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OF THE
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SUPREME COURT BUILDING
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November 12, 1968

Members of the Advisory Committee
on Rules of Evidence

Gentlemen:

Mr. Foley's office is sending you herewith 397 pages of materials. About one-half was submitted to, considered, and acted upon in tentative final form by the Committee at our meeting of last August. The other half is here presented in tentative final form for the first time, for consideration at the forthcoming meeting in December. About 75 pages remain to be done, and they will be in your hands prior to the December meeting.

In view of the volume of the materials and the fact that the rules have not been considered in sequence, the following comments may be helpful. References to action mean Committee action at the meeting of last August unless otherwise indicated.

Article I

Presented here as revised at meeting of August, 1968. The deletion of Rules 1-03 and 1-05 from the August materials has resulted in renumbering the rules following Rule 1-02.

Rule 1-03 and the Note were revised slightly.

Rule 1-06 was revised, principally in what now appears as (d). The Reporter reversed the order of (c) and (d) as a more logical sequence. The Note has been revised by the Reporter to conform with the change in (d).

Article II

Presented here as revised at the meeting of August, 1968.

Rule 2-01(g) was revised. The Reporter has made corresponding changes in the Note. The Reporter has also added a brief note on judicial notice of law, in accord with the Committee action directing that the long note be sent to other committees but not included in our draft proposal.

Article III

Presented here in tentative final form for first time.

Rule 3-01(b) contained internal inconsistencies as it emerged from the August meeting. Moreover, spelling out the procedural details appeared to be a needless complication. The Reporter has rewritten the subdivision to comply with what he conceives to have been the Committee's purpose.

Rule 3-03 has changed captions which the Reporter believes conform with the Committee's instruction.

Article IV

Presented here as revised at meeting of August, 1968.

Rule 4-08 was slightly revised.

Rule 4-10 was revised.

Rule 4-11 was slightly revised.

Article V

Presented here as revised at meeting of August, 1968.

Rule 5-02. Last sentence was added.

Rule 5-04 was slightly revised.

Rule 5-05 was amended by adding the Mann Act reference. The Reporter has made a corresponding change in the Note.

Rule 5-08 has a revised Note.

B45-1

Sum

Rule 5-09(e) was slightly revised.

Rule 5-10(c) (3) was revised.

Rule 5-11 was slightly revised.

Article VI

Presented here as revised at meeting of August, 1968.

Rule 6-10 was slightly revised.

Rule 6-11 was slightly revised.

Article VII

Presented here in tentative final form for the first time.

Rule 7-05(a) uses the expression "disclosure . . . through judicial procedure." The Reporter questions whether this is an apt description of discovery.

Article VIII

Presented here in tentative final form for the first time.


Rule 8-03(b) (3) has been amended by the Reporter by adding the "unless" clause to take care of the will cases. See California Evidence Code § 1260.

Rule 8-03(b) (7) has been amended by the Reporter by adding "and against the government in criminal cases" in (c). No reason is apparent for disallowing the evidence.

Rule 8-04(b) (4) has been amended by the Reporter by adding the last sentence to comply with Douglas and Bruton.

We will get the remaining rules in tentative final form with notes as rapidly as possible.

Best regards to each of you.


Edward W. Cleary
Reporter

EWC:in
Enclosures

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PROPOSED RULES OF EVIDENCE
FOR UNITED STATES COURTS AND ~~COMMISSIONERS~~ ^{Magistrates}

Advisory Committee
on Evidence

Tentative final draft

Article I. General Provisions

- 1 Rule 1-01. Scope. These rules govern proceedings in
- 2 the courts of the United States and before United
- 3 States ~~commissioners~~ ^{magistrates}, to the extent and with the ex-
- 4 ceptions stated in Rule 11-1.

First draft
1st revision

Advisory Committee's Note

Rule 1-01 (Tentative final draft)

Rule 11⁶-1 specifies in detail the courts, proceedings, questions, and stages of proceedings to which the rules apply in whole or in part.

Tentative final draft
1st revision

1 Rule 1-02. Purpose and construction. These rules shall
2 be construed to secure fairness in administration, elimi-
3 nation of unjustifiable expense and delay, and promotion
4 of growth and development of the law of evidence to the
5 end that the truth may be ascertained and proceedings
6 justly determined.

First draft

Advisory Committee's Note

Rule 1-02 (Tentative final draft)

For similar provisions see Rule 2 of the Federal Rules of Criminal Procedure, Rule 1 of the Federal Rules of Civil Procedure, California Evidence Code § 2, and New Jersey Evidence Rule 5.

1 Rule 1-03. Rulings on evidence.

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

6 (1) Objection. In case the ruling is one
7 admitting evidence, a timely objection or motion
8 to strike appears of record, stating the specific
9 ground of objection; or

10 (2) Offer of proof. In case the ruling is
11 one excluding evidence, the substance of the evi-
12 dence was made known to the judge by offer or was
13 apparent from the context within which questions
14 were asked.

15 (b) Record of ^{offer and} ruling. The judge may add such other

1 or further statement as ~~clearly~~ shows the character of the
2 evidence, the form in which it was offered, the objection
3 made, and the ruling thereon. He may direct the making
4 of an offer in question and answer form, and on request
5 shall do so in actions tried without a jury, unless it
6 clearly appears that the evidence is not admissible on any
7 ground or ~~that the matter or witness is privileged.~~
is inadmissible because of privileged.

8 (c) ^{Hearing} ~~Presence~~ of jury. In jury cases, proceedings
9 shall be conducted, to the extent practicable, so as to
10 prevent ~~excluded~~ ^{inadmissible} evidence from ~~coming to the attention of~~
being suggested to the jury
11 ~~the jury~~ by such means as making ^{statements or} offers of proof ~~in their~~
~~presence~~ ^{in their hearing.} or asking questions ~~suggesting the same~~
statements

13 (d) Plain error. Nothing ^{in this rule} ~~herein~~ precludes taking
14 notice of plain errors affecting substantial rights
15 although they were not brought to the attention of the
16 judge.

First draft
1st revision

Advisory Committee's Note

Rule 1-03 (Tentative final draft)

Subdivision (a) states the law as generally accepted today. Rulings on evidence cannot be assigned as error unless (1) a substantial right is affected, and (2) the nature of the error was called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures. The objection and the offer of proof are the techniques for accomplishing these latter objectives. For similar provisions see Uniform Rules 4 and 5; California Evidence Code §§ 353 and 354; Kansas Code of Civil Procedure §§ 60-404 and 60-405. The status of constitutional error as harmless or not is treated in Chapman v. California, 386 U.S. 18 (1967), reh. denied id. 987.

Subdivision (b). The first sentence is the third sentence of Rule 43(c) of the Federal Rules of Civil Procedure. Its purpose is to reproduce for an appellate court, insofar as possible, a true reflection of what occurred in the trial court. The second sentence is in part derived from the final sentence of Rule 43(c). It is designed to resolve doubts as to what testimony the witness would in fact give, and, in nonjury cases, to

provide the appellate court with material for a possible final disposition of the case in the event of reversal of a ruling which excluded evidence. See 5 MOORE'S FEDERAL PRACTICE ¶ 43.11 (2d ed. 1968).

Subdivision (c) proceeds on the supposition that a ruling which excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence nevertheless comes to the attention of the jury. Bruton v. United States, 389 U.S. 818 (1968). Rule 43(c) of the Federal Rules of Civil Procedure provides: "The court may require the offer to be made out of the hearing of the jury." In re McConnell, 370 U.S. 230 (1962), left some doubt whether questions on which an offer is based must first be asked in the presence of the jury. The subdivision answers in the negative. The judge can foreclose a particular line of testimony and counsel can protect his record without a series of questions before the jury, designed at best to waste time and at worst "to waft into the jury box" the very matter sought to be excluded.

Subdivision (d). This wording of the plain error principle is from Rule 52(b) of the Federal Rules of Criminal Procedure. While judicial unwillingness to be constricted by mechanical breakdowns of the adversary

system has been more pronounced in criminal cases, there is no scarcity of decisions to the same effect in civil cases. In general, see Campbell, Extent to which Courts of Review Will Consider Questions Not Properly Raised and Preserved, 7 Wis. L. Rev. 91, 160 (1932); Vestal, Sua Sponte Consideration in Appellate Review, 27 Fordham L. Rev. 477 (1958-59); 64 Harv. L. Rev. 652 (1951). In the nature of things the application of the plain error rule will be more likely with respect to the admission of evidence than to exclusion, since failure to comply with normal requirements of offers of proof is likely to produce a record which simply does not disclose the error.

Tentative final draft
1st revision

1 Rule 1-04. Preliminary questions of admissibility.

2 (a) General rule. When the qualification of a
3 person to be a witness, or the admissibility of evi-
4 dence, or the existence of a privilege, is stated in
5 these rules to be subject to a condition, ^{subject to (b)} and the ful-
6 fillment of the condition is in issue, ^{that} ~~the~~ issue is
7 to be determined by the judge. In making his determi-
8 nation the judge is not bound by the rules of evidence,
9 except claims of privilege.

10 (b) Relevancy conditioned on fact. When the
11 relevancy of evidence depends upon the fulfillment
12 of a condition of fact, the judge shall admit it upon
13 the introduction of evidence sufficient to support a
14 finding of the fulfillment of the condition. If
15 under all the evidence upon the issue the jury might
16 reasonably find that the fulfillment of the condition

1 is not established, the judge shall instruct the jury
2 to consider the issue and to disregard the evidence
3 unless they find the condition was fulfilled. If
4 under all the evidence upon the issue the jury could
5 not reasonably find that the condition was fulfilled,
6 the judge shall instruct the jury to disregard the
7 evidence.

8 (c) Presence of jury. Hearings on preliminary
9 questions of admissibility shall be conducted ~~outside~~^{of}
10 the ~~presence~~^{hearing} of the jury when the interests of justice
11 so require.

12 (d) Preliminary hearings on confessions and evi-
13 dence^x unlawfully^x obtained. Preliminary hearings on the
14 admissibility of confessions or statements by the accused
15 or evidence allegedly unlawfully obtained shall be con-
16 ducted outside the presence of the jury, ^{and} Testimony

Sentence begins on next page.

1 given by ^{him} ~~the accused~~ at the hearing is not admissible
2 against him at the trial on the issue of guilt, ~~and he~~
3 ~~does not by so~~ ^{the accused} testifying ^{at the hearing} ~~render himself liable~~ to
4 cross-examination as to other issues in the case.

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

First draft
1st revision

Advisory Committee's Note

Rule 1-04 (Tentative final draft)

Subdivision (a). The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? In each instance the admissibility of evidence will turn upon the answer to the question of the existence of the condition. Accepted practice, incorporated in the rule, places on the judge the responsibility for these determinations. MCCORMICK § 53; MORGAN, BASIC PROBLEMS OF EVIDENCE 45-50 (1962).

To the extent that these inquiries are factual, the judge acts as a trier of fact. Often, however, rulings on evidence call for an evaluation in terms of a legally set standard. Thus when a hearsay statement is offered as a declaration against interest, a decision must be made whether it possesses the required against-interest characteristics. These decisions, too, are made by the judge.

In view of these considerations, this subdivision refers to preliminary requirements generally by the broad

term "conditions," without attempt at specification.

This subdivision is of general application. It must, however, be read as subject to the special provisions for "conditional relevancy" in subdivision (b) and those for confessions in subdivision (c).

If the condition is factual in nature, the judge will of necessity receive evidence pro and con on the issue of its existence. The rule provides that the rules of evidence in general do not apply to this process. McCORMICK § 53, p. 123, n.8, points out that the authorities are "scattered and inconclusive," and observes:

"Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay."

This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest. Again, common practice calls for considering the testimony of a witness, particularly a child, in determining competency. If concern is felt over the use of affidavits by the judge in

preliminary hearings on admissibility, attention is directed to the many important judicial determinations made on the basis of affidavits. Rule 47 of the Federal Rules of Criminal Procedure provides:

"An application to the court for an order shall be by motion. . . . It may be supported by affidavit."

The Rules of Civil Procedure are more detailed. Rule 43(e), dealing with motions generally, provides:

"When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

Rule 4(g) provides for proof of service by affidavit. Rule 56 provides in detail for the entry of summary judgment based on affidavits. Affidavits may supply the foundation for temporary restraining orders under Rule 65(b).

Subdivision (b). In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it.

Relevance in this sense has been labelled "conditional relevancy," MORGAN, BASIC PROBLEMS OF EVIDENCE 45-46 (1962), and problems arising in connection with it are to be distinguished from problems of logical relevancy, e.g. evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 4-01.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them, and they are told to disregard the item unless they find in favor of fulfillment. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration.

Morgan, supra; California Evidence Code § 403; New Jersey Rule 8(2). See also Uniform Rules 19 and 67.

The order of proof is subject to the control of the judge under Rule 6-11(a).

Subdivision (c). Detailed treatment of when a preliminary hearing should be held outside the presence of the jury is not feasible. Certain matters must so be heard. See subdivision (d). The procedure is, however, a time-consuming one. Not infrequently the same evidence which is relevant to the issue of the establishment of the fulfillment of a condition is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge.

Subdivision (d). Preliminary hearings on the admissibility of confessions must be heard outside the presence of the jury, Jackson v. Denno, 378 U.S. 368 (1964), and prudence and fairness indicate a similar course in disposing of claims that evidence was unlawfully obtained.

The inadmissibility of the testimony of the accused

is based on Simmons v. United States, 390 U.S. 377 (1968) and removes obstacles in the way of enforcing constitutional rights suggested in Stein v. New York, 346 U.S. 156 (1953) and Jones v. United States, 362 U.S. 257 (1960). Inadmissibility is, however, limited to the issue of guilt, and use of the testimony for purposes of impeachment is not precluded in the event the accused testifies at the trial inconsistently with his testimony at the hearing. See Walder v. United States, 347 U.S. 62 (1954). The limitation on cross-examination is similarly based.

Subdivision (e). For similar provisions see Uniform Rule 8; California Evidence Code § 406; Kansas Code of Civil Procedure § 60-408; New Jersey Evidence Rule 8(1).

Tentative final draft
1st revision

1 Rule 1-05. Summing up and comment by judge. After the
2 close of the evidence and arguments of counsel, the
3 judge may sum up the evidence and comment to the jury
4 upon the weight of the evidence and the credibility of
5 the witnesses, if he ^{also} instructs the jury that they are
6 to determine for themselves the weight of the evidence
7 and the credit to be given to the witnesses and ^{that they} are
8 not bound by the judge's ^{summation or} comment thereon.

First draft
1st revision

Advisory Committee's Note

Rule 1-05 (Tentative final draft)

The rule states the present rule in the federal courts. Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899). The judge must, of course, confine his remarks to what is disclosed by the evidence and cannot convey to the jury his purely personal reaction to credibility or to the merits of the case; he can be neither argumentative nor an advocate. Quercia v. United States, 289 U.S. 466, 469 (1933); Billeci v. United States, 184 F.2d 394, 402, 24 A.L.R.2d 881 (D.C. Cir. 1950). For further discussion see the series of articles by Wright, The Invasion of Jury: Temperature of the War, 27 Temp. L.Q. 137 (1953), Instructions to the Jury: Summary Without Comment, 1954 Wash. U.L.Q. 177, Adequacy of Instructions to the Jury, 53 Mich. L. Rev. 505, 813 (1955); A.L.I. MODEL CODE OF EVIDENCE, Comment to Rule 8; MAGUIRE, WEINSTEIN, et al., CASES AND MATERIALS ON EVIDENCE 737-740 (5th ed. 1965); VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 224-229 (1949). A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, Standards Relating to Trial by Jury 121-129 (1968).

Tentative final draft
1st revision

1 Rule 1-06. Limited admissibility. When evidence which
2 is admissible as to one party or for one purpose but
3 inadmissible as to another party or for another purpose
4 is admitted, the judge upon request shall restrict the
5 evidence to its proper scope and instruct the jury
6 accordingly.

Advisory Committee's Note

Rule 1-06 (Tentative final draft)

A close relationship exists between this rule and Rule 4-03(a) which requires exclusion when "probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 4-03. In Bruton v. United States, 389 U.S. 818 (1968), the Court ruled that a limiting instruction did not effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him. The decision does not, however, bar the use of limited admissibility with an instruction where the risk of prejudice is less serious.

Similar provisions are found in Uniform Rule 6; California Evidence Code § 355; Kansas Code of Civil

Procedure § 60-406; New Jersey Evidence Rule 6. The

wording of the present rule differs, however, in re-

peating any implication that ~~the limited admissibility~~ ^{limiting or curative instruction}

~~procedure may be followed in all situations.~~

are sufficient in all situations

Tentative final draft
1st revision

1 Rule 1-07. Remainder of or related writings or recorded
2 statements. When a writing or recorded statement or
3 part thereof, is introduced by a party, he may be re-
4 quired at that time to introduce any other part or any
5 other writing or recorded statement which ought in fair-
6 ness to be considered with it.

First draft
1st revision

Advisory Committee's Note

Rule 1-07 (Tentative final draft)

The rule is an ^{*expression of the rule of completeness,*} ~~extension of the practice prevail-~~
^{*It is manifested by*} ~~ing as to depositions~~ under Rule 26(d)(4) of the Federal
Rules of Civil Procedure, which would become Rule 32(a)(4)
under PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES
OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS,
(November 1967):

"If only part of a deposition is offered in
evidence by a party, an adverse party may
require him to introduce all of it which is
relevant to the part introduced, and any party
may introduce any other parts."

A somewhat greater measure of discretion in application
is suggested by substituting, in lieu of "relevant," the
phrase "which ought in fairness to be considered with it."
Illinois Supreme Court Rule 212(c).

