they may have heard from others. The latter may result from the usual absence of a requirement that the hearsay rule apply to administrative hearings or to other investigations. Tacit recognition of these problems is found in the admission by the Notes that this exception would almost certainly collide with the Confrontation rights of an accused. Moreover, the admission of the findings against a party will place a heavy burden of rebuttal on that party to produce the live witnesses upon whom the fact finder relied in order to challenge the findings. There is also an apparent inconsistency with the cautious limitations found in Rule 803(22) in which only a conviction beyond a reasonable doubt of a serious crime is

[1] See *Washington* v. *Washington, Virginia & Maryland Coach Co.*, 250 F. Supp. 888, 890 (D.D.C. 1966) (bus driver's statement seen and uncorrected by supervisor is past recollection recorded of latter also).

admitted to prove a fact essential to the judgment. The omission of (c) from the Rule, of course, would not preclude occasional admission of such findings under some other Rule such, as, for example, the findings of a board of investigation as an admission of a governmental opponent offered against that party pursuant to Rule 801(d)(2).

11. Some problems arise in connection with the phraseology of Rules 803 (11) and (13) both rely heavily upon California Code provisions both of which spell out the specific kinds of "personal or family history" items as found in (11). Section (13) merely uses the general phrase. Unless different coverage is intended, however, which we doubt, the language of both sections ought to be the same. As to (12), the scope language is merely "Statements of fact contained in a certificate that the maker performed etc." It is not clear whether the Rule intends to admit only the visible facts of the ceremony which the celebrant witnessed and certified to or whether it should read more broadly as in (13) where the phrase is "statements of fact concerning personal or family history". If the narrower construction is intended, perhaps (12) should read "statements contained in a certificate to the effect that the maker etc." The context of the Advisory Notes tends to support the narrower construction particularly since the certifiers include persons who are not public officials.

12. After some discussion of Rule 803(18) the Committee concluded that either that the present rule restricting treatises to impeachment with a limiting instruction should be retained or the full language of the present Rule should allow use either or direct or upon cross. A majority favored the latter approach especially in light of the difficulty, both economic and otherwise, of obtaining adequate expert witnesses in certain types of cases, e.g. malpractice actions. Nevertheless, the problem of surprise may be a serious one for the opponent who has to try to counteract the use of some treatises he may be unaware of until it is brought out at trial. The Committee submits, therefore, that the Advisory Notes should reflect concern about this surprise problem so that trial judges will be alerted to them. Language such as this might accomplish the result. "In the use of learned treatises as evidence, unfair surprise may sometimes occur to the opponent and should be guarded against. The opponent of such evidence should obtain advance notice of such use in civil actions through the medium of discovery under Civil Rules 26(b)(4) and 36 and pre-trial conference under Civil Rule 16 as well as by criminal discovery under Criminal Rule 16 wherever possible." Three members would require a party to give reasonable advance notice of his intention to use a treatise as affirmative proof, i.e. no later than the pre-trial conference.

13. Rule 803(24) has given the Committee considerable concern. Prior to codification, the common law method of decisional growth would occasionally allow for development of new exceptions to the hearsay rule although in every case the Committee is aware of, a declarant with personal knowledge, was not available, e.g. *Dallas County* case cited in the Notes. Nevertheless the exclusion of any general provision at all would freeze the law of hearsay where the declarant is available to those spelled out in the first 23 sections and might deter case law exploration of new hearsay possibilities. Hence, we feel some such provision is wise. However, the section as now worded is too vague and leaves too much to surprise and to the perhaps casual discretion of trial judges. We believe that a trial court asked to admit novel hearsay should be required to make explicit record findings spelling out the facts supporting reliability and how they are comparable to those found in sections (1)-(23). Moreover, delay at the trial and unfairness might result if the opponent is taken off guard by such a novel offer by his opponent. Some advance warning is called for to prevent this and to insure thoughtful argument and decision in new areas. The Committee submits that the following wording might accomplish the result. It is based in part on wording recommended in the American Trial Lawyers report on the first draft of February 1970.

> (24) *Possible other exceptions.*—A statement not specifically covered by any of the foregoing exceptions where the trial judge makes express findings on the record that the statement has equivalent circumstantial guarantees of trustworthiness, provided that the proponent's intention to offer the statement is made known to the adverse party sufficiently in advance of the trial or hearing to provide him with a fair opportunity to prepare to meet it.

14. Rule 804(a)(3) deals with a lapse of memory of a witness declarant as amounting to "unavailability." The possibilities of imposition by the witness are

plain. While the last clause of (a) excludes "forgetfulness" induced by the proponent, (a)(3) sounds merely in terms of the witness' *testimony* that his memory has failed, as if that must be accepted on its face as enough without further inquiry. The Committee recommends that section (3) be rephrased to read "[declarant] is unable to remember the subject matter of his statement." This would emphasize to the court that this form of unavailability, as with the others, is a preliminary fact question calling Rule 104 into play and allowing cross-examination then and there on the question of whether the claimed lack of memory is bona fide and real.

15. Rule 804(b)(1) is consistent with the more liberal trends of the case especially since sworn and transcribed hearsay with a chance to examine by the person against whom offered possesses far more safeguards than any other exception to the hearsay rule. Nevertheless, the members were a little uncomfortable with the treating of direct examination as equivalent to cross. For example, even under Rule 607, the style and motivation of direct is likely to vary greatly from cross. Many such situations might run afoul of the motive and interest" test of hearsay as well as the right of Confrontation of an accused. For example, S is on trial for a Chicago robbery and puts W on the stand to show that he was at the Waldorf with T in New York at the time of the robbery. Later, in another Trial of T for robbery at the Waldorf, may the prosecution use the transcript of W's former testimony, he being out of the country, to place T at the Waldorf with S at the time in question? It would seem that the acceptability of the Rule in its application will depend on the realism with which the former direct examination can actually be called the equivalent of cross. The Advisory Notes should contain cautionary language reflecting the need for realistic analysis of the nature of the direct examination in question.

16. Rule 804(b)(2) makes several of the members uncomfortable, expecially when read with the very broad definitions of "unavailability" in (a). The text shows careful efforts to qualify the statement to eliminate anticipated abuses and loopholes. The range of Committee views is wide: from eliminate it totally to some form of further qualification to its use. One member suggests that the rule apply only when the declarant is absolutely unavailable i.e. by death, as in Massachusetts. Another would add at the end of the rule: "in a case where such evidence is necessary in order to meet a burden of the evidence or to make a prima facie case." The latter is another method of heightening the necessity for resort to such statements.

17. With respect to Rule 804(b)(4) there is also a split view within the Committee. A substantial majority are in favor of deleting the "hatred, ridicule or disgrace" type of interest. One member, however, believes that this interest in social approval is strong enough in most persons to make them reluctant to admit a fact of that sort unless they really believed it to be true. The fact that many persons every year part with thousands of dollars to blackmailers reflects the fact that many people value their good name over money. There is, of course, a real difficulty of factfinding here where a small group of persons have a special distaste for some behavior which most persons are not bothered by.

Three members would also require corroboration of statements which "inculpate" the accused. One member suggests, however, that this might imply that compliance with such a condition would authorize admission into evidence despite constitutional obstacles outside the hearsay area.

18. The Committee recommends identical language in (b) (6) as suggested in 803(24), supra.

19. Rule 805 seems sound to the Committee and in line with traditional law. However, the Notes refer to the statement of a wife in a hospital record as within Rule 803(4). This throws light on the intention of that rule but if our recommendations above are adopted, such a statement would have to come from the wife as a witness or through some exception other than Rule 803(4), i.e. excited utterance, admission.

20. Rule 806 expresses valuable procedures which should not be overlooked by Rule framers as they weigh the wisdom of various hearsay exceptions. The Rule spells out useful avenues of diminishing the harmful effect of hearsay statements offered by an opponent by allowing modes of impeachment analogous to cross examination in court.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE,
Washington, D.C., July 31, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice,
Committee on the Judiciary,
Washington, D.C.

DEAR MR. CHAIRMAN: With the permission of the Chief Justice as chairman of the Judicial Conference of the United States and in accordance with your request I am transmitting to you herewith the comments of our committee and of the Advisory Committee of the Conference on Rules of Evidence with respect to the amendments to the Federal Rules of Evidence which are proposed in your recent committee print of H.R. 5463. While these comments reflect the considered views of the two committees arrived at after full consideration, it should be understood that they constitute at present merely a working paper of the Conference which that body has not yet had opportunity to see, consider or act upon. They will, however, be presented to the Conference at its forthcoming meeting on September 13–14, 1973.

Sincerely yours,

ALBERT B. MARIS, *Chairman.*

FEDERAL RULES OF EVIDENCE

On July 18 and 19, 1973 the standing Committee on Rules of Practice and Procedure and the Advisory Committee on Rules of Evidence of the Judicial Conference of the United States met in joint session for the purpose of considering amendments to the Federal Rules of Evidence proposed to be incorporated in HR 5463, 93d Cong. by the House Subcommittee on Criminal Justice (Committee Print June 28, 1973). The two committees fully considered all of the proposed amendments as well as the Subcommittee Notes in explanation of them and agreed upon the following comments thereto:

RULE 104

The committees express no disagreement with the proposed amendment to subdivision (c).

RULE 105

The committees are unable to agree with the proposal to delete this rule. It is believed to embody a constitutional mandate, *Capital Traction Co.* v. *Hof*, 174 U.S. 1 (1899), which it is useful to set forth in these rules. Since the rules are to be enacted by the Congress, considerations of whether the matter involves procedure or evidence are lacking in importance. Incorporating the principle in these rules is simpler than amending both the Civil and Criminal Rules.

RULE 201

The committees are sympathetic to the Subcommittee's dissatisfaction with the term "adjudicative." It is believed, however, that a basic and fundamental difference exists between the historical facts of the particular litigation and social, economic, and scientific data that enter into the lawmaking process, whether by legislature or courts. The former have always been thought to demand a high measure of certainty, while the latter have been treated on the same basis of informality as has governed ascertainment of what the law generally is or ought to be. The deletion of subdivision (a) of the rule would leave both kinds of facts equally subject to the very narrow confines of subdivision (b), a situation in which the judicial system could scarcely function. See, for example, the *Hawkins* case, discussed in the Advisory Committee's Note, as an illustration of the liberality traditionally found with respect to judicial notice of "legislative" facts. The charge imposed upon the judiciary by proposed amended Rule 501, to interpret the common law in the light of reason and experience, would face a virtually insurmountable obstacle in the amendment. The committees suggest a return to the language of the Preliminary Draft of 1969, with some amendment, so that subdivision (a) would read: "This rule governs judicial notice of facts in issue or facts from which they may be inferred. It does not govern judicial notice of matters of law." The expression "matters of law" is sufficiently broad to encompass "legislative history, discussions by learned writers in treatises and law reviews, materials that contain controversial economic and social facts or findings or that indicate contemporary opinion, and similar materials." Cal. Ev. Code 1965, § 450,

Comment. The rule would not, of course, bar the judiciary from considering such matters when appropriate but would simply free them from the restraints of the rule.

The committees believe that subdivision (g) should be retained for the reasons set forth in the Advisory Committee's Note. The objection taken in the Subcommittee Note is believed to be met by the provisions of subdivision (e) of the rule; if at any time counsel has evidence showing that a judicially noticed matter is subject to reasonable dispute, the judge can take appropriate remedial measures as in other situations where he determines that an earlier ruling was erroneous in light of subsequent developments.

RULE 301

The substitution of "civil actions" may have the unintended effect of excluding proceedings and cases in bankruptcy from the application of the rule. Proceedings in bankruptcy are not regarded as "actions" and the civil rules which do apply to civil actions, do not apply to bankruptcy proceedings except as made applicable by the bankruptcy rules. Compare Evidence Rule 1101(b), which distinguishes between civil actions and proceedings and cases under the Bankruptcy Act.

RULE 302

The caption should be restored and the text amended to read "cases" in lieu of "actions." In this instance the text of Rule 302 as transmitted to the Congress is in error. See comment to Rule 301, above.

RULE 303

The committees recognize that the decision to defer consideration represents a legislative procedural determination.

RULE 402

The committees express no disagreement with the language of the amendment.

RULE 404

The committees express no disagreement with the amendment to subdivision (b).

RULE 405

The committees agree with the interpretation of subdivision (b) set forth in the Subcommittee Note.

RULE 501

Believing that privileges in the federal courts should be uniform and governed by federal law, the committees are unable to concur with the treatment given privilege by the Subcommittee. While Rules 502–513 if enacted as prescribed by the Court would no doubt make for uniformity in criminal prosecutions, federal question cases, and generally in bankruptcy, the proposed amendment injects an element of doubt. Experience under Rule 26 of the Criminal Rules offers small encouragement for the evolution of a comprehensive and uniform scheme of privileges through the decision-making process. It is hoped that the Subcommittee considers its general approach to privileges no more than temporary expedient and proposes to return to the subject.

For the reasons set forth in the Advisory Committee's Note to Rule 501, the committees are also unable to agree with the amendment's particularized treatment of privileges in diversity cases. In brief, the amendment would leave privileges created by State law in the peculiar posture of being effective in diversity cases but ineffective in other federal cases, notably in criminal cases which undoubtedly lie in the area of greatest sensitivity. With these privileges thus rendered largely illusory, their limited recognition is explainable only in terms of possible impact on the outcome of litigation, a result which has been rejected generally elsewhere in the federal procedural field.

RULE 601

The committees are unable to concur in the amendment. Rules governing the competency of witnesses are essentially legal formulations of credibility, and

credibility seems undeniably to be a matter of procedure. To the extent that they are designed to affect outcome, the same is true of procedural provisions generally. The *Erie* argument thus fails to convince. Moreover, the amendment applies all State rules of competency, not merely those found in the Dead Man's Acts. In this respect it goes beyond the expressions received by the Advisory Committee.

A nationwide study of Dead Man's Acts was made for the Advisory Committee. While the study disclosed wide adherence to the philosophy that the estates of decedents ought to be protected against legal attacks based on perjured testimony, the implementation of this sentiment assumed so great a variety of forms as to lead inescapably to the conclusion that failure is a foregone conclusion. The study was too extended to permit its inclusion in the Advisory Committee's Note, but it has been made available to the Subcommittee. The committees believe that any encouragement of the perpetuation of this remnant of the common law rule of incompetency of parties and interested persons is a disservice to the law of evidence.

Note should also be taken of the fact that the amendment is a step backward from present Civil Rule 43(a), which would be supplanted.

RULE 606

While the committees are satisfied with subdivision (b) as transmitted to the Congress, the difference between it and the amendment is believed not to be great enough to warrant disagreement with the amendment.

RULE 608

The committees express no disagreement with the amendment to subdivision (b).

RULE 609

The committees express no disagreement with the amendments to subdivisions (a), (b), and (d). Attention is, however, directed to a possible ambiguity in subdivision (a) with regard to whether the "unless" clause applies to both categories of crime or only to those in category (2). The problem could be avoided by reversing the two numbered categories, thus conforming clearly with the meaning expressed in the Subcommittee Note.

RULE 611

With regard to subdivision (b), the committees reaffirm the treatment of scope of cross-examination set forth in the rule as transmitted to the Congress but recognize the existence of a substantial division of opinion in the profession.

With regard to subdivision (c), see the comment on Rule 301, above.

RULE 612

The committees recognize that resistance has been encountered with regard to the treatment of documents consulted by a witness prior to taking the stand in the rule as transmitted to the Congress. The amendment appears to be an acceptable compromise of the competing interests at stake, and the committees express no disagreement with it.

RULE 801

The amendment would virtually destroy the utility of clause (d)(1)(A), which allows prior inconsistent statements to be used as substantive evidence. The instances in which the rule as proposed to be amended would operate would be relatively few in number, because, the prior statement having been made under oath, the threat of a perjury charge would make it highly unlikely that the witness would subsequently relate a different story on the stand, again under oath. The problem area consists of cases in which the prior statement was not under oath, and a rule which fails to encompass those cases is of slight practical significance.

The first of the two justifications given for the amendment in the Subcommittee Note is that "unlike in other situations, there can be no dispute as to whether the prior statement was made." The underlying assumption appears to be that some factor is present with regard to prior inconsistent statements that requires an extraordinarily high degree of assurance that the statement was in fact made. The nature of this factor is not, however, explained. Presumably the assurance would take the form of a written transcript of testimony, yet the amendment requires none, and it is well established under existing law that former testimony

may be proved by the testimony of any person who was present and heard it given. Indeed, many out-of-court statements are now admissible without any requirement that they be in writing. Among them are admissions, including confessions, spontaneous utterances, statements for purposes of diagnosis or treatment, declaration of pedigree, reputation of various kinds, dying declarations, and declarations against interest, as well as former testimony.

The second justification given in the Subcommittee Note for the amendment is that "the context of a formal proceeding and an oath provide firm additional assurances of the reliability of the statement." The premise of the rule as transmitted to the Congress is that sufficient assurances are already present in the circumstances, without the addition of the further highly limiting provisions of the amendment. If the premise of the amendment is that a statement not made under penalty of perjury is insufficient standing alone to support a conviction and ought therefore not to be admitted, a confusion between the distinct concepts of sufficiency and admissibility is present. If every item of evidence were required to be sufficient to sustain a verdict in order to be admissible, few items, particularly of circumstantial evidence, would ever be admitted. No one claims that this is so. See Advisory Committee's Note to Rule 401. Moreover, of the many kinds of hearsay admitted in evidence, only one, former testimony, is given under oath.

Prior to its action in prescribing the rule, the Supreme Court had occasion to examine a similar provision in the California Evidence Code. While the specific issue before the Court was whether the provision violated the constitutional right of confrontation, the Court's treatment of that question is equally applicable to the question whether a rule of this kind represents a wise approach to the problems of hearsay as a matter of policy. The Court said:

. . . Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth";[11]

(3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

It is, of course, true that the out-of-court statement may have been made under circumstances subject to none of these protections. But if the declarant is present and testifying at trial, the out-of-court statement for all practical purposes regains most of the lost protections. If the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness. Thus, as far as the oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury; indeed, the very fact that the prior statement was not given under a similar circumstance may become the witness' explanation for its inaccuracy—an explanation a jury may be expected to understand and take into account in deciding which, if either, of the statements represents the truth.

Second, the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial. The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant. We cannot share the California Supreme Court's view that belated cross-examination can never serve as a constitutionally adequate substitute for cross-examination contemporaneous with the original statement. The main danger in substituting subsequent for timely cross-examination seems to lie in the possibility that the witness' "[f]alse testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others, whose interest may be, and often is, to maintain falsehood rather than truth." *State* v. *Saporen*, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939). That danger, however, disappears when the witness has changed his testimony so that, far from "hardening," his prior statement has softened to the point where he now repudiates it.[12]

[11] 5 Wigmore § 1367.

[12] See Comment, Substantive Use of Extrajudicial Statements of Witnesses Under the Proposed Federal Rules of Evidence, 4 U. Rich. L. Rev. 110, 117–118 (1969); 82 Harv. L. Rev. 475 n. 16 (1968).

The defendant's task in cross-examination is, of course, no longer identical to the task that he would have faced if the witness had not changed his story and hence had to be examined as a "hostile" witness giving evidence for the prosecution. This difference, however, far from lessening, may actually enhance the defendant's ability to attack the prior statement. For the witness, favorable to the defendant, should be more than willing to give the usual suggested explanations for the inaccuracy of his prior statement, such as faulty perception or undue haste in recounting the event. Under such circumstances, the defendant is not likely to be hampered in effectively attacking the prior statement, solely because his attack comes later in time.

Similar reasons lead us to discount as a constitutional matter the fact that the jury at trial is foreclosed from viewing the declarant's demeanor when he first made his out-of-court statement. The witness who now relates a different story about the events in question must necessarily assume a position as to the truth value of his prior statement, thus giving the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement. The jury is alerted by the inconsistency in the stories, and its attention is sharply focused on determining either that one of the stories reflects the truth or that the witness who has apparently lied once, is simply too lacking in credibility to warrant its believing either story. The defendant's confrontation rights are not violated, even though some demeanor evidence that would have been relevant in resolving this credibility issue is forever lost.

It may be true that a jury would be in a better position to evaluate the truth of the prior statement if it could somehow be whisked magically back in time to witness a gruelling cross-examination of the declarant as he first gives his statement. But the question as we see it must be not whether one can somehow imagine the jury in "a better position," but whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. On that issue, neither evidence [13] nor reason convinces us that contemporaneous cross-examination before the ultimate trier of fact is so much more effective than subsequent examination that it must be made the touchstone of the Confrontation Clause.

California v. Green, 1970, 399 U.S. 149, 158–161.

The committees are unable to express agreement with the proposed amendment.

RULE 802

The committees express no disagreement with the language of the amendment. See comment under Rule 402.

RULE 803

The committees are unable to agree with the amendment to subdivision (6) of the rule. The amendment limits records within this hearsay exception to those kept in the course of a "business or professional activity." This provision is much narrower than present 28 U.S.C. § 1732(a), which uses the term "business" but defines it rather broadly to include "business, profession, occupation and calling of every kind." The joint committees believed that even this definition was not sufficiently broad to meet present day needs. Compare the definition in subdivision (b) of 28 U.S.C. § 1732.

Subdivision (7) of the rule would require revision to conform with action taken with regard to subdivision (6).

As to subdivision (8), see comment under Rule 301.

The committees are unable to agree with the proposal to delete subdivision (24). The common law developed the existing hearsay exceptions on a case-by-case basis, and this useful process should be permitted to continue. Neither the rulemaking nor the legislative process possesses the promptness and flexibility required to respond effectively to the immediate needs of a live case pending in the trial court. Compare the Subcommittee's proposal in amended Rule 501 that privilege be governed "by the principles of the common law as they may be interpreted

[13] The California Supreme Court in its earlier decision on this issue stated that "[t] his practical truth [the importance of immediate cross-examination] is daily verified by trial lawyers, not one of whom would willingly postpone to both a later date and a different forum his right to cross-examine a witness against his client." *People v. Johnson*, 68 Cal. 2d 646, 655, 441 P. 2d 111, 118 (1968), cert. denied, 393 U.S. 1051 (1969). The citations that follow this sentence are to books on trial practice that shed little empirical light on the actual comparative effectiveness of subsequent, as opposed to timely, cross-examination. As the text suggests, where the witness has changed his story at trial to favor the defendant he should, if anything, be more rather then less vulnerable to defense counsel's explanations for the inaccuracy of his former statement.

by the courts of the United States in the light of reason and experience." A formulation of this sort might be included in subdivision (24) in lieu of deleting that subdivision entirely.

RULE 804

The committees are unable to agree with the proposed amendment to subdivision (a)(5), requiring exhaustion of the possibilities of taking the deposition of the declarant. The most commonly encountered of the hearsay exceptions under this rule is that for former testimony, which in appearance and reality is virtually indistinguishable from a deposition. The suggested additional requirement would compel the wasteful and needless redoing of what has already been done. Depositions are expensive and time-consuming, and the quality of the evidence under all the hearsay exceptions of this rule are such as to justify doing without this needless pretrial complication. In any event, deposition procedures are available for 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 proposed amendment. No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule 32(a)(3) add 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.

The committees are unable to agree with the proposed amendments to subdivision (b)(1). A return to the older common law requirement of identity of the party against whom offered (or privity) is needlessly restrictive. Subjecting the evidence to a winnowing and sifting process by a party with like interests furnishes a guarantee of trustworthiness much like that found in declarations against interest. Modern authority supports this position. *Tug Raven* v. *Trexler*, 419 F. 2d 536 (4th Cir. 1969) (testimony at Coast Guard inquiry admissible in wrongful death action); *Cox* v. *Selover*, 171 Minn. 216, 213 N.W. 902 (1927) (testimony against guarantor with corporate connections admissible against corporate guarantor); *Bartlett* v. *Kansas City Public Service Co.*, 349 Mo. 13, 160 S.W. 2d 740, 142 A.L.R. 666 (1942) (testimony for defendant in suit by husband admissible in suit by wife); *Travelers Fire Ins. Co.* v. *Wright*, 332 P.2d 417 (Okla. 1958) (testimony against one partner in criminal prosecution for arson admissible in action on fire policy by partners). In another respect, however, the amendment appears unduly lenient in failing to incorporate an equivalent of the common law requirement that the issues be identical or at least similar, with a view to insuring that there was adequate motivation to explore the testimony. In lieu of the mechanical method of the common law, the rule as transmitted to the Congress required that the party to the former proceeding have had a motive and interest similar to those of the party against whom subsequently offered.

The committees are unable to agree with the proposal to delete subdivision (b)(2). The subdivision is designed to avoid the loss of valuable evidence, which may be readily evaluated by a jury, and it is carefully hedged about with safeguarding provisions designed to prevent abuse.

The committees are unable to agree with the amendment to subdivision (b)(3). The illogic of excluding the evidence in nonhomicide criminal cases is evident. Thus, under the amendment, in a narcotics prosecution the dying declaration of a gang member who had been "executed" would fail to qualify. Cognizance should be taken of the narrow subject-matter scope of the rule, as safeguarding against abuse.

The committees are unable to agree with certain of the amendments to subdivision (b)(4). The proposal to exclude declarations tending to expose the declarant to civil liability or to undermine a claim that he might assert does, it is true, leave declarations against "pecuniary" interest undisturbed in the rule. The latter is, however, apparently intended to be read in the narrow traditional English sense of an acknowledgement of a liquidated debt. The result is contrary to modern cases, including federal, extending the exception to admissions of tort and other unliquidated liabilities. See, e.g. *Gichner v. Antonio Triano Tile and Marble Co.*, 133 U.S.App.D.C. 250, 410 F.2d 238 (1968) (statement that declarant had smoked in building later found burned, held sufficiently against interest). The proposal also fails to afford a satisfactory answer as to the admissibility of a confession of fault by a decedent in jurisdictions holding that privity between decedent and his administrator is lacking in wrongful death actions with the result that declarations of the decedent are denied the status of admissions. Insofar as the amendments exclude declarations tending to make the declarant an object of hatred, ridicule, or disgrace, the pattern of authority is, of course, much less apparent. It is believed, however, that these factors may furnish a motive more powerful than fear of punishment or financial loss.

The committees express no disagreement with the rephrasing in general of the corroboration requirement of subdivision (b)(4). They do suggest, however, deletion of the word "clearly" as imposing a burden beyond those ordinarily attending the admissibility of evidence, particularly evidence offered by defendants in criminal cases, and as providing a prolific source of disputes and appeals.

The committees express no disagreement with the proposed final sentence to be added to subdivision (b)(4). The wording may, however, invite confusion, and it is suggested that "not admissible" be replaced by "not within this exception." The result is consistent with the Subcommittee Note.

The committees disagree with the proposal to delete subdivision (b)(6) for the same reasons stated concerning the similar proposal to delete subdivision (24) of Rule 803.

RULE 901

The committees express no disagreement with the language of the amendment to subdivision (10). See comment to Rule 402.

RULE 902

The committees express no disagreement with the language of the amendment to subdivision (4). See comment to Rule 402.

The committees agree with the amendment to subdivision (8).

RULE 1001

The committees agree with the amendment to subdivision (2).

RULE 1101

The final form of subdivision (c) will depend upon action taken with regard to Rule 501.

The committees express no disagreement with the language of the amendment to subdivision (e). See the comment to Rule 402.

MATTERS OF STYLE

The committees suggest that the original numbering of the rules be retained, even though a rule or subdivision is deleted entirely. This would appear to be in order as a means of avoiding confusion with regard to the large body of legal literature (opinions, law review articles, texts) in which references to the rules as transmitted to the Congress are already found.

In order to conform to the usage followed in drafting the rules the committees also suggest use of "judge" rather than "court" unless the context clearly requires otherwise. See, e.g., the amendment to Rule 612.

PROPOSED SECTION 2 OF H.R. 5463

The committees approve the proposal to add a section 1657 to title 28 U.S.C., which would confer upon the Supreme Court power to prescribe amendments to the Federal Rules of Evidence. After these rules have become effective by Act of Congress there will undoubtedly arise instances in which amendments will be found to be in the interest of justice and it will be very much in the public interest in this way to make it perfectly clear that the Court is empowered to deal with them. Likewise the committees are satisfied that it is appropriate to require that all such amendments be reported to the Congress and that they shall not take effect until a specified time has elapsed after they have been so reported, the exact length of that period of time being for the Congress to determine.

The proposed amendment further provides that if either House of Congress disapproves any rules amendment prescribed by the Supreme Court it shall not take effect. The committees understand the problem which this proposal is designed to meet but believe that it is unsound in principle and that it might in practice in some instances defeat a necessary exercise of the rule amending power which the section is designed to grant. It is suggested that the problem which the Subcommittee is seeking to meet could be taken care of adequately by a substitute provision that either House of Congress should have authority by

resolution to postpone the effective date of a rules proposal received from the Supreme Court for such a period of time as it might deem necessary to enable the Congress to give full consideration to it and to take action upon it.

The difficulty which the committees see in the proposal to give a single House of Congress veto power over rules proposals of the Court is that it would make it possible for one House to reject a rules amendment of which the other House approves, thus placing the Court in the impossible position of not being able to meet what might be an urgent problem except by a rule which would be destined for rejection by one House or the other. The committees believe that in a matter as vital to the proper administration of justice as procedural rulemaking, the Supreme Court, having been given primary responsibility, is entitled to have any action by the Congress in this field take the form of binding law, just as the Subcommittee is proposing to do in the case of the Federal Rules of Evidence, and not as a mere negative reaction from a single House.

It is believed, as suggested above, that both objectives, i.e., the need of each House of Congress to have ample time to consider and act upon rules amendments and the need of the Supreme Court, the bench and the bar to have the guidance of statutory law when the Congress acts in this area, will be met if each House is given independent authority to postpone the effective date of a rules proposal prescribed by the Supreme Court for a period of time sufficient to enable both Houses to act on it.

DISTRICT OF COLUMBIA DEFENSE LAWYERS ASSOCIATION,
Washington, D.C., July 31, 1973.

HON. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Members of the District of Columbia Defense Lawyers Association have followed with interest the formulation and development of the proposed Federal Rules of Evidence as set forth in H.R. 5463. The opportunity to comment upon the rules, in particular, proposed Rule 705, entitled "Disclosure of Facts or Data Underlying Expert Opinion," is most welcome. As presently formulated, Rule 705 represents a marked and rather startling departure from the present rule which places upon the proponent of expert testimony the responsibility for disclosing in advance its evidentiary basis.