The rule is based on two considerations. The first
is the misleading impression created by taking a state-
ment out of context, and the second is the inadequacy of
repair work when delayed to a point later in the trial.
See McCORMICK § 56; California Evidence Code § 356. The
rule does not in any way circumscribe the right of the
adversary to develop the matter on cross-examination or
as part of his own case.

For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.

Tentative final draft
1st revision

Article II. Judicial Notice

1 Rule 2-01. Judicial notice of adjudicative facts.

2 (a) Scope of rule. This rule governs judicial

3 notice of facts in issue or facts from which they may

4 be inferred.

5 (b) Kinds of facts. *A judicially noticed fact either* ~~The facts~~ must not be subject

6 ~~to reasonable dispute because~~ (1) generally known with-

7 in the territorial jurisdiction of the trial court or

8 (2) capable of accurate and ready determination by

9 resort to sources whose accuracy cannot reasonably be

10 questioned, *so that the fact is not subject to reasonable dispute*

11 (c) When discretionary. ~~In all cases~~ A judge or

12 court *may* ~~has discretion to~~ take judicial notice, whether

13 requested or not.

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

4 (e) Opportunity to be heard. A party is entitled
5 upon timely request to an opportunity to be heard as
6 to the propriety of taking judicial notice and the tenor
7 of the matter to be noticed.

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

10 (g) Instructing jury. In civil jury cases, the judge
11 shall instruct the jury to accept as conclusive any facts
12 judicially noticed. In criminal jury cases, the judge
13 shall instruct the jury that it may but is not required
14 to accept as conclusive any fact that is judicially
15 noticed.

First draft
1st revision

Advisory Committee's Note

Rule 2-01 (Tentative final draft)

Subdivision (a). This is the only evidence rule on the subject of judicial notice, and it deals only with judicial notice of "adjudicative" facts. No rule deals with judicial notice of "legislative" facts. Judicial notice of matters of ^{foreign} law is treated in Rule 44.1 of the Federal Rules of Civil Procedure and Rule 26.1 of the Federal Rules of Criminal Procedure.

The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the law-making process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. The terminology was coined by Professor Kenneth Davis in his article An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 404-407 (1942). The following discussion draws extensively upon his writings. In addition to the article cited above, see the same

author's Judicial Notice, 55 Colum. L. Rev. 945 (1955); ADMINISTRATIVE LAW TREATISE, ch. 15 (1958); A System of Judicial Notice Based on Fairness and Convenience, in PERSPECTIVES OF LAW 69 (1964).

The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside the area of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite.

Legislative facts are quite different. As Professor Davis says:

"My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are 'clearly . . . within the domain of the indisputable.' Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable." A System of Judicial Notice Based on Fairness and Convenience, supra, at 82.

An illustration is Hawkins v. United States, 358 U.S. 74 (1958), in which the Court refused to discard the common law rule that one spouse could not testify against the other, saying, "Adverse testimony given

in criminal proceedings would, we think, be likely to destroy almost any marriage." This conclusion has a large intermixture of fact, but the factual aspect is scarcely "indisputable." See Hutchins and Slesinger, Some Observations on the Law of Evidence -- Family Relations, 13 Minn. L. Rev. 675 (1929). If the destructive effect of the giving of adverse testimony by a spouse is not indisputable, should the Court have refrained from considering it in the absence of supporting evidence?

"If the Model Code or the Uniform Rules had been applicable, the Court would have been barred from thinking about the essential factual ingredient of the problems before it, and such a result would be obviously intolerable. What the law needs at its growing points is more, not less, judicial thinking about the factual ingredients of problems of what the law ought to be, and the needed facts are seldom 'clearly' indisputable." Davis, supra, at 83.

Professor Morgan gave the following description of the methodology of determining domestic law:

"In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. . . .

[T]he parties do no more than to assist; they control no part of the process." Morgan, Judicial Notice, 57 Harv. L. Rev. 269, 270-271 (1944).

This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations. See Borden's Farm Products Co. v. Baldwin, 293 U.S. 194 (1934), where the cause was remanded for the taking of evidence as to the economic conditions and trade practices underlying the New York Milk Control Law.

Similar considerations govern the judicial use of non-adjudicative facts in ways other than formulating laws and rules. Thayer described them as a part of the judicial reasoning process.

"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; and the capacity to do this, with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit." THAYER, PRELIMINARY TREATISE ON EVIDENCE 279-280 (1898).

As Professor Davis points out, A System of Judicial Notice Based on Fairness and Convenience, in PERSPECTIVES OF LAW 69, 73 (1964), every case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says "car," everyone, judge and jury included, furnishes, from non-evidence sources from within himself, the supplementing information that the "car" is not a railroad car but an automobile, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate Cogito, ergo sum. These items could not possibly be introduced into evidence, and no one suggests that they be. Nor are they appropriate subjects for any formalized treatment of judicial notice of facts. See Levin and Levy, Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum, 105 U. Pa. L. Rev. 139 (1956).

Another aspect of what Thayer had in mind is the use of non-evidence facts to appraise or assess the adjudicative facts of the case. Pairs of cases from two jurisdictions illustrate this use and also the

difference between non-evidence facts and adjudicative facts. In People v. Strook, 347 Ill. 460, 179 N.E. 821 (1932), venue in Cook county had been held not established by testimony that the crime was committed at 7956 South Chicago Avenue, since judicial notice would not be taken that the address was in Chicago. However, the same court subsequently ruled that venue in Cook county was established by testimony that a crime occurred at 8900 South Anthony Avenue, since notice would be taken of the common practice of omitting the name of the city when speaking of local addresses, and the witness was testifying in Chicago. People v. Pride, 16 Ill. 2d 82, 156 N.E.2d 551 (1951). And in Hughes v. Vestal, 264 N.C. 500, 142 S.E.2d 361 (1965), the Supreme Court of North Carolina disapproved the trial judge's admission in evidence of a state-published table of automobile stopping distances on the basis of judicial notice, though the court itself had referred to the same table in an earlier case in a "rhetorical and illustrative" way in determining that the defendant could not have stopped her car in time to avoid striking a child who suddenly appeared in the highway and that a nonsuit was properly granted. Ennis v. Dupree, 262 N.C. 224, 136 S.E.2d 702 (1964).

See also Brown v. Hale, 263 N.C. 176, 139 S.E.2d 210 (1964); Clayton v. Rimmer, 262 N.C. 302, 136 S.E.2d 562 (1964). It is apparent that this use of non-evidence in evaluating the adjudicative facts of the case is not an appropriate subject for a formalized judicial notice treatment.

In view of these considerations, the regulation of judicial notice of facts by the present rule extends only to adjudicative facts.

What, then, are "adjudicative" facts? Davis refers to them as those "which relate to the parties," or more fully:

"When a court or an agency finds facts concerning the immediate parties -- who did what, where, when, how, and with what motive or intent -- the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. . . .

"Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses."
2 ADMINISTRATIVE LAW TREATISE 353.

McCormick refers to the "particular facts in issue," which would appear to include only "ultimate" facts, though he later recognizes that judicial notice may be taken of a fact not itself an issue, for the

purpose of raising an inference as to the existence of a fact in issue. McCORMICK 687, 710. In order that facts in both categories be included, the rule uses the phrase "facts in issue or facts from which they may be inferred" as a definition of the area to be covered by a formalized judicial notice rule.

Subdivision (b). With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent. As Professor Davis says:

"The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal

evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention." A System of Judicial Notice Based on Fairness and Convenience, in PERSPECTIVES OF LAW 69, 93 (1964).

The rule proceeds upon the theory that these considerations call for dispensing with traditional methods of proof only in clear cases. Compare Professor Davis' conclusion that judicial notice should be a matter of convenience, subject to requirements of procedural fairness. Id., 94.

The rule is consistent with Uniform Rule 9(1) and (2) which limit judicial notice of facts to those "so universally known that they cannot reasonably be the subject of dispute," those "so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute," and those "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." The traditional textbook treatment has included these general categories (matters of common knowledge, facts capable of verification), MCCORMICK §§ 324, 325, and then has passed on into detailed treatment of such specific topics as facts relating to the personnel and records of the court, id. § 327, and other

governmental facts, id. § 328. The California draftsmen, with a background of detailed statutory regulation of judicial notice, followed a somewhat similar pattern. California Evidence Code §§ 451, 452. The Uniform Rules, however, were drafted on the theory that these particular matters are included within the general categories and need no specific mention, and this approach is followed in the present rule.

The phrase "propositions of generalized knowledge," found in Uniform Rule 9(1) and (2) is not included in the present rule. It was, it is believed, originally included in Model Code Rules 801 and 802 primarily in order to afford some minimum recognition to the right of the judge in his capacity of judge (not acting as the trier of fact) to take judicial notice of very limited categories of generalized knowledge. The limitations thus imposed have been discarded herein as undesirable, unworkable, and contrary to existing practice. What is left, then, to be considered, is the status of a "proposition of generalized knowledge" as an "adjudicative" fact to be noticed judicially and communicated by the judge to the jury. Thus viewed, it is considered to be lacking in practical significance. Judges use judicial notice of "propositions of generalized knowledge"

in a variety of situations: determining the validity and meaning of statutes, formulating common law rules, deciding whether evidence should be admitted, assessing the sufficiency and effect of evidence. When judicial notice is seen as a significant vehicle for progress in the law, these are the areas involved, particularly in developing fields of scientific knowledge. See McCORMICK 712. It is not believed that judges now instruct juries as to "propositions of generalized knowledge" derived from encyclopedias or other sources, or that they are likely to do so, or, indeed, that it is desirable that they do so. There is a vast difference between ruling on the basis of judicial notice that radar evidence of speed is admissible and explaining to the jury its principles and degree of accuracy, or between using a table of stopping distances of automobiles at various speeds in a judicial evaluation of testimony and telling the jury its precise application in the case. For cases raising doubt as to the propriety of the use of medical texts by lay triers of fact in passing on disability claims in administrative proceedings, see Sayers v. Gardner, 380 F.2d 940 (6th Cir. 1967); Ross v. Gardner, 365 F.2d 554 (6th Cir. 1966); Sosna v. Celebrezze, 234 F. Supp. 289

(E.D. Pa. 1964); Glendenning v. Ribicoff, 213 F. Supp. 301 (W.D. Mo. 1962).

Subdivisions (c) and (d). Under subdivision (c) the judge has a discretionary authority to take judicial notice, regardless of whether he is requested by a party to do so. The taking of judicial notice is mandatory, under subdivision (d), only when a party requests it and the necessary information is supplied. This scheme is believed to reflect existing practice. It is simple and workable, and avoids troublesome distinctions in the many situations where the process of taking judicial notice is not recognized as such.

Compare Uniform Rule 9 making judicial notice of facts universally known mandatory without request, and making judicial notice of facts generally known in the jurisdiction or capable of determination by resort to accurate sources discretionary in the absence of request but mandatory if request is made and the information furnished. But see Uniform Rule 10(3), which directs the judge to decline to take judicial notice if available information fails to convince him that the matter falls clearly within Uniform Rule 9 or is insufficient to enable him to notice it judicially. Substantially the same approach is found in

California Evidence Code §§ 451-453 and in New Jersey Evidence Rule 9. In contrast, the present rule treats alike all adjudicative facts which are subject to judicial notice.

Subdivision (e). Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter to be noticed. The rule requires the granting of that opportunity upon request. No formal scheme of giving notice is provided: an adversely affected party will learn that the taking of judicial notice is contemplated, either by virtue of service of a copy of a request by another party under subdivision (d) or through an indication by the judge or court. A similar provision for hearing on request is contained in the Administrative Procedure Act, 5 U.S.C § 556(e). See also Revised Model State Administrative Procedure Act (1961), 9C U.L.A. § 10(4) (Supp. 1967).

Subdivision (f). The provision for taking judicial notice at any stage is in accord with the usual view. Uniform Rule 12; California Evidence Code § 459; Kansas Rules of Evidence § 60-412; New Jersey Evidence Rule 12; McCORMICK 712.

Subdivision (g). Much of the controversy about judicial notice has centered upon the question whether evidence should be admitted in disproof of facts of which judicial notice is taken.

The writers have been divided. Favoring admissibility are THAYER, PRELIMINARY TREATISE ON EVIDENCE 308 (1898); 9 WIGMORE § 2567; Davis, A System of Judicial Notice Based on Fairness and Convenience, in PERSPECTIVES OF LAW, 69, 76-77 (1964). Opposing admissibility are Keeffe, Landis and Shaad, Sense and Nonsense about Judicial Notice, 2 Stan. L. Rev. 664, 668 (1950); McNaughton, Judicial Notice -- Excerpts Relating to the Morgan-Wigmore Controversy, 14 Vand. L. Rev. 779 (1961); Morgan, Judicial Notice, 57 Harv. L. Rev. 269, 279 (1944); MCCORMICK 710-711. The Model Code and the Uniform Rules are predicated upon indisputability of judicially noticed facts.

The proponents of admitting evidence in disproof have concentrated largely upon legislative facts. Since the present rule deals only with judicial notice of adjudicative facts, arguments directed to legislative facts ^{are not} ~~lose their~~ relevancy.

Within its relatively narrow area of adjudicative facts, the rule contemplates no evidence before the

jury in disproof in civil cases. The judge ^{will} instructs the jury to take judicially noticed facts as conclusive. This position is justified by the undesirable effects of the opposite rule in limiting the rebutting party, though not his opponent, to admissible evidence, in defeating the reasons for judicial notice, and in affecting the substantive law to an extent and in ways largely unforeseeable. Ample protection and flexibility are afforded by the broad provision for opportunity to be heard on request, set forth in subdivision (e).

Criminal cases are treated somewhat differently in the rule. While matters falling within the common fund of information supposed to be possessed by jurors need not be proved, State v. Dunn, 221 Mo. 530, 120 S.W. 1179 (1909), these are not, properly speaking, adjudicative facts but an aspect of legal reasoning. The considerations which underlie the general rule that a verdict cannot be directed against the accused in a criminal case seems to foreclose the judge's directing the jury on the basis of judicial notice to accept as conclusive any adjudicative facts in the case. State v. Main, 91 R.I. 338, 180 A.2d 814 (1962); State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951). Cf. People v. Mayes, 113 Cal. 618, 45 P. 860 (1896); Ross v. United States, 374 F.2d

97 (8th Cir. 1967). However, this view presents no obstacle to the judge's advising the jury as to a matter judicially noticed, if he instructs them that it need not be taken as conclusive.

Note on Judicial Notice of Law

By rules effective July 1, 1966, the method of invoking the law of a foreign country has been covered elsewhere. Rule 44.1 of the Federal Rules of Civil Procedure; Rule 26.1 of the Federal Rules of Criminal Procedure. These two new admirably designed rules are founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure. The Advisory Committee on Evidence believes that this assumption is entirely correct, has proposed no evidence rule with respect to judicial notice of law, and has suggested the expansion of the Rules of Civil and Criminal Procedure to include those matters of law which, in addition to foreign-country law, have traditionally been treated as requiring pleading and proof and more recently as the subject of judicial notice. A detailed memorandum to this effect has been transmitted to the advisory committees concerned.

Two areas of law would be affected: one the law of a sister state of the United States, and the other a rather ill-defined group of domestic rules of lesser status including "private" legislative acts, ordinances, and public agency regulations.

Next page in original is 69.

See note at top of pg.

"(Art. III on Presumptions?)"

Art. III on Presumptions?

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Tentative final draft

Article IV. Relevancy and Its Limits

1 Rule 4-01. Definition of "relevant evidence." "Rele-

2 vant evidence" means evidence having any tendency to

3 make the existence of any fact that is of consequence

4 to the determination of the action more or less probable

5 than it would be without the evidence.

First draft
1st revision

Advisory Committee's Note

Rule 4-01 (Tentative final draft)

Problems of relevancy fall into two categories:

(1) those in which the question is whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence, sometimes called "legal" relevancy, cf. Trautman, Logical or Legal Relevancy--A Conflict in Theory, 5 Vand. L. Rev. 385 (1952), and

(2) those in which the probative value of the evidence depends upon the existence of another fact, sometimes called "conditional" relevancy. MORGAN, BASIC PROBLEMS OF EVIDENCE 45-46 (1962). An illustration of the first is evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged,--probative value is a matter of analysis and reasoning. An illustration of the second is evidence of a spoken statement relied upon as proving that a person had notice of a defect,--probative value is totally lacking unless the person heard the statement.

The rules contained in this article deal only with the first of these categories, and in the discussion which follows the term "relevancy" is to be

taken in terms of that category. Problems of conditional relevancy, on the other hand, require no special rules except for determining the respective functions of judge and jury in dealing with these questions when they arise, as to which see Rule 1-04(b), Preliminary questions of admissibility--Relevancy conditioned on fact, and Rule 9-01, Requirement of authentication or identification.

The variety of relevancy problems is coextensive with the ingenuity of counsel in dealing with circumstantial evidence as a means of proof. Some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules, and Rule 4-04 and those following it are of that variety. An enormous number of cases, however, fall in no set pattern, and the present rule is designed as a guide for handling them.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. James, Relevancy, Probability and the Law, 29 Calif. L.

Rev. 689, 696, n.15 (1941) in SELECTED WRITINGS ON EVIDENCE AND TRIAL 610, 615, n.15 (Fryer ed. 1957). The rule summarizes this relationship as a "tendency to make the existence" of the fact to be proved "more or less probable." Compare Uniform Rule 1(2) which states the crux of relevancy as "a tendency in reason," thus perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle upon which relevancy in a particular situation depends.

The standard of probability under the rule is "more . . . probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As MCCORMICK § 152, p. 317, says, "A brick is not a wall," or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 576 (1956), quotes Professor McBaine, ". . . [I]t is not to be supposed that every witness can make a home run." Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase "fact that is of consequence to the determination of the action" to describe

the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word "material." Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. I. General Provisions), CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 10-11 (1964). The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a "material" fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 4-03), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder

weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission. Cf. California Evidence Code § 210, defining relevant evidence in terms of tendency to prove a disputed fact.

Tentative final draft

1 Rule 4-02. Relevant evidence generally admissible,
2 irrelevant evidence inadmissible. All relevant evi-
3 dence is admissible, except as otherwise provided by
4 these rules, by Act of Congress, or by the Constitu-
5 tion of the United States. Evidence which is not
6 relevant is not admissible.

First draft
1st revision

Advisory Committee's Note

Rule 4-02 (Tentative final draft)

The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are "a presupposition involved in the very conception of a rational system of evidence." THAYER, PRELIMINARY TREATISE ON EVIDENCE 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests. For similar provisions see California Evidence Code §§ 350, 351. Provisions that all relevant evidence is admissible are found in Uniform Rule 7(f); Kansas Code of Civil Procedure § 60-407(f); and New Jersey Evidence Rule 7(f); but the exclusion of evidence which is not relevant is left to implication.

Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Act of Congress, or by constitutional considerations.

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition,

Article V recognizes a number of privileges; Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

The Rules of Civil and Criminal Procedure in some instances require the exclusion of relevant evidence. For example: Rule 26(d) of the Rules of Civil Procedure, by imposing such requirements as notice and unavailability of the deponent, places limitations upon the use of relevant depositions. See proposed Rules 30(b)(2) and 32, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 39, 54, (November 1967). Similarly, Rule 15 of the Rules of Criminal Procedure restricts the use of depositions in criminal cases, even though relevant. And the effective enforcement of the command, originally statutory and now found in Rule 5(a) of the Rules of Criminal Procedure, that an arrested person be taken without unnecessary delay before a commissioner or other similar officer is held to require the exclusion of statements elicited

during detention in violation thereof. Mallory v. United States, 354 U.S. 449 (1957).

While congressional enactments in the field of evidence have generally tended to expand admissibility beyond the scope of the common law rules, in some particular situations they have restricted the admissibility of relevant evidence. Most of this legislation has consisted of the formulation of a privilege or of a prohibition against disclosure. 8 U.S.C. § 1202(f), records of refusal of visas or permits to enter United States confidential, subject to discretion of Secretary of State to make available to court upon certification of need; 10 U.S.C. § 3693, replacement certificate of honorable discharge from Army not admissible in evidence; 10 U.S.C. § 8693, same as to Air Force; 11 U.S.C. § 25(a)(10), testimony given by bankrupt on his examination not admissible in criminal proceedings against him, except that given in hearing upon objection to discharge; 11 U.S.C. § 205(a), railroad reorganization petition, if dismissed, not admissible in evidence; 11 U.S.C. § 403(a), list of creditors filed with municipal composition plan not an admission; 13 U.S.C. § 9(a), census information confidential, retained copies of reports privileged; 47 U.S.C. § 605, interception and divulgence

of wire or radio communications prohibited unless authorized by sender. These statutory provisions would remain undisturbed by the rules.

The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, Weeks v. United States, 232 U.S. 383 (1914); Katz v. United States, 389 U.S. 347 (1967); identification evidence obtained in violation of right to counsel, United States v. Wade, 388 U.S. 218 (1967); incriminating statement elicited from an accused in violation of right to counsel, Massiah v. United States, 377 U.S. 201 (1964).

Tentative final draft

1 Rule 4-03. Exclusion of relevant evidence on grounds
2 of prejudice, confusion, or waste of time.

3 (a) Exclusion mandatory. Although relevant, evi-
4 dence is not admissible if its probative value is sub-
5 stantially outweighed by the danger of unfair prejudice,
6 of confusion of the issues, or of misleading the jury.

7 (b) Exclusion discretionary. Although relevant,
8 evidence may be excluded if its probative value is sub-
9 stantially outweighed by considerations of undue delay,
10 waste of time, or needless presentation of cumulative
11 evidence.

First draft
1st revision

Advisory Committee's Note

Rule 4-03 (Tentative final draft)

The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan. L. Rev. 1, 12-15 (1956); Trautman, Logical or Legal Relevancy--A Conflict in Theory, 5 Vand. L. Rev. 385, 392 (1952); MCCORMICK § 152, pp. 319-321. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Exclusion for risk of ^{unfair} prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. It is apparent, however, that waste of time entails no serious likelihood of a miscarriage

of justice and hence should be accorded a different treatment. Consequently, subdivision (a) of the rule makes exclusion mandatory when probative value is substantially outweighed by risks of undue prejudice, confusion of issues, or misleading the jury, while subdivision (b) merely authorizes the judge to exclude when probative value is outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence, but does not require him to do so.

"Unfair prejudice" within this context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law. 6 WIGMORE § 1849. Cf. MCCORMICK § 152, p. 320, n.29, listing unfair surprise as a ground for exclusion but stating that it is usually "coupled with the danger of prejudice and confusion of issues." While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure § 60-445, surprise is not included in California Evidence Code § 352 or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45. While it can

scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 612 (1964). Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate.

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 1-06 and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor.

1 Rule 4-04. Character evidence not admissible to prove
2 conduct; exceptions; other crimes.

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

7 (1) Character of accused. Evidence of his
8 character or a trait of his character offered by
9 an accused, and similar evidence offered by the
10 prosecution to rebut the same;

11 (2) Character of victim. Evidence of the
12 character or a trait of character of the victim
13 of the crime offered by an accused, and similar
14 evidence offered by the prosecution to rebut the
15 same;

1 (3) Character of witness. Evidence of the
2 character of a witness, offered to attack or
3 support his credibility.

4 (b) Other crimes, wrongs, or acts. Evidence of
5 other crimes, wrongs, or acts is not admissible to
6 prove the character of a person in order to show that
7 he acted in conformity therewith. It may, however, be
8 admissible for other purposes, such as proof of motive
9 opportunity, intent, preparation, plan, knowledge,
10 identity, or absence of mistake or accident.

Advisory Committee's Note

Rule 4-04 (Tentative final draft)

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 4-05, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 6-08 to 6-10 for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 4-05, immediately following. (2) Character

evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may rebut; and (3) the character of a witness may be gone into as bearing on his credibility. McCORMICK §§ 155-161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic, an underlying

justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 584 (1956); McCORMICK § 157. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e. evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 581-583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 657-658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission

in its ultimate rejection of Uniform Rule 47, id., 615:

"Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Much of the force of the position of those favoring greater use of character evidence in civil cases is dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in Schlagenhauf v. Holder, 379 U.S. 104 (1964). It is believed that those espousing change have not met the burden of proof.

Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis

for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule provides that the evidence may be admissible. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 4-03(a). Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325 (1956).

1 Rule 4-05. Methods of proving character.

2 (a) Reputation or opinion. In all cases in which
3 evidence of character or a trait of character of a
4 person is admissible, proof may be made by testimony
5 as to reputation or in the form of an opinion.

6 (b) Specific instances of conduct. In cases in
7 which character or a trait of character of a person is
8 an essential element of a charge, claim, or defense,
9 proof may also be made of specific instances of his
10 conduct.

Advisory Committee's Note

Rule 4-05 (Tentative final draft)

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases where character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine. MCCORMICK § 153.

In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 WIGMORE § 1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with "the secondhand, irresponsible product of multiplied guesses and gossip which

we term 'reputation.'" It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion.

Tentative final draft
1st revision

1 Rule 4-06. Habit; routine practice.

2 (a) Admissibility. Evidence of the habit of a
3 person or of the routine practice of an organization,
4 whether corroborated or not and regardless of the
5 presence of eyewitnesses, is relevant to prove that
6 the conduct of the person or organization on a par-
7 ticular occasion was in conformity with the habit or
8 routine practice.

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

Advisory Committee's Note

Rule 4-06 (Tentative final draft)

Subdivision (a). An oft-quoted paragraph, McCORMICK § 162, p. 340, describes habit in terms effectively contrasting it with character:

"Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic."

Equivalent behavior on the part of a group is designated "routine practice of an organization" in the rule.

Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion.

Again quoting McCORMICK § 162, p. 341:

"Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to

character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it."

When disagreement has appeared, its focus has been upon the question what constitutes habit, and the reason for this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion. Lewan, Rationale of Habit Evidence, 16 Syracuse L. Rev. 39, 49 (1964). While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.

The rule is consistent with prevailing views. Much evidence is excluded simply because of failure to achieve the status of habit. Thus, evidence of intemperate habits is generally excluded when offered as proof of drunkenness in accident cases, Annot., 46 A.L.R.2d 103, and evidence of other assaults is inadmissible to prove the instant one in a civil assault action, Annot., 66 A.L.R.2d 806. In Levin v. United States, 338 F.2d 265 (D.C. Cir. 1964), testimony as to the religious "habits" of the accused,

offered as tending to prove that he was at home observing the Sabbath rather than out obtaining money through larceny by trick, was held properly excluded.

"It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of 'invariable regularity.' [1 Wigmore 520.] Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value." Id. at 272.

These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation. Slough, Relevancy Unraveled, 6 Kan. L. Rev. 38-41 (1957). Nor are they inconsistent with such cases as Whittemore v. Lockheed Aircraft Corp., 65 Cal. App. 2d 737, 151 P.2d 670 (1944), upholding the admission of evidence that plaintiff's intestate had on four other occasions flown planes from defendant's factory for delivery to his employer airline, offered to prove that he was piloting rather than a guest on a plane which crashed and killed all on board while en route for delivery.

A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission

in evidence. Slough, Relevancy Unraveled, 5 Kan. L. Rev. 404, 449 (1957). This requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility. A similar position is taken in New Jersey Rule 49. The rule also rejects the requirement of the absence of eyewitnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases. For comment critical of the requirement see Frank, J., in Cereste v. New York, N.H. & H. R. Co., 231 F.2d 50 (2d Cir. 1956), cert. denied 351 U.S. 951; 10 Vand. L. Rev. 447 (1957); McCORMICK § 162, p. 342. The omission of the requirement from the California Evidence Code is said to have effected its elimination. Comment, Cal. Ev. Code § 1105.

Subdivision (b). Permissible methods of proving habit or routine conduct include opinion and specific instances sufficient in number to warrant a finding that the habit or routine practice in fact existed. Proof by specific instances may be controlled by the overriding provisions of Rule 4-03 for exclusion on grounds of prejudice, confusion, misleading the jury, or waste of time. Thus the illustrations following A.L.I. Model Code of Evidence Rule 307 suggest the possibility of

admitting testimony by W that on numerous occasions he had been with X when X crossed a railroad track and that on each occasion X had first stopped and looked in both directions, but discretion to exclude offers of 10 witnesses, each testifying to a different occasion.

Similar provisions for proof by opinion or specific instances are found in Uniform Rule 50 and Kansas Code of Civil Procedure § 60-450. New Jersey Rule 50 provides for proof by specific instances but is silent as to opinion. The California Evidence Code is silent as to methods of proving habit, presumably proceeding on the theory that any method is relevant and all relevant evidence is admissible unless otherwise provided. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), REP., REC. & STUDY, CAL. LAW REV. COMM'N, 620 (1964).

Tentative final draft

1 Rule 4-07. Subsequent remedial measures. When, after
2 an event, measures are taken which, if taken previously,
3 would have made the event less likely to occur, evidence
4 of the subsequent measures is not admissible to prove
5 negligence or culpable conduct in connection with the
6 event. This rule does not require the exclusion of
7 evidence of subsequent remedial measures when offered
8 for another purpose, such as proving ownership, control,
9 feasibility of precautionary measures, or impeachment.

First draft

Advisory Committee's Note

Rule 4-07 (Tentative final draft)

The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. N.S. 261, 263 (1869).

Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rule is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting

Admissibility, 10 Rutgers L. Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, feasibility of precautionary measures, and impeachment. 2 WIGMORE § 283; Annot., 64 A.L.R.2d 1296. Two recent federal cases are illustrative. Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And Powers v. J. B. Michael & Co., 329 F.2d 674 (6th Cir. 1964), an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant's control. The factors of undue prejudice, confusion of issues, misleading the jury, and waste of

time remain for consideration under Rule 4-03.

For comparable rules, see Uniform Rule 51; California Evidence Code § 1151; Kansas Code of Civil Procedure § 60-451; New Jersey Evidence Rule 51.

1 Rule 4-08. Compromise and offers to compromise. Evi-
2 dence of (1) furnishing or offering or promising to
3 furnish, or (2) accepting or offering or promising to
4 accept, a valuable consideration in compromising or
5 attempting to compromise a claim which was disputed as
6 to either validity or amount, is not admissible to
7 prove liability for or invalidity of the claim or its
8 amount. Evidence of conduct or statements made in
9 compromise negotiations is likewise not admissible.
10 This rule does not require exclusion when the evidence
11 is offered for another purpose, such as proving bias
12 or prejudice of a witness, negating a contention of
13 undue delay, or proving an effort to obstruct a crimi-
14 nal investigation or prosecution.

First draft
1st revision

Advisory Committee's Note

Rule 4-08 (Tentative final draft)

As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim. As with evidence of subsequent remedial measures, dealt with in Rule 4-07, exclusion may be based on two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances. (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. McCORMICK §§ 76, 251. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.

The same policy underlies the provision of Rule 68 of the Federal Rules of Civil Procedure that evidence of an unaccepted offer of judgment is not admissible except in a proceeding to determine costs.

The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be "without prejudice," or so connected with the offer as to be inseparable from it. McCORMICK § 251, pp. 540-541. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself. For similar provisions see California Evidence Code §§ 1152, 1154.

The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. McCORMICK § 251, p. 540. Hence the rule requires that the claim be disputed as to either validity or amount.

The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule. The illustrative situations mentioned in the rule are supported by the authorities. As to proving bias or prejudice of a witness, see Annot., 161 A.L.R. 395, contra, Fenberg v. Rosenthal, 348 Ill. App. 510, 109 N.E.2d 402 (1952), and negating a contention of lack of due diligence in presenting a claim, 4 WIGMORE § 1061. An effort to "buy off" the prosecution or a prosecuting witness in a criminal case is not within the policy of the rule of exclusion, McCORMICK § 251, p. 542.

For other rules of similar import, see Uniform Rules 52 and 53; California Evidence Code §§ 1152, 1154; Kansas Code of Civil Procedure §§ 60-452, 60-453; New Jersey Evidence Rules 52 and 53.

Tentative final draft

1 Rule 4-09. Payment of medical and similar expenses.
2 Evidence of furnishing or offering or promising to pay
3 medical, hospital, or similar expenses occasioned by
4 an injury is not admissible to prove liability for the
5 injury.

First draft

Advisory Committee's Note

Rule 4-09 (Tentative final draft)

The considerations underlying this rule parallel those underlying Rules 4-07 and 4-08, which deal respectively with subsequent remedial measures and offers of compromise. As stated in Annot., 20 A.L.R.2d 291, 293:

"[G]enerally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person."

Contrary to Rule 4-08, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature.

For rules on the same subject, but phrased in terms of "humanitarian motives," see Uniform Rule 52; California

Evidence Code § 1152; Kansas Code of Civil Procedure
§ 60-452; New Jersey Evidence Rule 52.

Tentative final draft
1st revision

Rule 4-10. 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, is not admissible

in a civil or criminal proceeding involving the person

who made the plea or offer.



First draft
1st revision

Advisory Committee's Note

Rule 4-10 (Tentative final draft)

Withdrawn pleas of guilty were held inadmissible in federal prosecutions in Kercheval v. United States, 274 U.S. 220 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in People v. Spitaleri, 9 N.Y.2d 168, 173 N.E.2d 35 (1961), re-examined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in Kercheval, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326.

Exclusion of offers to plead guilty rests upon a different basis, promotion of disposition of criminal cases by compromise. As pointed out in McCORMICK § 251, p. 543,

"Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises."

See also People v. Hamilton, 60 Cal. 2d 105, 32 Cal. Rptr. 4, 383 P.2d 412 (1963), discussing legislation designed to achieve this result. As with compromise offers generally, Rule 4-08, free communication is needed, and security against having an offer of compromise admitted in evidence effectively encourages it.

To the same effect as the present rule is California Evidence Code § 1153. See also the narrower provisions of New Jersey Evidence Rule 52(2), rendering the offer to plead guilty inadmissible only in "that criminal proceeding."

Tentative final draft
1st revision

Rule 4-11. 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 it is relevant for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

First draft
1st revision

Advisory Committee's Note

Rule 4-11 (Tentative final draft)

The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds. MCCORMICK § 168; Annot., 4 A.L.R.2d 761. The rule is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

The second sentence points out the limits of the rule, using well established illustrations. Id.

For similar rules see Uniform Rule 54; California Evidence Code § 1155; Kansas Code of Civil Procedure § 60-454; New Jersey Evidence Rule 54.

Article V. Privileges

- 1 Rule 5-01. Privileges recognized only as provided.
- 2 Except as otherwise required by the Constitution of the
- 3 United States or provided by act of Congress, and except
- 4 as provided in these rules and in the Rules of Civil
- 5 and Criminal Procedure, no person has a privilege to:
- 6 (a) Refuse to be a witness; or
- 7 (b) Refuse to disclose any matter; or
- 8 (c) Refuse to produce any object or writing; or
- 9 (d) Prevent another from being a witness or dis-
- 0 closing any matter or producing any object or writing.