In order to appreciate the significance of this departure, one must first reexamine the nature and function of expert testimony. Uniquely, expert witnesses, once qualified, may testify as to their opinion upon strictly limited topics. See Proposed Rule 702. No other witness may offer his opinion, nor may experts qualified in one area offer an opinion in another. The reason for this is clear. Opinion evidence is desirable only in those areas of special expertise which the jury, or the judge as the case may be, lacks.

In those areas, the witness is capable of forming an opinion which the jury, or the judge, could not. On all other matters, the jury alone is authorized to form opinions and draw inferences. For example, where the witness' knowledge and experience is no greater than that of the jury, to allow such a witness to express an opinion is to invade the province of the jury.

"It is settled law in Virginia that expert evidence is inadmissible on matters of common knowledge or those as to which the jury are as competent to form an intelligent and accurate opinion as the witness." *Grasty* v. *Tanner*, 206 Va. 723, 146 S.E. 2d 252, 254 (1966) citing *Venable* v. *Stockner*, 200 Va. 900, 904 108 S.E. 2d 380, 383–384 (1959); *Richardson* v. *Lovvorn*, 199 Va. 688, 693, 101 S.E. 2d 511, 514 (1958).

As with other evidence, however, the jury has the responsibility of evaluating expert testimony. Clearly, in order to conduct this evaluation the jury must know the precise evidentiary basis for the expert opinion. The judicial process requires that the facts underlying the opinion be identified, and there is no valid reason to relieve the proponent of the opinion evidence of the duty to bring those facts to light. In fact, there are cogent and compelling reasons to retain the traditional requirement that he do so.

The majority rule which H.R. 5463 would displace is that the opinion may be based upon the witness' own knowledge of facts as disclosed in his testimony or upon facts in evidence presented in a hypothetical question. *Walrod* v. *Matthews*, 210 Va. 382, 171 S.E. 2d 180 (1969). The hypothetical question must assume all the facts "disclosed by the evidence material to the theory of the case as

viewed from the side propounding the question." *Kale* v. *Douthitt*, 274 F. 2d 476, 482 (4th Cir. 1960); *Waitt* v. *Commonwealth*, 207 Va. 230, 148 S.E. 2d 805, 810 (1966); *Ames & Webb, Inc.* v. *Commercial Laundry Co., Inc.* 204 Va. 616, 133 S.E. 2d 547, 550–551 (1963). And, the question is incompetent if it omits *any* material fact essential to the formation of a rational opinion or if it assumes *any* material fact not supported by the evidence. *Kale* v. *Douthitt, supra*, 274 F. 2d at 482.

In addition, the hypothesis must be clearly stated so that the jury will know with certainty the assumed facts upon which the expert bases his opinion, If the jury then finds the facts to be different from those assumed by the expert, the opinion should be rejected:

> "The jury must be informed of the facts or assumed facts upon which the expert's opinion is based and there must be evidence to support such facts, but it is for the jury to determine whether they exist or not and, if the jury's findings on controverted questions of fact is contra to the premises upon which the expert bases his opinion, his opinion falls with the premise. *State ex rel. Solomon* v. *Fishel*, 228 Md. 189, 179 A.2d 349, 354 (1962) (citations omitted).

Similarly, the opinion itself must take into account all relevant factors:

> "[I]t [the expert's opinion] was not receivable if he failed to take into account every relevant factor. *Kale* v. *Douthitt*, 274 F.2d 476 (4 Cir. 1960)". *Whittaker* v. *Van Fossan*, 297 F.2d 245, 246–47 (4 Cir. 1961) (per Bryan, J.).

More important still is the requirement that the expert testify only on the basis of facts in evidence. *Meade* v. *Belcher*, 212 Va. 796, 188 S.E.2d 211, 214 (1972). *Stonegap Colliery Co.* v. *Hamilton*, 119 Va. 271, 89 S.E. 305 (1916).

In *Grasty* v. *Tanner*, 206 Va. 723, 146 S.E.2d 252 (1966), for example, the opinion evidence of an expert as to speed was held inadmissible because the witness based his opinion partially upon certain assumptions of matters not in evidence:

> "Moreover, even if we were of opinion that the testimony of [the expert] as to speed was proper and necessary because the jury needed his scientific knowledge to enable them to arrive at the right of the matter, his evidence was inadmissible for another reason. There were certain variables which he did not consider in arriving at his opinion regarding the speed of the Grasty car at the time of the impact."

Even when the question eliciting the opinion is hypothetically posed, it is improper if it assumes a single fact not supported by the evidence. *Virginian Ry.* v. *Bell*, 118 Va. 492, 87 S.E. 570 (1916).

But most important, and this we believe is the principal objection we have to the proposed rule, it would seem beyond argument that, although the expert may have heard all the factual testimony in the case, he should not be asked to give his opinion based merely upon having heard such testimony, unless all the facts upon which his opinion is based are set out in a hypothetical question. Otherwise, the jury has no way of knowing which of the conflicting facts were relied upon by the expert as the basis for the opinion, which facts he accepted and which facts he chose to reject. In doing so he would be usurping the fact-finding function of the jury:

> "All courts agree that if there is any conflict between the witnesses as to the material facts on which an expert opinion is sought, or such facts are doubtful and remain to be found by the jury, the expert witness cannot, although he has heard the testimony, be asked to base his opinion on that testimony, because, to reach his conclusion, he would necessarily have to invade the province of the jury and pass on the credibility of witnesses and the weight of the evidence." 31 Am. Jur. 2d Expert and Opinion Evidence, p. 545 n. 10 (emphasis added and citations omitted).

In short, it is improper to allow the witness "not merely to give his opinion upon facts, but to ascertain and determine what the facts are." *Dexter* v. *Hall*, 15 Wall. (U.S.) 9 at 26–27, 21 L.Ed. 73 at 79 (1872). *See also Livingston* v. *Commonwealth*, 55 Va. (14 Gratt) 592 (1857).

Under proposed Rule 705, however, the opinion will be heard and received in evidence before its basis is revealed. The jury may thus be exposed to opinions without any basis in the evidence as well as opinions based upon the witness' improper selection and evaluation of the facts. Nor is it any real answer to this basic problem to say that, technically, the fact that the expert indulged in proscribed "fact finding" can be brought out upon cross-examination. This simply does not cure the basic unfairness in allowing inadmissible and improper opinion testimony to be considered by the jury. The likelihood of confusion, prejudice, and error is simply too high. On the other hand, where the proponent is required to set forth the factual basis before the opinion is offered, improper testimony can in most instances be avoided.

Accordingly, we believe that Rule 705 should be amended to require that the basis of the expert's opinion be set forth in a hypothetical question so that the jury will be informed of the precise basis and so that improper opinion testimony will be avoided.

Sincerely yours,

FRANK J. MARTELL,
President, Defense Lawyers Association.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., July 31, 1973.

In re Federal Rules of Evidence.

Hon. WILLIAM HUNGATE,
Chairman, Subcommittee on Criminal Justice, House Judiciary Committee, Rayburn House Office Building, Washington, D.C.

DEAR MR. HUNGATE: I appreciate your courtesy in furnishing this office a copy of the Committee Print of a tentative Subcommittee draft of H.R. 5463, a bill to establish the Federal Rules of Evidence.

In my opinion the enactment of Rule 408 in the form proposed by the Supreme Court and adopted in the draft bill would, because of the second sentence thereof, unduly interfere with the process of ascertaining the true facts in litigation. In many instances reliable and relevant evidence which could be of great value to the fact finder would be lost to the litigating process. The rule would affect both civil and criminal tax cases.

In the criminal tax area I can envision many legal problems with Rule 408 as it is proposed. Under this rule the trial of a criminal tax case could deteriorate into a series of motions, hearings, and rulings by the Court upon taxpayers (defendant) objection(s) that each document, statement or admission was submitted only in furtherance of compromise negotiations. The rule would definitely have an adverse effect on the Government's use of admissions made by a taxpayer to Service personnel and Department of Justice attorneys.

On the civil side there would be the threshold problem of defining the point where compromise negotiations begin. The second sentence of Rule 408 would undoubtedly have the undesirable effect of generating controversies as to whether statements of fact were "made in compromise negotiations" or not. I can foresee the argument by taxpayers that any statements made by them to revenue agents during the course of an audit were for the purpose of compromising the agent's proposed adjustments to their reported tax liabilities. While the revenue agent's role is primarily investigative, he does exercise some de facto settlement authority in the course of discharging his responsibility as a fact-finder. The privilege would probably be applicable to statements made by the taxpayer or his representative in the course of the district conference. It would clearly be applicable to the taxpayer's protest to the appellate division of the Internal Revenue Service as well as any statements submitted thereafter during appellate's consideration of the case. The administrative consideration of the issues raised on audit of tax returns is so often partly investigative and partly settlement oriented that any privilege accorded to statements of fact made in compromise negotiations might well be a severe handicap to the later development of facts in litigation of tax cases. Similar definitional problems will arise after an assessment where a revenue officer is seeking information concerning the financial status of a taxpayer relative to possible collection action prior to the submission of an offer in compromise.

Regardless of how this definitional problem may be resolved, I seriously question whether it is in the public interest to accord an evidentiary privilege to any statements submitted to the Internal Revenue Service by taxpayers during the administrative consideration of the issues raised on the audit of their returns or after assessments while collection efforts are being undertaken. In my view taxpayers and their representatives should be held strictly accountable for the accuracy of any factual representations made by them to the Internal Revenue Service regardless of the reasons for such representations.

The only reason advanced by the Advisory Committee on the Rules of Evidence for the adoption of the second sentence of Rule 408 is to promote "freedom of communication with respect to compromise." However, if this goal can be achieved only through conferring immunity upon the communicators, it appears to conflict with more important public policy goals, especially where one of the parties in the controversy or litigation is a Government agency. The advantage in greater "freedom of communication with respect to compromise," which I think may be

somewhat marginal, must be balanced against the disadvantages of (1) the complete loss of a substantial body of reliable evidence (mainly consisting of admissions of fact), (2) greater inconvenience and expense in preparing evidence for trial, and (3) the generating of controversies as to whether statements of fact were "made in compromise negotiations" or not.

I am aware of no criminal penalties for factual misrepresentations made during negotiations to settle a controversy between two private parties. On the other hand there is a strong public policy, implemented by various criminal sanctions, of discouraging false statements to federal Government agencies. For example, I invite your attention to section 7206 of the Internal Revenue Code. I do not suggest that enactment of Rule 408 would encourage direct violations of these criminal statutes. But the public policy they express would certainly be undermined by assuring taxpayers that, unless criminal intent can be shown, they have no responsibility for the accuracy of any factual representations they may make in the course of settlement negotiations with the Internal Revenue Service.

The proposed privilege would also, in my opinion, tend to obstruct the fair and efficient administration of the internal revenue laws. The administrative settlement machinery of the Internal Revenue Service was designed with the objective of securing a fair and speedy resolution of tax controversies at the lowest administrative level possible. In many instances, where the facts are peculiarly within the taxpayer's control and not readily subject to independent verification, the administrative decision whether to settle or litigate may be based primarily on the taxpayer's factual representations. If the taxpayer is accorded the privilege of suppressing such representations in the event of litigation, the Internal Revenue Service will be forced to re-examine the reliability of its informal fact-finding procedures. The result might well be increased use of the administrative subpoena power to ensure a clear separation between the settlement and investigative functions of the Service. If so, the additional cost of the average audit in terms of both time and expense would be significant. This would in turn result in either fewer audits or increased audit manpower, as well as additional expense and delay to taxpayers whose returns are selected for audit. In addition, it may be necessary to prescribe more onerous record-keeping requirements pursuant to Internal Revenue Code section 6001 to increase the likelihood that privileged taxpayer statements will be subject to documentary corroboration.

It appears to me that the common law rule has worked well over the years, and the courts in developing the rule have intentionally and wisely refrained from extending the privilege to independent statements of fact. Since I doubt that the advantages of departing from the common law rule are sufficient to outweigh its disadvantages, even in litigation between private parties, I recommend that the second sentence of Rule 408 be deleted from the draft bill. If this is not possible, then I recommend that the operation of the privilege for factual statements and conduct be restricted to litigation between private parties. For the reasons discussed above, the policy reason for extension of the common law privilege to independent statements of fact submitted during compromise negotiations does not seem fully applicable to controversies between a citizen and his Government, particularly tax controversies.

If my staff or I can be of any further assistance to the subcommittee in your consideration of this important legislation please don't hesitate to call upon us.

In view of your request for the expedition of this report, it has not been possible to obtain the customary clearance by the Office of Management and Budget prior to its submission.

Sincerely yours,

DONALD L. E. RITGER,
Acting General Counsel.

UNIVERSITY OF CINCINNATI,
Cincinnati, Ohio, July 31, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE HUNGATE: Your subcommittee has made some notable improvements in the Proposed Federal Rules of Evidence. For example, it was sound to delete F.R.E. 201(g), a provision that probably invaded a criminal defendant's right to trial by jury.

As enclosed articles reflect, I have studied the federal rules of evidence since they were in the Preliminary Draft Stage and have believed since that time that

they gave insufficient recognition to the principle of *Erie* v. *Tompkins*. See, The Proposed Rules of Evidence: An Introduction and Critique, 39 U.Cin.L.Rev. 469–471 (1969). Your sub-committee recognized this fact in the rules on privileges (501) and witnesses (601). I would point out that the Erie principle was also ignored in article IV, Relevancy and its Limits. For example, rule 407 excludes evidence or subsequent remedial measures when offered to prove negligence or culpable conduct. As the Advisory Committee notes, the rule is not based on relevance, but on the goal of encouraging (or at least not discouraging) defendants from making repairs after an accident has occurred. The rule may not achieve this goal because many defendants would make the repair even if the evidence was admissible against them. In any case, whether the evidence is excluded or not should be a matter of state policy where state law governs. (See the enclosed article, The Exclusionary Rule on Evidence of Repair—A Rule in Need of Repair.) A similar situation would exist with any rule whose purpose is not finding truth or expediting a trial, but rather promoting some other value and excluding evidence on that basis.

There is one change that the sub-committee made that does deserve reconsideration. That is the decision to place the creation of privileges on a case law basis in situations where federal law governs. In that connection, it should be noted that for privileges to be effective, the parties protected by them should know of their existence and be aware of their configurations. More specifically, a client talking to an attorney should know whether or not his statement will be admitted in federal court in a matter arising under federal law. Although the Advisory Committee on the rules overreached in attempting to apply the rules on privileges to state law claims, it did achieve a degree of predictability with respect to privileges that would serve to benefit the ordinary citizen. I would suggest that all the privileges that do not directly involve the government be retained as they were drafted by the advisory committee and the rules indicate that they are only applicable in cases arising under federal law.

As the enclosed writings reflect, I have other observations about the rules and would be pleased to expand upon those that I set forth herein. Should your committee desire that I testify, please call my office (513–475–2631), I would be more than happy to help.

With highest regard, I am

Respectfully yours,

VICTOR E. SCHWARTZ,
Acting Dean, Professor of Law.

Enclosures

NOTE.—The three attached articles not printed herein are:

1. Victor E. Schwartz, "The Exclusionary Rule on Subsequent Repairs—A Rule in Need of Repair," *The Forum* (New York: American Bar Association, October, 1971), Vol. VII, No. 1, pp. 1–7.

2. Victor E. Schwartz, "The Proposed Federal Rules of Evidence: An Introduction and Critique," *The University of Cincinnati Law Review* (Cincinnati: The University of Cincinnati, 1969) Vol. 38, No. 3, pp. 449–483.

No. 3. Victor E. Schwartz, "Evidence," *Virginia Law Review* (Charlottesville: The University of Virginia, 1970) Vol. 56, No. 7, pp. 1325–1355.

U.S. DISTRICT COURT,
Pittsburgh, Pa., August 2, 1973.

Re Federal Rules of Evidence H.R. 5463.

Hon. WILLIAM L. HUNGATE,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN HUNGATE: I have a letter from Mr. Foley of the Committee on Rules of Practice and Procedure of the Judicial Conference relative to proposed rules of evidence as changed by your subcommittee after several weeks of hearing.

The only matter I wish to comment on is the preservation of the dead man's rule. In diversity cases arising in states such as Pennsylvania where we sit, this is firmly embedded in the state law and to permit a different result to occur in federal court than if the case were tried in Pennsylvania State court is certainly not desirable.

Very truly yours,

WILLIAM W. KNOX,
District Judge.

BERMAN, BERMAN & SIMMONS, P. A.,
Lewiston, Maine, August 2, 1973.

Re H.R. 5463.

SUBCOMMITTEE ON CRIMINAL JUSTICE,
Committee on the Judiciary, House of Representatives,
Washington, D.C.

GENTLEMEN: I am writing to offer my comments on the proposed bill to establish the Federal Rules of Evidence. I write as a member of the Bar of the States of Maine and Massachusetts. The following comments reflect my personal views as an attorney engaged in litigation in both the State and Federal Courts.

Rule 105.—I agree with the Committee's proposed deletion of this rule. While the rule states the present practice in Federal Courts, many State jurisdictions have a contrary rule. I believe that a Judge ought to be able to fairly and impartially sum up the evidence but should not be allowed to comment upon the weight of the evidence and the credibility of the witnesses.

Rule 106.—It is my belief that, in criminal cases, limiting instructions are practically meaningless to a jury. See Bruton v. U.S., 88 S.Ct. 126. It would be my suggestion that evidence, in criminal cases, which is admissible as to one defendant but not admissible as to another should not be admitted into evidence. It seems to me that the prosecution, if it feels that such evidence is a necessary part of its case, could move to sever the trial of the joint defendants at the beginning of the proceedings.

Rule 107.—I have no objection to the proposed rule but question as to whether it goes far enough. There are times, in the trial of a case, when a written or recorded statement is used in a negative manner. For example, a prior written statement may not contain information about which the witness has testified and this fact is brought out in cross-examination. Fairness may require that the statement, or at least a portion thereof, ought to be considered contemporaneously with the negative inferences.

Rule 201(g).—I do not believe that the Subcommittee ought to delete this subsection. It seems to me that an improperly judicially noted fact is an appellate question and not for jury determination. The question of the propriety of taking judicial notice of a matter should be decided outside the presence of the jury.

Rule 601.—I understand the Subcommittee's concern with the rule as proposed and the rationale for the amendment. However, I believe that the proposed rule is a proper one and should be adopted. The original Advisory Committee's note pointed out that, with the exception of the Dead Man's Acts, American Jurisdictions generally have ceased to recognize grounds of incompetency not otherwise spelled out in other rules. The Dead Man's Statutes are anachronisms. The only justification for amending the rule is to avoid forum shopping in diversity cases. However, forum shopping has long been recognized as legitimate in the American Judicial System. See generally, Ladd Privileges, 1969 Ariz.St.L.J. 555.

The existing Federal Rules of Civil Procedure already support the proposition that the Federal Courts may, even in diversity cases, apply a broader range of admissibility. See e.g., Rule 43(a).

Rule 607.—I would think that before a party is allowed to impeach his own witness he should first be required to prove either that the witness is hostile or that there is some independent basis to infer that the witness is committing perjury. The contemplated rule opens the door for fishing expeditions and the bringing forth of facts by counsel through cross-examination and leading questions. I am convinced that juries are sophisticated enough to remember the source of their information.

Rule 609.—It has been my experience that impeachment by evidence of conviction of a crime can deny a defendant a fair trial. The juries do not understand nor accept the limiting instruction that the evidence is admissible solely for the purpose of attacking credibility. Many defendants do not take the stand in their own behalf because they believe that evidence of a prior conviction would be disastrous to their chances for a fair trial. I would recommend that only convictions of offenses bearing on credibility should be admissible.

Rule 611.—I believe the proposed "wide open" rule is preferable to the limiting rule suggested by this Committee. There seems nothing to be gained by hypothecating a witness' testimony. Further, it would seem desirable for a jury to hear all of a witness' testimony at one time.

Rule 613.—Under this rule, a defendant, in a criminal case, if he takes the stand, is subject to complete impeachment. I believe that some safeguards should be inserted in this rule. The rule, as presently written, raises substantial constitutional questions.

Rule 701.—This rule permits the rendering of opinions or the explanation of inferences by lay witnesses so long as the opinions are "rationally based on the perception of the witness . . ." This would appear to be contrary to the general rule that only experts may testify as to an opinion. I fail to see an overwhelming Federal question that requires such a change. This is especially true since this Committee was concerned with State policy in conjunction with Rule 601. It seems to me that the question of who might give an opinion should be determined by State Law.

Rule 801(d).—I believe that existing Federal Law, which permits the use of prior inconsistent statements for impeachment purposes only, is a desirable rule. The Committee's compromise is preferable to the proposed rule.

Rule 803(24).—I fully concur with the Subcommittee's decision to delete this subsection. The proposal that any statement which has circumstantial guarantees of trustworthiness should be admissible as an exception to the hearsay rule could, in my opinion, make the hearsay rule completely unintelligible. This is especially true when the proposal is read in conjunction with Rule 103. It seems to me that if sub 24 was adopted, the Rules of Evidence would differ from Court to Court and from Judge to Judge. Certainly, this is not a desirable objective.

Rule 804.—I concur with the Subcommittee's changes to the proposed rule for the reasons set forth in the Subcommittee's notes.

I hope that this letter will be of help to you in your deliberations. If there is any further information you desire, I would be happy to attempt to provide it.

Thank you for your courtesy and cooperation.

Very truly yours,

JACK H. SIMMONS.

U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT,
Abingdon, Va., August 2, 1973.

HON. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, House Judiciary Committee, U.S. House of Representatives, Washington, D.C.

DEAR MR. HUNGATE: I have been at NYU at a seminar for the past two weeks and during my absence received H.R. 5463. So, it was not possible for me to comment on the rules by July 31st. Indeed, if I had been here, the shortness of time allowed would have made it difficult to give much intelligent comment without dropping some significant part of the work of the court.

I realize a great deal of time and work have gone into making up the proposed rules by members of the bar, the Judicial Conference, and the committees of Congress.

Nevertheless, since comment has been invited I believe I should tell you in all candor that I cannot see that they have any virtue except uniformity. If specific rules of evidence are sought to be changed, I should think that is more properly a matter for Congress to undertake than a revamping of the entire Federal Rules of Evidence. For example, 28 USC § 1732 was such a change for many courts.

The field of evidence is constantly developing and I think is more properly left to the courts on a case-by-case basis where the admissibility of evidence must be decided in view of a precise factual situation according to the common law tradition, rather than be subjected to an all-embracing set of rules, some of which would be consistent with existing rules and possibly just as many of which will be inconsistent with them. The routine day-to-day rules of evidence, of course, are very nearly the same in all state and federal courts. It is only in the close situations that new rules or exceptions develop, and, with all respect, I submit that these situations are more properly justly decided in the light of a precise factual situation than covered by rules promulgated in advance.

Indeed, I also venture to guess that the promulgation of the proposed set of rules will certainly lead to a fresh batch of litigation of significant quantity over the construction of the rules. As you know, the ingenuity of lawyers is endless. This is really the strength of the adversary system.

To offer only one brief comment on a particular rule, I refer to proposed Rule 406. Suppose a person is charged in an automobile accident case with running a red light. The fact that he has run red lights before or is in a habit of running them, I should think, would be very prejudicial and irrelevant as to whether or not he ran the red light on the occasion in question. Similarly, and equally irrelevant and prejudicial, would be the fact that he had stopped at red lights in the past or makes a habit of stopping at them.

This is only one of many departures from rules of evidence most of us have grown up with, which seem to indicate to me that the broad reach of the proposed rules will be to convert rules of evidence in the courts to more nearly conform to rules of evidence in administrative hearings, where, all of us know, most objections are considered only as going to the weight of the evidence and not to its admissibility. For example, due to the tremendous commercial growth in this country and the increasing reliance of everyone on records and books of account, the Business Records Act may have been necessary and a recognition of a fact of life. I do not feel it appropriate, for the sake of uniformity alone, to enact what will be a complete code of evidence but believe the interests of justice would be promoted by correcting now what may need to be corrected, leaving the balance for development by the courts on a case-by-case basis in accordance with common law tradition which has served so well over the centuries, other than in unusual circumstances when legislatures properly have acted on the matters at hand.

I know, and hope you will draw the conclusion from this letter, I would be just as happy if Congress rejected all of the proposed rules at this time as they are offered in a bunch but might make such corrections as seem appropriate and needed by the society in which we live.

I thank you for the opportunity to comment and hope the lateness of this letter may be excused. Had I more time, there are more comments I would have to make on specific rules.

I think I have an inborn hesitation about creating uniformity for its own sake, and that is really my big reluctance and the reason for the nature of this response.

Sincerely,

H. E. WIDENER, Jr.

COMMITTEE ON FEDERAL COURTS,
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
New York, August 2, 1973.

HON. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. HUNGATE: I enclose our comments respecting H.R. 5463.

They are divided into four sections:

1. A report approving the scheme by which future changes may be made to the Federal Rules of Evidence, but making various technical suggestions with respect to the proposed addition to Title 28.

2. A report on the section dealing with privileges, Rule 501, approving of the change.

3. A report on the hearsay sections, generally approving the changes, with exceptions:

(*a*) We suggest reconsideration to Rule 804(a)(5).

(*b*) We suggest deleting the "civil action" application for dying declarations—Rule 804(b)(2).

(*c*) We think it unwise to include a requirement of corroboration as a test of admissibility with respect to statements against interest—Rule 804(b)(3).

4. A report on various other sections, approving the changes.

Our more intensive study reinforces the initial opinion we offered—that the Committee is to be commended for a most thorough, scholarly revision of the Federal Rules of Evidence.

We are glad to have offered our help, and we stand ready to assist with respect to any additional studies that might be desired.

Very truly yours,

ALVIN K. HELLERSTEIN.

SECTION 1

STATUTORY AUTHORITY FOR THE FEDERAL RULES OF EVIDENCE

The House Subcommittee's bill enacts the Federal Rules of Evidence, retaining most of the language of the rules as promulgated by the Supreme Court, but making certain changes. It also, by section 2 of its bill which adds § 1657 to Title 28, grants the Supreme Court a continuing power to amend the Federal Rules of Evidence, subject to Congressional veto.

As a matter of draftsmanship, one may doubt whether the grant of power to amend the Rules of Evidence should be located in Chapter 111, entitled "General Provisions", of Title 28. There are three chapters of Title 28—Chapters 115, 117, and 119—dealing with evidence, but they are concerned with documentary evidence, depositions, and witnesses, and have no place for a section granting

rulemaking power. It would seem more logical to put the proposed section into Chapter 131, "Rules of Courts", perhaps as § 2076, so that it will be near § 2072, "Rules of civil procedure", and § 2075, "Bankruptcy rules".

§§ 2072 and 2075 provide that laws in conflict with the respective rules shall be of no further force and effect once the rules take effect, and a similar provision is found in proposed § 1657. Both §§ 2072 and 2075 have a provision that proposed § 1657 does not have, that the respective rules "shall not abridge, enlarge, or modify any substantive right . . ." It is unclear why this provision is not found in proposed § 1657. Rules of evidence are generally regarded as procedural, as our committee pointed out in its submission to the House Subcommittee earlier this year; so perhaps it was thought a reference to substantive rights was not necessary. On the other hand, § 2072, dealing with rules of civil procedure, finds it necessary to refer to substantive rights.

Proposed § 1657 draws on the legislative practice in connection with reorganization plans. Our submission to the House Subcommittee referred to the procedure under 5 U.S.C. §§ 903 and 906(a), whereby reorganization plans are submitted to Congress by the president and take effect after 60 days unless either house before that time passes a resolution disapproving the plan. Proposed § 1657 allows amendments to the Federal Rules of Evidence to take effect within 180 days after they have been reported to Congress by the Chief Justice, unless either House within that time passes a resolution disapproving any amendment.

Under proposed § 1657, either House would exhaust its function by passing a resolution of disapproval. If it wished to substitute something for the disapproved amendment, it would have to do so by the usual method of statutory enactment. In other words, while one House could disapprove an amendment promulgated by the Supreme Court, only Congress could, by passing a bill, substitute something for the disapproved amendment.

Congress of course retains the power to change the Rules of Evidence at any time and in any way it wishes, as long as it does so by statutory enactment.

The House Subcommittee's bill is an example of a responsible assertion by Congress of a power to operate in a field in which both it and the courts have rights and duties.

SECTION 2.—RULE 501 (H.R. 5463)

We approve Rule 501.

The treatment of privileges by H.R. 5463 avoids the criticisms of the Advisory Committee Draft by preferring continued case-by-case development and by not excluding state rules of privilege from consideration by federal courts in appropriate circumstances. Rule 501, which is to be the only rule regarding privilege, deals not with privileges per se, but rather the source of law to be applied in ruling on a question of privilege. The source of law is to be federal in criminal actions and in civil actions where federal law supplies the rule of decision for a claim or a defense. In those situations, federal courts are to be guided 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" (see R. 26, Fed. R. Crim. Proc.). In other actions, that is, in actions for which the rule of decision for a claim or a defense is supplied by the law of a state, the question of privilege is to be determined according to the law of that state.

This treatment is more consistent with the principles of federalism than the Advisory Committee treatment.

In our report on the Preliminary Draft of the Rules of Evidence, we recommended that state law should govern the rule of privilege even where the federal courts were dealing with criminal matters or matters where the governing substantive law was federal. However, our extended discussion of the subject was sympathetic to a treatment such as that now expressed in H.R. 5463, and we support the treatment of the draft bill.

This treatment may not be without difficulties in civil actions where federal courts are required to receive evidence relevant to both federal and state claims and defenses, especially where a jury may be involved. However, we believe that there will be very few cases in which such problems may materially affect the outcome and, furthermore, that the interests of federalism outweigh the possibility of this difficulty.

SECTION 3.—HEARSAY

The House Subcommittee's changes in Article VIII, dealing with hearsay, are not extensive and, while some may be disagreed with, need not be objected to.

Rule 801(d)(1) provides that certain types of prior statements of a witness do not constitute hearsay. Among these were prior inconsistent statements. The

Advisory Committee's notes made it clear that the prior statement would now be admissible as proof of the facts stated therein, rather than merely to impeach the present testimony of the witness. (Compare the well-established rule that disbelief of a witness does not justify a finding to the opposite of what he testified to.) The House Subcommittee was concerned that prior inconsistent statements not under oath might now be admissible as proof of facts. It therefore added a proviso that a prior inconsistent statement should be admissible as proof of facts only if given under oath or affirmation at a trial, hearing, or deposition, or before a grand jury. The Subcommittee's Note states that its version of the rule is patterned after the position of the Second Circuit.