First draft
1st revision

Advisory Committee's Note

Rule 5-01 (Tentative final draft)

No attempt is made in these rules to incorporate the constitutional provisions which relate to the admission and exclusion of evidence, whether denominated as privileges or not. The grand design of these provisions does not readily lend itself to codification. The final reference must be the provisions themselves and the decisions construing them. Nor is formulating a rule an appropriate means of settling unresolved constitutional questions.

Similarly privileges created by act of Congress are not within the scope of these rules. These privileges do not assume the form of broad principles but are the product of resolving particular problems in particular terms. Among them are included such provisions as 13 U.S.C. § 9, generally prohibiting official disclosure of census information and conferring a privileged status on retained copies of census reports; 42 U.S.C. § 2000e-5(a), making inadmissible in evidence anything said or done during Equal Employment Opportunity conciliation proceeding; 42 U.S.C. § 2240, making required reports of incidents by nuclear facility licensee

inadmissible in actions for damages; 45 U.S.C. §§ 33, 41, similarly as to reports of accidents by railroads; 49 U.S.C. § 1441(e), declaring C.A.B. accident investigation reports inadmissible in actions for damages. The rule leaves them undisturbed.

The reference to the Rules of Civil and Criminal Procedure makes clear that provisions relating to privilege in those rules will continue in operation. See, for example, the "work product" immunity against discovery spelled out under the Rules of Civil Procedure in Hickman v. Taylor, 329 U.S. 495 (1947), now proposed to be formalized in revised Rule 26(b)(2), PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 11-12 (November 1967); and the secrecy of grand jury proceedings provided by Criminal Rule 6.

With respect to privileges created by state law, these rules in some instances grant them greater status than has heretofore been the case by according them recognition in federal criminal proceedings, bankruptcy, and federal question litigation.

In federal criminal prosecutions the primacy of federal law as to both substance and procedure has been undoubted. See, for example, United States v. Krol, 374 F.2d 776 (7th Cir. 1967), sustaining the admission in a federal prosecution of evidence obtained by electronic eavesdropping, despite a state statute declaring the use of these devices unlawful and evidence obtained therefrom inadmissible. This primacy includes matters of privilege. As stated in 4 BARRON, FEDERAL PRACTICE AND PROCEDURE § 2151, p. 175 (1951):

"The determination of the question whether a matter is privileged is governed by federal decisions and the state statutes or rules of evidence have no application."

In Funk v. United States, 290 U.S. 371 (1933), the Court had considered the competency of a wife to testify for her husband and concluded that, absent congressional action or direction, the federal courts were to follow the common law as they saw it "in accordance with present day standards of wisdom and justice." And in Wolfe v. United States, 291 U.S. 7 (1934), the Court said with respect to the standard appropriate in determining a claim of privilege for an alleged confidential communication between spouses in a federal criminal prosecution:

"So our decision here, in the absence of Congressional legislation on the subject, is to be controlled by common law principles, not by local statute." Id., 13.

On the basis of Funk and Wofle, the Advisory Committee on Rules of Criminal Procedure formulated Rule 26, which was adopted by the Court. The pertinent part of the rule provided:

"The . . . 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 . . . in the light of reason and experience."

As regards bankruptcy, section 21(a) of the Bankruptcy Act provides for examination of the bankrupt and his spouse concerning the acts, conduct, or property of the bankrupt. The Act limits examination of the spouse to business transacted by her or to which she is a party but provides "That the spouse may be so examined, any law of the United States or of any State to the contrary notwithstanding." 11 U.S.C. § 44(a). The effect of the quoted language is clearly to override any conflicting state rule of incompetency or privilege against spousal testimony. A fair reading would also indicate an overriding of any contrary state rule of privileged confidential spousal communications. Its validity has never been questioned and seems most unlikely to be. As

to other privileges, the suggestion has been made that state law applies, though with little citation of authority. 2 MOORE'S COLLIER ON BANKRUPTCY ¶ 21.13, p. 297 (14th ed. 1961). This position seems to be contrary to the expression of the Court in McCarthy v. Arndstein, 266 U.S. 34, 39 (1924), which speaks in the pattern of Rule 26 of the Federal Rules of Criminal Procedure:

"There is no provision [in the Bankruptcy Act] prescribing the rules by which the examination is to be governed. These are, impliedly, the general rules governing the admissibility of evidence and the competency and compellability of witnesses."

With respect to federal question litigation, the supremacy of federal law may be less clear, yet indications that state privileges are inapplicable preponderate in the circuits. In re Albert Lindley Lee Memorial Hospital, 209 F.2d 122 (2d Cir. 1953), cert. denied 347 U.S. 960; Colton v. United States, 306 F.2d 633 (2d Cir. 1962); Falsone v. United States, 205 F.2d 734 (5th Cir. 1953); Fraser v. United States, 145 F.2d 139 (6th Cir. 1944), cert. denied 324 U.S. 849; United States v. Brunner, 200 F.2d 276 (6th Cir. 1952). Contra, Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960). Additional decisions of district courts are collected in Annot.,

95 A.L.R.2d 320, 336. While a number of the cases arise from administrative income tax investigations, they nevertheless support the broad proposition of the inapplicability of state privileges in federal proceedings.

In view of these considerations, it is apparent that, to the extent that they accord state privileges standing in federal criminal cases, bankruptcy, and federal question cases, the rules go beyond what previously has been thought necessary or proper.

On the other hand, in diversity cases, or perhaps more accurately cases in which state law furnishes the rule of decision, the rules avoid giving state privileges the effect which substantial authority has thought necessary and proper. Regardless of what might once have been thought to be the command of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), as to observance of state created privileges in diversity cases, Hanna v. Plumer, 380 U.S. 460 (1965), is believed to locate the problem in the area of choice rather than necessity. Wright, Procedural Reform: Its Limitations and Its Future, 1 Ga. L. Rev. 563, 572-573 (1967). Contra, Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555, n.2 (2d Cir. 1967), and see authorities there cited. Hence all significant policy factors need to be considered in order that the choice may be a wise

one. The arguments advanced in favor of recognizing state privileges are: a state privilege is an essential characteristic of a relationship or status created by state law; state policy ought not to be frustrated by the accident of diversity; the allowance or denial of a privilege is so likely to affect the outcome of litigation as to encourage forum selection on that basis, not a proper function of diversity jurisdiction. To these arguments there are persuasive answers. The essential characteristic of a privilege is the suppression of information in judicial or administrative proceedings. No state can have a deep interest in the suppression of information except on a constitutional basis, such as self-incrimination, or in a situation where confidentiality is a necessary adjunct to the obtaining of information needed by the state, such as accident reports or the identity of an informer. These latter interests are recognized in Rules 5-02 and 5-10. Moreover, in any event, a privilege created by state law can never be perfect in affording complete security and so must in a sense be illusory, since it will always be subject to possible disclosure in a federal criminal proceeding, federal question litigation, or bankruptcy. Nor is there any wrong in allowing selection

of a court because of the superiority of its procedure for developing the facts, as long as the substantive law applied is the same. If the federal courts can offer no different procedure from state courts, in diversity cases, then complete conformity would be required, a position which simply does not square with the actualities. The Conformity Act has long since been repealed and supplanted by the Federal Rules of Civil Procedure. In one area, at least, the decision has already been made: Rule 35 of the Federal Rules of Civil Procedure, providing for compulsory physical examination, allows the examined party a copy of the report or a right to take the deposition of the examiner only at the price of waiving any physician-patient privilege with respect to other examinations previously or thereafter made. True, he may do without the report or deposition, thus avoiding the waiver, but the compulsion is great. See also proposed revised Rule 26(b)(2) of the Federal Rules of Civil Procedure, which would allow discovery of liability insurance without reference to state law. PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 11, 18-20 (November 1967).

1 Rule 5-02. Required reports privileged by statute.

2 A person making a return or report required by law to
3 be made has a privilege to refuse to disclose and to
4 prevent any other person from disclosing the return
5 or report, if the law requiring it to be made so
6 provides. A public officer or agency to whom a re-
7 turn or report is required by law to be made has a
8 privilege to refuse to disclose the return or report
9 if the law requiring it to be made so provides. No
10 privilege exists under this rule in actions directly
11 involving false statements or fraud in the return or
12 report,

*or where it would aid or conceal
fraud or where disclosure is essential to
a fair determination of a cause.*

First draft
2nd revision
suggested by
Judge Estes

1 Rule 5-02. Required reports privileged by statute.
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3 be made has a privilege to refuse to disclose and to
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6 provides. A public officer or agency to whom a re-
7 turn or report is required by law to be made has a
8 privilege to refuse to disclose the return or report
9 if the law requiring it to be made so provides. No
10 privilege exists under this rule where it would aid
11 or conceal fraud nor where disclosure is essential to
12 a fair determination of a cause.

First draft
1st revision

Advisory Committee's Note

Rule 5-02 (First draft)

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 5-01, 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 statute against claims of self-incrimination, honoring the privilege against self-incrimination, and encouraging the furnishing of the required information by assuring privacy.

These statutes, both state and federal, may generally be assumed to embody policies of significant dimension. Rule 5-01 insulates the federal provisions against disturbance by these rules; the present rule accomplishes the same result for state statutes. Illustrations of the kinds of returns and reports contemplated by the rule appear in the cases, where a reluctance to compel disclosure is manifested.

In re Reid, 155 Fed. 933 (E.D. Mich. 1906), assessor not compelled to produce bankrupt's property tax return in view of statute forbidding disclosure; In re Valecia Condensed Milk Co., 240 Fed. 310 (7th Cir. 1917), secretary of state tax commission not compelled to produce bankrupt's income tax returns in violation of statute; Herman Bros. Pet Supply, Inc. v. N.L.R.B., 360 F.2d 176 (6th Cir. 1966), subpoena denied for production of reports to state employment security commission prohibited by statute, in proceeding for back wages. And see the discussion of motor vehicle accident reports in Krizak v. W. C. Brooks & Sons, Inc., 320 F.2d 37, 42-43 (4th Cir. 1963). Cf. In re Hines, 69 F.2d 52 (2d Cir. 1934).

1 Rule 5-03. Lawyer-client privilege.

2 (a) Definitions. As used in this rule:

3 (1) A "client" is a person, public officer, or
4 corporation, association, or other organization or
5 entity, either public or private, who is rendered
6 professional legal services by a lawyer, or who
7 consults a lawyer with a view to obtaining profes-
8 sional legal services from him.

9 (2) A "lawyer" is a person authorized, or
10 reasonably believed by the client to be authorized,
11 to practice law in any state or nation.

12 (3) A "representative of the client" is one
13 having authority to obtain professional legal ser-
14 vices, or to act on advice rendered pursuant thereto,
15 on behalf of the client.

1 (4) A "representative of the lawyer" is one
2 employed by the lawyer to assist in the rendition
3 of professional legal services.

4 (5) A communication is "confidential" if not
5 intended to be disclosed to third persons other
6 than those to whom disclosure is in furtherance
7 of the rendition of professional legal services
8 to the client or those reasonably necessary for
9 the transmission of the communication.

10 (b) General rule of privilege. A client has a
11 privilege to refuse to disclose and to prevent any
12 other person from disclosing confidential communica-
13 tions (1) between himself or his representative and
14 his lawyer or his lawyer's representative, or (2) be-
15 tween his lawyer and the lawyer's representative, or
16 (3) made for the purpose of facilitating the rendition

of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest.

(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, and 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

1 knew or reasonably should have known to be a crime
2 or fraud; or

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

9 (3) Breach of duty by lawyer or client. As to
10 a communication relevant to an issue of breach of
11 duty by the lawyer to his client or by the client
12 to his lawyer; or

13 (4) Document attested by lawyer. As to a com-
14 munication relevant to an issue concerning an
15 attested document to which the lawyer is an attest-
16 ing witness; or

1 (5) Joint clients. As to a communication rele-
2 vant to a matter of common interest between two or
3 more clients if the communication was made by any of
4 them to a lawyer retained or consulted in common,
5 when offered in an action between any of the clients.

First draft
1st revision

Advisory Committee's Note

Rule 5-03 (Tentative final draft)

Subdivision (a). (1) The definition of "client" includes governmental bodies, Connecticut Mutual Life Ins. Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y. 1955); People v. Glen Arms Estate, Inc., 230 Cal. App. 2d 841, 41 Cal. Rptr. 303 (1965); Rowley v. Ferguson, 48 N.E.2d 243 (Ohio App. 1942); and corporations, Radiant Burners, Inc. v. American Gas Assn., 320 F.2d 314 (7th Cir. 1963). Contra, Gardner, A Personal Privilege for Communications of Corporate Clients--Paradox or Public Policy, 40 U. Det. L.J. 299, 323, 376 (1963). The definition also extends the status of client to one consulting a lawyer preliminarily with a view to retaining him, even though actual employment does not result. MCCORMICK § 92, p. 184. The client need not be involved in litigation; the rendition of legal service or advice under any circumstances suffices. 8 WIGMORE § 2294 (McNaughton Rev. 1961). The services must be professional legal services; purely business or personal matters do not qualify. MCCORMICK § 92, p. 184.

(2) A "lawyer" is a person licensed to practice law in any state or nation. There is no requirement that

the licensing state or nation recognize the attorney-client privilege, thus avoiding excursions into conflict of laws questions. "Lawyer" also includes a person reasonably believed to be a lawyer. For similar provisions, see California Evidence Code § 950.

(3) "Representative of the client" is limited to one who may properly be said to speak for the client within the spirit and purpose of the privilege, i.e. one having authority to obtain legal services or to act on legal advice for the client. Thus a driver for a defendant bus company 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. The rule reflects the trend of recent decisions. City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962); American Cyanimid Co. v. Hercules Powder Co., 211 F. Supp. 85 (D. Del. 1962); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963); Day v. Illinois Power Co., 50 Ill. App. 2d 52, 199 N.E.2d 802 (1964). Cf. United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950); Zenith Radio Corp., v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954). For state court decisions giving

accident reports by employees the status of attorney-client communications, see Simon, The Attorney-Client Privilege as Applied to Corporations, 65 Yale L.J. 953, 960 (1956). The rule does not affect the so-called "work product" immunity against discovery, which does not depend upon the attorney-client privilege. Hickman v. Taylor, 329 U.S. 495 (1947); Rule 26 (b) (3), PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, (November 1967).

The definition is sufficiently broad to encompass an expert employed by the client to assist in the planning and management of litigation, though not one employed to testify as a witness. Id., Rule 26(b) (4). Experts employed by the lawyer, who in effect act as "assistant counsel" and not as witnesses are covered by paragraph (4), infra. The status of the expert does not, and should not, depend upon whether he is employed by the lawyer or the client. In general, see Lalanc & Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 Fed. 563 (S.D.N.Y. 1898); People ex rel. Dept. of Public Works v. Donovan, 19 Cal. Rptr. 473, 369 P.2d 1 (1962).

The status of employees who are used in the process of communicating, as distinguished from those who are

parties to the communication, is treated in paragraph (5), infra.

(4) The definition of "representative of the lawyer" reflects the prevailing recognition that a lawyer may, in the process of rendering legal services, without departing from the attorney-client relationship employ assistants in addition to those used in the process of communicating. An accountant may well fall in this category, and communications between him and the client should under these circumstances be privileged. United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). Cf. Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949). See the discussion under "representative of the client," supra, paragraph (3).

(5) The requisite confidentiality of communication is defined in terms of intent. A communication made in public or meant to be relayed to outsiders or which is divulged by the client to third persons can scarcely be considered confidential. MCCORMICK § 95. The intent is inferable from the circumstances. Unless intent to disclose is apparent, the attorney-client communication is confidential.

Practicality requires that some disclosure be allowed beyond the immediate circle of lawyer-client

and their representatives without impairing confidentiality. Hence the definition allows disclosure to persons "to whom disclosure is in furtherance of the rendition of professional legal services to the client," contemplating those in such relation to the client as "spouse, parent, business associate, or joint client." Comment, California Evidence Code § 952.

Disclosure may also be made to persons "reasonably necessary for the transmission of the communication," without loss of confidentiality.

Subdivision (b) sets forth the privilege, using the previously defined terms: client, lawyer, their respective representatives, and confidential communication.

Substantial authority has in the past allowed the eavesdropper to testify to overheard privileged conversations and has admitted intercepted privileged letters. Today, the evolution of more sophisticated techniques of eavesdropping and interruption calls for abandonment of this position, and the rule accordingly adopts a policy of protection against these kinds of invasion of the privilege.

The privilege extends to communications (1) between client or his representative and lawyer or his representative, (2) between lawyer and lawyer's representative,

and (3) by client or his lawyer to a lawyer representing another in a matter of common interest.

The third type of communication occurs in the "joint defense" or "pooled information" situation, where different lawyers represent clients who have some interests in common. In Chahoon v. Commonwealth, 62 Va. 822 (1871), the court said that the various clients might have retained one attorney to represent all; hence everything said at a joint conference was privileged, and one of the clients could prevent another from disclosing what the other had himself said. The result seems to be incorrect in overlooking a frequent reason for retaining different attorneys by the various clients, namely actually or potentially conflicting interests in addition to the common interest which brings them together. The needs of these cases seem better to be met by allowing each client a privilege as to his own statements. Thus if all resist disclosure, none will occur. Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964). But, if for reasons of his own, a client wishes to disclose his own statements made at the joint conference, he should be permitted to do so, and the rule is to that effect. The rule does not apply to situations where there is no common interest to be promoted by a joint

consultation, and the parties meet on a purely adversary basis. Vance v. State, 190 Tenn. 521, 230 S.W.2d 987 (1950), cert. denied 339 U.S. 988. Cf. Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965).

Subdivision (c). The privilege is, of course, that of the client, to be claimed by him or by his personal representative. The successor of a dissolved corporate client may claim the privilege. California Evidence Code § 953; New Jersey Evidence Rule 26(1). Contra, Uniform Rule 26(1).

The lawyer may not claim the privilege on his own behalf. However, he may claim it on behalf of the client, and it is assumed that the ethics of the profession will require him to do so except under most unusual circumstances. American Bar Association, Canons of Professional Ethics, Canon 37. His authority to make the claim is presumed unless there is evidence to the contrary, as would be the case if the client were now a party to litigation in which the question arose and were represented by other counsel. Ex parte Lipscomb, 111 Tex. 409, 239 S.W. 1101 (1922).

Subdivision (d) in general incorporates well established exceptions.

(1) The privilege does not extend to advice in

aid of future wrongdoing. 8 WIGMORE § 2298 (McNaughton Rev. 1961). The wrongdoing need not be that of the client. The provision that the client knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is erroneously advised that a proposed action is within the law. No preliminary finding that sufficient evidence aside from the communication has been introduced to warrant a finding that the services were sought to enable the commission of a wrong is required. Cf. Clark v. United States, 289 U.S. 1, 15-16 (1933); Uniform Rule 26(2)(a). While any general exploration of what transpired between attorney and client would, of course, be inappropriate, it is wholly feasible, either at the discovery stage or during trial, so to focus the inquiry by specific questions as to avoid any broad inquiry into attorney-client communications. Numerous cases reflect this approach.

(2) Normally the privilege survives the death of the client and may be asserted by his representative. Paragraph (c), supra. When, however, the identity of the person who steps into the client's shoes is in issue, as in a will contest, the identity of the person entitled to claim the privilege remains undetermined

until the conclusion of the litigation. The choice is thus between allowing both sides or neither to assert the privilege, with authority and reason favoring the latter view. McCORMICK § 98; Uniform Rule 26(2)(b); California Evidence Code § 957; Kansas Code of Civil Procedure § 60-426(b)(2); New Jersey Evidence Rule 26(2)(b).

(3) The exception is required by considerations of fairness and policy when questions arise out of dealings between attorney and client, as in cases of controversy over attorney's fees, claims of inadequacy of representation, or charges of professional misconduct. McCORMICK § 95; Uniform Rule 26(2)(c); California Evidence Code § 958; Kansas Code of Civil Procedure § 60-426(b)(3); New Jersey Evidence Rule 26(2)(c).

(4) When the lawyer acts as attesting witness, the approval of the client to his so doing may safely be assumed, and waiver of the privilege as to any relevant lawyer-client communications is a proper result. McCORMICK § 92, p. 184; Uniform Rule 26(2)(d); California Evidence Code § 959; Kansas Code of Civil Procedure § 60-426(b)(d) [sic].

(5) The subdivision states existing law. McCORMICK

§ 95, pp. 192-193. For similar provisions, see Uniform Rule 26(2)(e); California Evidence Code § 962; Kansas Code of Civil Procedure § 60-426(b)(4); New Jersey Evidence Rule 26(2). The situation with which this provision deals is to be distinguished from the case of clients with a common interest who retain different lawyers. See subdivision (b)(3) of this rule, supra.

1 Rule 5-04. Psychotherapist-patient privilege.

2 (a) Definitions:

3 (1) A "patient" is a person who consults or is
4 examined or interviewed by a psychotherapist for
5 purposes of diagnosis or treatment of his mental or
6 emotional condition.

7 (2) A "psychotherapist" is (i) a person autho-
8 rized to practice medicine in any state or nation,
9 who devotes a substantial portion of his time to
10 the practice of psychiatry, or is reasonably believed
11 by the patient to be such, or (ii) a person licensed
12 or certified as a psychologist under the laws of any
13 state or nation, who devotes a substantial portion
14 of his time to the practice of clinical psychology.

15 (3) A communication is "confidential" if not
16 intended to be disclosed to third persons other than

1 those present to further the interest of the patient
2 in the consultation, examination, or interview, or
3 persons reasonably necessary for the transmission of
4 the communication, or persons who are participating
5 in the diagnosis and treatment under the direction
6 of the psychotherapist, including members of the
7 patient's family.

8 (b) General rule of privilege. A patient has a privi-
9 lege to refuse to disclose and to prevent any other person
10 from disclosing confidential communications among himself,
11 his psychotherapist, or persons who are participating in
12 the diagnosis or treatment under the direction of the psycho-
13 therapist, including members of the patient's family.

14 (c) Who may claim the privilege. The privilege may
15 be claimed by the patient, by his guardian or conservator,
16 or by the personal representative of a deceased patient.

1 The person who was the psychotherapist may claim the
2 privilege but only on behalf of the patient. His
3 authority so to do is presumed in the absence of evi-
4 dence to the contrary.

5 (d) Exceptions.

6 (1) Proceedings for hospitalization. There is
7 no privilege under this rule for communications
8 relevant to an issue in proceedings to hospitalize
9 the patient for mental illness, if the psychothera-
10 pist in the course of diagnosis or treatment has
11 determined that the patient is in need of hospitali-
12 zation.

13 (2) Examination by order of judge. If the judge
14 orders an examination of the mental or emotional
15 condition of the patient, communications made in the
16 course thereof are not privileged under this rule

1 with respect to the particular purpose for which
2 the examination is ordered unless the judge orders
3 otherwise.

4 (3) Condition an element of claim or defense.

5 There is no privilege under this rule as to commu-
6 nications relevant to an issue of the mental or
7 emotional condition of the patient in any proceeding
8 in which he relies upon the condition as an element
9 of his claim or defense, or, after the patient's
10 death, in any proceeding in which any party relies
11 upon the condition as an element of his claim or
12 defense.

Advisory Committee's Note

Rule 5-04 (Tentative final draft)

The rules contain no provision for a general physician-patient privilege. While many states have by statute created the privilege, the exceptions which have been found necessary in order to obtain information required by the public interest or to avoid fraud are so numerous as to leave little if any basis for the privilege. Among the exclusions from the statutory privilege, the following may be enumerated: communications not made for purposes of diagnosis and treatment; commitment and restoration proceedings; issues as to wills or otherwise between parties claiming by succession from the patient; actions on insurance policies; required reports (venereal diseases, gunshot wounds, child abuse); communications in furtherance of crime or fraud; mental or physical condition put in issue by patient (personal injury cases); malpractice actions; and some or all criminal prosecutions. California, for example, excepts cases in which the patient puts his condition in issue, all criminal proceedings, will and similar contests, malpractice cases, and disciplinary proceedings, as well as certain other situations, thus leaving virtually

nothing covered by the privilege. California Evidence Code §§ 990-1007. For other illustrative statutes see Ill. Rev. Stat. 1967, c. 51 § 5.1; N.Y.C.P.L.R. § 4504; N.C. Gen. Stat. 1953, § 8-53.

The doubts attendant upon the general physician-patient privilege are not present when the relationship is that of psychotherapist and patient. While the common law recognized no general physician-patient privilege, it had indicated a disposition to recognize a psychotherapist-patient privilege, Note, Confidential Communications to a Psychotherapist: A New Testimonial Privilege, 47 Nw. U.L. Rev. 384 (1952), when legislatures began moving into the field.

The case for the privilege is convincingly stated in Report No. 45, Group for the Advancement of Psychiatry 92 (1960):

"Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious

feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment."

A much more extended exposition of the case for the privilege is made in Slovenko, Psychiatry and a Second Look at the Medical Privilege, 6 Wayne L. Rev. 175, 184 (1960), quoted extensively in the careful Tentative Recommendation and Study Relating to the Uniform Rules of Evidence (Article V. Privileges), CAL. LAW REV. COMM'N, 417 (1964). The conclusion is reached that Wigmore's four conditions needed to justify the existence of a privilege are amply satisfied.

Illustrative statutes are Cal. Evidence Code §§ 1010-1026; Ga. Code § 38-418 (1961 Supp.); Conn. Gen. Stat., § 52-146a (1966 Supp.); Ill. Rev. Stat. 1967, c. 51 § 5.2.

While many of the statutes simply place the communications on the same basis as those between attorney and client, 8 WIGMORE § 2286, n.23 (McNaughton Rev. 1961), basic differences between the two relationships forbid resorting to attorney-client save as a helpful point of departure. Goldstein and Katz, Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute, 36 Conn. B.J. 175, 182 (1962).

Subdivision (a). (1) The definition of patient does not include a person submitting to examination for scientific purposes. Cf. Cal. Evidence Code § 1011.

(2) A psychotherapist is defined as a medical doctor who devotes a substantial portion of his time to psychiatry, or a person reasonably believed to be in this category, or a licensed psychologist who devotes a substantial portion of his time to clinical psychology. The requirement that the psychologist be in fact licensed, and not merely be believed to be so, is believed to be justified by the number of persons, other than psychiatrists, purporting to render psychotherapeutic aid and the variety of their theories.

CAL. LAW REV. COMM'N, supra, at pp. 434-437.

(3) Confidential communication is defined in terms conformable with those of the lawyer-client privilege, Rule 5-03(a)(5), supra, with changes appropriate to the difference in circumstance.

Subdivisions (b) and (c). The lawyer-client rule is drawn upon for the phrasing of the general rule of privilege and the determination of those who may claim it. See Rule 5-03(b) and (c).

Subdivision (d). The exceptions differ substantially from those of the attorney-client privilege, as

a result of the basic differences in the relationships. While it has been argued convincingly that the nature of the psychotherapist-patient relationship demands complete security against legally coerced disclosure in all circumstances, Louisell, The Psychologist in Today's Legal World: Part II, 41 Minn. L. Rev. 731, 746 (1957), the committee of psychiatrists and lawyers who drafted the Connecticut statute concluded that in three instances the need for disclosure was sufficiently great to justify the risk of possible impairment of the relationship. Goldstein and Katz, Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute, 36 Conn. B.J. 175 (1962). These three exceptions are incorporated in the present rule.

(1) The interests of both patient and public call for a departure from confidentiality in commitment proceedings. Since disclosure is authorized only when the psychotherapist determines that hospitalization is needed, control over disclosure is placed largely in the hands of a person in whom the patient has already manifested confidence. Hence damage to the relationship is unlikely.

(2) In a court ordered examination, the relationship is likely to be an arm's length one, though not necessarily so. In any event, an exception is necessary

for the effective utilization of this important and growing procedure. The exception, it will be observed, deals with a court ordered examination rather than with a court appointed psychotherapist. Also, the exception is effective only with respect to the particular purpose for which the examination is ordered. The rule thus conforms with the provision of 18 U.S.C. § 4244 that no statement made by the accused in the course of an examination into competency to stand trial is admissible on the issue of guilt.

(3) By injecting his condition into litigation, the patient must be said to waive the privilege, in fairness and to avoid abuses. Similar considerations prevail after the patient's death.

1 Rule 5-05. Husband-wife privilege.

2 (a) General rule of privilege. An accused in a
3 criminal proceeding has a privilege to prevent his
4 spouse from testifying against him.

5 (b) Exceptions. There is no privilege under this
6 rule (1) in proceedings in which one spouse is charged
7 with a crime against the person or property of the other
8 or of a child of either, or with a crime against the
9 person or property of a third person committed in the
10 course of committing a crime against the other, or
11 (2) as to matters occurring prior to the marriage, or
12 (3) in proceedings in which a spouse is charged with
13 importing an alien for prostitution or other immoral pur-
14 pose in violation of 8 U.S.C. § 1328, or with transport-
15 ing a female in interstate commerce for immoral purposes
16 or other offense in violation of 18 U.S.C. §§ 2421-2424.

First draft
1st revision

Advisory Committee's Note

Rule 5-05 (Tentative final draft)

Subdivision (a). Rules of evidence have evolved around the marriage relationship in four respects: (1) incompetency of one spouse to testify for the other; (2) privilege of one spouse not to testify against the other; (3) privilege of one spouse not to have the other testify against him; and (4) privilege against disclosure of confidential communications between spouses, sometimes extended to information learned by virtue of the existence of the relationship. Today these matters are largely governed by statutes.

With the disappearance of the disqualification of parties and interested persons, the basis for spousal incompetency no longer existed, and it, too, virtually disappeared in both civil and criminal actions. Usually reached by statute, this result was reached for federal courts by the process of decision. Funk v. United States, 290 U.S. 371 (1933). These rules contain no recognition of incompetency of one spouse to testify for the other.

While some 10 jurisdictions recognize a privilege not to testify against one's spouse in a criminal case,

and a much smaller number do so in civil cases, the great majority recognizes no such privilege, ^{on behalf of the testifying spouse} and this is the position taken by the rule. Compare Wyatt v. United States, 362 U.S. 525 (1960), a Mann Act prosecution in which the wife was the victim. The majority opinion held that she could not claim privilege and was compellable to testify. The holding was narrowly based: the Mann Act presupposed that the women with whom it dealt had no independent wills of their own, and this legislative judgment precluded allowing a victim-wife an option whether to testify, lest the policy of the statute be defeated. A vigorous dissent took the view that nothing in the Mann Act required departure from usual doctrine, which was conceived to be one of allowing the injured party to claim or waive privilege.

The only privilege which the rule recognizes is that of the accused in a criminal case to prevent his or her spouse from testifying. The privilege prevails in this form in about 30 jurisdictions and is believed to represent the one aspect of marital privilege the continuation of which is warranted. It was sustained in Hawkins v. United States, 358 U.S. 74 (1958). Cf. McCORMICK § 66; 8 WIGMORE § 2228 (McNaughton Rev. 1961). Comment, Uniform Rule 23(2).

The rule recognizes no privilege for confidential communications. The traditional justifications for privileges not to testify against a spouse and not to be testified against by one's spouse have been the prevention of marital dissension and the repugnancy of requiring a person to condemn or be condemned by his spouse. 8 WIGMORE §§ 2228, 2241 (McNaughton Rev. 1961). These considerations bear no relevancy to marital communications. Nor can it be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware. The other communication privileges, by way of contrast, have as one party a professional person who can be expected to inform the other of the existence of the privilege. Moreover, those privileges are essentially and almost exclusively verbal in nature, quite unlike marriage. See Hutchins and Slesinger, Some Observations on the Law of Evidence: Family Relations, 13 Minn. L. Rev. 675 (1929). Cf. MCCORMICK § 90; 8 WIGMORE § 2337 (McNaughton Rev. 1961).

Subdivision (b) contains three exceptions to the privilege against spousal testimony in criminal cases.

(1) The need of limitation upon the privilege in order to avoid grave injustice in cases of offenses

against the other spouse or a child of either can scarcely be denied. 8 WIGMORE § 2239 (McNaughton Rev. 1961). The rule therefore disallows any privilege against spousal testimony in these cases and in this respect is in accord with the result reached in Wyatt v. United States, 362 U.S. 525 (1960), a Mann Act prosecution, denying the accused the privilege of excluding his wife's testimony, since she was the woman who was transported for immoral purposes.

(2) The second exception renders the privilege inapplicable as to matters occurring prior to the marriage. This provision eliminates the possibility of suppressing testimony by marrying the witness.

(3) The third exception continues and expands established Congressional policy. In prosecutions for importing aliens for immoral purposes, Congress has specifically denied the accused any privilege not to have his spouse testify against him. 8 U.S.C. § 1328. No provision of this nature is included in the Mann Act, and in Hawkins v. United States, 358 U.S. 74 (1958), the conclusion was reached that the common law privilege continued. Consistency requires similar results in the two situations. The rule adopts the Congressional approach, as based upon a more realistic appraisal of the marriage relationship in

cases of this kind, in preference to the specific result in Hawkins. Note the common law treatment of pimping and sexual offenses with third persons as exceptions to marital privilege. 8 WIGMORE § 2239 (McNaughton Rev. 1961).

With respect to bankruptcy proceedings, the smallness of the area of spousal privilege under the rule and the general inapplicability of privileges created by state law render unnecessary any special provision for examination of the spouse of the bankrupt, such as that now contained in section 21(a) of the Bankruptcy Act. 11 U.S.C. § 44(a).

For recent statutes and rules dealing with husband-wife privileges, see California Evidence Code §§ 970-973, 980-987; Kansas Code of Civil Procedure §§ 60-423(b), 60-428; New Jersey Evidence Rules 23(2), 28.

1 Rule 5-06. Communications to clergymen.

2 (a) Definitions. As used in this rule:

3 (1) A "clergyman" is a minister, priest, rabbi,
4 or other similar functionary of a religious organi-
5 zation, or reasonably believed to be such by the
6 person consulting him.

7 (2) A communication is "confidential" if made
8 privately and not intended for further disclosure.

9 (b) General rule of privilege. A person has a
10 privilege to refuse to disclose and to prevent another
11 from disclosing a confidential communication by the
12 person to a clergyman in his professional character as
13 spiritual adviser.

14 (c) Who may claim the privilege. The privilege may
15 be claimed by the person, by his guardian or conservator,
16 or by his personal representative if he is deceased. The

1 clergyman may claim the privilege on behalf of the person,
2 and his authority so to do is presumed in the absence of
3 evidence to the contrary.

First draft
1st revision

Advisory Committee's Note

Rule 5-06 (Tentative final draft)

The considerations which dictate the recognition of privileges generally seem strongly to favor a privilege for confidential communications to clergymen. During the period when most of the common law privileges were taking shape, no clear-cut privilege for communications between priest and penitent emerged. 8 WIGMORE § 2394 (McNaughton Rev. 1961). The English political climate of the time may well furnish the explanation. In this country, however, the privilege has been recognized by statute in about two-thirds of the states and occasionally by the common law process of decision. Id., § 2395; Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1959).