Whether juries are able to distinguish between statements offerend only to impeach and statements as proof of facts is an unanswered question, but the requirement of the added solemnity of an oath at an official court proceeding seems a proper one.

Rule 802 changes the reference to "rules adopted by the Supreme Court" so that it reads "rules prescribed by the Supreme Court pursuant to statutory authority . . ." This change indicates the heightened consciousness of the Congress over its power to control the rule-making power of the courts.

Rule 803(6) deals with records kept in the course of a regularly conducted activity. The House Subcommittee thought the exception should be confined to records made in the course of a regularly conducted business or professional activity, if it was the practice of the business or professional activity to make the records. Since the exception for regularly kept records almost always arises in the case of business entries, the House Subcommittee's narrowing of the provision will probably not be significant.

Rule 803(7) deals with the absence of regularly kept records as proof of the nonoccurrence of the matter that, had it occurred, would have been recorded. The House Subcommittee ties this provision to subdivision (6), so that only non-entries in business or professional records may be considered.

Rule 803(8) changes the expression "civil cases" to "civil actions".

Rule 803(16) changes the expression "whose authenticity is established" to "the authenticity of which is established".

Rule 803(24) and *Rule 804(b)(6)* are the open end provisions, allowing exceptions that are not covered by the listed exceptions but that have comparable circumstantial guarantees of trustworthiness. When these provisions were being considered by our Committee, some question was raised whether they were not too broad. The prevailing opinion was that the hearsay rules should not be inflexible. It was thought proper, however, to change the wording of the original draft of the rules, which labeled the exceptions to the hearsay rule as examples of the inapplicability of the rule. The Advisory Committee accepted our views. While our committee's views were the product of careful consideration of the problem, this particular part of the hearsay rule does not appear to be one in which we should continue to urge our views. The House Subcommittee's deletion of the open end provisions does not impair the flexibility of the hearsay rule.

Rule 804(a)(5) defines unavailability of a witness to include a situation where he is absent from the hearing and the proponent has been unable to procure his attendance by process or other reasonable means. The House Subcommittee includes the words "or testimony" after "attendance", the idea being that the proponent should attempt to take the deposition of a person as a precondition to his being deemed unavailable as a witness.

This amendment would seem to require further thought to determine to what extent it will complicate court proceedings. If a person is in a foreign country and not subject to subpoena, will it now be necessary for the party seeking to introduce his hearsay statement to obtain letters rogatory in the hope of examining him in the foreign country? How much effort must be expended before a person is declared unavailable? Compare the recent case of *Mancusi* v. *Stubbs*, U.S. (1972), in which the Supreme Court held that the prior testimony of a witness who had given his testimony in the United States but had then gone to Sweden could be used in a criminal trial on the ground of the witness' unavailability, even though the prosecution had made no attempt to induce the witness to return.

In criminal cases, the question of the diligence used to secure the attendance of an absent witness can become a constitutional one, inasmuch as the use of prior testimony violates the confrontation clause of the Constitution, unless due diligence has been used to find the missing witness. *Barber* v. *Page*, 390 U.S. 719 (1968).

Rule 804(b)(1) is to be compared with Rule 801(d)(1). Rule 801(d)(1) deals with prior testimony by an available witness, who can be cross-examined now about what he said then. Rule 804(b)(1) deals with prior testimony of a person who is

unavailable now, but who was or could have been cross-examined then. The House Subcommittee has narrowed the rule so that the prior testimony is admissible only if the person against whom it is now offered, or a predecessor in interest, had had an opportunity to examine at the previous trial. The House Subcommittee disapproved of the rule as promulgated, which allowed prior testimony to be admissible if it had been subject to cross-examination by someone "with motive and interest similar to those of the party against whom now offered . . ." The House Subcommittee thought it unfair to make a party responsible for the way someone else has previously handled the witness, unless the party's predecessor in interest had the prior opportunity to examine.

Rule 804(b)(2) would have made admissible statements of recent perception, as long as not made in connection with pending or anticipated litigation. The Advisory Committee's notes indicated that the law was moving in the direction of the rule, although by slow statutory steps. The best justification for the rule would seem to be in states that do not have the dead man statute: if an interested person may testify against the estate of a decedent, it is only fair to hear what the decedent had said upon the subject. The great fear is that statements will be made after litigation is contemplated. The rule as promulgated excluded such statements. The House Subcommittee thought the rule too broad, even in its limited form, and deleted it. The House Subcommittee did not believe that statements of recent perception bore enough guarantees of trustworthiness to justify their admission. Our committee had not taken a position on this exception. On balance, it would seem that the action by the House Subcommittee should not be objected to.

Rule 804(b)(2) (renumbered from Rule 804(b)(3)) has been amended by the House Subcommittee to allow dying declarations in prosecutions for homicide and in civil cases. The draft had allowed dying declarations in all cases. The House Subcommittee's action seems somewhat inconsistent. On the one hand, it recognized that dying declarations are not among the most reliable forms of hearsay; it therefore limited their use to homicide cases, "where exceptional need for the evidence is present." But it extended the exception to civil cases. Our committee had favored broadening the exception from homicide to all criminal cases, but not to civil cases.

Rule 804(b)(3) (renumbered from Rule 804(b)(4) deals with statements aginst interest. The usual form of the rule limits the exception to statements against pecuniary or proprietary interest. There has been a recent broadening to include statements tending to subject the declarant to criminal liability. The House Subcommittee does not go as far as the draft in broadening the exception to statements tending to subject the declarant to civil liability or to render invalid a claim by him or to make him an object of hatred, ridicule, or disgrace. The House Subcommittee also views askance statements inculpating the declarant and exculpating the accused in a criminal trial. It would not make such statements admissible unless corroborating circumstances clearly indicate trustworthiness.

There is a methodological problem here that should be touched on. The hearsay exceptions are permitted because the law makes a rough determination that certain statements are sufficiently probative to justify being admitted, but their weight is at all times for the trier of facts. To condition admissibility upon a showing of corroborating circumstances indicating trustworthiness is in effect to decide what weight the declaration against interest should have as a concomitant to admitting it. The judge will apparently decide the question of admissibility himself, Rule 104(a), and it may be necessary for him to hold a preliminary hearing—perhaps out of the hearing of the jury, Rule 104(c)—with attendant disruption of the trial. In short, how much preliminary inquiry should there be to determine admissibility?

The House Subcommittee also codified the rule of *Bruton* v. *United States*, 391 U.S. 123(1968), excluding confessions by a codefendant or another implicating the defendant in a criminal case. There should be no objection to this addition.

Rule 804(b)(4) has been renumbered from Rule 804(b)(5).

SECTION 4.

Rule 104—Subsection (c)

The Advisory Committee's final version of this subsection was criticized for its failure to provide for the mandatory exclusion of the jury on a preliminary hearing where the accused is a witness and requests such exclusion.

H.R. 5463 cures that problem and is preferable to the Advisory Committee's approach.

Subsection (d)

H.R. 5463 adopts the Advisory Committee's language in this subsection. Due to the fact that the controlling principles in this area are still being developed by the Courts, no further amendment is suggested.

Rule 403

H.R. 5463 adopts the Advisory Committee's language in this Rule, thereby rejecting the mandatory exclusion of relevant evidence under certain circumstances. The March, 1971 Draft of the Rules contained the mandatory/discretionary approach which was then described by the Advisory Committee as a "useful" one. We suggest a return to the March, 1971 language in order to avoid placing the decision as to the exclusion of unfairly prejudicial evidence entirely in a discretionary posture.

Rule 404—Subsection (a)(2)

H.R. 5463 adopts the Advisory Committee's version of this subsection. Although this subsection was previously criticized as an unwarranted expansion of the use of character evidence, we do not suggest any further amendment.

Subsection (b)

H.R. 5463 returns to the language of the March, 1971 Advisory Committee Draft in this subsection. Such an approach is preferable in that it highlights the discretionary nature of admissibility in this area.

Rule 606—Subsection (b)

H.R. 5463 amends the Advisory Committee's final version of this subsection to permit testimony by jurors as to matters of fact or occurrences as opposed to the mental processes of the jurors. Such an approach is preferable to the one taken by the Advisory Committee in that it permits inquiry into objective events involving potential jury misconduct.

Rule 609

H.R. 5463 amends the Advisory Committee's final version of this Rule and substantially adopts the rule of *Luck* v. *United States*, 348 F.2d 763 (D.C. Cir. 1965) which permits the Judge to exclude the prior convictions of a witness when the danger of unfair prejudice outweights the probative value of the evidence. This approach is highly preferable to that of the Advisory Committee in that it preserves the discretionary power of the Court in an area which is often critical in a criminal case. Moreover, the time limit with respect to prior convictions which may be used for impeachment purposes has been abbreviated in H.R. 5463 to provide for a more rational approach to the use of such evidence.

Rule 804—Subsection (b)(4) (Renumbered (b)(3) in H.R. 5463)

H.R. 5463 amends the Advisory Committee's final version of this subsection and includes the rule of *Bruton* v. *United States*, 389 U.S. 818 (1968) rendering inadmissible a statement or confession offered against the accused and made by a codefendant or other person implicating himself and the accused. This is a highly desirable change. The other minor amendments of this subsection in H.R. 5463 are equally desirable ones which generally strengthen the barriers against inherently untrustworthy or unfair.

SPELLMAN, SPELLMAN AND SPELLMAN,
Perry, Iowa, August 7, 1973.

Re Report on proposed new rules of Federal evidence.

HON. CHAIRMAN OF THE HOUSE JUDICIARY COMMITTEE,
U.S. House of Representatives, House Judiciary Committee, Capitol Building, Washington, D.C.

DEAR SIR: Would you forward the most recent report of the Judiciary Committee, which I believe is dated June 28th, 1973, which has the current changes and amendments to the proposed Federal Rules of Evidence. Please forward said Committee report to this office as soon as possible. If there is a charge, kindly indicate.

I would also at this time like to register my opposition to what I understand to be the import of Proposed Rule 706 relating to giving the Federal Court power to provide for the selection and appointment of an "impartial" Court-appointed expert in various cases. As a trial lawyer my objection is basically twofold, first, that such a procedure is another attack at the adversary system which has so long been the main stay of our legal system and the time-tested means for ascertaining the truth of the particular matter in controversy. My second objection is

that, although the word impartial sounds fine, it would be particularly difficult any expert to be truly impartial under our adversary system and certainly the past and present employment, past and present experience and viewpoints of the particular expert would be involved in his "impartial" opinion or judgment. In addition such an alleged "impartial" expert would unfairly and by the very reason of his Court-appointment be inherently and intrinsically cloaked with special authority and believability as a result of his judicial approval, not necessarily related to or relevant to his particular opinion and ground and basis therefore.

Respectfully,

DANIEL J. SPELLMAN.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Washington, D.C., August 7, 1973.

Hon. WILLIAM HUNGATE,
Chairman, Subcommittee on Criminal Justice, House Judiciary Committee, Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: In response to your invitation by letter of June 30, 1973. we are submitting for consideration by the Subcommittee on Criminal Justice our comments on Proposed Rule 408 of the Proposed Federal Rules of Evidence. This letter constitutes a modification of and elaboration on my letter of May 31, 1973, which attempted to call to the Subcommittee's attention certain serious difficulties which the Proposed Rule might create for the Commission and other agencies involved in the enforcement of federal statutes through conciliation and litigation.

The proposed Rule is of special concern to the Commission since Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., as amended by the Equal Employment Opportunity Act of 1972 (Public Law 92-261, March 24, 1972) requires us to attempt to conciliate an alleged violation before bringing suit. If the courts were to hold that the Proposed Rule precludes the introduction into evidence of factual information obtained during settlement, it would severely affect the enforcement efforts of agencies that investigate and attempt to settle alleged violations at the same time. Agencies following this procedure frequently receive factual material—documents, compilations, and the like—in the course of settlement discussions which is essential to the proof of a violation and which, in our opinion, is admissible under the common law rule. The evidence produced is not privileged information and, even though produced in settlement negotiations, would usually be subject to discovery. The exclusion of such information would unnecessarily hamper the Government's enforcement efforts.

If the Proposed Rule is adopted, there is yet another undesirable effect which it may have on the Commission's enforcement activities. Although the Commission does investigate a charge of discrimination before undertaking conciliation, we frequently find it necessary to gather additional factual information during conciliation efforts, especially when there is a substantial interval between the investigation and conciliation states. It may be reasonably anticipated that employers and unions charged with violations will withhold as much information as possible from Commission investigators and then make it available during conciliation in an attempt to immunize themselves from the presentation of such information during litigation.

Factual information obtained during conciliation attempts is normally of the type which would be subject to later discovery, and admissible, in connection with litigation following an unsuccessful conciliation process. At the very least, the Proposed Rule may be detrimental to the Commission's enforcement efforts by requiring it to initiate costly, duplicative and time consuming discovery proceedings to obtain information which it already has in its possession. Such a situation would redound neither to the benefit of the Commission or the opposing party.

Accordingly, I wish to suggest for the Subcommittee's consideration the following modifications in the Proposed Rule and accompanying Note which would eliminate undesirable effects of the common law rule while at the same time preserve the integrity of the conciliation and litigation activities of agencies charged with enforcement of federal statutes.

> 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, *unless such evidence would be subject to discovery and admissible had no compromise negotiations occurred, notwithstanding that such evidence was prepared or produced solely for the purpose of settlement.* (Suggested revision emphasized)

This revision would entail a corresponding change in the latter part of the paragraph of the Advisory Committee's Note. Such a revision could read as follows:

> These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, unless such evidence would be subject to discovery and admissible had no compromise negotiations occurred. If such evidence is otherwise subject to discovery and admissible, its admissibility under the rule does not jeopardize the freedom of communication needed for compromise efforts. Nor it it necessary to determine whether such evidence is an "admission of fact" obtained during compromise efforts if, instead, the standard is whether the evidence is otherwise discoverable and admissible. While eliminating undesirable effects of the common law rule, this criterion also obviates any need for duplicative requests for discovery.

In the past, the courts have held admissible factual information produced during settlement negotiations with a government agency. See *e.g., United States* v. *Tuschman*, 405, F. 2d 688 (6th Cir., 1969). They might apply the Proposed Rule so as to continue to render such information admissible. Nevertheless, particularly in light of the language in the Advisory Committee Note, there is a substantial possibility that they may exclude purely factual material of this type.

We therefore respectfully request that the Subcommittee consider our revisions of the Proposed Rule and Note and the rationale for their adoption.

In the alternative, we suggest that there be inserted as a Note to Proposed Rule 408 a provision similar to that contained in the original Advisory Committee's Note to Proposed Rule 501 (Privileges). The Committee there spelled out the intent of Rule 501 that constitutional provisions which relate to the admission and exclusion of evidence, and similar provisions created by act of Congress including 42 U.S.C. 2000e–5(a) on Equal Employment Opportunity Commission conciliation proceedings, are not within the scope of the rules. The Subcommittee's version of Rule 501 retains these exceptions. The addition of such an explanatory note to Rule 408 would therefore provide a policy on admissibility consistent with Proposed Rule 501.

Thank you for your consideration of these comments.

Sincerely,

WILLIAM A. CAREY,
General Counsel.

THE UNIVERSITY OF CHICAGO,
Chicago, Ill., August 7, 1973.

Re Rule 201 of Federal Rules of Evidence.

Hon. WILLIAM L. HUNGATE,
House of Representatives,
Washington, D.C.

The purpose of this letter is to express my opinion that your Subcommittee's version of Rule 201 is unworkable and harmful.

The facts that judges use for lawmaking cannot be limited to facts that are "not subject to reasonable dispute." Yet that is what your version of Rule 201 requires. Facts needed for judicial lawmaking are seldom developed through evidence submitted at a trial. Such facts are almost always the subject of judicial notice. And such facts are seldom of such a nature that they can be called, in the language of 201, "not subject to reasonable dispute."

A rule on judicial notice cannot lump together the facts about the parties and the facts that are used for lawmaking. The two kinds of facts are quite different. *Judicial practices about the two kinds of facts are and always have been quite different.* Facts pertaining to the parties should not be judicially noticed but should be developed through the evidence unless the facts are unlikely to be questioned. But facts that help a judge determine what the law ought to be often cannot be proved with evidence; they are a part of a judge's thinking, and they often have to be the subject of judicial notice.

The advisory committee, whose thinking your Subcommittee seems to be rejecting, understood the difference between the two kinds of facts, and that is why it provided that its proposed Rule 201 should apply only to what it called "adjudicative facts" and not to what it called "legislative facts." The advisory

committee in its note on Rule 201 fully explained why it found that distinction necessary.

When courts engage in lawmaking, they constantly use facts, through judicial notice, that they could not use if your version of Rule 201 were literally applied.

For instance, in the abortion cases, Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), the Supreme Court's opinions are full of extra-record facts about the history of abortion, and about abortion practices throughout the world.

Chief Justice Burger said, 410 U.S. at 208: "I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice acceptable in other contexts."

The committee's proposal of June 28, 1973, would mean that the Supreme Court may not take notice of such facts as those noticed in the abortion cases, except those which are found to be "not subject to reasonable dispute." Of course, Mr. Justice Blackmun, who collected all the facts, would not be prepared to say that the facts are "not subject to reasonable dispute." He would say only that he found most of them in the books in the library of the Mayo Clinic in Rochester, Minnesota, and that the sources seemed reasonably reliable. He surely would not say that the accuracy of the sources, in the language of Rule 201, "cannot reasonably be questioned."

The idea that facts used for lawmaking have to be "not subject to reasonable dispute," as your version of Rule 201 provides, is highly impractical. Neither legislators nor judges are able in all instances to find such facts to guide their judgment in making law. Both legislators and judges often have to settle for less. Both often have to guess about the facts that are used for lawmaking, because social science has not provided answers to factual questions that are "not subject to reasonable dispute."

In the principal obscenity case the Supreme Court decided two months ago, Chief Justice Burger said (Paris Adult Theatre v. Slaton, 93 S.Ct. 2628, 2637 (1973)): "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions." Legislators and judges can't help it. They can't always have facts "not subject to reasonable dispute," as you probably realize as a legislator.

In the obscenity opinions, the various Justices quarreled about the question whether erotic literature cases sexual crimes; some said yes, and some said no; and they would all agree that none of them had facts "not subject to reasonable dispute."

The advisory committee, I think, knew what it was doing in its formulation of Rule 201. It knew that the judicial notice Rule cannot be the same for facts about the parties and for facts used for lawmaking. Whether the defendant in a criminal case committed a specified act is one kind of question. Whether erotic literature causes sex crimes—or what the abortion practices were in ancient Egypt—is another kind of question. *Both types of questions cannot be governed by the same simple Rule. The court must have more freedom for the second type of fact.*

The advisory committee quoted Thayer's great work on evidence: "In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved." What Thayer said, I think, is profoundly and eternally true. You can no more legislate away the truth that Thayer stated than you can legislate away the law of gravity.

In 1924, Mr. Justice Brandeis said in a formal opinion that "Much evidence referred to by me is not in the record." Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 533 (1924). You should look at his opinion and see how much extra-record evidence he put into it. Yet that was judicial excellence, not misbehavior. It was in his capacity to bring facts to bear upon legal problems that Mr. Justice Brandeis was one of the greatest Justices we have ever had. Of course, the facts were legislative facts, not adjudicative facts. As to what the parties did—that is, as to adjudicative facts—Mr. Justice Brandeis would not go outside the record.

The Supreme Court said in NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953), speaking of the NLRB, that "in devising a remedy the Board is not confined to the record of a particular proceeding." If the Board is not "confined to the record," neither would a court be. The reason is that facts which bear upon law, including a remedy, are legislative facts, and legislative facts are not governed by the legal restrictions that apply to adjudicative facts.

Your Rule 201 would change the law of the Seven-Up case. Do you intend that?

The Supreme Court recently held the death penalty unconstitutional, in Furman v. Georgia, 408 U.S. 238 (1972). The nine Justices wrote nine opinions. The one in the middle may have been Mr. Justice White; his reasons were narrower

than those of other Justices. If his vote had been the opposite, the decision would have been the other way. The turning point in his opinion is his use of extra-record evidence, which neither he nor anybody else would claim to be "not subject to reasonable dispute." Here is what he said: "I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313. He was acknowledging that the crucial facts he was using came from outside the record. Clearly, his facts were not beyond reasonable dispute.

You might like to look at Mercer v. Esperdy, 234 F. Supp. 611 (S.D.N.Y. 1964), in which an enterprising district judge took all the crucial facts out of the New York Times. You might deliberate on the question what you would have done if you were in the position of the district judge. If your rule had applied, an innocent life might not have been saved.

The crucial information, none of it indisputable, came from outside the record in such outstanding cases as United States v. Aluminum Co., 148 F. 2d 416 (2d Cir. 1945) (Judge Learned Hand); Durham v. United States, 214 F. 2d 862 (D.C. Cir. 1954) (changing the law of criminal insanity); and Triangle Publications, 176 F. 2d 969, 976 (2d Cir. 1948) (where Judge Frank interviewed teenage girls outside the record—for legislative facts).

Even apart from your deletion of the necessary distinction between adjudicative facts and legislative facts, your version of Rule 201 will be extremely damaging, in my opinion. If you are acting on the assumption that you are merely codifying judicial practices, your assumption is clearly erroneous by a wide margin. Maybe the best way for me to demonstrate that is by focusing on a single typical case, which brings out the judicial attitudes and customs about judicial notice. The case I choose is SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1964). We can observe the behavior of eighteen judges, including nine Justice of the Supreme Court. The SEC sought an injunction requiring a registered investment adviser to disclose to his clients a practice of purchasing shares of a security for his own account shortly before recommending that security for long-term investment and then immediately selling the shares at a profit upon the rise in the market price following the recommendation. The only evidence in the record against the respondent was an affidavit by an SEC investigator about the respondent's practices. The affidavit was limited to what the respondent had done. It contained no general facts about the practice known as "scalping." In denying the injunction, the district judge said: "Perhaps it could be shown that defendants' operations in liquidating their long positions and covering their short positions affected the market price of the stocks and thus reduced the value of their clients' positions in the stock. No attempt at any such proof has yet been made, however." 191 F. Supp. 897, 899 (S.D.N.Y. 1961). The judge was clearly right, since the only evidence for the Commission was the affidavit, and it contained no statement about effects on market prices, although in each instance of a "buy" recommendation the respondent purchased before the recommendation and sold at a profit after the recommendation, and in the one instance of a "sell" recommendation it sold short before the recommendation and purchased at a lower price after the recommendation. The majority of the Second Circuit said: "Surely, no one could be so naive as to believe that a small advisory service with only 5,000 subscribers could by its own recommending influence cause such stocks as Union Pacific (22,000,000 shares outstanding), Continental Insurance (12,000,000 shares outstanding) and United Fruit (8,730,000 shares outstanding) invariably and automatically to rise so that the defendants could always sell their small holdings at a small profit. . . . The SEC's conclusion that these particular $5,000 subscribers must have rushed in, thereby creating an artificial stimulant, is wholly speculative and is at variance with common sense." 300 F. 2d 745, 748 (2d Cir. 1962). The Court's statement was factual. Its facts were not "clearly indisputable."

Do the best lawyers assume that judicial notice is limited to clearly indisputable facts? One answer is found in the Government's brief in the Capital Gains case, signed by the Solicitor General and his Assistant, and by the General Counsel, Associate General Counsel, and an Attorney of the SEC. The brief at page 15 directly contradicted the factual conclusions of the majority of the Court of Appeals in the passage quoted above: "The fact is, however, that '(m)arket activity, under normal trading conditions, takes place not in the entire outstanding

issue of a security but in that portion known as the floating supply . . . (which is) composed principally of shares registered in the names of brokers or nominees, as distinguished from those registered in the names of the beneficial owners.' Securities and Exchange Commission, Report on the Feasibility and Advisability of the Complete Segregation of the Functions of Dealer and Broker (1963), p. 31." The facts stated in the brief are clearly extra-record, as is their source. Since the facts contradict what the majority of the Court of Appeals asserted, they can hardly be deemed "clearly indisputable."

The Government's brief went on to say: "Economists and financial writers have recognized that the recommendations of advisory services such as respondents' do have a significant effect upon the market activity in the stocks recommended by them." For this the brief cited five references, and then it continued: "Indeed, one writer specifically listed respondents' service as among those which are likely to affect prices: "Traders have to watch carefully for tips from investment services, outfits such as Standard & Poor's Outlook, Moody's, Fitch's, United Business Service, Value Line, Capital Gains Research, John Magee, Garfield A. Drew and others. Many of them like the bigger brokerage houses, have substantial followings. Their definite recommendations bring quick action.' Crane, the Sophisticated Investor (1959), p. 67 (emphasis added)." The last sentence is a statement of fact. Considering what the Court of Appeals had said, it is not "clearly indisputable."

The Capital Gains case was heard a second time by the Second Circuit, with all nine judges participating. The court again denied the injunction. The four dissenting judges in an opinion by Judge Clark showed that they knew how to go outside the record for disputable facts. For instance: "The common-law doctrines of fraud and deceit grew up in a business climate very different from that involved in the sale of securities, and the rigors of those doctrines were ill fitted to regulation of the sale of this unique and intricate merchandise." 306 F. 2d at page 614. Again: "The majority present an extensive analysis of the 'legislative history' of the Act to support their narrow construction of § 206. Very little of this is actually history . . ." Id. at 615. This dispute about what is "actually history" seems clearly factual. Your version of Rule 201 does not provide for judicial notice of disputed facts about legislative history.

To the argument that the problem of scalping should be left for treatment in an SEC regulation, Judge Clark said for the four that "it will be several years before any regulation hitting the defendants' practices can be properly drafted, enacted, and then upheld judicially. Obviously not in our generation can any effective regulation along this line be expected." Id. at 615. This is factual, and it is not clearly indisputable.

Of the announcement of the court's earlier decision, Judge Clark said: "Perhaps the worst feature is that it sanctions and indeed endorses a low standard of business morality, as the business world has apparently been quick to see." Id. at 619. For this he cited four newspaper articles, none in the record. What the business world has seen is factual, and it is far from "clearly indisputable." The word "apparently" does not make the observation any less factual.

The Supreme Court held, eight to one, in an opinion by Mr. Justice Goldberg, that the injunction in the Capital Gains case should be granted. It showed, too, that it knew how to go beyond the record for disputable facts. Quoting a 1963 Supreme Court opinion, the Court said: "As we recently said in a related context, 'It requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail' in every facet of the securities industry." 375 U.S. at pages 186–187, 84 S. Ct. at page 280. Some economists deny that ethical standards had anything to do with the market crash of 1929 or the depression of the 1930's; the statement of fact can hardly be called "clearly indisputable."

The Court said in a footnote: "For a discussion of the effects of investment advisory service recommendations on the market price of securities, see Note, 51 Calif. L. Rev. 232, 233." Someone—could it have been Mr. Justice Goldberg or his law clerk?—knew that factual materials appeared at page 233. At that page one finds such statements as this: "The president of the New York Stock Exchange has said that public response to advisory service reports is such that 'on certain occasions it was difficult to handle the stock on the floor of the exchange and provide an orderly market.' One of the characteristics of the contemporary stock market is its 'thinness': the small percentage of outstanding shares that is actually traded. As a result, a relatively slight increase in supply or demand may significantly influence price. Furthermore, it is a recognized market phenomenon that 'initial activity generates additional activity in the direction of the initial change in prices. . . .'" If the Court considered what has just been

quoted, it was taking judicial notice. The statements were not "clearly indisputable."

The Court capped its opinion with this statement of extra-record observation which was the very subject of the controversy under litigation: "Experience has shown that disclosure in such situations, while not onerous to the adviser, is needed to preserve the climate of fair dealing which is so essential to maintain public confidence in the securities industry and to preserve the economic health of the country."

Unlike the various other opinions in the Capital Gains case, the Harlan dissenting opinion did not rely upon disputable legislative facts taken from extra-record sources; his main position was the simple one that "I can find nothing in the terms of the statute or in its legislative history which lends support to the absolute rule of disclosure now established by the Court." But Mr. Justice Harlan did manage to go outside the record for an adjudicative fact. Whether or not the fact may have been disputable we have no means of knowing, but he relied upon its assertion without contradiction: "According to respondents' brief (and the fact does not appear to be contested), the annual gross income of Capital Gains Research Bureau from publishing investment information and advice was some $570,000." Mr. Justice Harlan contrasted this figure with the alleged $20,000 profits from the questioned transactions. The use of the extra-record fact is of little significance, but it does exemplify something that often happens in appellate courts; extra-record facts about the parties often came in through the briefs and more often come in through oral arguments. The practice is sound and sensible, as long as it is done openly and without objection, but your Rule 201 does not recognize it.

Some conclusions that flow from analysis of the Capital Gains case seem very clear but are fundamentally opposed to your version of Rule 201:

1. Facts that are most useful for thinking about problems of policy are often in the nature of actual conclusions that are mixed with judgment or opinion.

2. The bulk of social science in its present stage of development probably cannot be called "clearly indisputable," but it is decidedly useful in trying to work out law and policy.

3. Even though anyone would prefer to found law making and policy making upon clearly indisputable facts, the practical choice is often between proceeding in ignorance and following the uncertain, tentative, and far from indisputable teachings of social science such as they are, for the simple reason that clearly indisputable facts are often unavailable.

4. The whole vital and basic idea of the Brandeis brief and all that goes with it, including research by counsel and by judges into factual materials that are useful in thinking about policy questions, is totally at war with your Rule 201, for the Brandeis brief assumes that courts will consider extra-record facts which bear upon disputed issues and that the facts may be presented without regard for the question whether they are indisputable.

5. The judicial making of law and policy is much strengthened, not weakened, by the judges' increasing resort to social science literature. The judicial tendency in this direction should be encouraged, and it may be most needed when the factual materials are least clear. Whenever a judge finds a problem of social policy especially difficult, he properly draws upon his education and experience, including a spectrum of facts from the most specific to the most general, and many of the facts or mixtures of facts with judgment are in the nature of faulty impressions.

6. The many instances of judicial resort to extra-record facts in the Capital Gains case reflect the practices of conscientious judges at their best. The use of extra-record facts was helpful in all respects, and it was harmful in no respect.