Subdivision (a) (1) defines a clergyman as a "minister, priest, rabbi, or other similar functionary of a religious organization." The concept is necessarily broader than that inherent in the ministerial exemption for purposes of Selective Service. See United States v. Jackson, 369 F.2d 936 (4th Cir. 1966). However, it is not so broad as to include all self-denominated "ministers." A fair construction of the language requires that the person to whom the status is sought to be attached be

regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis. No further specification seems possible in view of the lack of licensing and certification procedures for clergymen. However, this lack seems to have occasioned no particular difficulties in connection with the solemnization of marriages, which suggests that none may be anticipated here. For similar definitions of "clergyman" see California Evidence Code § 1030; New Jersey Evidence Rule 29.

The "reasonable belief" provision finds support in similar provisions for lawyer-client in Rule 5-03 and for psychotherapist-patient in Rule 5-04. A parallel is also found in the recognition of the validity of marriages performed by unauthorized persons if the parties reasonably believed him legally qualified. HARPER and SKOLNICK, PROBLEMS OF THE FAMILY 153 (Rev. Ed. 1962).

(2) The definition of "confidential" communication is consistent with the use of the term in Rule 5-03(a)(5) for lawyer-client and in Rule 5-04(a)(3) for psychotherapist-patient, suitably adapted to communications to clergymen.

Subdivision (b). The choice between a privilege narrowly restricted to doctrinally required confessions

and a privilege broadly applicable to all confidential communications with a clergyman has been exercised in favor of the latter. Many clergymen now receive training in marriage counseling and the handling of personality problems, and matters of this kind fall readily into the realm of the spirit. The same considerations which underlie the psychotherapist-patient privilege of Rule 5-04 suggest a broad application of the privilege for communications to clergymen.

State statutes and rules fall in both the narrow and the broad categories. A typical narrow statute proscribes disclosure of "a confession . . . made . . . in the course of discipline enjoined by the church to which he belongs." Ariz. Rev. Stats. Ann. 1956, § 12-2233. See also California Evidence Code § 1032; Uniform Rule 29. Illustrative of the broader privilege are statutes applying to "information communicated to him in a confidential manner, properly entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating . . . is seeking spiritual counsel and advice," Fla. Stats. Ann. 1960, § 90.241, or to any "confidential communication properly entrusted to him in his professional

capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline," Iowa Code Ann. 1950, § 622.10. See also Ill. Rev. Stats. 1967, c. 51 § 48.1; Minn. Stats. Ann. 1945, § 595.02(3); New Jersey Evidence Rule 29.

Under the privilege as phrased, the communicating person is entitled to prevent disclosure not only by himself but also by the clergyman and by eavesdroppers. For discussion see Advisory Committee's Note under lawyer-client privilege, Rule 5-03(b).

Subdivision (c) makes clear that the privilege belongs to the communicating person. However, a prima facie authority on the part of the clergyman to claim the privilege on behalf of the person is recognized. The discipline of the particular church and the discretion of the clergyman are believed to constitute sufficient safeguards for the absent communicating person. See Advisory Committee's Note to the similar provision with respect to attorney-client in Rule 5-03(c).

Tentative final draft

1 Rule 5-07. Political vote. Every person has a privilege
2 to refuse to disclose the tenor of his vote at a political
3 election conducted by secret ballot unless the vote was
4 cast illegally.

First draft

Advisory Committee's Note

Rule 5-07 (Tentative final draft)

Secrecy in voting is an essential aspect of effective democratic government, insuring free exercise of the franchise and fairness in elections. Secrecy after the ballot has been cast is as essential as secrecy in the act of voting. Nutting, Freedom of Silence: Constitutional Protection Against Governmental Intrusion in Political Affairs, 47 Mich. L. Rev. 181, 191 (1948). Consequently a privilege has long been recognized on the part of a voter to decline to disclose how he voted. To require disclosure would be the exercise of "a kind of inquisitorial power unknown to the principles of our government and constitution, and might be highly injurious to the suffrages of a free people, as well as tending to create cabals and disturbances between contending parties in popular elections." Johnston v. Charleston, 1 Bay 441, 442 (S.C. 1795).

The exception for illegally cast votes is a common one under both statutes and case law, Nutting, supra, at p. 192; 8 WIGMORE § 2214, p. 163 (McNaughton Rev. 1961). The policy considerations which underlie the privilege

are not applicable to the illegal voter. However, nothing in the exception purports to foreclose an illegal voter from invoking the privilege against self-incrimination under appropriate circumstances.

For similar provisions, see Uniform Rule 31; California Evidence Code § 1050; Kansas Code of Civil Procedure § 60-431; New Jersey Evidence Rule 31.

Tentative final draft

1 Rule 5-08. Trade secrets. A person has a privilege,
2 which may be claimed by him or his agent or employee,
3 to refuse to disclose and to prevent other persons from
4 disclosing a trade secret owned by him, if the allowance
5 of the privilege will not tend to conceal fraud or other-
6 wise work injustice. When disclosure is directed, the
7 judge shall take such protective measures as the interests
8 of the holder of the privilege and of the parties and the
9 furtherance of justice may require.

First draft
1st revision

Advisory Committee's Note

Rule 5-08 (Tentative final draft)

While sometimes said not to be a true privilege, a qualified right to protection against disclosure of trade secrets has found ample recognition, and, indeed, a denial of it would be difficult to defend. 8 WIGMORE § 2212(3) (McNaughton Rev. 1961). And see 4 MOORE'S FEDERAL PRACTICE ¶¶ 30.12 and 34.15 (2nd ed. 1963 and supp. 1965) and BARRON and HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 715.1 (Wright ed. 1961). Congressional policy is reflected in the Securities Exchange Act of 1934, 15 U.S.C. § 78x, and the Public Utility Holding Company Act of 1933, id. § 79v, which deny the Securities and Exchange Commission authority to require disclosure of trade secrets or processes in applications and reports. See also Rule 30(b) of the Federal Rules of Civil Procedure (revised as Rule 26(c)(7) under amendments proposed in November, 1967) mentioned further hereinafter.

Illustrative cases raising trade-secret problems are: Du Pont Powder Co. v. Masland, 244 U.S. 100 (1917), suit to enjoin former employee from using plaintiff's secret processes, countered by defense that many of the processes were well known to the trade; Segal Lock & Hardware Co. v. FTC, 143 F.2d 935 (2d Cir. 1944), question whether expert

locksmiths employed by FTC should be required to disclose methods used by them in picking petitioner's "pick-proof" locks; Dobson v. Graham, 49 F. 17 (E.D. Pa. 1889), patent infringement suit in which plaintiff sought to elicit from former employees now in the hire of defendant the respects in which defendant's machinery differed from plaintiff's patented machinery; Putney v. Du Bois Co., 240 Mo. App. 1075, 226 S.W.2d 737 (1950), action for injuries allegedly sustained from using defendant's secret formula dish-washing compound. See 8 WIGMORE § 2212(3) (McNaughton Rev. 1961); Annot., 17 A.L.R.2d 383; 49 Mich. L. Rev. 133 (1950). The need for accommodation between protecting trade secrets, on the one hand, and eliciting facts required for full and fair presentation of a case, on the other hand, is apparent. Whether disclosure should be required depends upon a weighing of the competing interests involved against the background of the total situation, including consideration of such factors as the dangers of abuse, good faith, adequacy of protective measures, and the availability of other means of proof.

The cases furnish examples of the bringing of judicial ingenuity to bear upon the problem of evolving protective measures which achieve a degree of control over disclosure. Perhaps the most common is simply to take testimony in

camera. Annot., 62 A.L.R.2d 509. Other possibilities include making disclosure to opposing counsel but not to his client, Du Pont Powder Co. v. Masland, 244 U.S. 100 (1917); making disclosure only to the judge (hearing examiner), Segal Lock & Hardware Co. v. FTC, 143 F.2d 935 (2d Cir. 1944); and placing those present under oath not to make disclosure, Paul v. Sinnott, 217 F. Supp. 84 (W.D. Pa. 1963).

Existing Rule 30(b) of the Federal Rules of Civil Procedure provides that in discovery proceedings the judge may enter an order "that secret processes, developments, or research need not be disclosed, or . . . other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." The proposed amendments of November, 1967, shift the substance of the provision into proposed Rule 26(c), to the effect that the judge may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way" While the instant evidence rule extends this underlying policy into the trial, the

difference in circumstances between discovery stage and trial may well be such as to require a different ruling at the trial.

For other rules recognizing privilege for trade secrets, see Uniform Rule 32; California Evidence Code § 1060; Kansas Code of Civil Procedure § 60-432; New Jersey Evidence Rule 32.

1 Rule 5-09. Secret of state.

2 (a) Definition. A "secret of state" is information
3 not open or theretofore officially disclosed to the public
4 concerning the national defense or the international rela-
5 tions of the United States.

6 (b) General rule of privilege. The government has a
7 privilege to refuse to give evidence and to prevent any
8 person from giving evidence upon a showing of substantial
9 danger that the evidence will disclose a secret of state.

10 (c) Procedure. The privilege may be claimed only
11 by the chief officer of the department of government
12 administering the subject matter which the secret concerns.
13 The required showing may be made in whole or in part in
14 the form of a written statement. The judge may hear the
15 matter in chambers, but all counsel are entitled to in-
16 spect the claim and showing and to be heard thereon. The

1 judge may take such protective measures as the interests
2 of the government and the furtherance of justice may
3 require.

4 (d) Notice to government. If the circumstances of
5 the case indicate a substantial possibility that a claim
6 of privilege for a secret of state would be appropriate
7 but has not been made because of oversight or lack of
8 knowledge, the judge shall give or cause notice to be
9 given to the officer entitled to claim the privilege and
10 shall stay further proceedings a reasonable time to afford
11 opportunity to assert a claim of privilege.

12 (e) Effect of sustaining claim. If a claim of privi-
13 lege for a secret of state is sustained in a proceeding
14 to which the government is a party and it appears that
15 another party is thereby deprived of material evidence,
16 the judge shall make any further orders which the

1 interests of justice require, such as striking the testi-
2 mony of a witness, declaring a mistrial, finding against
3 the government upon an issue as to which the evidence is
4 relevant, or dismissing the action.

Advisory Committee's Note

Rule 5-09 (Tentative final draft)

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 (1953), and as one "the existence of which has never been doubted," 8 WIGMORE § 2378, p. 794 (McNaughton Rev. 1961).

Subdivision (a). 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).

Subdivision (b). The rule vests the privilege in the government, where it properly belongs, United States v. Reynolds, supra, p. 7, 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 requirement of complete disclosure to the judge, even though it be in camera. See Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 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 (c). 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 (d) is designed to assure that opportunity to make the claim is afforded.

Compare Rule 16(e) of the Federal Rules of Criminal Procedure for protective orders in connection with discovery.

Subdivision (d) spells out and emphasizes a power and responsibility on the part of the trial judge in matters of national security. An analagous 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 (e). 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 statements of government witnesses, 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. Beekman, 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. 1944); and see United States v. Reynolds, 345 U.S. 1 (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).

1 Rule 5-10. Identity of informer.

2 (a) Rule of privilege. The government or a State or
3 subdivision thereof has a privilege to refuse to disclose
4 the identity of a person who has furnished to a law en-
5 forcement officer information purporting to reveal the
6 commission of a crime.

7 (b) Who may claim. The privilege may be claimed by
8 an appropriate representative of the government, regard-
9 less of whether the information was furnished to an officer
10 of the government or of a State or subdivision thereof.

11 Unless the government objects, the privilege may be claimed
12 by an appropriate representative of a State or subdivision
13 if the information was furnished to an officer thereof.

14 (c) Exceptions.

15 (1) Voluntary disclosure; informer a witness.

16 No privilege exists under this rule if the identity

1 of the informer or his interest in the subject matter
2 of his communication has been disclosed by a holder
3 of the privilege or by the informer's own action, or
4 if the informer appears as a witness.

5 (2) Testimony on guilt or innocence. If the
6 government elects not to disclose the identity of
7 an informer and the circumstances indicate a reason-
8 able probability that the informer can give testimony
9 necessary to a fair determination of the issue of
10 guilt or innocence, the judge shall on motion of the
11 accused dismiss the proceedings, and he may do so on
12 his own motion.

13 (3) Legality of obtaining evidence. If infor-
14 mation from an informer is relied upon to establish
15 the legality of the means by which evidence was
16 obtained and the judge is not satisfied that the

1 information was received from an informer reasonably
2 believed to be reliable, he may require the identity
3 of the informer to be disclosed. The judge may
4 permit the disclosure to be made in camera or make
5 any other order which justice requires. All counsel
6 shall be permitted to be present at every stage at
7 which any counsel is permitted to be present. If
8 disclosure of the identity of the informer is made
9 in camera, the record thereof shall be sealed and
10 preserved to be made available to the appellate
11 court in the event of an appeal.

First draft
1st revision

Advisory Committee's Note

Rule 5-10 (Tentative final draft)

The rule recognizes the use of informers as an important aspect of law enforcement, whether the informer is a citizen who steps forward with information or a paid undercover agent. In either event, the basic importance of anonymity in the effective use of informers is apparent, Bocchicchio v. Curtis Publishing Co., 203 F. Supp. 403 (E.D. Pa. 1962), and the privilege of withholding their identity was well established at common law. Roviaro v. United States, 353 U.S. 53, 59 (1957); MCCORMICK § 148; 8 WIGMORE § 2374 (McNaughton Rev. 1961).

Subdivision (a). The public interest in law enforcement requires that the privilege be that of the government, State, or political subdivision, rather than that of the witness. The rule blankets in as an informer anyone who tells a law enforcement officer about a crime, without regard to whether the officer is one charged with enforcing the particular law.

Only identity is privileged; communications are not included except to the extent that disclosure would

operate also to disclose the informer's identity. The common law was to the same effect. 8 WIGMORE § 2374, at p. 765 (McNaughton Rev. 1961). See also Roviaro v. United States, supra, at p. 60; Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1951).

Subdivision (b). Normally the "appropriate representative" to make the claim will be counsel. However, it is possible that disclosure of the informer's identity will be sought in proceedings to which the government, State, or subdivision, as the case may be, is not a party. Under these circumstances effective implementation of the privilege requires that other representatives be considered "appropriate." See, for example, Bocchicchio v. Curtis Publishing Co., 203 F. Supp. 403 (E.D. Pa. 1962), a civil action for libel, in which a local police officer not represented by counsel successfully claimed the informer privilege.

Subdivision (c) deals with situations in which the informer privilege either does not apply or is curtailed.

(1) If the identity of the informer is disclosed, nothing further is to be gained from efforts to suppress it. Disclosure may be direct, or the same practical effect may result from action revealing the informer's interest in the subject matter. See, for example,

Westinghouse Electric Corp. v. City of Burlington, 351 F.2d 762 (D.C. Cir. 1965), on remand City of Burlington v. Westinghouse Electric Corp., 246 F. Supp. 839 (D.C. 1965), which held that the filing of civil antitrust actions destroyed as to plaintiffs the informer privilege claimed by the Attorney General with respect to complaints of criminal antitrust violations. While allowing the privilege in effect to be waived by one not its holder, i.e. the informer himself, is something of a novelty in the law of privilege, if the informer chooses to reveal his identity, further efforts to suppress it are scarcely feasible.

If the informer becomes a witness, the interests of justice in disclosing his status as a source of bias are believed to outweigh any remnant of interest in nondisclosure which then remains. See Harris v. United States, 371 F.2d 365 (9th Cir. 1967), in which the trial judge permitted detailed inquiry into the relationship between the witness and the government. Cf. Attorney General v. Briant, 15 M. & W. 169, 153 Eng. Rep. 808 (Exch. 1846).

To phrase disclosure for purposes of waiver in terms of knowledge of the informer's identity by "those who would have cause to resent the communication," as suggested in Roviaro v. United States, 353 U.S. 53, 60 (1957), is needlessly restrictive.

(2) The informer privilege may not be used to suppress the identity of a witness when the public interest in protecting the flow of information is outweighed by the individual's right to prepare his defense. Roviaro v. United States, supra. The rule phrases this balancing in terms of "a reasonable probability that the informer can give testimony necessary to a fair determination of the issue of guilt or innocence."

(3) One of the acute conflicts between the interest of the public in nondisclosure and the avoidance of unfairness to the accused as a result of nondisclosure arises when information from an informer is relied upon to legitimate a search and seizure by furnishing probable cause for an arrest without a warrant or for the issuance of a warrant for arrest or search. McCray v. Illinois, 386 U.S. 300 (1967), rehearing denied 386 U.S. 1042. The hearing in camera which the rule permits provides an accommodation of these conflicting interests. United States v. Jackson, 384 F.2d 825 (3d Cir. 1967). The limited disclosure to the judge avoids any significant impairment of secrecy, while affording the accused a substantial measure of protection against arbitrary police action. The procedure is consistent with McCray and the decisions there discussed.

Tentative final draft
1st revision

1 Rule 5-11. Waiver of privilege by voluntary disclosure.

2 A person upon whom these rules confer a privilege against
3 disclosure of a confidential matter waives the privilege
4 if he or his predecessor while holder of the privilege
5 voluntarily discloses or consents to disclosure of any
6 significant part of the matter. This rule does not apply
7 if the disclosure is itself a privileged communication.

First draft

Advisory Committee's Note

Rule 5-11 (Tentative final draft)

The central purpose of most privileges is the promotion of some interest or relationship by endowing it with a supporting secrecy or confidentiality. It is evident that the privilege should terminate when the holder by his own act destroys this confidentiality. MCCORMICK §§ 87, 97, 106; 8 WIGMORE §§ 2242, 2327-2329, 2374, 2389-2390 (McNaughton Rev. 1961).

The rule is designed to be read with a view to what it is that the particular privilege protects. For example, the lawyer-client privilege covers only communications, and the fact that a client has discussed a matter with his lawyer does not insulate the client against disclosure of the subject matter discussed, although he is privileged not to disclose the discussion itself. See MCCORMICK § 93. The waiver here provided for is similarly restricted. Therefore a client, merely by disclosing a subject which he had discussed with his attorney, would not waive the applicable privilege; he would have to make disclosure of the communication itself in order to effect a waiver.

By traditional doctrine, waiver is the intentional relinquishment of a known right. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). However, in the confidential privilege situations, once confidentiality is destroyed through voluntary disclosure, no subsequent claim of privilege can restore it, and knowledge or lack of knowledge of the existence of the privilege appears to be irrelevant. California Evidence Code § 912; 8 WIGMORE § 2327 (McNaughton Rev. 1961).

Tentative final draft

1 Rule 5-12. Privileged matter disclosed under compulsion
2 or without opportunity to claim privilege.
3 Evidence of a statement or other disclosure of privileged
4 matter is inadmissible against the holder of the privilege
5 if the disclosure was (a) compelled erroneously or (b) made
6 without opportunity to claim the privilege.

Advisory Committee's Note

Rule 5-12 (Tentative final draft)

Ordinarily a privilege is invoked in order to forestall disclosure. However, under some circumstances consideration must be given to the status and effect of a disclosure already made. Rule 5-11, immediately preceding, gives voluntary disclosure the effect of a waiver, while the present rule covers the effect of disclosure made under compulsion or without opportunity to claim the privilege.

Confidentiality, once destroyed, is not susceptible of restoration, yet some measure of repair may be accomplished by preventing use of the evidence against the holder of the privilege. The remedy of exclusion is therefore made available when the earlier disclosure was compelled erroneously or without opportunity to claim the privilege.

With respect to erroneously compelled disclosure, the argument may be made that the holder should be required in the first instance to assert the privilege, stand his ground, refuse to answer, perhaps incur a judgment of contempt, and exhaust all legal recourse, in order to sustain his privilege. See Fraser v. United

States, 145 F.2d 139 (6th Cir. 1944), cert. denied 324 U.S. 849; United States v. Johnson, 76 F. Supp. 538 (M.D. Pa. 1947), aff'd 165 F.2d 42 (3d Cir. 1947), cert. denied 332 U.S. 852, reh. denied 333 U.S. 834. However, this exacts of the holder greater fortitude in the face of authority than ordinary individuals are likely to possess, and assumes unrealistically that a judicial remedy is always available. In self-incrimination cases, the writers agree that erroneously compelled disclosures are inadmissible in a subsequent criminal prosecution of the holder, MAGUIRE, EVIDENCE OF GUILT 66 (1959); MCCORMICK § 127; 8 WIGMORE § 2270 (McNaughton Rev. 1961), and the principle is equally sound when applied to other privileges. The modest departure from usual principles of res judicata which occurs when the compulsion is judicial is justified by the advantage of having one simple rule, assuring at least one opportunity for judicial supervision in every case.

The second circumstance stated as a basis for exclusion is disclosure made without opportunity to the holder to assert his privilege. Illustrative possibilities are disclosure by an eavesdropper or by a person used in the transmission of a privileged communication.

Tentative final draft

1 Rule 5-13. Comment upon or inference from ^{claim}~~exercise~~ of
2 privilege; instruction.

3 (a) Comment or inference not permitted. The ^{claim}~~exercise~~
4 of a privilege, whether in the present proceeding or upon
5 a prior occasion, is not a proper subject of comment by
6 judge or counsel, and no inference may be drawn therefrom.

7 (b) Claiming privilege outside presence of jury. In
8 jury cases, proceedings shall be conducted, to the extent
9 practicable, so as to facilitate the making of claims of
10 privilege outside the presence of the jury.

11 (c) Jury instruction. Upon request, any party against
12 whom the jury might draw an adverse inference from a claim
13 of privilege is entitled to an instruction that no inference
14 may be drawn therefrom.

First draft
1st revision

Advisory Committee's Note

Rule 5-13 (Tentative final draft)

Subdivision (a). In Griffin v. California, 380 U.S. 609, 614 (1965), the Court pointed out that allowing comment upon the exercise of a privilege "cuts down on the privilege by making its assertion costly." Consequently it was held that comment upon the election of the accused not to take the stand infringed upon his privilege against self-incrimination so substantially as to constitute a constitutional violation. While the privileges governed by these rules are not constitutionally based, they are nevertheless founded upon important policies and are entitled to maximum effect. Hence the present subdivision forbids comment upon the exercise of a privilege, in accord with the weight of authority. Courtney v. United States, 390 F.2d 521 (9th Cir. 1968); 8 WIGMORE §§ 2243, 2322, 2386; Barnhart, Privilege in the Uniform Rules of Evidence, 24 Ohio St. L.J. 131, 137-138 (1963). Cf. MCCORMICK § 80.

Subdivision (b). As is the case if comment upon its exercise is allowed, the value of a privilege is greatly depreciated if a party is forced to claim the privilege in the presence of the jury. Whether a privilege will be

claimed is usually ascertainable in advance. The making of the claim outside the presence of the jury is usually feasible, and the result is to avoid the virtual destruction of the privilege by innuendo. Tallo v. United States, 344 F.2d 467 (1st Cir. 1965); United States v. Tomaiolo, 249 F.2d 683 (2d Cir. 1957); San Fratello v. United States, 343 F.2d 711 (5th Cir. 1965); Courtney v. United States, 390 F.2d 521 (9th Cir. 1968); 6 WIGMORE § 1808, pp. 275-276; 6 U.C.L.A. L. Rev. 455 (1959). This position is in accord with the general agreement of the authorities that an accused cannot be forced to make his election not to testify in the presence of the jury. 8 WIGMORE § 2268, p. 407 (McNaughton Rev. 1961).

Unanticipated situations are, of course, bound to arise, and much must be left to the discretion of the judge and the professional responsibility of counsel.

Subdivision (c). Opinions will differ as to the effectiveness of a jury instruction not to draw an adverse inference from the exercise of a claim of privilege. See Bruton v. United States, 389 U.S. 818 (1968). Whether an instruction shall be given is left to the sound judgment of counsel for the party against whom the adverse inference may be drawn. The instruction is a matter of right, if requested. This is the result reached

in Bruno v. United States, 308 U.S. 287 (1939), holding that an accused is entitled to an instruction under the statute (now 18 U.S.C. § 3481) providing that his failure to testify creates no presumption against him.

The right to the instruction is not impaired by the fact that the claim of privilege is by a witness, rather than by a party, provided an adverse inference against the party may result.

Tentative final draft

Article VI. Witnesses

1 Rule 6-01. General rule of competency. Every person is
2 competent to be a witness except as otherwise provided
3 in these rules.

Advisory Committee's Note

Rule 6-01 (Tentative final draft)

This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds thus abolished are religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds.

The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind.

No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application, and a leading commentator observes that few witnesses are disqualified on that ground. Weihofen, Testimonial Competence and Credibility, 34 Geo. Wash. L. Rev. 53 (1965). Discretion is regularly exercised in favor of allowing the testimony.

A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence. 2 WIGMORE §§ 501, 509. Standards of moral qualification in practice consist essentially of evaluating a person's truthfulness in terms of his own answers about it. Their principal utility is in affording an opportunity on voir dire examination to impress upon the witness his moral duty. This result may, however, be accomplished more directly, and without haggling in terms of legal standards, by the manner of administering the oath or affirmation under Rule 6-03.

Admissibility of religious belief as a ground of impeachment is treated in Rule 6-10. Conviction of crime as a ground of impeachment is the subject of Rule 6-09. Marital relationship is the basis for privilege under Rule 5-05. Interest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses.

Tentative final draft

1 Rule 6-02. Lack of personal knowledge. A witness may
2 not testify to a matter unless evidence is introduced
3 sufficient to support a finding that he has personal
4 knowledge of the matter. Evidence to prove personal
5 knowledge may, but need not, consist of the testimony
6 of the witness himself. This rule is subject to the
7 provisions of Rule 7-03, relating to opinion testimony
8 by expert witnesses.

First draft
1st revision

Advisory Committee's Note

Rule 6-02 (Tentative final draft)

". . . [T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information." MCCORMICK § 10, p. 19. These foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception. 2 WIGMORE § 650. It will be observed that the rule is in fact a specialized application of the provisions of Rule 1-04(b) on conditional relevancy.

This rule does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement. Rules 8-01 to 8-05 would be applicable. This rule would, however, prevent him from testifying to the subject matter of the hearsay statement, as he has no personal knowledge of it.

The reference to Rule 7-03 is designed to avoid any

question of conflict between the present rule and the provisions of that rule allowing an expert to express opinions based on facts of which he does not have personal knowledge.

Tentative final draft

Rule 6-03. 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.

First draft

Advisory Committee's Note

Rule 6-03 (Tentative final draft)

The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. As is true generally, affirmation is recognized by federal law. "Oath" includes affirmation, 1 U.S.C. § 1; judges and clerks may administer oaths and affirmations, 28 U.S.C. §§ 459, 953; and affirmations are acceptable in lieu of oaths under Rule 43(d) of the Federal Rules of Civil Procedure. Perjury by a witness is a crime, 18 U.S.C. § 1621.

Tentative final draft

1 Rule 6-04. Interpreters. Interpreters are subject to
2 the provisions of these rules relating to qualification
3 as an expert and the administration of an oath or affir-
4 mation in appropriate form.

First draft

Advisory Committee's Note

Rule 6-04 (Tentative final draft)

The rule implements Rule 43(f) of the Federal Rules of Civil Procedure and Rule 28(b) of the Federal Rules of Criminal Procedure, both of which contain provisions for the appointment and compensation of interpreters.

Tentative final draft

1 Rule 6-05. Competency of judge as witness. The judge
2 presiding at the trial may not testify in that trial as
3 a witness. If he is called to testify, no objection
4 need be made in order to preserve the point.

First draft
1st revision

Advisory Committee's Note

Rule 6-05 (Tentative final draft)

In view of the mandate of 28 U.S.C. § 455 that a judge disqualify himself in "any case in which he . . . is or has been a material witness," the likelihood that the presiding judge in a federal court might be called to testify in the trial over which he is presiding is slight. Nevertheless the possibility is not totally eliminated.

The solution here presented is a broad rule of incompetency, rather than such alternatives as incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality? The rule of

general incompetency has substantial support. See Report of the Special Committee on the Propriety of Judges Appearing as Witnesses, 36 A.B.A.J. 630 (1950); cases collected in Annot. 157 A.L.R. 311; McCORMICK § 68, p. 147; Uniform Rule 42; California Evidence Code § 703; Kansas Code of Civil Procedure § 60-442; New Jersey Evidence Rule 42. Cf. 6 WIGMORE § 1909, which advocates leaving the matter to the discretion of the judge, and statutes to that effect collected in Annot. 157 A.L.R. 311.

The problem is brought into existence by the act of calling the judge, and the rule is designed to discourage that step by providing an "automatic" objection. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector.

Tentative final draft

Rule 6-06. Competency of juror as witness.

(a) At the trial. A member of the jury may not testify as a witness in the trial of the case in which he is sitting as a juror. If he is called 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 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. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

First draft
1st revision

Advisory Committee's Note

Rule 6-06 (Tentative final draft)

Subdivision (a). The considerations which bear upon the permissibility of testimony by a juror in the trial in which he is sitting as juror bear an obvious similarity to those evoked when the judge is called as a witness. See Advisory Committee's Note to Rule 6-05. The judge is not, however, in this instance involved in such manner as to call for departure from usual principles requiring objection to be made; hence the only provision on objection is that opportunity be afforded for its making out of the presence of the jury. Compare Rule 6-05.

Subdivision (b). Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and

embarrassment. McDonald v. Pless, 238 U.S. 264 (1915). On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. See Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964). The authorities are in virtually complete accord in excluding the evidence. Fryer, Note on Disqualification of Witnesses, SELECTED WRITINGS ON EVIDENCE AND TRIAL 345, 347 (Fryer ed. 1957); MAGUIRE, WEINSTEIN, et al., CASES ON EVIDENCE 887 (5th ed. 1965); 8 WIGMORE § 2349 (McNaughton Rev. 1961). As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. 8 WIGMORE § 2354 (McNaughton Rev. 1961). However, the door of the jury room is not a satisfactory dividing point, and the Supreme Court has

refused to accept it. Mattox v. United States, 146 U.S. 140 (1892). Cf. McDonald v. Pless, 238 U.S. 264 (1915). 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. Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866); Perry v. Bailey, 12 Kan. 539 (1874); State v. Kociolek, 20 N.J. 92, 118 A.2d 812 (1955). The jurors are the persons who know what really happened, and 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.

See also Rule 6(e) of the Federal Rules of Criminal Procedure, governing the secrecy of grand jury proceedings. The present rule does not relate to secrecy and disclosure but to the competency of certain witnesses and evidence.

Tentative final draft

1 Rule 6-07. Who may impeach. The credibility of a wit-
2 ness may be attacked by any party, including the party
3 calling him.

First draft
1st revision

Advisory Committee's Note

Rule 6-07 (Tentative final draft)

The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under Rule 8-01(c)(2). Ladd, Impeachment of One's Own Witness--New Developments, 4 U. Chi. L. Rev. 69 (1936); MCCORMICK § 38; 3 WIGMORE §§ 896-918. The substantial inroads into the old rule made over the years by decisions, rules, and statutes are evidence of doubts as to its basic soundness and workability. Cases are collected in 3 WIGMORE § 905. Rule 26(d)(1) of the Federal Rules of Civil Procedure allows any party to impeach a witness by means of his deposition, and Rule 43(b) allowed the calling and impeachment of an adverse party or person identified with him. Illustrative statutes allowing a party to impeach his own witness under varying circumstances are Ill. Rev. Stats. 1967, c. 110 § 60; Mass. Laws Anno. 1959, c. 233

§ 23; 20 N.M. Stats. Anno. 1954, § 20-2-4; N.Y.C.P.L.R. § 4514 (McKinney 1963); 12 Vt. Stats. Anno. 1959, §§ 1641a, 1642. Complete judicial rejection of the rule is found in United States v. Freeman, 302 F.2d 347 (2d Cir. 1962), and the same result is reached in Uniform Rule 20; California Evidence Code § 785; Kansas Code of Civil Procedure § 60-420. See also New Jersey Evidence Rule 20.

1 Rule 6-08. Evidence of character and conduct of witness.

2 (a) Opinion evidence of character. Opinion evidence

3 as to the character of a witness is admissible to attack

4 or support his credibility but subject to these limita-

5 tions: (1) opinions are limited to truthfulness or un-

6 truthfulness, and (2) opinions of truthful character are

7 admissible only after the introduction of opinion evidence

8 of untruthfulness or other evidence impugning his charac-

9 ter for truthfulness.

10 (b) Reputation evidence of character. Evidence of

11 the reputation of a witness for truthfulness or untruth-

12 fulness is inadmissible.

13 (c) Specific instances of conduct. Specific instances

14 of the conduct of a witness, for the purpose of attacking

15 or supporting his credibility, other than conviction of

1 crime as provided in Rule 6-09, may not be proved by
2 extrinsic evidence. They may, however, if relevant to
3 truthfulness, be inquired into on cross-examination of
4 the witness himself or on cross-examination of a witness
5 who testifies to an opinion of his character for truth-
6 fulness or untruthfulness, subject to the general
7 limitations upon relevant evidence in Rule 4-03 and
8 the limitations upon interrogation in Rule 6-11.

First draft
1st revision

Advisory Committee's Note

Rule 6-08 (Tentative final draft)

Subdivision (a). In Rule 4-04(a) the general position is taken that character evidence is not admissible for the purpose of proving that the person acted in conformity therewith, subject, however, to several exceptions, one of which is character evidence of a witness as bearing upon his credibility. The present rule develops that exception.

In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally. The result is to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive. MCCORMICK § 44.

The use of opinion evidence as a means of proving the character of witnesses is consistent with Rule 4-05(a).

Character evidence in support of credibility is admissible under the rule only after the character of the witness has first been attacked, as has been the case at common law. MAGUIRE, WEINSTEIN, et al., CASES ON EVIDENCE 295 (5th ed. 1965); MCCORMICK § 49, p. 105;

4 WIGMORE § 1104. The enormous needless consumption of time which a contrary practice would entail justifies the limitation. An opinion that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest do not. McCORMICK § 49; 4 WIGMORE §§ 1106, 1107. Whether evidence in the form of contradiction is an attack upon the character of the witness must depend upon the circumstances. McCORMICK § 49. Cf. 4 WIGMORE §§ 1108, 1109.

Subdivision (b). Contrary to the position taken in Rule 4-05(a), allowing character whenever admissible to be proved by reputation or opinion, the present rule precludes use of reputation evidence as proof of the character of a witness. This departure from standard doctrine is justified because reputation in respect to truth and veracity does not in fact ordinarily exist and witnesses who testify thereto are for the most part actually giving their own opinions, disguised misleadingly in response to the command of the traditional rule. See McCORMICK § 44. Even under the traditional rule, common practice has permitted inquiry as to whether the character witness would believe the principal witness

under oath, as a sort of addendum serving to reduce the generality of reputation evidence to a working reality. United States v. Walker, 313 F.2d 236 (6th Cir. 1963), and cases cited therein; MCCORMICK § 44, pp. 94-95, n.3.

Subdivision (c). In conformity with Rule 4-05, which forecloses use of evidence of specific incidents as proof of character unless character is an issue in the case, the present rule generally bars evidence of specific instances of conduct of a witness for the purpose of attacking or supporting his credibility. There are, however, two exceptions: (1) specific instances are provable when they have been the subject of criminal conviction, and (2) specific instances may be inquired into on cross-examination of the principal witness or of a witness giving an opinion of his character for truthfulness.