7. The legal development should follow the judicial practices exemplified by the Capital Gains case.

Judicial recognition of the distinction between adjudicative and legislative facts is the subject matter of scores of judicial opinions. The Subcommittee's statement that the distinction "was not clear and would breed litigation" is evidently based on ignorance of the case law on the subject, for the statement is obviously not based on a reading of the many opinions that develop the distinction. Outstanding federal judges have been the leaders in developing the distinction, and other judges have been following. Yet the Subcommittee cites no case.

Mr. Roger Pauley of the Subcommittee's staff has told me on the telephone that the Subcommittee has not considered the relevant judicial opinions, dealing with the distinction.

The problem of judicial notice is whether the tribunal can use facts that are not presented at the trial. The problem is *the same* as the problem of whether and when a trial is required at all. The courts use the distinction between adjudicative facts and legislative facts as the basis for determining when an administrative agency is required to find facts on the basis of a trial-type hearing and when it can find facts without such a hearing. See, for instance, the penetrating opinion of Judge Leventhal in American Airlines v. CAB, 359 F.2d 624 (D.C. Cir. 1966), for the nine-judge court, in which the court did not require a hearing before the CAB because "The issue involves . . . 'legislative' rather than 'adjudicative' facts." See the similar remarks of Judge Friendly in WBEN v. United States, 396 F.2d 601, 618 (2d Cir. 1968). The First Circuit said in Hahn v. Gottlieb, 430 F.2d 1243, 1248 (1970) that "when decision turns on 'legislative' rather than 'adjudicative' facts, a formal adversary hearing may contribute little or nothing. . . . The distinction between 'legislative' and 'adjudicative' facts is particularly apt in this case." In Langevin v. Chanango Court, 447 F.2d 296, the court said that facts were "adjudicative" and not merely "general facts which help the tribunal decide questions of law and policy and discretion."

The courts know that the distinction is a necessary one, and they also know that the distinction does not breed litigation, even though, like any other legal distinction, issues necessarily arise in the borderland.

My main point can be put very simply: Your version of Rule 201 would forbid the Supreme Court to write the kind of opinions it wrote in the abortion cases; the Court should be free to resort to extra-record facts in making law, even if the facts cannot be said to be "not subject to reasonable dispute." The advisory committee was right in its belief that facts about the parties have to be treated one way and that facts that bear upon lawmaking have to be treated another way. Some such distinction as the one between adjudicative facts and legislative facts has to be recognized if Rule 201 is to be sensible.

The subject of judicial notice is a very intricate one at some levels, and I do not know all the answers. But I have written extensively on the subject; the advisory committee cites some of my writings in its note on Rule 201.

I hope this letter will be helpful to you. I shall be glad to try to assist the Subcommittee in any way I can.

Sincerely yours,

KENNETH CULP DAVIS.

GREENFIELD, DAVIDSON & MANDELSTAMM,
St. Louis, Mo., August 9, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice,
House of Representatives, Washington, D.C.

DEAR BILL: Thanks for your nice letter of August 2. I must say before I get to commenting on your letter that it makes me feel like an old old goat to see that Pete Rodino whom I met through Roland Libinotti is now chairman and another young fellow, Bill Hungate, is well up toward the top on the Democratic side and Bob McClory who I knew when he was in the state senate in Illinois, is now No. 2 man on the Republican side.

Perhaps my objection to having a Code of Evidence may be just that I am an old man. I have always felt that a court expanded its rulings on evidence to achieve substantial justice. For example: our own Missouri court in the very recent weeks have recognized the existence of computer printouts as business records admissible as such. I fear codifying the rules of evidence will stultify growth. I have always thought the careful lawyer could make an appropriate record to keep out that which ought not be admitted. By the same token a lawyer who had been to the courthouse more than once or twice would know how to make the kind of record necessary to put in something that common sense and justice requires go in.

That is why I am not at all certain that we needed a Federal Code of Evidence. I do recognize the argument which the new Code should make relatively uniform trial of causes arising under Federal law. I thought the old rule did but evidently others differed.

My two objections go to (a) the broadening of the hearsay rules, the permitting of hearsay upon hearsay, and (b) the removal of the implied requirement that one calling a witness (other than an adverse witness) vouches for his testimony. There

is enough perjury in the courthouse today without a lawyer being permitted to put someone on the stand whom he doesn't believe will tell the truth. Further, to permit, as the court rules apparently will do, one to call any witness and proceed to impeach him simply to discredit him and by association, the adversary, I think is a retrogressive step.

I know those arguments have been made and I didn't think that the committee ought to be further harassed with them. As I indicated to you, the revision turned out was done with surgical skill and reflects obvious consideration of many points which I am certain included the points I raised.

Again, my warm congratulations on a dedicated service to the legal profession.

Sincerely,

JOHN L. DAVIDSON, Jr.

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., August 20, 1973.

To: House Judiciary Committee.
Attention: Mr. Herbert Hoffman.
From: American Law Division.
Subject: Current Law of Privileges in Federal Courts.

The enclosed report on the current law of privileges in federal courts has been prepared in response to your request. As noted in the report, the term "privilege" is defined with reference to the use of that term in the Federal Rules of Evidence appearing in the Supreme Court's order of November 20, 1972, 93 S. Ct. 45, 34 L. Ed. 2d 37 (1972), and therefore does not include such "privileges" as the privilege against self-incrimination, the privilege against the admission of illegally obtained evidence, etc. The report also does not include those federal court decisions where the court was guided by provisions in the District of Columbia Code.

CHARLES DOYLE,
Legislative Attorney.

CURRENT STATUS OF THE LAW OF TESTIMONIAL PRIVILEGES IN FEDERAL COURTS

INTRODUCTION

As used in this report, the term "privilege" refers to the type of privileges contained in Article V of the Federal Rules of Evidence of the November 20, 1972 order of the United States Supreme Court, 93 S. Ct. 45, 34 L. Ed. 2d 37 (1972). Although the phrase "federal law of testimonial privileges" as used hereafter does not refer to the complex question of whether and under what circumstances federal courts may or must resolve issues of privilege on the basis of state rather than federal law, some introductory remarks on the question are probably in order.

The procedure in most federal court proceedings are governed by the Federal Rules of Civil and Criminal Procedure. Rule 26 of the Federal Rules of Criminal Procedure states that ". . . [t]he admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reasons and experience." There is empirical evidence that the courts have been faithful to this principle and make almost no use of state rules of evidence in criminal cases." Wright, *Law of Federal Courts*, 409–10 (2d ed. 1970). The situation is far more obscure in civil cases.* As Professor Wright has noted:**

> Able commentators have asserted variously: that the federal courts must defer to state privileges in all cases, diversity and non-diversity; [39] that the federal courts are constitutionally bound to apply state privileges in diversity cases but not in other litigation; [40] that it is normally desirable to honor and apply state privileges but the federal court is not compelled to do so; [41] that federal courts should follow state law where it denies a privilege but not

*Rule 43(a) of the Federal Rules of Civil Procedure provides: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. 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. The competency of a witness to testify shall be determined in like manner.

**Wright, *Law of Federal Courts*, 415 (2d ed. 1970). Footnotes from the original below:

where it grants one;[42] and that the history and judicial holdings are so inconclusive that no authoritative answer is yet possible.[43]

The case law has been correctly described as in "considerable confusion." [44] There now seems to be a tendency to honor state privileges in diversity cases,[45] though some decisions reach a contrary result and others attempt to distinguish statutory privileges from those that are judicially created.[46] The reported cases generally refuse to honor a state privilege in actions in which the United States is seeking to enforce federal law,[47] though it may be that more deference is paid to state privileges in the courtroom than in the reporters.[48]

As a general rule, " 'The public . . . has a right to every man's evidence' except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). Thus, in the absence of a recognized privilege, the court has the authority to punish a witness who refuses to perform his testimonial duty, 18 U.S.C. § 401, or to use civil contempt to try and overcome the recalcitrance of a witness, see 28 U.S.C. § 1784.

Required Reports Privileged by Statute

Statutes which require the making of returns or reports sometimes confer on the reporting party a privilege against disclosure, commonly coupled with a prohibition against disclosure by the officer to whom the report is made. Some of the federal statutes of this kind are mentioned in the Advisory Committee's Note to Rule 501 [of the Federal Rules of Evidence as announced in the Supreme Court order cited supra] . . . A provision against disclosure may be included in a statute for a variety of reasons, the chief of which are probably assuring the validity of the incrimination, and encouraging the furnishing of the required information by assuring privacy. Federal Rules of Evidence, Advisory Committee's Note to Rule 502, 93 S. Ct. at 49, 34 L. Ed. 2d at 41.

Under existing law the courts have generally recognized the privileged status of reports required by state or federal statutes, see *McCormick on Evidence* § 112 (Cleary, ed., 2d ed. 1972); *Wigmore on Evidence*, § 2377 (1940 ed.). Discussion of the law in this area would involve an examination of each of the statutes in question and therefore will not be included.

Lawyer-Client Privilege

It is a general rule that confidential communications between an attorney and his client, made because of the professional relationship and concerning the subject matter of the attorney's employment, are privileged from disclosure, even for the purposes of the administration of justice. *Chirac* v. *Reinicker*, 11 Wheat, 280, 6 L. Ed. 474. The essentials of the general rule are stated in 8 Wigmore, Evidence § 2292, at 554 (McNaughton rev. 1961) as follows:

"(1) where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *United States* v. *Goldfarb*, 328 F. 2d 280, 281 (6th Cir. 1964); see also *Radiant Burners, Inc.* v. *American Gas Association*, 320 F. 2d 314, 319 (7th

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[42] Louisell, Confidentiality, Conformity and Confusion: Privileges in Federal Courts Today, 1956, 31 Tul. L. Rev. 101; Note, 1956, 44 Calif. L. Rev. 949.

[43] Weinstein, Recognition in the United States of the Privileges of Another Jurisdiction, 1956, 56 Col. L. Rev. 535, 545–47; Comment, 1960, 38 Texas L. Rev. 451.

[44] Pugh, Rule 43(a) and the Communications Privileged Under State Law: An Analysis of Confusion, 1954, 7 Vand. L. Rev. 556, 563; Note, 1961, 49 Calif. L. Rev. 382; Comment, 1964, 52 Calif. L. Rev. 640.

[45] Green, The Admissibility of Evidence Under the Federal Rules, 1941, 55 Harv. L. Rev. 197, 208–209.

[46] Degan, The Feasibility of Rules of Evidence in Federal Courts, 1960, 24 F.R.D. 341, 353.

[47] *Massachusetts Mut. Life Ins. Co.* v. *Brei*, C.A. 2d, 1962, 311 F. 2d 463, 464.

[48] *Krizak* v. *W. C. Brooks & Sons, Inc.*, C.A. 4th, 1963, 320 F. 2d 37, noted 1964, 5 Wm. & Mary L. Rev. 134; *Massachusetts Mut. Life Ins. Co.* v. *Brei*, C.A. 2d, 1962, 311 F. 2d 463; *Palmer* v. *Fisher*, C.A. 7th, 1955, 228 F. 2d 603, *certiorari denied*, 76 S. Ct. 1030, 351 U.S. 965, 100 L. Ed. 1485; *Boyd* v. *Wrisley*, D.C. Mich. 1964, 228 F. Supp. 465. See *Republic Gear Co.* v. *Borg-Warner Corp.*, C.A. 2d, 1967, 381 F. 2d 551, 555, n. 2. [1972 Supp.] The present state of the authorities is well summarized in *Lukee Enterprises, Inc.* v. *New York Life Ins. Co.*, D.C.N.M. 1971, 52 F.R.D. 21, 22–23.

[49] See cases cited 2B Barron & Holtzoff (Wright ed.), § 967, nn. 67, 67.1. [1972 Supp.] See 9 Wright & Miller, § 2408, pp. 333–336.

[47] *Colton* v. *U.S.*, C.A. 2d, 1962, 306 F. 2d 633, *certiorari denied*, 83 S. Ct. 505, 371 U.S. 951, 9 L. Ed. 2d 400; *U.S.* v. *Kocel*, C.A. 2d, 1961, 296 F. 2d 918, noted 1962, 23 Mont. L. Rev. 238; *In re Albert Lindley Lee Memorial Hospital*, C.A. 2d, 1953, 200 F. 2d 122, *certiorari denied*, 74 S. Ct. 103, 346 U.S. 864, 98 L. Ed. 375; *U.S.* v. *Brunner*, C.A. 6th, 1952, 200 F. 2d 276; *Dorfman* v. *Rombs*, D.C. Ill., 1963, 218 F. Supp. 905.

Contra: *Love* v. *U.S.*, C.A. 8th, 1967, 386 F. 2d 260; *certiorari denied*, 88 S. Ct. 1111; 390 U.S. 985, 19 L. Ed. 2d 1286; *Baird* v. *Koerner*, C.A. 9th, 1960, 297 F. Id 623; noted 1961, 49 Calif. L. Rev. 1030; *U.S.* v. *Ladner*, D.C. Miss. 1965, 238 F. Supp. 895; *U.S.* v. *Becton Dickinson & Co.*, D.C.N.J., 1962, 212 F. Supp. 92.

[48] Weinstein, note 31 above [The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence, 1969, 69 Col. L. Rev. 353], at 372, n. 82.

Cir. 1963); *Lee National Corp.* v. *Deramus*, 313 F. Supp. 224, 226 (D. Del. 1970); *Harkobusic* v. *General Transportation Corp.*, 31 F.R.D. 264, 265 (W.D. Pa. 1962).

Other federal courts have defined the privilege in similar but somewhat different language:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. *United States* v. *United Shoe Machinery Corporation*, 89 F. Supp. 357, 358 (D.Mass. 1950); see also, *N.L.R.B.* v. *Harvey*, 264 F. Supp. 770, 772 (W.D. Va. 1966); *Philadelphia Housing Auth.* v. *American Radiator & Standard Sanitary Corp.*, 294 F. Supp. 1148 (E.D. Pa. 1969).

In any event, the cases generally state that the communications must involve a member of the bar or his subordinate. While the traditional view seems to be that the attorney must be a member of the bar of the State in which he is employed, *United States* v. *United States Machinery Corporation*, 89 F. Supp. 357 (D. Mass. 1950), there is contrary authority, *Paper Converting Machine Co.* v. *FMC Corp.*, 215 F. Supp. 249 (E.D. Wis. 1963); cf. *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963) (recognizing a privilege but based on California law). The latter position seems more consistent with that of other jurisdictions as to the existence of a privilege for communications involving one whom the "client" reasonably, though erroneously, believed to be a member of the bar, see *People* v. *Barker*, 60 Mich. 277, 27 N.W. 539 (1886); *State* v. *Lender*, 266 Minn. 561, 124 N.W. 2d 355 (1963). The federal courts have apparently yet to decide whether such cases are within the privilege.

The "subordinates" covered by the privilege include those individuals operating under the supervision of the attorney for the purpose of assisting him in serving his clients and have been held to include accountants, *United States* v. *Kovel*, 296 F. 2d 918 (2d Cir. 1961); but see, *Himmelfarb* v. *United States*, 175 F. 2d 924 (9th Cir. 1949), law clerks, *Cold Metal Process Co.* v. *Aluminum Co. of America*, 7 F.R.D. 684 (D. Mass. 1947), stenographers, *Himmelfarb* v. *United States*, *supra*, engineers, *Lewis* v. *United Air Lines Transportation Corp.*, 32 F. Supp. 21 (W.D. Pa. 1940), and interpreters, *United States* v. *Kovel*, *supra* (dictum); *Andrews* v. *Solomon*, F. Cas. No. 378 (C.C. Pa. 1816) (dictum). Of course, the question of who may be covered by the privilege as the attorney's subordinate is closely associated with the requirement that the communications be confidential, *i.e.*, generally outside the hearing or intercession of third parties, which is discussed below.

The question of who may constitute a "client" for purposes of the privilege is far more difficult. Traditionally, the privilege involved a human being seeking the legal assistance of his attorney. Not suprisingly the concept was later applied to legal entities who were not natural persons. This presents problems. As Professor Cleary observed in the second edition of *McCormick:*

> The application of the privilege for the benefit of a corporate client, as distinguished from a natural person, was never questioned until a federal district court in 1962 held that a corporation is not entitled to claim the privilege. [*Radiant Burners, Inc.* v. *American Gas Association*, 207 F. Supp. 771 (N.D. Ill. 1962)]. The decision attracted wide attention and much comment, most of which was adverse, until reversed on appeal. *Radiant Burners, Inc.* v. *American Gas Association*, 320 F. 2d 314 (7th Cir. 1963)]. There seems little reason to believe that the issue will arise soon again.
>
> When the client is a corporation, questions arise as to who "speaks" for it for purposes of the privilege. Should a communication from any employee suffice? Or should the privilege apply only to communications from members of the "control group," i.e. those authorized to seek and act upon legal advice? Or should some intermediate position be taken? Lower level employees can scarcely be said to speak for the corporation, and their status realistically seems to be simply that of any witness who possesses information. At the other extreme, no one would deny the privilege in the case of members of the control group. The area of controversy lies between. *McCormick on Evidence*, §87 (Cleary, ed., 2d ed. 1972).

Until very recently the question of what natural persons could be considered to personify the corporate "client" for purposes of the privilege was determined by the "control group" test. The test was first articulated in *City of Philadelphia* v.

Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962) where the court observed:

> Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privilege communication is made?, the most satisfactory solution. I think, that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has the authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.* See accord, *Congoleum Industries, Inc.* v. *GAF Corp.*, 49 F.R.D. 82 (E.D. Pa. 1969); *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970); *Natta* v. *Hogan*, 392 F. 2d 686 (10th Cir. 1968).

In 1970, the Seventh Circuit Court of Appeals announced a somewhat different view:

> We conclude that the control group test is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group, and that in those instances where the order here under attack must rest entirely upon the control group test, the order is unlawful.
>
> It is clear that we are not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part of the corporation. We express no opinion with respect to communications by employees who fall in that class.
>
> We conclude that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment. *Harper & Row Publishers, Inc.* v. *Decker*, 423 F. 2d 487, 491–92 (7th Cir. 1970).

The question of whose communications with the corporation's attorney are covered by the privilege was left unanswered when the Supreme Court affirmed *Harper & Row Publishers, Inc.*, by an evenly divided court without opinion, *Harper & Row Publishers, Inc.* v. *Decker*, 400 U.S. 348 (1971). See, "Attorney-Client Privilege in Federal Courts: Under What Circumstances Can Corporation Claim Privilege for Communications from Its Employees and Agents to Corporation's Attorney" 9 A.L.R. Fed. 685 (1971) (enclosed).

The privilege only covers attorney-client communications made in confidence where the attorney is acting as a lawyer. For this reason, the federal courts have generally held that the privilege does not cover matters such as the existence of the relationship, *National Union Fire Ins. Co. of Pittsburgh* v. *Aetna Casualty & Surety Co.*, 384 F. 2d 316 (D.C. Cir. 1967); *United States* v. *Brickey*, F. 426 2d 680 (8th Cir. 1970), the identity of the client, *United States* v. *Ponder*, 475 F. 2d 37 (5th Cir. 1973), *Colton* v. *United States*, 306 F. 2d 633 (2d Cir. 1962), the client's address, *United States* v. *Lee*, 107 F. 2d 702 (C.C N.Y. 1901) or the attorney's fee, *In re Semel*, 411 F. 2d 195 (3d Cir. 1969) unless the circumstances indicate that they

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* It could be argued that the court concluded that the only agent of the client who could be covered by privilege was an agent who was also a "personification" of the client, i.e., a member of the control group; thus, unlike natural persons, a corporate client could not confer with its attorney through an agent: "Now, in cases where an employee of a corporation in an executive or managerial position communicates a fact relative to pending litigation to a lawyer retained or employed by the corporation, the question frequently arises: When he does so, is the corporation seeking the advice of the attorney? In other words, was he at the time, in contemplation of law, the corporation seeking advice? If not, then he was giving the lawyer information in order that the latter could advise a client other than himself. In such case the employee is merely a witness and I think that *Hickman* v. *Taylor*, 329 U.S. 495 . . . settles the question that a statement given by a witness to a lawyer who is collecting information in order to prepare for litigation pending against the lawyer's client is not privileged although it may be within the ambit of the "work product" principle; and it is very important to keep in mind the fact that the work product principle is not and cannot properly be described as a privilege. Some Courts have confused the situation by calling it a qualified privilege, but it is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case." *Id.* Such an argument is considerably weakened by the fact that the Court in *Hickman* did not really address itself to the question of whether the documents in question could be privileged as confidential communications between attorney and the client's *authorized* agents. See *Hickman* v. *Taylor*, 4 F.R.D. 479 (E.D. Pa. 1945), reversed 153 F. 2d 212 (3rd Cir., reversed 329 U.S. 495 (1947).

were meant to be kept confidential as where the client is in hiding, *United States* v. *Lee*, *supra*, or where so much of the relationship is already known that disclosure of the client's name would destroy the confidentiality of the communication, *N.L.R.B.* v. *Harvey*, 349 F. 2d 900 (4th Cir. 1965). The presence of third parties also generally creates doubts as to whether the communications were confidential and thus whether they are privileged, *United States* v. *Blackburn*, 446 F. 2d 1089 (5th Cir. 1971); *United States* v. *Bigos*, 459 F. 2d 639 (1st Cir. 1972). However, where the third parties are the agents or subordinates of the attorney or his client, are necessary for communication, or involve clients with identical interests, their presence does not defeat the existence of the privilege, *Hunydee* v. *United States*, 355 F. 2d 183 (9th Cir. 1965); *United States* v. *Kovel*, 296 F. 2d 918 (2d Cir. 1961). *In re Bretto*, 231 F. Supp. 529 (D. Minn. 1964).

Those communications associated with the non-legal activities of an attorney are obviously not privileged, *Canaday* v. *United States*, 384 F. 2d 849 (8th Cir. 1966); *United States* v. *Bartone*, 400 F. 2d 459 (6th Cir. 1968), although "the fact that a nonlawyer could perform whatever service the communication is related to does not mean that the communication cannot be privileged, *Ellis-Foster Company* v. *Union Carbide and Carbon Corporation*, D.N.J. 1958, 159 F. Supp. 917, *reversed on other grounds*, 3 Cir., 284 F. 2d 917." *United States* v. *Summe*, 208 F. Supp. 925, 928 (E.D. Ky. 1962). By the same token ths privilege is only available where the attorney's legal services have been sought by the client, *Morgan* v. *United States*, 380 F. 2d 686 (9th Cir. 1967); *Olender* v. *United States*, 210 F. 2d 795 (9th Cir. 1954).

The privilege not only restricts disclosure of confidential communications while the attorney is being retained but also communications made with a view to retaining the attorney and disclosure of communications made during the relationship after it has been terminated, *Petition of Sawyer*, 129 F. Supp. 687 (D. Wis. 1955) aff'd 229 F. 2d 805 (7th Cir. 1956); *United States* v. *Foster*, 309 F. 2d 8 (4th Cir. 1962); *Baldwin* v. *Commissioner of Internal Revenue*, 125 F. 2d 812 (9th Cir. 1942).

The general proposition that where legal advice is sought from a lawyer the confidential communications relating to that purpose are privileged is subject to a number of exceptions. The privilege does not protect confidential communications made in contemplation or furtherance of a crime, *United States* v. *Rosenstein*, 474 F. 2d 705 (2d Cir. 1973); *United States* v. *Shewfelt*, 455 F. 2d 836 (9th Cir. 1972). Nor does it permit exclusion of the testimony of the attorney of a deceased testator as to communications involving a will in a contest by claimants to the client's estate, *Sorrels* v. *Alexander*, 142 F. 2d 769 (D.C. Cir. 1944); *Glover* v. *Patten*, 165 U.S. 394 (1897). The attorney may also testify when that is necessary to defend himself against charges of misconduct, or where the attorney represented both parties in the case at issue, *Popovitch* v. *Kasperlik*, 70 F. Supp. 376 (W.D. Pa. 1947).

The exception permitting the attorney to disclosure of confidential communications between himself and his client when assailed by the client concerning events surrounding those conversations is frequently cited as one example of the most widely recognized exception to the coverage of the privilege—waiver, *United States* v. *Woodall*, 438 F. 2d 1317 (5th Cir. 1971); *United States* v. *Wiggins*, 184 F. Supp. 673 (D.D.C. 1960). The privilege can only be waived by the client or his authorized agent, *Himmelfarb* v. *United States*, 175 F. 2d 924 (9th Cir. 1949); *United States* v. *Cote*, 456 F. 2d 142 (8th Cir. 1972); *American Cyanamid Co.* v. *Hercules Powder Co.*, 211 F. Supp. 85 (D. Del. 1962).

Physician-Patient (Psychotherapist-Patient) Privilege

As a general rule federal courts apply the law of the State in which they are sitting to all issues of privilege in diversity cases, *supra*. As noted earlier a discussion of these cases is beyond the scope of this report. In non-diversity cases, the federal courts do not recognize the physician-patient privilege, *United States* v. *Mancuso*, 444 F. 2d 691 (5th Cir. 1971); *In re Verplank*, 329 F. Supp. 433 (C.D.Cal. 1971); *United States* v. *Kansas City Lutheran Home & Hospital Association*, 297 F. Supp. 239 (W.D. Mo. 1969).

Husband-Wife Privilege

The federal courts recognize two distinct privileges arising out of the marital relationship. The first bars one spouse from testifying adversely to the other. *See* 2 C. Wright, Federal Practice & Procedure: Criminal § 405, at 84088; . . . The second bars the testimony of one spouse as to confidential communications of the other. *See Blau* v. *United States*, 1951, 340 U.S. 332, 71 S. Ct. 301, 95 L. Ed. 306; 2 C. Wright, Federal Practice & Procedure: Criminal § 406, at 93–94. *United States* v. *Harper*, 450 F. 2d 1032, 1045 (5th Cir. 1971).

Competency—At early common law neither husband nor wife were competent witnesses in a case in which their spouse was a party, *McCormick on Evidence*, § 66 (Clearly, ed., 2d ed. 1972); 2 *Wigmore on Evidence*, § 603 (3d ed. 1940). This principle of marital incompetency or disqualification has been generally rejected and replaced with a privilege, although some authorities take the view that one spouse may be said to be "incompetent" to testify against the other. For a general discussion see, Orfield, "The Husband-Wife Privileges in Federal Criminal Procedure" 24 *Ohio State Law Journal* 144 (1963); "Competency of One Spouse to Testify Against the Other in Criminal Cases: Modern Trend" 38 *Virginia Law Review* 359 (1952). As a general rule, "[a] husband or wife cannot be compelled to testify against his or her spouse nor can either one be permitted to do so unless the other consents." *United States* v. *Moorman*, 358 F. 2d 31, 33 (7th Cir. 1966), see accord, *Hawkins* v. *United States*, 358 U.S. 74 (1958); *Peek* v. *United States*, 321 F. 2d 934 (9th Cir. 1953); *Olender* v. *United States*, 210 F. 2d 795 (9th Cir. 1954). While the privilege almost always arises in a criminal context, there is some authority for the contention that the privilege applies with equal force in civil cases, *Giles* v. *DelGuercio*, 150 F. Supp. 864 (S.D. Cal. 1957).* The privilege is available to a spouse during the marriage notwithstanding the fact that the testimony sought involves events occurring before the marriage and that the marriage took place under circumstances that suggest that one of the purposes was to secure the privilege. *Courtney* v. *United States*, 390 F. 2d 521 (9th Cir. 1958); *San Fratello* v. *United States*, 340 F. 2d 560 (5th Cir. 1965). However, the privilege cannot outlive the marriage and no privilege may be claimed after the marriage has been terminated by divorce, *Pereira* v. *United States*, 347 U.S. 1 (1954); *United States* v. *Termini*, 267 F. 2d 18 (2d Cir. 1959), or annulment. *Cooper* v. *United States*, 282 F. 2d 527 (9th Cir. 1960), although even long term separation will not extinguish the privilege. *Jackson* v. *United States*, 250 F. 2d 897 (5th Cir. 1958). Of course, a valid marriage is a necessary prerequisite for any claim of privilege and the courts have refused to recognize the privilege where the marriage was a sham and there was never any intention that the parties should live together as man and wife, *Lutwak* v. *United States*, 344 U.S. 604 (1953); *United States* v. *McElrath*, 377 F. 2d 508 (6th Cir. 1967).

Since the common law rule of general incompetency has been rejected, *Funk* v. *United States*, 290 U.S. 371 (1933), one spouse is a competent witness *for* the other, *Lutwak* v. *United States*, 344 U.S. 604 (1953); *Ford* v. *United States*, 210 F. 2d 313 (5th Cir. 1954); *United States* v. *Norris*, 205 F. 2d 828 (2d Cir. 1953).

The privilege is subject to two general exceptions, one where the husband or wife is the victim of the spouse's criminal act, *United States* v. *Shipp*, 409 F. 2d 33 (4th Cir. 1969); *Wyatt* v. *United States*, 362 U.S. 525 (1960); *Shores* v. *United States*, 174 F. 2d 838 (8th Cir. 1950), and the other where the privilege has been waived, *United States* v. *Moorman*, 358 F. 2d 31 (7th Cir. 1966); *Peek* v. *United States*, 321 F. 2d 934 (9th Cir. 1963).

Privileged communications during the marriage—The privilege protecting one from adverse testimony by his spouse is clearly distinguishable from the privilege afforded communications occurring during their marriage:

> The rule against adverse spousal testimony depends on a marital relation at the time the testimony is offered, and it is immaterial whether the persons were married at the time about which the witness is asked to testify. The confidential communications privilege, however, applies only to communications between the persons while they are married, but it survives death or divorce. Second, the former rule applies only to defendant and his spouse, while the confidential communications privilege applies to any witness. Third, the rule against adverse spousal testimony applies to all testimony of any kind, while the confidential communications privilege reaches only those communications made in confidence and intended to be confidential. There is, however, a presumption that marital communications are confidential that must be overcome before the testimony can be admitted. 2 Wright & Miller, *Practice & Procedure*, § 406.

Confidential communications between husband and wife are privileged under federal law, *Wolfle* v. *United States*, 291 U.S. 7 (1934); *Blau* v. *United States*, 340 U.S. 332 (1951). Since the purpose of the privilege is to protect communications made during the marriage, it does not include conversations occurring prior to the marriage or after its termination, *Volianitis* v. *Immigration and Naturalization Service*, 352 F. 2d 766 (9th Cir. 1965); *Pereira* v. *United States*, 347 U.S. 1 (1954), but the privileged status of a communication made during the marriage

*This is contrary to the practice in most other jurisdictions which generally limit the privileges to criminal cases and permitting one spouse to testify either for or against the other in civil cases. *McCormick on Evidence*, § 66 (Clearly ed., 2d ed. 1972).

is not terminated by divorce, *Pereira* v. *United States, supra; Barsky* v. *United States*, 339 F. 2d 180 (9th Cir. 1964), or annulment, *Cooper* v. *United States*, 282 F. 2d 527 (9th Cir. 1960). As the Court noted in *Pereira*, 347 U.S. at 6, "Although marital communications are presumed to be confidential, that presumption may be overcome by proof of facts showing that they were not intended to be private. *Blau* v. *United States*, 340 U.S. 332; *Wolfle* v. *United States*, 291 U.S. 7. The presence of a third party negatives the presumption of privacy. . . . [*Pool* v. *United States*, 260 F. 2d 57 (9th Cir. 1958)]. So too, the intention that the information conveyed be transmitted to a third person. . . . The privilege, generally, extends only to utterances and not to acts." Of course the privilege may be waived by the spouse who holds it, *Fraser* v. *United States*, 145 F. 2d 139 (6th Cir. 1944).

Clergyman-Penitent

We have only been able to locate three cases where the federal law of clergyman-penitent privilege is discussed, *Mullen* v. *United States*, 263 F. 2d 275 (D.C. Cir. 1958); *United States* v. *Wells*, 446 F. 2d 2 (2d Cir. 1971); *In re Verplank*, 329 F. Supp. 433 (C.D. Cal. 1971)*. One authority summarized *Mullen* as follows:

> In a recent case the defendant was convicted of keeping his children in chains. At the trial, a Lutheran minister, appearing as the court's witness, testified that the defendant had confessed to such conduct while seeking spiritual advice. On appeal, the conviction was reversed for failure of the trial judge to instruct as to intent. In a concurring opinion another ground was offered—the privilege of a penitent. The concurring opinion represented the views of two judges of a bench of three. It made no difference that no objection was taken in the trial court, since the witness was called by the trial judge. Rule 52(d) of the Federal Rules of Criminal Procedure, concerning obvious errors, permitted the appellate court to notice such error. The disclosure was a confidential confession to a spiritual adviser. There was no waiver of the privilege merely because the minister testified as a character witness for the defendant. The court of appeals recognized the privilege even though it did not exist at common law and even though there was no federal statute creating it. Rule 26 of the Federal Rules of Criminal Procedure provides that privileges of witnesses shall be governed by the principles of the common law as they may be interpreted by the federal courts in the light of reason and experience. The favorable views of Dean Wigmore were cited. Orfield, "Privileges in Federal Criminal Evidence" 40 *University of Detroit Law Journal* 403, 414 (1963).

The Second Circuit in *Wells* discussed the question briefly:

> Appellant also assigns error in the admission in evidence on the issue of mental competence of a letter from appellant to a priest, as a violation of a priest-penitent privilege. The priest took the letter, which requested him to get in touch with Agent Jansen of the FBI and have him come to see appellant, as intended not to be kept in confidence and turned a copy of it over to the FBI. Judge Weinstein also so interpreted it, and admitted it into evidence.
>
> In this ruling we think the court was correct. The letter contains no hint that its contents were to be kept secret, or that its purpose was to obtain religious or other counsel, advice, solace, absolution or ministration. It merely requested assistance by putting Wells in touch with the agent and explained Well's purpose and plan in asking this. While the privilege has been recognized in federal courts it appears to be restricted to confidential confession or other confidential communications of a penitent seeking spiritual rehabilitation. *Mullen* v. *United States*, 105 U.S. App. D.C. 25, 263 F. 2d 275, 277–280 (1958). . . . 446 F. 2d at 4.

In re Verplank, is both interesting and of questionable vitality because of the weight which it places on Rule 506 of the Proposed Rules of Evidence for United States Courts and Magistrates, 51 F.R.D. 315, 371 (1971) in addition to the foundation used in *Mullen*, 329 F. Supp. at 436–37. *Verplank* recognized the privileged as expressed in the 1971 version of the Federal Rules of Evidence.

Political Vote

We have been unable to locate any federal cases discussing the political vote privilege recognized in some jurisdictions, see 8 *Wigmore on Evidence* § *2214* (3d ed. 1940).

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*There is general dicta supporting federal recognition of the privilege in *Totten* v. *United States*, 92 U.S. 105, 107 (1875); *McMann* v. *S.E.C.* 87 F. 2d 377, 378 (2d Cir. 1937); and *United States* v. *Kenney*, 111 F. Supp. 233, 234 (D.D.C. 1953). However, since in these cases recognition is contained within a statement also suggesting federal recognition of a doctor-patient privilege, their authority is questionable.

Trade Secrets

While the right to have one's trade secrets and confidential customer lists protected against unnecessary intrusion has long been referred to as a "privilege", 8 *Wigmore on Evidence* §2212(3) (3d ed. 1940), it differs greatly from the more commonly recognized privileges. "In the first place, in an epoch when patent-rights and copyrights for invention are so easily obtained and so amply secured, there can be only an occasional need for the preservation of an honest trade secret without resort to public registration for its protection." *Id.* Second, trade secrets enjoy certain other statutory protections in connection with their required disclosure to governmental agencies, see Required Reports Privilege, *supra*, 15 U.S.C. §§78x, 79v, and 5 U.S.C. §552(b)(4). Thirdly and most importantly, it is a privilege that seems to be recognized only when the party who seeks its disclosure has no substantial need for the information. As the Seventh Circuit Court of Appeals recently observed:

> Trade secrets are not privileged, and plaintiff has no absolute right to refuse to divulge the information sought on those grounds. *Natta* v. *Zletz*, 405 F. 2d 99, 101 (7th Cir. 1968). . . . Plaintiff may not simultaneously contend that such secrets exist and base a suit upon them, and nevertheless preclude any accurate determination of the truth of those claims by the very court which it expects to grant relief.* [*Our conclusion that the material claimed as trade secrets is discoverable does not preclude a motion by plaintiff upon remand for a protective order from the district court under Rule 30(b). Cf. *Natta* v. *Zletz*. . . . *National Utility Service, Inc.* v. *Northwestern Steel and Wire Co.*, 426 F. 2d 222, 227 (7th Cir. 1970). See discussion of cases generally in Rules of Evidence for United States Courts and Magistrates, Rule 508, Advisory Committee's Note 56 F.R.D. 183, 250–51 (1972).

Secrets of State and Other Official Information

The federal recognized privileges in this area are materially effected by the Freedom of Information Act and the exceptions thereto. 5 U.S.C. § 552. The purpose of the Freedom of Information Act, as amended, is to make information in the possession of the United States government generally available to the public with certain exceptions. Under the Act any member of the general public who feels information has been improperly withheld may seek judicial relief in the appropriate United States District Court. The exceptions to the general disclosure requirements of the Act were modeled after the evidentiary privileges generally available to the government in a judicial context:

> 5 U.S.C. § 552. Public Information; agency rules, opinions, orders, records and proceedings
>
> (b) This section does not apply to matters that are—
>
> (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory files compiled for law enforcement purposes except to the extent available to a party other than an agency;
>
> (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
>
> (9) geological and geophysical information and data, including maps, concerning wells.

While the litigant is obviously entitled to the same rights as any other member of the general public under the Freedom of Information Act, it does not necessarily follow that the governmental privilege in actual litigation will be as broad as the exceptions to the Act. *State Secrets*—There seems little question that the common law recognized a privilege for information involving diplomatic and military secrets, 8 *Wigmore on Evidence* §2378 (3d ed. 1940). In *United States* v. *Reynolds*, 345 U.S. 1, 7–8, 11 (1953), the Supreme Court declared:

> Judicial experience with the privilege which protects military and state secrets has been limited in this country. English experience has been more extensive, but still relatively slight compared with other evidentiary privileges.

> Nevertheless, the principles which control the application of the privilege emerge quite clearly from the available precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. . . .

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.

In the context of the Freedom of Information Act, the courts have held that under the exemption of 5 U.S.C. § 552(b)(1) that the courts must accept the classification of information except in cases of arbitrary or capricious classification, *Epstein* v. *Ressor*, 421 F. 2d 930 (9th Cir. 1970); *Soucie* v. *David*, 448 F. 2d 1067 (D.C. Cir. 1971); see also, *EPA* v. *Mink*, 410 U.S. 73 (1973).

Other official information

Whatever its boundaries as to other types of claims not involving state secrets, it is well established that the privilege obtains with respect to intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. [*Machin* v. *Zuchert*, 316 F. 2d 336 (D.C. Cir. 1963) (deliberations and recommendations as to Air Force policy); *Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d 654 (D.C. Cir. 1960) (recommendations as to Renegotiation Board policies and decisions); *Clark* v. *Pearson*, 238 F. Supp. 495, 496 (D.D.C. 1965) (advisory recommendations as to Justice Department action); *Zacher* v. *United States*, 227 F. 2d 219, 226 (8th Cir. 1955) (recommendations to Attorney General as to litigation decision); *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939 (Ct. Cl. 1958) (opinions as to proposed sale of plants by General Services Administration); *Walled Lake Door Co.* v. *United States*, 31 F.D.R. 258, 259–60 (E.D. Mich. 1962) (memoranda and reports pertaining to decision of Interstate Commerce Commission); *E. W. Bliss Co.* v. *United States*, 203 F. Supp. 175, 176 (N.D. Ohio 1961) (transmittal letters); *O'Keefe* v. *Boeing Co.* 38 F.D.R. 329, 334 (S.D.N.Y. 1965) (opinions, recommendations and deliberations as to Air Force policy) . . . .]

This privilege, as do all evidentiary privileges, effects an adjustment between important but competing interests. There is, on the one hand, the public concern in revelations facilitating the just resolution of legal disputes, and on the other, occasional but compelling public needs for confidentiality. In striking the balance in favor of nondisclosure of intra-governmental advisory and deliberative communications, the privilege subserves a prepondering policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate, and thus achieves an objective akin to those attained by other privileges more ancient and commonplace in character. Nowhere is the public interest more vitally involved than in the fidelity of the sovereign's decision- and policy-making resources. *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324–25 (D.D.C. 1966).

As the Court indicates, the "privilege" in an evidentiary sense is not absolute and disclosure may be required if the court determines that the interests of the party requesting the information outweigh the government's need for secrecy. *Olsen* v. *Camp*, 328 F. Supp. 728 (E.D. Mich. 1969); *Singer Sewing Machine Co.* v. *N.L.R.B.*, 329 F. 2d 200 (4th Cir. 1964).

Informer-Identity

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. . . . The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity

of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of cause, the privilege must give way. *Roviaro* v. *United States*, 353 U.S. 53, 59–61 (1957).

Since *Roviaro*, the federal courts have consistently held both that the defendant has no absolute constitutional right to the disclosure of the identity, *United States* v. *Bolton*, 458 F.2d 377 (9th Cir. 1972); *United States* v. *Newsome*, 432 F.2d 51 (5th Cir. 1970); *United States* v. *Harrison*, 432 F.2d 1328 (D.C. Cir. 1970), and that the government has no absolute right to withhold the informant's identity, *United States* v. *Emory*, 468 F.2d 1017 (8th Cir. 1872); *Riley* v. *United States*, 411 F.2d 1146 (9th Cir. 1969); *Garcia* v. *United States*, 373 F.2d 806 (19th Cir. 1967); *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 (5th Cir. 1972). As the Court observed in *United States* v. *Skeens*, 449 F.2d 1066, 1071 (D.C. Cir. 1971):

> The Supreme Court has made clear that the exception to the informer privilege recognized by *Roviaro* requires that, in each case, the court balance the right of the defendant to a fundamentally fair trail by obtaining any evidence that may be helpful to his defense, on the one hand, and the need of society "to protect the flow of information to the Government" by keeping secret the identify of its informers, on the other. *Westinghouse Elec. Corp.* v. *City of Burlington*, . . . 351 F.2d 762, 768 (1965); *United States* v. *Russ*, 362 F.2d 843, 845 (2d Cir.) . . . In striking this balance as we do today, we find ourselves in accord with every other federal appellate court, including a panel of this Court in *Anderson* v. *United States*, . . . 272 F.2d 75 . . . (1969), which has had the occasion to consider the disclosure problem since *Roviaro*. The lower federal courts have consistently held that *Roviaro* does not require disclosure of an informant who was not an actual participant in or a witness to the offense charged.
>
> *See, e.g., Rocha* v. *United States*, 401 F. 2d 529 (5th Cir. 1968) . . .; *Jiminez* v. *United States*, 397 F.2d 271 (5th Cir. 1968); *Churder* v. *United States*, 397 F. 2d 825, 831–832 (8th Cir. 1968); . . . Conversely, disclosure has been required where the informant was an active participant or was present at the scene of the crime. See, e.g., *Lopez-Hernandez* v. *United States*, 394 F. 2d 820 (9th Cir. 1968); *United States*, v. *Roberts*, 388 F. 2d 646, 648–649 (2d Cir. 1968); *Gilmore* v. *United States*, 256 F. 2d 565, 566–567 (5th Cir. 1958).

The defendant seeking the identity of an informer is generally said to have the heavy burden of establishing the need for disclosure and that burden cannot be met by mere speculation as to the informer's possible testimony, *United States* v. *Kelly*, 449 F. 2d 329 (9th Cir. 1971); *United States* v. *Skeens*, *supra; Lannom* v. *United States*, 381 F. 2d 858 (9th Cir. 1967).

While it is generally said that "when the issue is not guilt or innocence, but, as here, the question of probable cause for an arrest or search . . . police officers need not invariably be required to disclose an informant's identity if the trial judge is convinced, by the evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant," *McCray* v. *Illinois*, 386 U.S. 300 (1967), the Second Circuit has held that disclosure is required when the informer's information constituted " 'the essence or core or main bulk' of the evidence brought forth which would otherwise establish probable cause." *United States* v. *Tucker*, 380 F. 2d 206, 212 (2d Cir. 1967); *United States* v. *Commissiong*, 429 F. 2d 834 (2d Cir. 1970); *United States* v. *Colon*, 419 F. 2d 120 (2d Cir. 1969).

Other Privileges

Various federal courts have refused to recognize the existence of any testimonial privilege between newsmen and their sources, *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), researchers and their sources, *United States* v. *Doe*, 460 F. 2d 328 (1st Cir. 1972), draft counselors and their clients, *In re Verplank*, 329 F. Supp. 433 (C.D. Cal. 1971), bankers and their customers, *Harris* v. *United States*, 413 F. 2d 316 (9th Cir. 1969); *Rosenblatt* v. *Northwest Airlines, Inc.*, 54 F.R.D. 21 (S.D.N.Y. 1971); *Stark* v. *Connally*, 347 F. Supp. 1242 (N.D. Cal. 1972), insurance companies and their insureds, *Gottlieb* v. *Bresler*, 24 F.R.D. 371 (D.D.C. 1959), and accountants and their clients, *United States* v. *Wainwright*, 413 F. 2d 796 (10th Cir. 1969); *Himmelfarb* v. *United States*, 175 F. 2d 924 (9th Cir. 1949); *United States* v. *Schmidt*, 343 F. Supp. 444 (M.D. Pa. 1972).

HARNESS, DICKEY & PIERCE,
Detroit, Mich., August 21, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: I am writing to urge reconsideration of your subcommittee's revised draft of Rule 804 (b) (1) of the Federal Rules of Evidence, at least insofar as it is applicable to civil actions.

The amended Rule 804 (b) (1) as it appears in the committee draft published in the Congressional Record House for June 26, 1973 makes possible a highly unjust result in certain situations. Assume, for example, that in an action brought by A against B the testimony adduced by B was completely discredited by rebuttal testimony adduced by A, and judgment was rendered for A on that ground. The witnesses for both sides were cross-examined by opposing counsel. In a subsequent action by A against C, involving the same issue (assuming none of the witnesses are then available) the rule in the amended form of the committee draft would allow C to offer the discredited testimony adduced by B in the previous action, but would not allow A to offer the testimony which discredited B's testimony because C had no opportunity to cross-examine. This would result in a gross miscarriage of justice.

Rule 804 (b)(1) in the form approved by the Supreme Court would avoid such injustice; and it is the result of long and careful consideration by highly qualified experts over a period of more than thirty years. Thus, it was first proposed by Professor Wigmore in his work on Evidence published in 1940. There Wigmore, in discussing the question, said: (5 Wigmore Sec. 13388)

> "It is commonly said that the parties to the litigation in which testimony was first given must have been the same as in the litigation in which it was offered.
>
> But this limitation suffers in practice many modifications; and properly so, for it is not a strict and necessary deduction from the principle * * *
>
> "It ought, then, to be sufficient to inquire whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has; and the determination of this ought to be left entirely to the trial judge:"

The Uniform Rules of Evidence, which were approved by the National Conference of Commissioners of Uniform State Laws on August 22, 1953, and also by the American Bar Association at its meeting in Boston on August 28, 1953, as well as the American Law Institute in May, 1954, incorporated the proposed rule. See Uniform Rule 63(3) which reads as follows:

> "Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, *or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered* * * *" (italics added)

Jones on Evidence, Civil and Criminal, 6th Edition, 1972, Vol. 2, Section 9:25 to 9:27 sets forth the three stages in the development of the law. The first, which is referred to as "the older rule to which some courts still adhere," requires identity of all parties and of issues for admission of testimony given in an earlier proceeding. Next, what is called "the more liberal and generally followed rule," requires that the party against whom the testimony is offered has had an opportunity to cross-examine the witness. Finally, in Section 9:27 (Vol. 2, p. 242) Jones states:

> "Some courts have *commendably* modified the same party doctrine even further by recognizing that it should not be necessary that the party against whom the former testimony is now offered, should actually have had an opportunity to cross-examine on the former occasion, but that it is sufficient if there was a party in the former proceeding who had an opportunity of cross-examination, and who had an interest and motive for cross-examination similar to that which the party has against whom the testimony is now offered." (emphasis added)

Judge Joe Ewing Estes in a talk before the 1958 meeting of the 5th Judicial Circuit, in recommending use of the Uniform Rules for guidance by trial judges, commented favorably on Rule 63(3). See 24 FRD 331.

California, Kansas, New Jersey and Utah have adopted by statute or court rule this more liberal view. Thus, for example, the California Evidence Code, Section 1292 (as enacted in 1965) reads as follows:

> 1292. "Former testimony offered against person not a party to former proceeding. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if: (1) The declarant is unavailable as a witness; (2) The former testimony is offered in a civil action; and (3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing."

To the same effect is the Kansas Code of Civil Procedure, Sec. 60–460(c)(2); the New Jersey Evidence Rule 63(3) and the Utah Supreme Court Rule 63(3).

Other jurisdictions have adopted this view by judicial rulings. See *Tug Raven et al.* v. *Trexler*, 419 F. 2d 536, C.A. 4 1969, cert. den. 398 U.S. 938; *Minyen* v. *American Home Insurance Company*, 443 F. 2d 788 (dictum); *Cox* v. *Selover*, Minn. 1927, 213 N.W. 902; *Bartlett* v. *Kansas City Public Service Co.*, Missouri S. Ct., 1942, 160 S.W. 2d 740; *Proulx* v. *Parrow*, 115 Vt. 232, 56 A 2d 623, 1948; *In re Durant*, 80 Conn. 140, 67 A 497; *Travelers Fire Insurance Company* v. *J. C. Wright et al.*, Okla., 1958, 322 P 2d 417; 70 ALR 2d 1170.

McCormick on Evidence, 2d Edition, 1972, in discussing this doctrine explains why there is no validity to the requirement of identity of parties against whom the testimony is offered, as follows: (Chapter 25, Sec. 256, p. 620)

> "The argument that it is unfair to force upon a party another's cross-examination or decision not to cross-examine a witness loses its validity with the realization that other hearsay exceptions involve no cross-examination whatever, and further that the choice is not between perfect and imperfect conditions but between imperfect conditions and no testimony at all."

I recognize that this letter comes late in your committee deliberations, but feel that it is important to avoid crystalizing an unjust rule. Note that the proposed rules as amended by your committee even prevent further judicial development of this important point of law.

Very truly yours,

JOHN A. BLAIR.

SCHWEPPE, DOOLITTLE, KRUG, TAUSEND,
BEEZER & BEIERLE,
Seattle, Wash., August 22, 1973.

Re proposed Federal Rules of Evidence.

Congressman WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HUNGATE: Your committee's print of a tentative subcommittee draft of H.R. 5463 did not come to my attention until today. I realize that the deadline for comments has passed, but I ask that you consider this comment to the extent possible.

My comment relates to *Rule 802(6)*, the "business record" exception to the Hearsay Rule. Your subcommittee has inserted requirements for admissability that (a) a document is *kept* in the course of a regularly conducted activity, and (b) it was a regular practice of the business to make such a document.

My own experiences as a practicing antitrust lawyer lead me to object to both these requirements. My observation is that these requirements will result in the exclusion from evidence of much material which is reliable, relevant and important to a fair consideration of litigated facts. Precautionary instructions about the weight to be accorded documents commonly prepared by businessmen which do not meet these requirements, may be in order, but I do not believe these requirements should affect admissibility. The criteria for admissibility set forth in the original draft of Rule 802(6) are adequate to assure reliability, and I strongly recommend a return to that original language.

Very truly yours,

DAVID G. KNIBB.

MALONEY, WILLIAMS AND BAER,
Boston, Mass., August 24, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed please find a tardy set of my comments on the Subcommittee draft of the proposed Federal Rules of Evidence.

Very truly yours,

TERRY PHILIP SEGAL.

JULY 13, 1973.

Re ABA Committee on Federal Rules of Criminal Procedure and Evidence: Proposed Federal Rules of Evidence.

Hon. WILLIAM H. ERICKSON,
Justice, Colorado Supreme Court,
State Capitol, Denver, Colo.

DEAR JUSTICE ERICKSON: As a newly appointed member of your Subcommittee, I recently received the House Committee Print of H.R. 5463.

Between attempting to complete my criminal trial docket and squeeze in a vacation before the ABA convention, I am taking the liberty of sending you my thoughts on the Committee Print.

Because the Proposed Rules contained a number of inconsistencies in the area of Privileges, the Committee Print represents a step forward. For example, the Proposed Rules recognized no privilege for a patient's confidential communication to a doctor, unless the doctor is acting as a psychotherapist (Rule 504). Psychotherapy should not have been singled out for special treatment—especially since many thorough doctors frequently inquire about mental or emotional conditions. Rather there should be a general physician-patient privilege. Additionally, the Proposed Rules recognized a privilege for communications to Clergymen (Rule 506), but did not protect the confidential communications of a married couple, except in certain criminal proceeding situations (Rule 505).

While narrowing the privileges of private citizens, the Proposed Rules created a wider Governmental privilege for "official information" (Rule 509). Under existing case law, executive privilege as a justification for refusing to produce subpoenaed departmental records must be invoked "by the head of the department which has control over the matter." *United States* v. *Reynolds*, 345 U.S. 1, 8 (1953). Under the Proposed Rules (Rule 509C), any government attorney can claim the privilege for "official information"—thus creating a greater opportunity when no security lower echelon bureaucrats to withhold relevant information when no security issues are involved.

In the hearsay area, the Proposed Rules recognized a hearsay exception (Rules 803(24)) and 804(b)(6)) for statements having "comparable guarantees of trustworthiness" as the exceptions listed in Rules 803 and 804. In my view, the House Committee should not have eliminated Rules 803(24) and 804(b)(6). I concur with Hon. Jack Weinstein that admission of hearsay should depend upon probative force weighed against the possibility of prejudice, unnecessary waste of court time, and availability of more satisfactory evidence. Weinstein, *Probative Force of Hearsay*, 46 Iowa Law Review 331, 338. As Judge Weinstein points out, a series of independent letters written by disinterested ministers who were eyewitnesses to an event and who are shown to have acute vision, sound memories, and clear powers of communication, could be more reliable than dying declarations or implied admissions which may be made by a party having no knowledge of the event. Weinstein, *supra*, at 339.

I look forward to seeing you in Washington next month.

Sincerely,

TERRY PHILIP SEGAL,
Assistant U.S. Attorney.

U.S. DISTRICT COURT,
Memphis, Tenn., August 30, 1973.

Re Section 803(18) Federal Rules of Evidence.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice,
Committee on Judiciary,
House of Representatives, Washington, D.C.

DEAR SIR: This is to forward a comment on the proposed Federal Rules of Evidence. Enclosed please find an excerpt from the magazine "Modern Medicine".

This was sent to me by Dr. Munden, a Memphis psychiatrist, who is in our court from time to time. I am forwarding it with the thought that it is a comment from a segment that might not be heard from by your committee as thoroughly as the Bench and Bar might comment.

I note that the section to which this comment pertains is one that your subcommittee has not proposed to change. However, I am aware of its controversial nature by virtue of its discussion at our Judicial Conference for the Sixth Circuit, held in May. It is the thought of some judges that this rule will encourage one expert to take the stand and read from treatises by other experts who are not before the Court to be cross-examined. As a trial judge, I can forsee many problems in the determination of what constitutes a learned treatise. I have already encountered difficult problems with regard to applying this principle on cross-examination.

Please consider me as one who is opposed to the rule in its present form. I would prefer that it not be applied at all. However, it has established recognition with regard to cross-examination. Therefore, if the principle seems to be appropriate for cross-examination, I would at least favor a change to not permit merely reading from a book on direct examination.

Yours very truly,

ROBERT M. MCRAE, Jr.

"TEXTBOOK TESTIMONY", A SOURCE OF PROBLEMS?

Editor/Concerning the recent article on textbook testimony by Stanley D. Kane (MM, May 14), it is my opinion that the Michigan Supreme Court's decision to allow the use of textbooks is unfortunate and misguided. In this the good judges may have been overinfluenced by a sense of reverence and awe for the written word.

I have had considerable experience as a witness, and I wish to point out some of the problems and confusion that will be fostered by such use of textbooks.

To begin with, the issue of "authoritative": It would not be difficult at all for an attorney and a medical witness to select textbooks considered "authoritative," with clean-cut, definitely conflicting opinions. Any physician will tell you, if he is candid enough, that the vast bulk of textbooks and articles are rehashes and, when all is said and done, of very questionable value. This is in part due to the status-prestige factor of getting anything in print. Moreover, there is no "authoritative" textbook that I know of that does not have excellent to poor sections.

Last but not least, I would like to paraphrase Dr. Henry Davidson, a most experienced medical witness: "None of the authors in any authoritative textbook is familiar with the case in question."

KENNETH J. MUNDEN, M.D.,
Memphis.

Stanley Kane replies: Dr. Munden's point is well taken and cogently put. The Michigan decision, however, is part of a continuing judicial trend toward weakening of the requirement of expert testimony in malpractice cases.

SAN FRANCISCO, CALIF., *September 7, 1973.*

Congressman WILLIAM L. HUNGATE,
U.S. House of Representatives,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN HUNGATE: I am advised that your Committee, the Special Subcommittee on Reform of Federal Criminal Laws, has held and is holding hearings on the proposed Federal Rules of Evidence.

I wish to add my voice to those who oppose adoption of the proposed Federal Rules. I have been in practice over 22 years in California and for several years in the late 1950's was a member of the California State Bar Committee on Federal Practice. I regularly practice in both the State and Federal Courts.

Preliminarily, I should say I am strongly impressed with the forceful logic of Professor Charles L. Black, Jr. of the Yale Law School, that at the very outset there is a fundamental problem in such rules being promulgated under the nominal sponsorship of the United States Supreme Court, but without that Court's genuine participation in the working out of the proposed Rules. The effect of such sponsorship is to "commit" the Court on later questions of the validity and constitutionality of such rules, even though those questions have never been examined with care in the customary judicial adversary proceeding. I understand Professor Black's statement on this was set forth at length in a letter to the House Com-

mittee, a copy of which was later published in the Spring 1973 Yale Law Report.

I have profound objections to proposed changes in the law of privilege, as follows:

(1) Rule 5–01, insofar as it denies recognition to all State-created privileges as such, and protects only those privileges explicitly created by the proposed Federal Rules;

(2) Rule 5–05, which abolishes both the marital communication privilege and the privilege of spouses not to testify against each other in *civil* cases;

(3) Rule 5–03, Subsection (a)(3), which in effect appears to eliminate the attorney-client privilege as to most employees of a corporation.

1. State-created privileges should be fully recognized in the Federal Courts.

Any legal privilege by definition limits the pursuit of truth. Notwithstanding this, the law of all States recognizes and protects certain privileged relationships, and indeed Article V (Rules 5–01 through 5–13) of the proposed Federal Rules expressly grants such protection to certain relationships. My point here is that State-created privileges should be fully protected *as such* in Federal Court litigation.

a. Rule 5–01 would make a "trap" out of State-created privileges.

While laymen of course are not aware of the fine points of the law in evidence, most of them do have general notions as to the existence of privileged relationships, and do rely on such. They should not be deprived of the benefit of such because circumstances (often fortuitous, as is typically the case in Federal diversity jurisdiction actions) permit the action to be brought in a Federal, rather than a State, courthouse.

The proposed Rule would make a "trap" out of State-created privileges. For example, the proposed Federal Rules do not recognize the physician-patient privilege. If a patient asks a doctor if he can submit information in confidence, is the doctor to embark upon an inquiry as to the identity, law of incorporation and residence of all potential parties in possible future litigation, followed by a disquisition on the fine points of Federal jurisdiction?

b. Rule 5–01 would "chill" exercise of free communication within State-privileged relationships.

To the extent laymen became aware that such variance between the privileges recognized in State Courts and in Federal Courts existed, such confused and arbitrary distinctions would breed disrespect in laymen for the law. Further, it would "chill" the exercise of free communication within the privileged relationships even in situations governed solely by State law. As a practical matter, therefore, the proposed Federal Rules interfere with people's activities in situations not even subject to Federal law.

c. Rule 5–01 would put a premium upon "gamesmanship" and "forum shopping".

In potential diversity-jurisdiction cases, Rule 5–01 would put a premium upon "forum shopping", and would offer a premium to litigants to bring additional litigation in the Federal Courts even though dealing with matters wholly governed by State law, simply to get the benefit of an arbitrary difference in procedural rules. This would both further burden the already over-burdened Federal Courts, and would reintroduce "gamesmanship" in the choice of forum, an evil which modern jurisprudence seeks to minimize. Offering such a premium by means of an arbitrary distinction of procedural law reintroduces the very evils which *Erie* v. *Tompkins* sought to eliminate as to substantive law.

d. There are serious doubts as to the Constitutional validity of Rule 5–01.

The practical effect of Rule 5–01 would be to regulate and adversely affect certain status-relationships normally wholly regulated by State law, by removing from them privileged incidents created by applicable State law. Serious questions can be raised as to the power of the Federal Government to so interfere with the jurisdiction of the States in such respect. Several years of litigation could be expected before such questions would be settled. Whatever the constitutionality of such Federal regulation, the wisdom of such Federal intrusion into relationships normally governed and protected by State law is most debatable.

e. The change proposed in Rule 5–01 would simply be unworkable.

It would be unworkable for several independent reasons:

In many situations, it would impose upon men of principle the moral obligation to defy the Federal Court and Federal law, if they are to honor confidences given and accepted under the contemplated protection of State law.

It would be unworkable in requiring attorneys, requested to advise as to questions of privilege, to render all advice with respect to two over-lapping and contradictory systems of law, the intricacies of which are virtually impossible to explain to a layman.

Laymen so exposed to attempted explanation by attorneys of such overlapping and contradictory "privileges" would undoubtedly feel—with some logic—that this was "lawyers' doubletalk", and tend to lose respect for the law.

2. To deny protection to the marital communication or husband-wife privilege in civil litigation is immoral and unworkable.

While I have made no detailed survey, I believe the law of most States protects both the "marital communication" privilege and (subject to obvious exceptions) the privilege of one spouse not to testify against another.

While the pursuit of truth in litigation is of vital social importance, the protection of human dignity is of even greater importance. The decisions of the United States Supreme Court during the past years have granted enhanced protection to the latter, particularly in criminal cases.

The common opinion of mankind regards the marital relation as the most sacred in human society. I cannot believe that most people, laymen and lawyers alike, would not find it abhorrent that spouses might be judicially compelled to divulge confidential marital communications, or to testify against each other.

The Comment to Rule 5–05 that the marital communication privilege is essentially like other "communication privileges" [e.g., lawyer-client, doctor-patient] and that "those privileges are essentially and almost exclusively *verbal in nature, quite unlike marriage*" (emphasis added), makes me wonder if the author of the Comments was ever married. A normal marriage is the supreme "communicating relationship". Laymen and lawyers alike, I submit, will wonder at judicial rules which protect confidential communications to lawyers and clergymen, but not to spouses.

3. Rule 5–03(a)(3) would by indirection virtually eliminate the attorney-client privilege as to corporations in large areas of important litigation.

Rule 5–03(a)(3) defines a "representative of the client" as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client". In the case of corporate clients, this appears to limit the attorney-client privilege to corporate *officials*, i.e., those who deal on behalf of the corporation with counsel in creative transactions, or who represent the corporation in receiving professional advice. The Advisory Committee notes (Preliminary Draft, p. 80) make clear that a "bus driver", for example, in a collision case "would *not* be considered a representative, and the status of *communications between him and the company lawyer* would be *unaffected* by the fact of employment" (emphasis added).

I think this is a profoundly significant, and profoundly unwise, change in the law.

There are vast areas of litigation, including the great bulk of tort litigation, and all common carrier and products liability litigation, where the defense participants in the transaction (the operation of the carrier, the design, production, inspection, and supervision process, and the like) are "*working level*" employees of corporations. Only they have direct knowledge of the relevant matters in issue in the litigation, to communicate to counsel for the defendant corporation. Only they can speak to the point on the basis of personal knolwedge for the corporation. Corporate *officials* (e.g., the secretary of the corporation, the personnel manager, the manager of contract administration, etc.) in general have no relevant personal knowledge of such matters.

The practical effect of such change would be to deny the benefit of attorney-client protection to corporations in such litigation.

The one-sided nature of such a change—where individual personal injury plaintiffs have the full and privileged benefit of counsel but the representatives of the defendant do not—is obvious.

Some people may think that the attorney-client privilege in this type of situation is used primarily for "coaching" purposes, and therefore properly should be abolished. I believe experienced trial lawyers know better. Our present litigation system simply will not work unless the witnesses and laymen involved in the particular case can be educated as to the nature of the proceeding, the issues involved, the applicable legal rules, the rules of evidence, and the like, and the full benefit of their knowledge and thinking obtained by counsel. Indeed, it is the recognized obligation of trial counsel to the court to educate the clients involved in this regard, both to conserve judicial time and to insure compliance with the rules of evidence and other rules of judicial procedure. If such discussions are not protected by attorney-client privilege, however, they would be subject to harassing and unseemly inquisition at discovery, and subject to possible gross misunderstanding by a lay jury.

The proper application of the attorney-client privilege to employees of corporations has been exhaustively dealt with by the California Supreme Court in *Chadbourne v. Superior Court* 1964, 60 Cal. 2d 723, 388 P. 2d 700, with a number of comprehensive rules laid down at pp. 736–738. The opinion is by Justice Peters, who surely cannot be accused of any undue bias in favor of corporations or insurance companies, and the protection which such opinion grants corporate employees seems carefully thought out, reasonable and fair to both sides, and in practice has proved workable.[1]

A particular instance may make the point more vivid. The *Chadbourne* opinion lays down some 11 rules at pp. 736–738. Rule 1 protects communications to corporate counsel from the corporate employee who "is a person who may be charged with liability" (e.g., the "bus driver" who is accused of having been negligent). As noted above, that "bus driver" would *not* be protected under the proposed new Federal Rules.

In my opinion, again a question of human dignity is involved. To me, it is paradoxical indeed that in this day and age, when the courts and other organs of society profess to be expanding their concern for "ordinary working men" (who today are typically "working level" employees *of corporations*), the proposed new Federal Evidence Rules would as a practical matter deny just such persons the benefit of counsel in civil litigation in which they are involved as employees of a corporate defendant. Speaking for myself, I do not relish having to explain to such a corporate employee in future cases that, whereas the plaintiff-participant in the accident, for example, is entitled to the full benefit of the attorney-client privilege, and will be fully protected therein by the Federal Courts, the Federal Courts have decided that he (the employee of the corporate defendant in the transaction) is not.

Numerous prominent lawyers and authorities have spoken against the above change. One such body is the Committee appointed by the American College of Trial Lawyers to study the proposed Rules. I am also informed that the Association of the Bar of the City of New York, has also gone on record in opposition to this change.

I earnestly hope you will vote to require amendment of the proposed Federal Evidence Rules in the respects described, or else vote to reject them completely in their present form.

Respectfully yours,

NEIL E. FALCONER.

Enclosure.

[S.F. No. 21439. In Bank. Jan. 30, 1964.]

D. I. CHADBOURNE, INC., Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; WILLIAM HARRISON SMITH et al., Real Parties in Interest.

[1] **Witnesses—Privileged Communications—Attorney and Client.**—When facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of attorney-client privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it.

[2] **Id.—Privileged Communications—Burden of Proof.**—The party claiming privilege carries the burden of showing that the evidence that it seeks to suppress is within the terms of the statute.

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[1] See Cal.Jur.2d, Witnesses, § 63; Am.Jur., Witnesses (1st ed § 521).

McK. Dig. References: [1] Witnesses, § 77; [2] Witnesses, § 61; [3] Witnesses, § 74; [4-13] Witnesses, § 76(3); [14] Discovery, § 7.

[1] I enclose a copy of pages 723 and 736–738 of this opinion, for your information.

rior Court, 30 Cal.App.2d 130 [85 P.2d 965]), but to what extent? May it transfer the information through four hands (as here) without waiving the privilege? Through a dozen? No California authority has expressly discussed the length to which an insurance company may go in the transmittal of the statement of an employee of its corporate insured, without losing confidentiality. Some of these questions must be answered, for the answers are requisite to the determination of the single issue here involved.

[3] Certainly the public policy behind the attorney-client privilege requires that an artificial person be given equal opportunity with a natural person to communicate with its attorney, within the professional relationship, without fear that its communication will be made public. As one writer has said, "The more deeply one is convinced of the social necessity of permitting corporations to consult frankly and privately with their legal advisers, the more willing one should be to accord them a flexible and generous protection." (Simon, *The Attorney-Client Privilege as Applied to Corporations* (1956) 65 Yale L.J. 953, 990.)

But reason dictates that the corporation not be given greater privileges than are enjoyed by a natural person merely because it must utilize a person in order to speak. If we apply to corporations the same reasoning as has been applied in regard to natural persons in reference to privilege, and if we adapt those rules to fit the corporate concept, certain principles emerge clear. [4] These basic principles may be stated as follows:

1. When the employee of a defendant corporation is also a defendant in his own right (or is a person who may be charged with liability), his statement regarding the facts with which he or his employer may be charged, obtained by a representative of the employer and delivered to an attorney who represents (or will represent) either or both of them, is entitled to the attorney-client privilege on the same basis as it would be entitled thereto if the employer-employee relationship did not exist;

[5] 2. When such an employee is not a codefendant (or person who may be charged with liability), his communication should not be so privileged unless, under all of the circumstances of the case, he is the natural person to be speaking for the corporation; that is to say, that the privilege will not attach in such case unless the communication constitutes information which emanates from the corporation (as dis-

tinct from the nonlitigant employee), and the communicating employee is such a person who would ordinarily be utilized for communication to the corporation's attorney;

[6] 3. When an employee has been a witness to matters which require communication to the corporate employer's attorney, and the employee has no connection with those matters other than as a witness, he is an independent witness; and the fact that the employer requires him to make a statement for transmittal to the latter's attorney does not alter his status or make his statement subject to the attorney-client privilege;

[7] 4. Where the employee's connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation's business, the employee is no longer an independent witness, and his statement or report is that of the employer;

[8] 5. If, in the case of the employee last mentioned, the employer requires (by standing rule or otherwise) that the employee make a report, the privilege of that report is to be determined by the employer's purpose in requiring the same; that is to say, if the employer directs the making of the report for confidential transmittal to its attorney, the communication may be privileged;

[9] 6. When the corporate employer has more than one purpose in directing such an employee to make such report or statement, the dominant purpose will control, unless the secondary use is such that confidentiality has been waived;

[10] 7. If otherwise privileged under the rules stated above, a communication does not lose its privilege merely because it was obtained, with the knowledge and consent of the employer, by an agent of the employer acting under such agency;

8. For such purpose an insurance company with which the employer carries indemnity insurance, and its duly appointed agents, are agents of the employer corporation; but the extent to which this doctrine may be carried, and the number of hands through which the communication may travel without losing confidentiality must always depend on reason and the particular facts of the case;

[11] 9. And in all corporate employer-employee situations it must be borne in mind that it is the intent of the person from whom the information emanates that originally governs its confidentiality (and hence its privilege); thus where the employee who has not been expressly directed by

his employer to make a statement, does not know that his statement is sought on a confidential basis (or knowing that fact does not intend it to be confidential), the intent of the party receiving and transmitting that statement cannot control the question of privilege;

AMERICAN BAR ASSOCIATION,
Chicago, Ill., September 12, 1973.

Hon. WILLIAM HUNGATE,
Chairman, Subcommittee on Criminal Justice of the House Judiciary Committee, Rayburn House Office Building Washington, D.C.

DEAR CONGRESSMAN HUNGATE: At the meeting of the House of Delegates of the American Bar Association held August 6–8, 1973, the enclosed resolution was adopted upon recommendation of the Committee on Federal Practice and Procedure.

This resolution is being transmitted for your information and whatever action you may deem appropriate.

Please do not hesitate to let us know if you need any further information or have any questions.

Sincerely yours,

KENNETH J. BURNS, Jr.

Enclosure.

RULES OF EVIDENCE

Recommendation presented by the Committee on Federal Practice and Procedure and Approved by the House of Delegates—August, 1973.

Whereas, Subsequent to the filing of the report of the Special Committee on Federal Practice and Procedure, the Special Subcommittee of the Judiciary Committee of the House of Representatives (commonly called the Hungate Subcommittee) which is giving detailed consideration to the proposed Federal Rules of Evidence, has filed a report with the full Judiciary Committee, where the matter is presently pending; and

Whereas, Certain of the recommendations of the Special Committee are no longer necessary because the pertinent sections to which the Special Committee objected have been stricken in the report of the Hungate Subcommittee;

Now, therefore, be it *Resolved*, That the American Bar Association concurs in the Hungate Subcommittee's Report on the Federal Rules of Evidence insofar as the Report omits from the proposed Federal Rules of Evidence for United States Courts and Magistrates as transmitted by the Supreme Court of the United States to the Congress certain of the rules pertaining to Hearsay [Rules 803(24), 804(b)(2), and Rule 804(b)(6)]; all of the rules pertaining to privilege (Rules 501–513); and the rule on summing up and comment by judges (105).

Further *Resolved*, That the recommendations made by the Special Committee in its reports for revision of certain rules be approved as follows (the page number in the Special Committee's report follows the Rule number and title):

Rule 601	General Rule of Competency (p. 8).
Rule 609(a)	Impeachement by Evidence of Conviction of Crime—General rule (p. 9).
Rule 609(b)	Time limit (p. 10).
Rule 609(c)	Effect of pardon, annulment or certificate of rehabilitation (p. 10).
Rule 803(1)	Hearsay Exceptions. Present sense impression (p. 11).
Rule 803(6)	Records of regularly conducted activity (p. 11).
Rule 803(18)	Learned treatises (p. 12).
Rule 804(b)(1)	Hearsay exceptions. Former testimony (p. 13).
Rule 804(b)(5)	Hearsay exceptions. Statement of personal or family history (p. 14).

AMERICAN BAR ASSOCIATION, SPECIAL COMMITTEE ON FEDERAL PRACTICE AND PROCEDURE

RECOMMENDATION

That the President of the American Bar Association be authorized to designate Association representatives to present the views of the Association upon the proposed Rules of Evidence for United States Courts and Magistrates as set forth in the Special Committee's August, 1973 Report.

REPORT—AUGUST, 1973

The Special Committee on Federal Practice and Procedure met in Chicago on Monday, June 18th at the call of the Acting Chairman to consider and act on the Proposed Rules of Evidence for United States Courts and Magistrates. All the Committee members were present. The Rules are under consideration by a Special Sub-committee of the Committee on the Judiciary of the House of Representatives, of which Congressman William L. Hungate is the Chairman. Mr. Meserve had written to the Congressman on February 16, 1973, that the Special Committee would consider further changes and whether it would make recommendations with respect to the Rules. This meeting was called as a result of that commitment.

It should be emphasized at the outset that *the Committee did not consider:* first, whether or not there should be any new Rules; second, whether if there were to be Rules such Rules should be drafted by the Supreme Court of the United States or its duly authorized representatives or by a Congressional committee; and, third, whether there should be in any Rules of Evidence provisions relating to privileges (Article V) or hearsay (Article VIII). Various members of the Committee felt and the Report of the previous American Bar Association Committee expressed its opinion strongly on these issues but they were not on the agenda for discussion since the purpose of the meeting was only to review the Rules now being considered by the Hungate Committee.

Rule 105. Summing up and comment by the judge

This Rule affords the Judge the option of summing up the evidence and commenting to the jury upon the weight of the evidence and credibility of the witnesses, provided he also instructs the jurors that they must determine for themselves the weight of evidence and the credibility of witnesses and are not bound by his summation or comment.

The Committee recommends that the provision as written be stricken out in its entirety and in place thereof the following be inserted:

> "After the close of the evidence and arguments of counsel, the judge may review the evidence to the extent necessary to clarify his instructions on the law. If he does so, he shall also charge that the jury's recollection of the evidence is to control, but he shall not comment to the jury on the weight of the evidence or the credibility of the witnesses."

The present Federal procedure is one which permits the Judge to make such comments and the Appellate Courts have attempted to set forth pertinent guidelines. This has proved ineffectual because it cannot take into account the manner in which such comment is made; such as the tone of voice used by the Judge, facial expressions, or other indicia of his personal beliefs which the printed record does not reflect. We see no useful purpose served by permitting such summation and comment.

Rule 503. Lawyer-client privilege

This Rule preserves the traditional Lawyer-Client privilege broadly codifying existing law. Moreover, it extends the privilege to cover "representative of the lawyer" who is defined as "one employed to assist the lawyer in the rendition of professional legal services". This definition would seem broad enough to cover accountants, para-professionals, investigators and secretaries working with the lawyer.

As to a related definition, i.e. "representative of the client", the Committee originally proposed the following language which was not, at that time, accepted. The Committee strongly urges the adoption of the following provision which it originally suggested:

> "(3) A 'representative of the client' is one (a) having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on

behalf of the client, *or (b) authorized by the client to disclose or furnish to the client's lawyer or a representative of such lawyer confidential communications, data or information.*"

Rule 503. Lawyer-client privilege

(c) *Who May Claim the Privilege.*

The Committee strongly urges in the second sentence the word "may" be changed to "shall" and add at the end the words "unless waived by the client" so that the sentence will read:

"The person who was the lawyer at the time of the communication must claim the privilege but only on behalf of the client unless waived by the client."

Rule 504. Psychotherapist-patient privilege

The Committee urges that limitation on the physician-patient privilege contained in Rule 504 be rejected and that the revised Rule should contain the traditional protection of the physician-patient privilege, subject only to the waiver by the patient or his legal representative. The privilege would be considered to have been so waived where an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

Rule 505. Husband-wife privilege

This Rule narrows the Husband-Wife privilege to criminal cases with three stated exceptions. The Special Committee favors the existing rule of law where the privilege is available in both civil and criminal cases and recommends that language be adopted that preserves the privilege, in accordance with the law of the state, in both civil and criminal cases.

Rule 506. Communications to clergymen

This Rule deals with communication with clergymen and defines the term "clergymen" broadly and extends the privilege to any communication made to a clergyman in his professional capacity. The Special Committee has no comment as to the Proposed Rule except that it feels very strongly that paragraph (c) which permits the privilege to be claimed by the person, his guardian, conservator or personal representative, if he is deceased, should be amended so that either the clergyman or the person may claim the privilege. The Special Committee proposed this language:

"(c) *Who May Claim the Privilege.* The privilege may be claimed either by the clergyman or by the person, by his guardian or conservator or by his personal representative, if he is deceased, and may not be waived by anyone other than the person."

Rule 509. Secrets of state and other official information

This Rule has undergone more discussion and more amendment than any other Rule or Privilege. As now drafted, the Special Committee has this recommendation which it deems of real importance. In paragraph (c) *Procedures*, the phrase in the first sentence reading "but the privilege for official information may be asserted by any attorney representing the government" should be eliminated so that the sentence will read:

"(c) *Procedures.* The privilege for secrets of state and the privilege for official information may be claimed only by the chief officer of the government agency or department administering the subject matter which the secret or official information sought concerns."

The Committee feels that if the privilege is to be claimed, it should be done by a person at a high level of authority and not by some Assistant United States District Attorney, way down on the bottom of the totem pole.

The Committee urges that Rule 509 be reviewed and reconsidered to make it consistent with the *Freedom of Information Act* with the view of placing the government in the same position as any other percipient witness insofar as the imposition of a duty to disclose relevant evidence is concerned.

Rule 513. Comment upon or inference from claim of privilege; instruction

The Special Committee suggests that the provision be tightened by making it clear that paragraph (a) *Comment or Inference Not Permitted*, does not apply to the constitutional privilege against self-incrimination, which these Rules do not purport to state or to govern in any respect. Although no comment on the claim of

this constitutional privilege is permitted in criminal cases, there is authority to permit counsel for the opposing party in civil litigation to suggest to the jury that they may draw appropriate inference from a party's refusal to answer questions relevant to the issues in the civil case, even though the party is entitled to refuse to answer because of the privilege against self-incrimination.

The Special Committee's suggestion could be implemented by adding the words "accorded by Rules 503–510, inclusive" so that the sentence will read:

"(a) *Comment or Inference Not Permitted.* The claim of a privilege accorded by Rules 503–510, inclusive; whether in the present proceeding or upon a prior occasion is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom."

ARTICLE VI. WITNESSES

Rule 601. General rule of competency

This Rule eliminates the so-called "Dead Man's Acts". The Special Committee prefers to omit this provision so that the law will be as it is at present governed by the laws of the various states. If, however, it remains the present paragraph should be marked (a) and a new paragraph should be added as follows:

"(b) *Effect of State Dead Man Disqualification.* With respect to a material proposition as to which state law controls the rule of decision, the law of that state creating a disqualification of evidence or witnesses on the basis of state policies safeguarding the estates of deceased or incompetent persons, shall control over any inconsistent provision in these rules."

This addition is suggested in order to avoid the same *Erie* considerations of federal usurpation and forum shopping that are presented by the proposed privilege Article.

Rule 609. Impeachment by evidence of conviction of crime

(a) *General Rule.*

The Committee strongly urges that there be added to this Rule the language that appeared in the previous edition (1971 Revised Draft) and is omitted in the current Draft (November 20, 1972):

"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."

(b) *Time Limit.*

The Committee strongly urges that the language used in the current draft be stricken in its entirety and in place thereof the language in the previous draft (1971 Revised Draft) reading as follows be substituted:

"(b) *Time Limit.* Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date."

(c) *Effect of Pardon, Annulment or Certificate of Rehabilitation.*

The Committee strongly urges that the following words in lines 4 and 5 of this paragraph be stricken out:

"and the witness has not been convicted of a subsequent crime"

so that the paragraph will read:

"(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 substantial showing or rehabilitation or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on innocence."

ARTICLE VIII. HEARSAY

Rule 803. Hearsay exceptions

(1) *Present Sense Impression.*

The Committee feels that contemporaneity of the event and statement offers the only basis of enhanced reliability and that it is undesirable to relax this requirement. It strongly urges that the last three words in the sentence "or immediately thereafter" be stricken out so the corrected sentence will read:

"(1) *Present Sense Impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition."

(6) *Records of Regularly Conducted Activity.*

The Special Committee feels the Proposed Rule is too broad. It suggests that paragraph (6) be stricken out in its entirety and in place thereof the following be inserted:

"(6) *Records of Regularly Conducted Activity.* A memorandum, report, record, or data compilation, in any form, of acts, events or conditions made at or near the time by, or from information transmitted by, a person with knowledge and a duty to so record or transmit, and kept in the course of a regularly conducted business or professional activity, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness."

(18) *Learned Treatises.*

The Special Committee recommends that in the second and third lines, the words "or relied upon him in direct examination" be stricken and in place thereof the words "or relevant to such cross-examination" so that as amended it will read as follows:

"(18) *Learned Treatises.* To the extent called to the attention of an expert witness upon cross-examination *or relevant to such cross-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." (Italic indicates changes.)

(24) *Other Exceptions.*

The Special Committee recommends that this provision be stricken out in its entirety and in place thereof the following be inserted:

"(24) *Other.* A statement not specifically covered by any of the foregoing exceptions but having *equivalent circumstantial probability* of trustworthiness; *provided that the proponent's intention to offer the statement was made known to the adverse party sufficiently in advance of the trial or hearing to provide him with a fair opportunity to prepare to meet it.*" (Italic indicates changes.)

Rule 804. Hearsay Exceptions.

(b) *Hearsay Exceptions.*

(1) *Former Testimony.*

This sub-paragraph (1) should be striken in its entirety and in place thereof the following should be inserted:

"(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 another proceeding, *if offered and received in evidence on an issue of fact involved in the current hearing, against a party who had an opportunity to examine the witness and whose incentive, interest and* position with respect to that issue was substantially identical to that of the party against whom now offered." (Italic indicates changes.)

Rule 804. Hearsay Exceptions

(b) *Hearsay Exceptions.*

(2) *Statement of Recent Perception.*

The Special Committee recommends that this subparagraph (2) be omitted as offering too great an opportunity for abuse without any strong assurance of accuracy. If that recommendation is accepted, the numbering of the following paragraphs will have to be changed.

Rule 804. Hearsay Exceptions

(b) *Hearsay Exceptions.*

(5) *Statement of Personal or Family History.*

The Special Committee recommends that this provision be stricken and in place thereof the following be inserted:

"(5) *Statement of Personal or Family History.* A statement *made prior to the commencement of the action* (A) 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 *can be shown by evidence other than the declarant's own statement to have* been related to the other by blood, adoption, or

marriage or to have been so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared." (Italic indicates changes.)

Rule 804. Hearsay exceptions

(b) *Hearsay Exceptions.*

(6) *Other Exceptions.*

This sub-paragraph (6) should have added, at the end, a sentence so that the provision will read as follows:

"(6) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial probability of trustworthiness; *provided that the proponent's intention to offer the statement was made known to the adverse party sufficiently in advance of the trial or hearing to provide him with a fair opportunity to prepare to meet it.*"

Respectfully submitted,

HASKELL COHN, *Acting Chairman.*
ROBERT L. CLARE, JR.
MICHAEL J. KEADY.
JOHN A. KLUWIN.
MYZELL SOWELL.
WAYNE E. STICHTER.

CHAMBERS, U.S. COURT OF CLAIMS,
Washington, D.C., September 12, 1973.

Re. H.R. 5463.
Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice,
House Judiciary Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: Please refer to the letter of July 17, 1973, sent to you by Judge Marion T. Bennett of this court and your reply of July 19, 1973, regarding the applicability of the Federal Rules of Evidence to the Court of Claims and its trial judges (commissioners).

We believe that neither Judge Maris nor any member of his committee will object to the amendment which Judge Bennett proposed to Section 1101(a), and we therefore respectfully request that H.R. 5463 be amended so that Section 1101 (a) will read as follows:

"1101(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 United States Court of Claims,* and to United States magistrates, in the proceedings and to the extent hereinafter set forth. The word 'judge' in these rules includes United States magistrates, referees in bankruptcy *and commissioners of the Court of Claims.*"

We thank you for your consideration of this request and shall be glad to supply any information which you or any member of your Staff may desire.

Sincerely yours,

WILSON COWEN, *Chief Judge.*

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., September 13, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for making available to the Department the Committee Print of a tentative Subcommittee draft of H.R. 5463, a bill to establish the Federal Rules of Evidence.

We have reviewed the Committee Print and I am fowarding the Department's analysis and recommendations concerning this draft.

We appreciate the opportunity to express our views on this important subject and look forward to working with you further in this matter.

Sincerely,

WILLIAM D. RUCKELSHAUS,
Acting Deputy Attorney General.

Enclosure.

DEPARTMENT OF JUSTICE ANALYSIS AND RECOMMENDATIONS REGARDING DRAFT OF PROPOSED RULES OF EVIDENCE OF THE SUBCOMMITTEE ON CRIMINAL JUSTICE, HOUSE COMMITTEE ON THE JUDICIARY

ARTICLE I. GENERAL PROVISIONS

RULE 104—PRELIMINARY QUESTIONS

Subdivision (c) Hearing of Jury:

This section provides that proceedings as to the admissibility of confessions shall not be heard before the jury and that other preliminary matters, if justice requires or if the accused, when a witness, so requests, will also be heard without the jury's hearing.

Problem.—It is our view that the Judge should determine when to excuse the jury and not the accused. In situations where no prejudice could reasonably be expected to accrue to the accused, his power, under the rule as now constituted, nonetheless to demand the jury's absence could result in a waste of court time by forcing repetition of evidentiary matter which would in any event be heard by the jury.

We also consider such a rigid rule to be unwise since the consequences of failing to accord such an unqualified right to the defendant are not certain. For example, will this be "plain error" which produces a reversal? Must the defendant in every instance when a preliminary matter arises during the course of a trial expressly waive this right to testify out of the presence of the jury? Compare *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *United States* v. *Brown*, D.C. Cir. No. 23,022 (June 3, 1970). These are but a few of the difficult and unsettled questions the proposed rule generates.

Recommendation.—We therefore suggest that the provision regarding the right of the accused be deleted and that the second sentence of subdivision (c) be amended to read:

> "Hearings on other preliminary matters shall be so conducted when the judge determines that the interests of justice so require."

RULE 106—REMAINDER OF OR RELATED WRITINGS OR RECORD STATEMENTS

Proposed Rule 106 authorizes an adverse party to require a party who has introduced a writing or recorded statement or part thereof to introduce "any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

Problem.—The language of proposed Rule 106 could be utilized to subvert the function of cross-examination by permitting one party to disrupt the orderly presentation of evidence by the other by moving into evidence, under a claim of fairness, other documents which properly should be admitted only in its own case. This may well have a generally disruptive effect in orderly presentation, particularly in complicated fraud and antitrust cases which involve a great number of documents. The upshot is that instead of preventing the jury from being misled—the aim of the Rule—the Rule may have the opposite effect: *i.e.*, it may engender the disorderly and illogical presentation of evidence with consequent disruption and confusion.

In our view, the rule should be confined to requiring the offering party to place into evidence only whatever other part of the *same* document "relates to the same subject matter." McCormick, *Law of Evidence* p. 132. The proposed test of fairness is vague and fails to provide the necessary guidance. Should the rare situation arise in which a jury is apt to be misled by a party offering into evidence one writing inextricably intertwined to another—such as a letter and a response—the judge is empowered to eliminate the confusion by his general control "over the mode and order of presenting evidence" under proposed Rule 611(a).

Recommendation.—We therefore suggest that the rule be amended accordingly:

> When a part of a writing or recorded statement is introduced by a party, an adverse party may require him at that time to introduce any other part of the same writing or recorded statement which relates to the same subject matter.

Problem.—If the Subcommittee should not accept our objection and decide to permit other separate documents to remain admissible under the rule, we note that an adverse party may be able to secure the introduction into evidence of documents which are not properly authenticated or are otherwise inadmissible. This is

so because the rule provides only that the document sought to be moved into evidence by the adverse party will be admitted if it "ought in fairness to be considered . . . ." To use such vague terminology and dispense with other rules regarding admissibility of documentary evidence seems unwise.

Recommendation.—Accordingly if our initial recommendation is not accepted, we suggest the following alternative change:

> 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 is otherwise admissible* and which ought in fairness be considered contemporaneously with it.

RULE 201—JUDICIAL NOTICE

Problem.—We observe an inconsistency between the definition of judicial fact in 201(a) as one "not subject to reasonable dispute" and the subcommittee's note following the rule regarding the deletion of subsection (g), which had provided that the judge was to instruct as established fact those which are judicially noticed. The note provides in pertinent part:

> "Believing that judicial notice should be treated on the same basis as any other evidence which is admitted—subject to refutation—the Subcommittee deleted [subdivision g]. (Emphasis added.)

Recommendation.—In our view, the above comment is inconsistent with the tenor and purpose of subsection (a); accordingly the comment regarding subsection [g] should be deleted.

RULE 301—PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS

Comment.—In order to eliminate gramatical awkwardness, we suggest that this rule be rewritten as follows: "In all civil actions, except as provided *for by Act of Congress* or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." [emphasis added.]

RULE 302—APPLICABILITY OF STATE LAW IN CIVIL ACTIONS

As more fully developed in our comment to Rule 501, we oppose the blanket application of State law as supplying the "rule of decision" with regard to presumptions.

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

Subdivision 404(b) Other crimes, wrongs, or acts:

This subdivision provides that 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. This is a correct statement of the law. 1 Wigmore, *Evidence*, § 216; McCormick, *Law of Evidence*, § 157. Rule 404(b) also provides that such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Problem.—We are disturbed by the modifier "may" since the general rule is that if relevant, such evidence *is* admissible and the normal "rule of exclusion is simply inapplicable," McCormick, p. 327. See also 1 Wigmore, *Evidence*, § 216. Only if the probative value of these facts is substantially outweighed by the danger of unfair prejudice, are they properly excludable. Rule 404(b), accordingly, should be amended to reflect this rule of admissibility in lieu of the purely discretionary "may" which fails to provide appropriate guidance. Rule 404(b) should also be amended to make it clearer than it does now that the list of purposes it enumerates for which evidence of other crimes is admissible is not exhaustive.

Recommendation.—The second sentence of Rule 404(b) should be redrafted to read as follows:

> It is, however, admissible for other purposes including but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, unless the probative value of this evidence is substantially outweighed by the danger of unfair prejudice.

The Subcommittee note should also be amended to give recognition to this change.

RULE 405—METHODS OF PROVING CHARACTER

Subdivision 405(a) Reputation or Opinion:

This subdivision changes traditional law by permitting character to be proved by opinion as well as reputation evidence. While the Department originally opposed this departure from the common law, we now withdraw our opposition to this general change.

Problem.—However, we call to the Subcommittee's attention a consideration often raised in opposition to the inclusion of such opinion evidence. It is said that while a small number of witnesses usually adequately serves to establish reputation, and the point at which reputation testimony becomes unnecessarily cumulative is not difficult to discern, individual opinion testimony on the other hand is theoretically never cumulative.

In other words, there is only one community reputation to prove but an inexhaustable supply of individual opinions exist.

Recommendations.—We suggest that an addition to the rule or at least a Subcommittee note be added recognizing the duty of the judge to limit within the bounds of common sense, the number of opinion witnesses permitted to a particular party.

RULE 408—COMPROMISE AND OFFERS TO COMPROMISE

This rule provides that compromises and offers to compromise are not admissible to prove liability for or invalidity of the claim or its amount. It also provides that "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible."

Problem.—Under existing law, an offer to compromise is inadmissible but factual information submitted therewith is admissible. See IV Wigmore, 3rd ed., Sec. 1061; *United States* v. *Tuschman*, 405 F. 2d 688 (C.A. 6th). This is the common law rule. It prevails in most of the states either with or without some minor statutory variations.

Our objection to the Rule is that it renders inadmissible "statements made in compromise negotiations": this encompasses much evidence presently admissible (as in *Tuschman, supra*). It could also be interpreted as meaning the exclusion of pre-existing documents submitted in connection with settlement proceedings. The implication of the Advisory Committee's Notes is that the present rule is not working and that it inhibits "freedom of communication" in the settlement process.

This is not the experience of the Department of Justice. Taking tax litigation, example, the Department of Justice presently settles approximately 60% of its refund cases. The principal reason the percentage is no greater is that the tax refund cases coming to the federal district courts and the Court of Claims are the "hard core" cases which could not be settled at the various levels of the Internal Revenue Service. These often involve complicated questions of tax law which must be clarified by the courts. Although Tax Court cases are not within the jurisdiction of the Department of Justice, these rules would be applicable to the Tax Court by virtue of Rule 31, Tax Court Rules. Presently, some 90% of Tax Court cases are settled. Thus, obviously, the present rule is working very well in tax litigation.

Carrying the example of tax litigation further, it should be noted that settlement negotiations are undertaken at different levels and are so often interwoven with the investigative process (in the Internal Revenue Service) and the discovery process (in the federal courts) that one could anticipate considerable litigation is to what statements were submitted in connection with the settlement process and what statements were submitted as part of the investigative or discovery procedures. In at least one type of tax case (proof by the net worth method) the Government not only may put in statements of the taxpayer but must put in those statements. See *Holland* v. *United States*, 348 U.S. 121, in which the Supreme Court said that statements by the taxpayer become vital links in the Government's proof and that the Government must explore leads offered by the taxpayer. Although *Holland* was a criminal case, component proof by the net worth method is, generally, the same in civil fraud cases.

It has been our experience that the present rule does not inhibit the settlement process. On the contrary, we believe the present rule is conducive of serious, responsible, and truthful settlement representations and that, conversely, the proposed rule would encourage frivolous and misleading, if not outright false, representations in the settlement process.

Recommendation.—Accordingly, the sentence "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible" should be omitted from the Rule.

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

This rule renders inadmissible evidence of withdrawn guilty pleas, pleas of nolo contendere, offers to plead guilty or nolo contendere and of statements made in connection with any of the foregoing.

Problem.—The inadmissibility of a plea of nolo contendere "in any civil or criminal proceeding" is contrary to the provisions of Section 5 of the Clayton Act, 15 U.S.C. §16(a) which states affirmatively that a *nolo* plea in an antitrust case, brought by or on behalf of the United States under the antitrust laws, is *prima facie* evidence against the defendant making such plea unless no testimony has been taken as of that time.[1]

The proposed rule therefore is in conflict with Section 5 of the Clayton Act and would, if adopted, in effect nullify the purpose of the Section to provide a method and inducement for a defendant to plead nolo before any evidence is received at trial.

Problem.—In admitting guilt, we feel that in regard to voluntary statements made in open court, while represented by counsel, such declarations should be admissible for impeachment purposes and in subsequent perjury prosecutions. This view is strongly supported by the Supreme Court's ruling in *Harris* v. *New York*, 401 U.S. 222 (1971) that a statement obtained in violation of *Miranda*, which was nonetheless not coerced, can be used for impeachment purposes. The rationale of the Court's holding was that a defendant who takes the stand is under an obligation to speak truthfully and that, accordingly, the Court would not countenance the use of the *Miranda* rule as a shield against perjured testimony.

Recommendation.—Accordingly, we suggest amending Rule 410 as follows:

> 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 proceeding against the person who made the plea or offer, *except as provided by any Act of Congress. This rule shall not apply to the introduction of statements made in connection with any of the foregoing pleas or offers when offered for impeachment purposes or in a subsequent perjury prosecution of the declarant.*

ARTICLE V. PRIVILEGES

The considerations that led to the elimination of the rules as to evidentiary privileges as drafted and proposed by the Judicial Conference are both numerous and understandable. The Department of Justice submitted to the Supreme Court detailed proposals regarding privileges, only some of which were adopted, which we still feel strike a proper balance between the needs of law enforcement and the interests of an accused. Nevertheless, in light of the Subcommittee's action in dispensing with the privileges altogether, the Department takes no position on the propriety of deleting these sections from the Rules.

RULE 501—GENERAL RULE

Problem.—In eliminating all provisions dealing with privileged communications, the Subcommittee added the following provision:

> 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: Provided, That in civil actions, with respect to 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.

As the accompanying note points out, the change represents a policy decision on the part of the Subcommittee to adhere to *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, and apply state law regarding a claim of privilege in diversity cases.

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[1] Sec. 5 [38 Stat. 731; 69 Stat. 283; 15 U.S.C. § 16.] (a) final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws *shall be prima facie evidence against such defendant* in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided, that this section shall not apply to consent judgments or decrees entered before any testimony has been taken* or to judgments or decrees entered in actions under section 4A. [Emphasis added]

Recommendation.—The policy decision to adhere to *Erie* in cases involving privileged communications, if limited to diversity cases, is of no real concern to us. As worded, however, the Subcommittee's rule does not appear to limit this dependence on state law solely to diversity actions. This poses a real problem. There are thus statutes which make state law determinative in cases in which the United States may be a party (e.g., Federal Tort Claims Act). There is generally no reason in those instances to apply state law in matters regarding the admissibility of evidence and claims of privilege. Before a blanket rule applicable to all such cases is adopted, Congress should examine each of the instances in which state law is applicable to actions involving the United States and determine whether the policy considerations favoring uniformity of procedure in actions involving the United States should prevail. The last sentence of the rule should be amended to reflect these views.

This same dependence on state law in civil actions is found in Rule 302 (effect of presumptions) and Rule 601 (determination of witness competence). Our comment thus also applies to those provisions.

Article VI. Witnesses

Rule 601

The problem inherent in the second sentence of the Rule has already been discussed. We make the same recommendation as made regarding Rule 501.

Rule 606—Competency of Juror as Witness

Subdivision 606(b) Inquiry into the Validity of verdict or indictment:

In accord with the Advisory Committee's earlier 1971 draft, this subsection permits inquiry into matters occurring within the jury room as well as extraneous influences, with the sole qualification that no impeachment is allowed "concerning the effect of anything upon [the juror's] mind or emotions . . ."

Problem: Permitting a juror to testify concerning transactions occurring during jury deliberations constitutes a manifest departure from existing law concerning the extent to which jurors may impeach their verdict. The Supreme Court has drawn a distinction which permits a juror to testify that improper information came to the attention of the jury, *Mattox* v. *United States*. 146 U.S. 140, but precludes a juror from testifying about all other improprieties in the process by which the jury reached its verdict. *McDonald* v. *Pless*, 238 U.S. 264.

The Supreme Court summarized the rules concerning a juror's right to impeach his verdict in *Stein* v. *New York*, 346 U.S. 156, 178:

> Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset and harass them. This Court will not accept their own disclosure of forbidden quotient verdicts in damage cases. *McDonald* v. *Pless*, 238 U.S. 264. Nor of compromise in a criminal case whereby some jurors exchanged their convictions on one issue in return for concession by other jurors on another issue. *Hyde* v. *United States*, 225 U.S. 347. 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. *McDonald* v. *Pless*, *supra*,at 267–268.

We disagree with the Subcommittee's conclusion that there is a trend toward allowing jurors to testify about everything but their own mental process. Recent federal decisions show continued adherence to the rule that jurors cannot testify about irregularities in their deliberations. See *Holden* v. *Porter*, 405 F. 2d 878 (C.A. 9); *United States* v. *Chereton*, 309 F. 2d 197 (C.A. 6); *Farmer's Cooperative Elevator Ass'n* v. *Strand*, 382 F. 2d 224, 230 (C.A. 8); *United States* v. *Crosby*, 294 F. 2d 928, 949 (C.A. 2).

Strong policy considerations continue to support the rule that jurors should not be permitted to testify about what occurred during the course of their deliberations. Recent experience has shown that the danger of harassment of jurors by unsuccessful litigants warrants a rule which imposes strict limitations on the instances in which jurors may be questioned about their verdict. See generally, *Miller* v. *United States*, 403 F. 2d 77 (C.A. 2); *United States* v. *Driscoll*, 276 F. Supp. 333. The danger of harassment is particularly apparent in organized crime cases.

Recommendation.—We suggest that Subdivision (b) should be redrafted to provide as follows:

> (b) Inquiry into Validity of Verdict or Indictment. Upon 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 any thing upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict or indictment or concerning his mental process in connection therewith, except that a juror may testify on the question of whether or not extraneous prejudicial information was improperly brought to the jury's attention during the course of its deliberations. Nor may a juror's affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received.

RULE 608 EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

The last sentence of this rule provides:

> The giving of testimony, whether by the 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.

Problem.—This provision appears to constitute both a striking departure from current law and is inconsistent with other sections of the Code.

The note of the Advisory Committee explains the provision as follows:

> While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity. While it is true that an accused, unlike an ordinary witness, has an option whether to testify, if the option can be exercised only at the price of opening up inquiry as to any and all criminal acts committed during his lifetime, the right to testify could scarcely be said to possess much vitality.

To the contrary, it has long been held that *any* witness who chooses to testify is subject to impeachment by disclosure of prior convictions. This established practice was recently considered and sanctioned by the Supreme Court in *McGautha* v. *California*, 402 U.S. 183, 215. The provision also is inconsistent with Rule 609 which specifically provides that evidence of past convictions is admissible for the purpose of attacking the credibility of a witness.

Recommendation.—We urge deletion of the last sentence of the Rule.

RULE 609—IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

Subdivision (b)—Time Limit:

This subsection provides that a witness may not be impeached by disclosure of a particular prior conviction if ten years has elapsed since the date of conviction or of his release, whichever is the later date. This constitutes a change from the Supreme Court's version which provided that *no* conviction is remote unless ten years has elapsed from the witness' most recent conviction or date of release.

Problem.—While we do not deem it appropriate to advocate a reinstatement of the Court's version, we do question whether all convictions older than ten years are absolutely without probative value, as the Subcommittee seems to assume. For instance, a conviction may have occurred ten years ago and been followed by an extended period of illegal activity by the accused that only recently has been the subject of investigation and indictment. In these circumstances, the conviction would not be without probative value.

Recommendation.—We therefore suggest that the provision be qualified to permit the disclosure of an older conviction if the judge, in his discretion, concludes the conviction is of probative value:

> "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of conviction or of release of the witness from confinement, whichever is the later date unless the judge determines, in the interests of justice, that the conviction still has probative value."

Subdivision 609(d):

This subsection provides that in a criminal case evidence of a juvenile adjudication for an impeachment of a witness other than the accused is admissible if the

judge determines the evidence necessary for a fair determination of the issue of guilt or innocence.

Problem.—We fail to perceive the rationale for distinguishing between the accused and the other witness in the context of this rule. While a juvenile adjudication may not be recognized as having the same significance as a criminal conviction, nonetheless it has some probative validity. Indeed, this is recognized by the Sub-Committee's decision to permit its use against an ordinary witness.

Given the determination to attach relevance to juvenile adjudications, the distinction between the accused and any other witness is not well taken. Since *In re Gault*, 387 U.S. 1 (1967), juvenile proceedings have been characterized by most of the same procedural and constitutional safeguards manifest in criminal hearing. Similarly, the subsection does not constitute a blanket approval of juvenile adjudications for impeachment purposes, but grants to the judge the discretion of determining when admission of the juvenile record is appropriate.

Recommendation.—Delete the words "other than the accused" from the fourth line of the subsection.

RULE 611—MODE OF ORDER OF INTERROGATION AND PRESENTATION

Subdivision 611(b) Scope of Cross-Examination:

We commend the Subcommittee for the adoption of this provision. The Subcommittee proposal that cross-examination be limited to the subject of direct examination and to matters affecting credibility is a vital improvement over previous proposals. The rule proposed by the Supreme Court would have plainly interfered with the orderly conduct of a trial. It would, for example, have permitted astute defense counsel in criminal cases to inject their defense into the prosecution's case-in-chief and thereby totally disrupt the orderly, understandable presentation of evidence. A clear example of an attempt to do this which was rejected by the trial court and affirmed by the Court of Appeals was the trial of Bobby Baker. *Baker* v. *United States*, 401 F. 2d 958 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970). The Subcommittee proposal is the rule in the federal courts and, contrary to the Advisory Note to the Revised Draft, is not at all difficult for a court to administer.

ARTICLE VIII. HEARSAY

RULE 801. DEFINITIONS

Subdivision (d)(1)—Prior Statement of Witness

This subsection provides that prior statements of a witness are admissible as proof of the facts stated only if given at a trial or hearing or in a deposition or before a grand jury.

Problem.—The Subcommittee has changed the proposal unanimously recommended in the Preliminary, Revised, and Supreme Court drafts that any prior statement of a witness who is testifying and therefore subject to cross-examination is not hearsay. Instead, the Subcommittee has limited such statements to those given "under oath and subject to the penalty of perjury at a trial or hearing or in a deposition or before a grand jury." While this proposal is better than existing law, it severely and unreasonably limits the beneficial effect of the proposed draft. Thus, even sworn statements in affidavits cannot be used. And, there are numerous other circumstances, other than the making of sworn statements, which, experience has shown, establish that a person has good reason to tell the truth and thus provide assurances of the reliability of the statement. The Subcommittee draft is inconsistent with the *Model Code of Evidence*, Rule 603 and the Uniform Rules, Rule 63. It is inconsistent with Section 1235 of the California Evidence Code, the constitutionality of which was upheld in *California* v. *Green*, 399 U.S. 149 (1970). As the Supreme Court stated in that case, 399 U.S. at 154, the California rule (which the Subcommittee draft restricts) is "supported by most legal commentators and by recent proposals to codify the law of evidence." But the rule should not be limited even to these less restrictive circumstances, for it must be remembered that, under the remaining provisions of the Rule, prior statements are only admitted into evidence; the declarant is subject to cross-examination and the fact-finder can choose to disbelieve the prior statement.

Recommendation.—Delete the last sentence from subdivision (d)(1).

RULE 803—HEARSAY EXCEPTIONS. AVAILABILITY OF DECLARANT IMMATERIAL

Subdivision (6).—This subsection provides for the admissibility of records of a regularly conducted business or professional activity.

Problem.—The rule as drafted by the Judicial Conference and promulgated by the Supreme Court provided for the admissibility of records of any regularly conducted *activity*. This was modified, as in the Subcommittee's draft, by the proviso that such records were not admissible if the sources of information or other circumstances indicate lack of trustworthiness. The proposed rule as now changed fails to recognize that there are records of regularly conducted activity, other than purely business or professional activity, which have the same character of trustworthiness and equally sufficient checks against inducements to misstate to make them trustworthy and give them the necessary truthfulness. Moreover, the proposal is inconsistent with 28 U.S.C. 1732 which provides for the introduction into evidence of records of a "Business, profession, *occupation, and calling of every kind.*" The proposed rule could be read to prevent the introduction of records of charitable organizations, religious and social organizations, and even political parties, despite the regularity and formality with which such records are kept. This appears to be an unnecessarily restrictive provision, particularly in light of the protection afforded by the proviso, already noted, giving the court descretion as to instances in which circumstances indicate a lack of trustworthiness.

The proposed rule is also in conflict with 28 U.S.C. 1732 in that it requires the record to be made by or from information supplied by a person with knowledge. The statute requires only that it was within the regular course of the activity to make a record, either at the time of an act or at a reasonable time thereafter and then provides that lack of personal knowledge by entrant or maker may affect weight of the evidence but not its admissibility. This would seem a preferrable rule, particularly since much regularly complied or entered information is now provided and entered by mechanical or electronic means.

More to the point, the fact that the proposed rule is narrower than 28 U.S.C. 1732 and that Rule 802 provides that hearsay is admissible as provided by the Rules, etc., *or* by Act of Congress demonstrates that the proposed rule is unnecessary and, for all practical purposes, a nullity.

Recommendation.—Delete proposed Rule 803(6) or, in the alternative, redraft the Rule to conform to the Act of Congress, 28 U.S.C. 1732.

Subdivision (22) Judgment of Previous Conviction.—Under this subdivision, final judgments of conviction entered after a trial or upon a plea of guilty would be admissible but not as to crimes punishable by imprisonment of one year or less.

Problem.—As the Adivsory Committee Note points out, the former judgment under consideration in subsequent litigation may assume one of three forms: (1) the former judgment is conclusive under the doctrine of res judicata, either as a bar or a collateral estoppel; or (2) it is admissible in evidence for what it is worth; or (3) it may be of no effect at all. This Rule does not deal with the first form but would prevent the use of a former judgment of conviction for a misdemeanor for other evidentiary purposes. This is a departure from present law with serious implications in both civil and criminal tax cases. For example, since the Supreme Court held in *Spies* v. *United States*, 317 U.S. 492, that the willful failure to file a return plus affirmative acts designed to mislead or conceal may constitute a willful attempt to evade a tax (tax fraud), the Government normally puts into evidence in both civil and criminal tax fraud cases prior convictions for willful failure to file returns. (Section 7203, Title 26, U.S.C.) As such evidence goes to intent (form (2) supra,) this provision would seem to render such evidence inadmissible. In the same manner, convictions for other tax misdemeanors may have subsequent evidentiary use. (Willful failure to pay the tax, keep records, or supply information, also covered by Section 7203, Internal Revenue Code of 1954.) The maximum penalty for each count of these tax misedmeanors is a $10,000 fine or imprisonment for not more than one year, or both.

We also question the conclusion of the Advisory Committee, evidently accepted by the Subcommittee, that the motivation to defend a misdemeanor charge carrying a penalty of one year or less is "often minimal or nonexistent." Many federal crimes are punishable by periods of incarceration from six months to a year, and we do not believe a person facing incarceration for such a period would deem the period to be insignificant.

Recommendation.—In accord with this objection, and our comment under Rule 410 regarding the admissibility of convictions based on pleas of nolo contendere, we suggest that Subdivision 22 should be redrafted to provide as follows:

> (22) Judgment of Previous Conviction—Except as provided to the contrary by any Act of Congress, 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

six months, 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.

Subdivision 24.—This subdivision provided for the admissibility of statements not specifically covered by foregoing provisions but having comparable circumstantial guarantees of trustworthiness. The Subcommittee has deleted this subdivision.

Problem.—The deletion of this subdivision totally prevents, without resort to the demonstrably cumbersome procedure of drafting and establishing new Rules, any development of the hearsay rule to accommodate changes in such areas of business practices, and technology, and similarly prevents any changes to provide for what may be now unanticipated situations which present similar guarantees of trustworthiness. This is so even though the proposed subdivision was strictly limited so as to permit development of possible additional exceptions only when such development was clearly consistent with the Rules and standards already articulated. The rules of evidence relating to hearsay are peculiarly ones based on human experience and the change and refinement in social and commercial practices. Such rules should not be totally frozen. We would also note that deleting of subdivision would appear to be inconsistent with the approach taken in deleting Article V and the comments that the rules of privilege were left "to be developed by the federal courts" in light of "reasons and experience."

Recommendation.—Subdivision 24 should be readopted.

RULE 804—HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

Subdivision (b)(1) Former Testimony:

In the category of "former testimony: the rule includes testimony given as a witness at another hearing of the same or a different proceeding, or *in a deposition in the course of another proceeding.*

Problem.—Particularly in civil matters, which often extend over a period of many years, witnesses who are deposed may die or become otherwise unavailable by the time trial commences. Yet for some unexplained reason, both the Subcommittee and Supreme Court versions provide that only deposition testimony given in *another proceeding* is admissible under this hearsay exception. We perceive no reason why deposition testimony taken in a current case, when the witness becomes unavailable, should not also be admissible.

Recommendation.—Add the words "the same or" after the phrase "in the course of" in the third line of subsection (b)(1).

Subdivision (b)(2) Statement Under Belief of Impending Death:

In criminal cases, this subsection permits statements by a declarant made under belief of impending death only in homicide prosecutions. The Court version did not restrict the use of such statements to homicide cases.

Problem.—If a dying declaration is deemed inherently trustworthy, then the fact that the declarant, though believing death to be imminent, nonetheless survived, does not render his previous statement any less reliable nor should the nature of the charges brought be determinitive.

The change promulgated by the Subcommittee imposes an unreasonable burden on the prosecution in cases where the victim at the time of the crime believes that death is imminent but the victim dies of causes other than the criminal act, or the victim, as a result of the crime, is unable to speak or has mental impairment. Thus, for example, if a rape victim were to die in child birth or if a victim of an aggravated assault were to be physically or mentally unable to testify, any statements made by them in the belief that death was imminent from the crime would be inadmissible. The rule would be unduly restrictive in cases where even though a victim may die as a result of a criminal act, the charges are other than homicide, such as, for example, kidnapping charges.

Recommendation.—Delete the qualifying phrase "In a prosecution for homicide or in a civil case", from the subdivision.

Subdivision (b)(3) Statement Against Interest

The Subcommittee's decision not to include, as statements against interest, declarations rendering a declarant's claim invalid or subjecting the declarant to social opprobrium is a substantial improvement. Such criteria are vague and statements within those two categories do not seem necessarily indicative of trustworthiness. Two other aspects of the subdivision, however, require comment.

1. The subdivision provides that a declarant's inculpatory statement, offered to exculpate the accused, is not admissible unless corroborating circumstances clearly indicate its trustworthiness. It is not clear exactly what corroborating circumstances are required under this provision. In light of the Supreme Court's recent decision in *Chambers* v. *Mississippi*, 410 U.S. ——, that such inculpatory hearsay statements must be admitted if there exists "considerable assurance of their reliability", we recommend a Subcommittee note to indicate that the subsection is to be applied in conformity with the *Chambers* decision.

2. The last sentence of this subdivision, which was added by the committee, constitutes an attempted codification of the Supreme Court's ruling in *Bruton* v. *United States*, 391 U.S. 123: "A statement or confession offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused, is not admissible."

Problem.—The issue of *Bruton*, revolving about the relationship of the Sixth Amendment confrontation clause and hearsay statements inculpating the accused and/or the declarant, is complicated and marked by nuance. Therefore, we consider it unwise to codify the matter thus precluding development of the doctrine.

Indeed, a perusal of court cases subsequent to the *Bruton* decision discloses various exceptions to the rule that, while well considered, would be eliminated by the rigid proviso within subdivision (b)(3):

(*a*) The *Bruton* rule has been held not to apply where a confession of the accused is also admitted into evidence. *United States* v. *Mancusi*, 404 F. 2d 296 (C.A. 2, 1968); or where an accused's statement at least placed him at the scene of the crime, *United States* v. *Zelker*, 452 F. 2d 1009 (C.A. 2, 1971).

(*b*) When an accused raises the defense of entrapment by claiming a co-defendant had been working with the authorities, hearsay statements of the co-defendant may be introduced to prove the accused was the instrumental party of the crime. *United States* v. *Arceneau*, 437 F. 2d 924 (C.A. 9, 1971).

(*c*) As worded, the provision also seems to alter in many instances, the traditional rule (sustained in the face of a *Bruton* challenge by the Supreme Court in *Dutton* v. *Evans*, 400 U.S. 74) permitting admission of a co-conspirator's statements. As such, the provision also seems inconsistent with Rule 801(d)(2), which provides for the admission of such statements.

Recommendation.—The last sentence of Rule 804(b)(3) should be deleted.

Subdivision 6

This subdivision provided for the admissibility of statements not specifically covered by foregoing exceptions but having comparable circumstantial guarantees of trustworthiness. The Subcommittee has deleted this subdivision.

Problem.—The deletion of this subdivision raises the same problems and considerations as the deletion of subdivision 24 of Rule 803 and reference should be made to our comments on that Rule.

Recommendation.—Subdivision 6 should be readopted.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
SUPREME COURT BUILDING,
Washington, D.C., September 18, 1973.

HON. WILLIAM L. HUNGATE.
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reference to the communication to you from Judge Maris concerning H.R. 5463 and transmitting the views on the committee print of the Advisory Committee on the Rules of Evidence and the standing Committee of the Judicial Conference of the United States on the Rules of Practice and Procedure. The Judicial Conference of the United States on September 13, 1973, considered the views of its two committees and voted its approval thereof. The Conference concurred in the action of the committees in making these views and comments known to your subcommittee in time for consideration by your staff.

Sincerely,

WILLIAM E. FOLEY, *Deputy Director.*

THE COLORADO BAR ASSOCIATION,
Denver, Colo., September 27, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice,
House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE HUNGATE: Enclosed herewith is a copy of a report on the proposed Federal Rules of Evidence which was prepared by an expert committee of this association.

This report and recommendations for change, agreeing as I understand it with the modifications made in the rules by your subcommittee, were approved by the board of governors of the Colorado Bar Association on September 7, 1973.

Copies of this report and of the favorable action of the board also have been sent to the entire Colorado delegation in both houses.

Sincerely yours,

WILLIAM B. MILLER, *Executive Director.*

SUBCOMMITTEE ON PROPOSED RULES OF EVIDENCE REPORT TO THE BOARD OF GOVERNORS OF THE COLORADO BAR ASSOCIATION

At your request, the sub-committee on the Proposed Federal Rules of Evidence met to consider the stand that the Bar of Colorado should take in regard to these rules. The Proposed Rules of Evidence for U.S. District Court and Magistrates were approved by the Supreme Court on November 20, 1972. Since then the proposed Rules have been under review by the House Sub-Committee on Criminal Justice of the House Judiciary Committee. That sub-committee made its initial report on June 28, 1973. That report proposes substantial changes to the Rules as proposed by the Supreme Court. Your committee has considered and analyzed both "versions" of the Rules for the purposes of this report.

It was the sentiment of your committee that the area of evidence is not one which readily lends itself to any sort of strict codification. Evidence is an area which requires a great deal of flexibility in order to meet the changes and demands brought about by advances in law, society and technology. Evidentiary rules based upon developing case law allows for the guidelines of precedent but also enables the trial bar and courts to develop modified rules as the need arises. Perhaps, the evil to be most avoided is that of creating an evidence code which would raise the rules of evidence to a level of static substantive law. The experience of the State of California is instructive in this area.

There can be no doubt, however, that the trend is toward the development of some sort of evidence rules or code. The form and philosophy of that development has not yet been fully settled. Your committee has reviewed the Proposed Rules as set forth by the U.S. Supreme Court and the modifications proposed by the House Sub-Committee on Criminal Justice of the House Judiciary Committee. Your committee feels that the overall effect of the rules as proposed by the House Sub-Committee is more nearly in accord with the views of your committee and would better serve the bar. It is recommended that the House modifications be supported over the rules proposed by the Supreme Court. The rules as modified by the House Sub-Committee allow for flexibility to meet the changes necessitated at the trial level by constant new developments and yet they do not abdicate complete discretion to the trial judge on the basis of "allow it in for what it's worth."

Concerning specific articles, your committee makes the following recommendations and comments:

Article I: Your committee recommends approval and support of this article as modified by the House Sub-Committee. It will be noted that the House Sub-Committee omitted Rule 105. Summing Up and Comment by the Judge. Your committee very much disagrees with the idea of the judge being allowed to comment on the evidence presented in the trial. It is recognized that the law now allows comment on the evidence by federal judges, but the propriety of this rule is seriously questioned. Your committee is in agreement with the comments made by the House Sub-Committee.

(c) Instructing the jury.—Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the

presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negates a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

HOUSE SUBCOMMITTEE NOTE

Rule 303 was deleted since the subject of presumptions in criminal cases is dealt with in the proposals of the Brown Commission and S.1 to revise the criminal code. The Sub-Committee determined to consider this issue in the course of its study of these proposals, commencing later this Congress.

The approach taken by rule 704 of the model code of evidence is that which more nearly agrees with the views favored by your committee:

Article II.—Your committee recommends approval and support of this article as modified by the House Sub-Committee. In essence, this article is a statement of the law on judicial notice as it is currently embodied in the common law.

Article III.—The rules proposed by the Supreme Court call for a dichotomy of presumptions between civil and criminal cases. The House Sub-Committee deleted all reference to presumptions in criminal cases, but impliedly maintained the distinction. Your committee does not favor this dichotomy or distinction of presumptions in civil and criminal cases and recommends that the House Sub-Committee be apprized of this feeling.

Your committee feels that the rule for presumptions as laid down in Rule 303 should be applied to both civil and criminal cases.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS

RULE 301. PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS

In all civil actions 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 proving that the nonexistence of the presumed fact is more probable than its existence.

HOUSE SUBCOMMITTEE NOTE

The word "civil" was added to effectuate the Sub-Committee's decision not to deal with the question of presumptions in criminal cases. See Rule 303. Throughout, references to "civil cases" have been made "civil actions," the term used in the Federal Rules of Civil Procedure.

RULE 303. PRESUMPTIONS IN CRIMINAL CASES

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

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

RULE 105. SUMMING UP AND COMMENT BY JUDGE

After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.

HOUSE SUBCOMMITTEE NOTE

The Sub-Committee recognized that the Rule was consistent with existing practice in the Federal courts but felt that the question whether the trial judge should be

allowed to comment on the weight of the evidence and the credibility of witnesses was primarily procedural rather than evidentiary and thus inappropriate in a code of evidence.

EFFECT OF PRESUMPTIONS

(1) Subject to Rule 703, when the basic fact of a presumption has been established in an action, the existence of the presumed fact must be assumed unless and until evidence has been introduced which would support a finding of its nonexistence or the basic fact of an inconsistent presumption has been established.

(2) Subject to Rule 703, when the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the nonexistence of the presumed fact or the basic fact of an inconsistent presumption has been established, the existence or nonexistence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action.

Article IV.—It is felt that Rules 404, 405 and 406 as proposed unduly complicate the whole area of character evidence. Your committee feels that the rules in this area must be reviewed, with an eye to properly maintaining the distinctions between the question of truth and veracity of any witness, which is open to attack by providing reputation and conviction of a crime, and that of character trait which may be an issue in the suit. There is no distinction between criminal and civil cases which should be more clearly noted. Conduct evidencing past character trait should be admissible.

It will be noted that Rule 410, Offer to Plead Guilty, as it is proposed directly conflicts with present Colorado law. Your committee recommends that the proposed rule be favored because it represents the majority position. Colorado has long been in the minority in the area, and adoption of the federal approach might provide the impetus to bring Colorado into accord with the majority view.

Article V.—Your committee whole-heartedly agrees with the approach taken by the House Sub-Committee in this area, which allows no privilege other than those authorized by statute or Constitution.

Article VI.—It is recommended that the modifications proposed by the house be favored in this area of cross examination. Cross examination should be limited to those matters raised on direct examination and those pertaining to the veracity of the witness. Your committee does not favor the approach which allows cross-examination on any matter, governed solely by the discretion of the judge.

Article VII.—The approach taken in this article is *not* favored. Rule 701 is greatly oversimplified. It merges the two principles of conclusions of fact and opinions of lay witnesses. The proposed rule states:

> If the witness is not testifying as an expert, his testimony in the 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.

It is recommended that a rule such as the following be adopted:

> (1) If the witness, otherwise competent, is not testifying as an expert, his testimony, in the form of conclusions of observable fact, is limited to those conclusions which
>
> (a) are made in the realm of his day to day experience, and
>
> (b) are based upon a reasonable opportunity for his personal observation.
>
> (2) If the witness, otherwise competent, is not testifying as an expert, his testimony, in the form of opinions, is limited to those opinions which
>
> (a) are based upon his special knowledge or familiarity with the subject matter, and
>
> (b) are reasonably necessary to a clear understanding of such special subject matter.

Rules 702 and 705 are concerned with expert testimony and opinion. The move to make expert testimony more readily and easily admitted is favored. The hypothetical question has long been a subject of controversy and your committee favors its demise. However, it strongly felt that the proposed rules go too far in this direction of liberalizing the requirements for the admission of expert testimony. The proposed rules require no foundation to be admitted on which the expert based his opinion. Your committee feels that it is absolutely essential that a foundation be required before an expert opinion be admitted. Otherwise, once any expert has been qualified as such he could offer his opinion on any matter with no reasons to support that opinion. For example, one can envision the following dialogue immediately after the expert had been qualified as an orthopedic surgeon:

Q. Doctor, do you have an opinion based upon a reasonable degree of medical rtainty as to the extent of permanent disability suffered by the plaintiff as a result this automobile accident?

A. Yes.

Q. What is your opinion?

A. She is totally permanently disabled.

Q. Thank you, doctor, that is all.

Article VIII.—The rules as proposed by the Supreme Court were a considerable change in the law of hearsay, and its underlying philosophy. The court formulated a general rule excluding hearsay with the two broad exceptions. rather than perpetuate the present system with its many narrow exceptions. The court calls for non-application of the hearsay rule if 1) the offered evidence is not likely to be enhanced by having the declarant testify, and 2) if there are strong assurances of accuracy and the declarant is unavailable, thus preferring "accurate" hearsay testimony over no testimony at all. The modifications proposed by the House Sub-Committee return hearsay evidence to the present common law rule with enumerated exceptions. It is felt that the rules on hearsay as proposed by the Supreme Court inject too much uncertainty and discretion into the law of evidence. Your committee approves the approach taken by the House Committee.

Article IX.—The committee finds that the proposed federal rules in this area are for the most part an accurate representation of the modern common law. The committee further finds that the proposed federal rule provides for a more flexible guide to evidentiary problems relating to authentication and identification and thereby avoids the necessity of the search for "a case in point." The official comments adequately define the appropriate interpretation that should be applied to the rules. The proposed federal rules would cover a number of cases and situations arising in trial, not currently reported in case law or statutory law.

Article X.—Your committee recommends approval and support for this article, Contents of Writings, Recordings, and Photographs, as modified by the House Sub-Committee.

Respectfully submitted.

FRANCIS W. JAMISON, *Chairman*.

[COMMITTEE PRINT]

[October 10, 1973]

H.R. 5463

93d Cong., 1st sess., as amended by the Subcommittee on Criminal Justice, House Committee on the Judiciary

NOTE: Changes proposed by the Subcommittee to the Rules of Evidence as transmitted to the Congress from the Supreme Court are shown as follows: The rules as transmitted to the Congress are printed in roman; brackets indicate material deleted by the Subcommittee; and italics indicate material added by the Subcommittee.

A BILL To establish [rules of evidence for certain courts and proceedings] *the Federal Rules of Evidence, and for other purposes*

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.

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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 judge by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling.—The [judge] *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. [He] *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 [judge] *court*.

Subcommittee Note

The Rules submitted by the Court used the terms "judge" and "court" interchangeably. The Subcommittee determined that the term "court" should be preferred unless plainly inappropriate in the context of a rule since "court" has the advantage of including cases tried by multi-judge courts. Amendments of "judge" to "court" with concomitant changes in pronoun references appear throughout the Rules.

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 [judge] *court*, subject to the provisions of subdivision (b). In making [his] *its* determination [he] *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 [judge] *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.

Subcommittee Note

The Subcommittee adopted the March 1971 draft version of subdivision (c). Although recognizing that in some instances duplication of evidence would occur and that the procedure could be subject to abuse, the Subcommittee felt that a proper regard for the right of an accused not to testify generally in the case requires that he be given an option to testify out of the presence of the jury on preliminary matters.

[Rule 105. Summing Up and Comment by Judge

[After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.]

Subcommittee Note

The Subcommittee recognized that the Rule was consistent with existing practice in the Federal courts but felt that the question whether the trial judge should be allowed to comment on the weight of the evidence and the credibility of witnesses was primarily procedural rather than evidentiary and thus inappropriate in a code of evidence.

Rule 10[6] *5.* 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 [judge] *court*, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 10[7] *6.* 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 [judge or] court may take judicial notice whether requested or not.

(d) When mandatory.—A [judge or] 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.—[The judge shall instruct the jury to accept as established any facts judicially noticed.] *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.*

Subcommittee Note

Being of the view that a mandatory instruction to a jury in a criminal case to accept as established any fact judicially noticed was inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial, the Subcommittee adopted the 1969 Advisory Committee draft of subsection (g) allowing a mandatory instruction in civil actions and proceedings, but not in criminal cases.

Article III. Presumptions *In Civil Actions and Proceedings*

Rule 301. Presumptions in General *in Civil Actions and Proceedings*

In all *civil* [cases] *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 [proving that the nonexistence of the presumed fact is more probable than its existence] *going forward with the evidence, and, even though met with contradicting evidence, a presumption is sufficient proof of the fact presumed to be considered by the trier of the facts.*

Subcommittee Note

Being persuaded that the term "cases" might be construed to exclude certain bankruptcy and other civil proceedings, the Subcommittee determined to use the phrase "actions and proceedings" to include all types of civil litigation, and to use the term "cases" to include all criminal litigation. Such changes in terminology appear consistently throughout the Rules.

The word "civil" was added to effectuate the Subcommittee's decision not to deal with the question of presumptions in criminal cases. See Rule 303.

With respect to the weight to be given a presumption in a civil case, the Subcommittee agreed with the conclusion reflected 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 Subcommittee 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 adopted by only a few courts—lent too great a force to presumptions. The Subcommittee accordingly adopted 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 is merely deemed sufficient evidence of the fact presumed to be considered by the jury or other finder of fact.

Rule 302. Applicability of State Law in Civil [Cases] *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.

[Rule 303. Presumptions in Criminal Cases

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

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

[(c) Instructing the jury.—Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.]

Subcommittee Note

Rule 303 was deleted since the subject of presumptions in criminal cases is dealt with in the H.R. 10047 and S. 1, proposals to revise the criminal code. The Subcommittee determined to consider this issue in the course of its study of these proposals.

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 [adopted] *prescribed* by the Supreme Court *pursuant to statutory authority*. Evidence which is not relevant is not admissible.

Subcommittee Note

To accommodate the view that the Congress should not acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence, and the concern that the Congress must not affect adversely whatever authority the Court does have to promulgate rules,

the Subcommittee amended "by other rules adopted by the Supreme Court" to read "by other rules prescribed by the Supreme Court pursuant to statutory authority" in this and other rules where the reference appears.

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. [This subdivision does not exclude the evidence when offered] *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.

Subcommittee Note

In the March 1971 draft the second sentence of (b) began "It may, however, be admissible for other purposes. . . ." The Subcommittee preferred the 1971 formulation as placing greater emphasis on admissibility than did the final Court version.

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.

Subcommittee Note

The Court's version of subdivision (a) had proposed to change existing law by allowing evidence of character in the form of opinion as well as reputation testimony. Predicated in part on the view that wholesale allowance of opinion testimony might tend to turn a trial into a swearing contest between conflicting character witnesses the Subcommittee decided to delete from this Rule, as well as from Rule 608, reference to opinion testimony.

Rule 406. Habit; Routine Practice

[(a) Admissibility.—] 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.

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

Subcommittee Note

The subheading "(a) Admissibility" was dropped from the Rule for purposes of consistency of style in view of the Subcommittee's deletion of subsection (b). The Subcommitee was also of the view that the method of proof of habit and routine practice should be left to the courts on a case by case basis and so struck out subdivision (b).

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] *admissions of liability or opinions given during* compromise negotiations is likewise not admissible. *Evidence of facts disclosed during compromise negotiations, however, is not inadmissible by virtue of having been first disclosed in those negotiations.* This rule does not require exclusion when [the] evidence *of conduct or statements made in compromise negotiations* 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.

Subcommittee Note

Under existing federal law evidence of conduct and statements made in compromise negotiations is admissible in litigation. The second sentence of the Court draft 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 of the rule was likely to impede compromise negotiations. They were fearful that parties dealing with government agencies would be reluctant to furnish information at preliminary meetings and would wait until formal compromise negotiations began, thus effecting an immunity for themselves with respect to the evidence supplied. Under the rule as recast by the Subcommittee admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of facts is admissible. The latter aspect of the rule is drafted so as to preserve, however, other possible objections to the introduction of such evidence. The Subcommittee also intends no change in the present law whereby a party may protect himself from the future use of his statements by couching them in hypothetical or conditional form, such as "Let us assume for purposes of the discussion that" or "If it were the case that."

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 Guilty; Nolo Contendere; Withdrawn Plea of Guilty

[Evidence] *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 proceeding against the person who made the plea or offer.

Subcommittee Note

The Subcommittee added the phrase "Except as otherwise provided by Act of Congress" after being advised of the existence of a specific statute in the anti-trust field permitting the introduction into evidence of a nolo contendere plea in certain circumstances. The Subcommittee did not believe that it should be the intent of the Rules to alter any such particular congressional policy judgments.

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. [Privileges Recognized Only as Provided] *General Rule*

[Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these

rules or in other rules adopted by the Supreme Court, no person has a privilege to:

(1) Refuse to be a witness; or
(2) Refuse to disclose any matter; or
(3) Refuse to produce any object or writing; or
(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.]

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.

Subcommittee Note

The Subcommittee eliminated the proposed specific rules on privileges and, through a single Rule, 501, left the law of privileges in its present state—to be developed by the Federal courts in accordance with the standard contained in Rule 26 of the Federal Rules of Criminal Procedure. That is, privileges shall be governed by the principles of the common law as interpreted by the courts in the light of reason and experience. The words "person, government, State, or political subdivision thereof" were added to the lone term "witnesses" used in Rule 26 to make clear, that, as under present law, not only witnesses may have privileges.

The proviso in Rule 501, as adopted by the Subcommittee, is modeled after Rule 302 and is similar to language added by the Subcommittee to Rule 601 relating to the competency of witnesses. It is designed to mandate the application of State privilege law in civil actions governed by *Erie R. Co. v. Tompkins*, 304 U.S. 64, a result in accord with current Federal court decisions. The Subcommittee deemed the proviso to be necessary in light of the Advisory Committee's view (see its note to Court Rule 501) that this result is not mandated under *Erie*.

[Rule 502. Required Reports Privileged by Statute

[A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

[Rule 503. Lawyer-Client Privilege

[(a) Definitions.—As used in this rule:

[(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who

consults a lawyer with a view to obtaining professional legal services from him.

[(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any State or nation.

[(3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

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

[(b) General rule of privilege.—A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

[(c) Who may claim the privilege.—The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

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

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

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

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

[(4) Document attested by lawyer.—As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

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

[Rule 504. Psychotherapist-Patient Privilege

[(a) Definitions—

[(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

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

[(3) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

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

[(c) Who may claim the privilege.—The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

[(d) Exceptions—

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

[(2) Examination by order of judge.—If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

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

[Rule 505. Husband-Wife Privilege

[(a) General rule of privilege.—An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

[(b) Who may claim the privilege.—The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.

[(c) Exceptions.—There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of section 1328 of title 8, United States Code, with transporting a female in interstate commerce for immoral purposes or other offense in violation of sections 2421–2424 of title 18, United States Code, or with violation of other similar statutes.

[Rule 506. Communications to Clergymen

[(a) Definitions.—As used in this rule—

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

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

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

[(c) Who may claim the privilege.—The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

[Rule 507. Political Vote

[Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

[Rule 508. Trade Secrets

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

[Rule 509. Secrets of State and Other Official Information

[(a) Definitions.—

[(1) Secret of state.—A "secret of state" is a governmental secret relating to the national defense or the international relations of the United States.

[(2) Official information.—"Official information" is information within the custody or control of a department or agency of the Government the disclosure of which is shown to be contrary to the public interest and which consists of (A) intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions, or (B) subject to the provisions of section 3500 of title 18, United States Code, investigatory files compiled for law enforcement purposes and not otherwise available, or (C) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to section 552 of title 5, United States Code.

[(b) General rule of privilege.—The Government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.

[(c) Procedures.—The privilege for secrets of state may be claimed only by the chief officer of the Government agency or department administering the subject matter which the secret information sought concerns, but the privilege for official information may be asserted by any attorney representing the Government. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of secrets of state, the judge, upon motion of the Government, may permit the Government to make the required showing in the above form in camera. If the judge sustains the privilege upon a showing in camera, the entire text of the Government's statements shall be sealed and preserved in the court's records in the event of appeal. In the case of privilege claimed for official information the court may require examination in camera of the information itself. The judge may take any protective measure which the interests of the Government and the furtherance of justice may require.

[(d) Notice to Government.—If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

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

[Rule 510. Identity of Informer

[(a) Rule of privilege.—The Government or a State or subdivision thereof has a privilege to refuse to disclose the identity of a person

who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

[(b) Who may claim.—The privilege may be claimed by an appropriate representative of the Government, regardless of whether the information was furnished to an officer of the Government or of a State or subdivision thereof. The privilege may be claimed by an appropriate representative of a State or subdivision if the information was furnished to an officer thereof, except that in criminal cases the privilege shall not be allowed if the Government objects.

[(c) Exceptions.—

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

[(2) Testimony on merits.—If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the Government is a party, and the Government invokes the privilege, the judge shall give the Government an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the Government elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on his own motion. In civil cases, he may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the Government. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera, at which no counsel or party shall be permitted to be present.

[(3) Legality of obtaining evidence.—If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed. The judge shall, on request of the Government, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be

sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the Government.

[Rule 511. Waiver of Privilege by Voluntary Disclosure

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

[Rule 512. Privileged Matter Disclosed Under Compulsion or Without Opportunity To Claim Privilege

[Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

[Rule 513. Comment Upon or Inference From Claim of Privilege; Instruction

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

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

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

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.*

Subcommittee Note

One effect of the Rule as originally proposed would have been to abolish religious belief, conviction of crime, and other grounds recognized in some 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. Recognizing that there is substantial disagreement as to the merit of Dead Man's Statutes, the Subcommittee nevertheless felt 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 Subcommittee 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.

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] *concerning* 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 which he would be precluded from testifying] *indicating an effect of this kind* be received *for these purposes.*

Subcommittee Note

As proposed, subdivision (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); 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 deliberations.

The 1969 and the 1971 drafts would have permitted a member of the jury to testify concerning irregularities occurring in the jury room. The Advisory Committee comment to subdivision (b) 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 in the 1971 draft 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 inner 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 Subcommittee approved subdivision (b) in the text of those drafts.

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] *Reputation* evidence of character.—The credibility of a witness may be attacked or supported by evidence in the form of reputation [or opinion], 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 [and not remote in time], be inquired into on cross-examination of the witness [himself or on cross-examination of a witness who testifies to his character for truthfulness or untruthfulness] *(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.

Subcommittee Note

See Note to Rule 405 with respect to the change in subdivision (a).

The second sentence of subdivision (b) as proposed 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 Subcommittee redrafted the second sentence to emphasize the discretionary role 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?). The Subcommittee is of the view that explicitly referring to the discretion of the court and deleting the reference to remoteness is a more practical way to deal with the subject. As recast, the subdivision makes clear the antecedent of "his" in the original.

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 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], *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 [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* [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.

(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 [substantial showing of] *finding of the* rehabilitation [and the witness] *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 [judge] *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 [judge] *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.

Subcommittee Note

The Advisory Committee note stated: "There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose." The Subcommittee consideration of the Rule made this clear. Sentiment was expressed that only convictions of offenses bearing on credibility should be admissible; as proposed, the Rule had no limitation. Sentiment was expressed in support of the formulation of the 1971 draft—no conviction should

be admissible if "the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice." Concern was voiced as to whether there should be an arbitrary time limitation such as that contained in subdivision (b), and whether and under what circumstances juvenile adjudications should be admissible.

The Subcommittee draft addresses and disposes of these considerations as follows:

(1) Subdivision (a) was amended so that convictions of crimes involving dishonesty or false statements are always admissible to attack credibility. However, for all other crimes, convictions of only those which are felonies by Federal standards will be admissible unless the judge determines that the danger of unfair prejudice outweighs the probative value of the evidence of the convictions.

(2) Subdivision (b) was amended to read in substance as set forth in the 1971 Advisory Committee draft as constituting a fairer, more reasonable, time measure than that in the draft submitted to the Congress.

(3) Subdivision (c) was amended to reflect the Subcommittee's view that, with regard to pardons, annulments, etc. based on rehabilitation, only conviction of a subsequent serious crime (not any crime as the Court draft had proposed) should be sufficient to permit reference to the pardoned conviction for impeachment purposes.

(4) Subdivision (d) was amended to confer upon a judge discretion to admit evidence of juvenile adjudications in criminal cases only. This appeared to be the intention of the Court, judging from the use of the word "accused" in the second sentence of subdivision (d) as submitted to the Congress.

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 of Order of Interrogation and Presentation

(a) Control by [judge] *court*.—The [judge] *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.—[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.] *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. [In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions.] *When a party is entitled to call an adverse party or a witness identified with an adverse party, interrogation may be by leading questions.*

Subcommittee Note

The Subcommittee amended subdivision (b) to return to the rule which prevails in the Federal courts and 39 State jurisdictions. As amended, the Rule is in

the text of the 1969 draft; it limits cross-examination to credibility and to matters testified to on direct examination, unless the judge permits more. This more traditional rule facilitates orderly presentations and progress at trial. Further, in the light of existing discovery procedures, there appears to be no need to abandon the traditional rule.

The change in subdivision (c) from "In civil cases" to "When" is designed to reflect the possibility that in criminal cases the defendant may be entitled to call a witness identified with the government, in which event the Subcommittee felt the defendant should be permitted to inquire using 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 before or while 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 [it] *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 [judge] *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 [judge] *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 [judge] *court* in [his] *its* discretion determines that the interests of justice so require, declaring a mistrial.

Subcommittee Note

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 Subcommittee recast the first sentence of the Rule to permit access to any such writings only if the court determines access is in the interests of justice.

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 [Judge] *Court*

(a) Calling by [judge] *court*.—The [judge] *court* may, on [his] *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 [judge] *court*.—The [judge] *court* may interrogate witnesses, whether called by [himself] *itself* or by a party.

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

Rule 615. Exclusion of Witness

At the request of a party the [judge] *court* shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and [he] *it* may make the order of [his] *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 [judge] *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 [judge] *court* may on [his] *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 [judge] *court* may appoint any expert witnesses agreed upon by the parties, and may appoint *expert* witnesses of [his] *its* own selection. An expert witness shall not be appointed by the [judge] *court* unless he consents to act. A witness so appointed shall be informed of his duties by the [judge] *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 [judge] *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 [judge] *court* may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and cases involving just compensation under the fifth amendment. In other civil [cases] *actions and proceedings* the compensation shall be paid by the parties in such proportion and at such time as the [judge] *court* directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment.—In the exercise of [his] *its* discretion, the [judge] *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 and subject to the penalty of perjury at a trial or hearing or in a deposition or before a grand jury*, 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 (C) one of identification of a person made after perceiving him; 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.

Subcommittee Note

Present Federal law generally permits the use of prior inconsistent statements of a witness for impeachment only. Subdivision (d) (1) as proposed by the Court would permit such statements to be admissible as substantive evidence. Although there was some support expressed for the Court Rule, based largely on the need to counteract the effect of witness intimidation, the Subcommittee decided to adopt a compromise version of the Rule patterned after the position of the Second Circuit. See *United States v. De Sisto*, 329 F.2d 929, cert. denied, 377 U.S. 979; *United States v. Cunningham*, 446 F.2d 194. The Rule as approved draws a distinction between types of prior inconsistent statements and allows only those made before a grand jury, or at a trial or hearing, or in a deposition, to be admissible for their truth. The rationale for the Subcommittee's decision was that (1) unlike in other situations, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding and an oath provided firm additional assurances of the reliability of the statement. The Subcommitee intends that nothing in the Rule should be deemed to impair the secrecy of grand jury investigations.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules [adopted] *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 includ-

ing 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 *business* activity.—A memorandum, report, record, or data compilation in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, [all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.] *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, profession, occupation, and calling of every kind.*

(7) Absence of entry in records [of regularly conducted activity] *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, [of a regularly conducted activity] *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, or (C) in civil [cases] *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 [whose authenticity] *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 comparable circumstantial guarantees of trustworthiness.]

Subcommittee Note

Subdivision (4) was approved as submitted by the Court, with the understanding that it was not intended in any way adversely to affect substantive privilege laws or any privilege rules which might be adopted.

Subdivision (5) was amended to include a memorandum of statements adopted by a witness as well as those made by him, a treatment consistent with the Jencks Act, 18 U.S.C. 3500. Otherwise, the Rule was approved as submitted by the Court, with the understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. Moreover, the same principle was deemed applicable to all the hearsay rules.

Subdivision (6) of the Court Rule permitted a record made "in the course of a regularly conducted activity" to be admissible in certain circumstances. The Subcommittee 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 Subcommittee 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 Rule was accordingly redrafted to incorporate these limitations.

Subdivision (7) was amended to reflect the Subcommittee's action with respect to subdivision (6).

Subdivision (8) was approved in substance as submitted by the Court, with the understanding that evaluations or opinions contained in public reports would not be admissible, and intending that the term "factual findings" should be strictly construed.

In subdivison (13) the Subcommittee intends that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in subdivision (11).

Subdivision (24) was deleted as injecting too much uncertainty into the law of evidence. It was noted that Rule 102 directs the courts to construe these Rules of Evidence so as to promote "growth and development." If additional hearsay exceptions are to be created, they should be by amendments to these Rules, not on a case by case basis.

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 [judge] *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 [judge] *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, [at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.] *if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.*

[(2) Statement of recent perception.—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.]

[(3)](*2*) Statement under belief of impending death.—[A] *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.

[(4)](*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 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 expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless [corroborated.] *corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception.*

[(5)] (*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.

[(6) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.]

Subcommittee Note

The Subcommittee amendment to subdivision (a)(5) is primarily designed to require that an attempt be made to depose a witness as a precondition to the witness being deemed unavailable; the Subcommittee, however, recognized the propriety of an exception to this requirement in the case where it is the witness' former testimony that is sought to be admitted under Subdivision (b)(1).

Subdivision (b)(1) of the Court Rule allowed prior testimony of a 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 Subcommittee believed it is generally unfair to impose upon the party against whom the hearsay is being offered responsibility for the manner in which the witness was previously handled. The sole exception to this, in the Subcommittee's view, is where a party's predecessor in interest had the prior opportunity and similar motive to examine the witness. The subdivision was amended to reflect these policy determinations.

The Subcommittee voted to delete subdivision (b)(2) as creating a new and unwarranted hearsay exception of great potential breadth. The Subcommittee did not believe that statements of the type referred to in the proposed Court Rule bore sufficient guarantees of trustworthiness to justify admissibility.

Subdivision (b)(3) of the Court Rule 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 Subcommittee 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. At the same time, the Subcommittee approved the expansion to civil cases, although noting the possibility that this could lead to forum shopping in some cases.

Under Subdivision (b)(4) the Subcommittee 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 the declarant to civil liability or to render invalid a claim by him against another to be unnecessary 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 exception from its present federal limitation to include statements subjecting the declarant to criminal liability and statements tending to make the declarant an object of hatred, ridicule, or disgrace. The Subcommittee eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. As for statements against penal interest, the Subcommittee 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 also 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 corroboration 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 Subcommittee settled on 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 cases like *Donnelly v. United States*, 228 U.S. 243, where the circumstances clearly indicated reliability, would be changed. The Subcommittee also determined to add to the Rule the final sentence from the 1971 draft, designed to codify the doctrine of *Bruton v. United States*, 391 U.S. 123. The Subcommittee did 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 event the declarant would not be "unavailable."

Subdivision (b)(6) was deleted for the same reasons underlying the deletion of Rule 803(24).

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 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 compilations.—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 [adopted] *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 [judge] *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 [adopted] *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 [under the hand and seal of] *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.

Subcommittee Note

Subdivision (8) was redrafted 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 required by the law of the State which authorized the notary to take the acknowledgment.

Subdivision (9) was approved as submitted by the Court. However, there was considerable discussion concerning the meaning of the term "general commercial law". The Subcommittee 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. 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 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 technique which accurately reproduces the original.

Subcommittee Note

The Subcommittee amended subdivision (2) specifically to include video tapes in the defintion of "photographs."

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.

Subcommittee Note

With respect to clause (1), the Subcommittee intends that the courts should be liberal in deciding "a genuine question is raised as to the authenticity 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.

Subcommittee Note

With respect to subdivision (1), the Subcommittee assumes that loss or destruction of an original by another at the instigation of the proponent would be tantamount to loss or destruction by the proponent himself.

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 a reasonable time and place. The [judge] *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 [Judge] *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 [judge] *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.

Subcommittee Note

The phrase "in accordance with the provisions of Rule 104" was added to make clear that the procedures set forth in Rule 104 apply to the situation described in the first sentence of this Rule.

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 [word] *terms* "judge" *and* "*court*" in these rules include United States magistrates [and], 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 proceedings, to contempt proceedings except those in which the [judge] *court* may act summarily, and to proceedings and cases under the Bankruptcy Act.

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

(d) Rules inapplicable.—The rules (other than [those] with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the [judge] *court* under rule 104[(a)].

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

(3) Miscellaneous proceedings.—Proceedings for extradition or rendition; preliminary examinations in criminal cases; sen-

tencing, 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 [adopted] *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 Secretary of Agriculture under sections 292, 499f and 499g (c) of title 7, United States Code; naturalization and revocation of naturalization under sections 1421–1429 of title 8, United States Code; prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of Secretary of the Interior under section 522 of title 15, United States Code; review of orders of petroleum control boards under section 715d of title 15, United States Code; actions for fines, penalties, or forfeitures under the Tariff Act of 1930 (19 U.S.C., c. 4, part V), or under the Anti-Smuggling Act (19 U.S.C., c. 5); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C., c. 9); disputes between seamen under sections 256–258 of title 22, United States Code; 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 679 of title 46, United States Code; actions against the United States for damages caused by or for towage or salvage services rendered to public vessels under chapter 22 of title 46, United States Code, as implemented by section 7730 of title 10, United States Code.] *review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize associations 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.

Subcommittee Note

The Subcommittee amendment in subdivision (a) extends the application of the Federal Rules of Evidence to the Court of Claims and its commissioners.

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

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 110[2] *3.* 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. 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.*"; *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."

Subcommittee Note

The amendments made by this section to 28 U.S.C. 1732 and 1733 are conforming amendments reflecting the Subcommittee's action with respect to Rules 803(6) and 803(8).

Sec. [2] *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.

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