(1) Conviction of crime as a technique of impeachment is treated in detail in Rule 6-09, and here is merely recognized as an exception to the general rule excluding evidence of specific incidents for impeachment purposes.

(2) Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principal witness himself or of

a witness who testifies concerning his character for truthfulness. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of requirements that the instances inquired into be relevant to truthfulness, that the probative value of the evidence not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, or by waste of time, under Rule 4-03, and that the witness be protected against undue harrassment or embarrassment, under Rule 6-11. See Advisory Committee's Notes to those rules. No greater specification in the form of a rule is feasible, and much must be left to the sound discretion of the trial judge. Obviously cross-examination as to other acts of misconduct by the accused in a criminal case involves an area of greater sensitivity in these matters than misconduct by others.

Tentative final draft

1 Rule 6-09. Impeachment by evidence of conviction of
2 crime.

3 (a) General rule. For the purpose of attacking the
4 credibility of a witness, evidence that he has been

5 convicted of a crime is admissible but only if the crime,

6 ~~of which he was convicted was at the time of conviction~~
~~under the laws of the United States or any State or nation,~~

7 (1) ^{was} ~~is~~ punishable by death or ^{by} imprisonment in excess of
8 one year ^{under the law under which he was convicted} or (2) involves ^d dishonesty or false statement

9 regardless of the punishment.

10 (b) Time limit. Evidence of a conviction under this

11 rule is inadmissible if a period of more than 10 years has

12 elapsed since the date of the release of the witness from

13 confinement, or the expiration of the period of his parole,

14 probation, or sentence, whichever is the later date.

15 (c) Effect of pardon, annulment, or certificate of

16 rehabilitation. Evidence of a conviction is inadmissible

1 under this rule if (1) the conviction has been the subject
2 of a pardon, annulment, certificate of rehabilitation, or
3 other equivalent procedure, and (2) the procedure under
4 which the same was granted or issued required a substan-
5 tial showing of rehabilitation or was based on innocence.

6 (d) Juvenile adjudications. Evidence of juvenile
7 adjudications is generally inadmissible under this rule.
8 The judge may, however, allow evidence of a juvenile
9 adjudication of a witness other than the accused if con-
10 viction of the offense would be admissible to attack the
11 credibility of an adult and the judge is satisfied that
12 admission in evidence is necessary for a fair determina-
13 tion of the issue of guilt or innocence.

14 (e) Pendency of appeal. The pendency of an appeal
15 therefrom does not render evidence of a conviction inadmis-
16 sible. Evidence of the pendency of an appeal is admissible.

Advisory Committee's Note

Rule 6-09 (Tentative final draft)

Subdivision (a). The reasons for excluding specific instances of conduct as a means of impeachment do not justify exclusion when the evidence takes the form of a conviction of crime. Dangers of unfair prejudice, confusion of issues, misleading the jury, waste of time, and surprise tend to disappear or diminish. 3 WIGMORE §§ 979, 980. For general discussion, see Ladd, Credibility Tests--Current Trends, 89 U. Pa. L. Rev. 166, 174-184 (1940).

With respect to the kinds of convictions provable, the pattern of the rule is the one most commonly encountered in the states and consists in substance of the common law grounds of disqualification transposed into grounds of impeachment. While it may be argued that considerations of relevancy should limit provable convictions to those of crimes of untruthfulness, acts are constituted major crimes because they entail substantial injury to and disregard of the rights of other persons or the public, and a demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into willingness to give false

testimony. The limitation of convictions of minor crimes to those involving dishonesty or false statement is warranted by their relatively insubstantial nature.

By reason of our constitutional structure, the federal category of crimes is far from being a complete one, and resort must be had to the laws of the states for the specification of many crimes. For example, simple theft as compared with theft from interstate commerce. Other instances of such borrowing are the Assimilative Crimes Act, making the state law of crimes applicable to the special territorial and maritime jurisdiction of the United States, 18 U.S.C. § 13, and the provision of the Judicial Code disqualifying persons as jurors on the grounds of state as well as federal convictions, 28 U.S.C. § 1861. For evaluation of the crime in terms of seriousness, reference is made to the congressional measurement of felony (subject to imprisonment in excess of one year) rather than adopting state definitions which vary considerably. See 28 U.S.C. § 1861, supra, disqualifying jurors for conviction in state or federal court of crime punishable by imprisonment for more than one year.

The most troublesome aspect of impeachment by

evidence of conviction is presented when the witness is himself the accused in a criminal case. The conventional view, unhesitatingly supported by Wigmore, has been that an accused who elects to take the stand is subject to impeachment as a witness, including impeachment by proof of conviction. 3 WIGMORE §§ 889-891. Yet there is apparent a growing uneasiness that impeachment in this form not only casts doubt upon his credibility "but also may result in casting such an atmosphere of aspersion and disrepute about the defendant as to convince the jury that he is an habitual lawbreaker who should be punished and confined for the general good of the community."

Richards v. United States, 192 F.2d 602, 605 (D.C. Cir. 1951). See Griswold, The Long View, 51 A.B.A.J. 1017, 1021 (1965); Schaefer, Police Interrogation and the Privilege Against Self-Incrimination, 61 Nw. U.L. Rev. 506, 512 (1966); Kalven and Zeisel, THE AMERICAN JURY 124, 126-130, 144-146 (1966). The probability of drawing the forbidden inference increases when the prior convictions are for the same crime as that now charged.

Various possible resolutions of the difficulty have been considered by the Advisory Committee. (1) Allow no impeachment by conviction when the witness is the accused. The argument is made that in any event no great need exists

to impeach the accused, since he is by force of circumstances obviously strongly motivated to testify falsely. Note, 66 Dick. L. Rev. 339, 344 (1962). Yet the purpose of having the accused testify is the belief that he may be believed despite his self-interest, and consequently anything which aids in appraising his credibility must be of value. Disallowing the conviction evidence enables an accused to appear as a person whose character entitles him to credence, when the fact is to the contrary, and denies a valuable argument to the witness-accused who has no prior record. Moreover, the elimination of conviction evidence would render impossible the use of opinion evidence of character for truthfulness. (2) Allow only crimen falsi. Most of the crimes regarded as having a substantial impeaching effect would be excluded, with virtually the same effect as (1). (3) Exclude if the crime is similar. The solution would be only partial, and admission or exclusion would largely be a matter of random chance. (4) Allow conviction evidence only if the accused first introduces evidence of character for truthfulness, as in Uniform Rule 21. However, again the result is effectively to foreclose the use of opinion testimony. Any opinion testimony on behalf of the accused is totally unrealistic if insulated from cross-examination

concerning his convictions. If the matter is allowed to be gone into on cross-examination, the prosecution could by presenting opinions of untruthful character confront the accused with the alternatives of allowing the testimony to go unrebutted or of presenting rebuttal witnesses on whose cross-examination the door would be opened.

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

This view finds support in Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965). Efforts in subsequent decisions to evolve guides for the exercise of discretion have produced lines which consist essentially of the proposals previously considered herein, which are subject to the deficiencies noted. See Brown v. United States, 370 F.2d 242 (D.C. Cir. 1966); Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967).

In the absence of an acceptable alternative, the rule adheres to the traditional practice of allowing the witness-accused to be impeached by evidence of conviction of crime, like other witnesses. California Evidence Code § 788 is to the same effect.

Subdivision (b). Most statutes recognize no time limit on impeachment by evidence of conviction. However, practical considerations of fairness and relevancy demand that some boundary be recognized. See Ladd, Credibility Tests--Current Trends, 89 U. Pa. L. Rev. 166, 176-177 (1940).

This portion of the rule is derived from the proposal advanced in Recommendation Proposing an Evidence Code, § 788(5), p. 142, CAL. LAW REV. COMM'N (1965), though not adopted. See California Evidence Code § 788.

Subdivision (c). A pardon or its equivalent granted solely for the purpose of restoring civil rights lost by virtue of a conviction has no relevance to an inquiry into character. If, however, the pardon or other proceeding is hinged upon a showing of rehabilitation the situation is otherwise, and the result under the rule is to render the conviction inadmissible. The alternative of allowing in evidence both the conviction and the rehabilitation has not been adopted for reasons of policy, economy of time, and difficulties of evaluation.

A similar provision is contained in California Evidence Code § 788. Cf. A.L.I. Model Penal Code, Proposed Official Draft § 306.6(3)(e) (1962), and discussion in A.L.I. PROCEEDINGS 310 (1961).

Pardons based on innocence have the effect, of course, of nullifying the conviction ab initio.

Subsection (d). The prevailing view has been that a juvenile adjudication is not usable for impeachment. Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941);

Cotton v. United States, 355 F.2d 480 (10th Cir. 1966).

This conclusion was based upon a variety of circumstances. By virtue of its informality, frequently diminished quantum of required proof, and other departures from accepted standards for criminal trials under the theory of parens patriae, the juvenile adjudication was considered lacking the precision and general probative value of the criminal conviction. While In re Gault, 387 U.S. 1 (1967), no doubt eliminates these characteristics insofar as objectionable, other obstacles remain. Practical problems of administration are raised by the common provisions in juvenile legislation that records be kept confidential and that they be destroyed after a short time. While Gault was skeptical as to the realities of confidentiality of juvenile records, it also saw no constitutional obstacles to improvement. 387 U.S. at 25. See also Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum. L. Rev. 281, 289 (1967). In addition, policy considerations much akin to those which dictate exclusion of adult convictions after rehabilitation has been established strongly suggest a rule of excluding juvenile adjudications. Admittedly, however, the rehabilitative process may in a given case be a demonstrated failure, or the strategic importance of a

given witness may be so great as to require the overriding of general policy in the interests of particular justice. See Giles v. Maryland, 386 U.S. 66 (1967). Wigmore was outspoken in his condemnation of the disallowance of juvenile adjudications to impeach, especially when the witness is the complainant in a case of molesting a minor. 1 WIGMORE § 196; 3 id. §§ 924a, 980. The rule recognizes discretion in the judge to effect an accommodation among these various factors by departing from the general principle of exclusion. In deference to the general pattern and policy of juvenile statutes, however, no such discretion is recognized when the witness is the accused in a criminal case.

Subdivision (e). The presumption of correctness which ought to attend judicial proceedings supports the position that pendency of an appeal does not preclude use of a conviction for impeachment. United States v. Empire Packing Co., 174 F.2d 16 (7th Cir. 1949), cert. denied 337 U.S. 959; Bloch v. United States, 226 F.2d 185 (9th Cir. 1955), cert. denied 350 U.S. 948 and 353 U.S. 959; and see Newman v. United States, 331 F.2d 968 (8th Cir. 1964). Contra, Campbell v. United States, 176 F.2d 45 (D.C. Cir. 1949). The pendency of an appeal is, however, a qualifying circumstance properly considerable.

Tentative final draft
1st revision

1 Rule 6-10. Religious beliefs or opinions. Evidence of
2 the beliefs or opinions of a witness on matters of re-
3 ligion is inadmissible for the purpose of showing that
4 by reason of their nature his credibility is impaired
5 or enhanced.

First draft

Advisory Committee's Note

Rule 6-10 (Tentative final draft)

While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule. Cf. Tucker v. Reil, 51 Ariz. 357, 77 P.2d 203 (1938). To the same effect, though less specifically worded, is California Evidence Code § 789. See 3 WIGMORE § 936.

1 Rule 6-11. Mode and order of interrogation and presen-
2 tation.

3 (a) Control by judge. The judge shall exercise
4 reasonable control over the mode and order of interrogat-
5 ing witnesses and presenting evidence so as to (1) make
6 the interrogation and presentation effective for the
7 ascertainment of the truth, (2) avoid needless consump-
8 tion of time, and (3) protect witnesses from undue
9 harassment or embarrassment.

10 (b) Scope of cross-examination. Cross-examination
11 should be limited to the subject matter of the direct
12 examination and matters affecting the credibility of the
13 witness, ^{however} ~~but~~ the judge may in the exercise of discretion
14 permit inquiry into additional matters ~~but only~~ as if
15 on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as 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.

Advisory Committee's Note

Rule 6-11 (Tentative final draft)

Subdivision (a). Spelling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge, and the rule sets forth the objectives which he should seek to attain.

Item (1) restates in broad terms the power and obligation of the judge as developed under common law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, MCCORMICK § 5, the order of calling witnesses and presenting evidence, 6 WIGMORE § 1867, the use of demonstrative evidence, MCCORMICK § 179, and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances.

Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 4-03(b).

Item (3) calls for a judgment under the particular circumstances whether harassment or embarrassment is "undue." Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion. MCCORMICK § 42. In Alford v. United States, 282 U.S. 687, 694 (1931), the Court pointed out that, while the trial judge should protect the witness from questions which "go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate," this protection by no means forecloses efforts to discredit the witness. Reference to the transcript of the prosecutor's cross-examination in Berger v. United States, 295 U.S. 78 (1935), serves to lay at rest any doubts as to the need for judicial control in this area.

The inquiry into specific instances of conduct of a witness allowed under Rule 6-08(c) is expressly made subject to this rule.

Subdivision (b). The tradition in the federal courts and in numerous state courts has been to limit the scope of cross-examination to matters testified to on direct, plus matters bearing upon the credibility of the witness. Various reasons have been advanced to justify the rule of limited cross-examination. (1) A party vouches for

his own witness but only to the extent of matters elicited on direct. Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 Fed. 668, 675 (8th Cir. 1904), quoted in MAGUIRE, WEINSTEIN, et al., CASES ON EVIDENCE 277, n.38 (5th ed. 1965). But the concept of vouching is discredited, and Rule 6-07 rejects it. (2) A party cannot ask his own witness leading questions. This is a problem properly solved in terms of what is necessary for a proper development of the testimony rather than by a mechanistic formula similar to the vouching concept. See discussion under subdivision (c). (3) A practice of limited cross-examination promotes orderly presentation of the case. Finch v. Weiner, 109 Conn. 616, 145 Atl. 31 (1929). In the opinion of the Advisory Committee this latter reason has merit. It is apparent, however, that the rule of limited cross-examination thus viewed becomes an aspect of the judge's general control over the mode and order of interrogating witnesses and presenting evidence, to be administered as such. The matter is not one in which involvement at the appellate level is likely to prove fruitful. See, for example, Moyer v. Aetna Life Ins. Co., 126 F.2d 141 (3rd Cir. 1942); Butler v. New York Central R. Co., 253 F.2d 281 (7th Cir. 1958); United States v. Johnson, 285 F.2d 35 (9th Cir. 1960); Union Automobile

Indemnity Ass'n v. Capitol Indemnity Ins. Co., 310 F.2d 318 (7th Cir. 1962). In view of these considerations, the rule is phrased in terms of a suggestion rather than a mandate to the trial judge.

The qualification "as if on direct examination," applicable when inquiry into additional matters is allowed is designed to terminate at that point the asking of leading questions as a matter of right and to bring into operation subdivision (c) of the rule.

The rule does not purport to determine the extent to which an accused who elects to testify thereby waives his privilege against self-incrimination. The question is a constitutional one, rather than a mere matter of administering the trial. Under United States v. Simmons, 390 U.S. 377 (1968), no general waiver occurs when the accused testifies on such preliminary matters as the validity of a search and seizure or the admissibility of a confession. When he testifies on the merits, however, can he foreclose inquiry into an aspect or element of the crime by avoiding it on direct? The affirmative answer given in Tucker v. United States, 5 F.2d 818 (8th Cir. 1925), is inconsistent with the description of the waiver as extending to "all other relevant facts" in Johnson v. United States, 318 U.S. 189, 195 (1943).

See also Brown v. United States, 356 U.S. 148 (1958). The situation of an accused who desires to testify on some but not all counts of a multiple-count indictment is one to be approached, in the first instance at least, as a problem of severance under Rule 14 of the Federal Rules of Criminal Procedure. Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964). Cf. United States v. Baker, 262 F. Supp. 657, 686 (D.D.C. 1966). In all events, the extent of the waiver of the privilege against self-incrimination ought not to be determined as a by-product of a rule on scope of cross-examination.

Subdivision (c). The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Within this tradition, however, numerous exceptions have achieved recognition: the witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 WIGMORE §§ 774-778. An almost total unwillingness to reverse for infractions has been manifested by appellate courts. See cases cited in 3 WIGMORE § 770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased,

as is subdivision (b), in words of suggestion rather than command.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

The final sentence deals with categories of witnesses automatically regarded and treated as hostile. Rule 43(b) of the Federal Rules of Civil Procedure included only "an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party." This limitation virtually to persons whose statements would stand as admissions is believed to be an unduly narrow concept of those who may safely be regarded as hostile without further demonstration. See, for example, Maryland Casualty Co. v. Kador, 225 F.2d 120 (5th Cir. 1955), and Degelos v. Fidelity and Casualty Co., 313 F.2d 809 (5th Cir. 1963), holding

despite the language of Rule 43(b) that an insured fell within it, though not a party in an action under the Louisiana direct action statute. The phrase of the rule, "witness identified with" an adverse party, is designed to enlarge the category of persons thus callable.

Tentative final draft
1st revision

1 Rule 6-12. Writing used to refresh memory. If a wit-
2 ness uses a writing to refresh his memory, either before
3 or while testifying, an adverse party is entitled to
4 have it produced at the hearing, to inspect it, to cross-
5 examine the witness thereon, and to introduce in evidence
6 those portions which relate to the testimony of the
7 witness for the purpose of affecting his credibility.
8 If it is claimed that the writing contains matters not
9 related to the subject matter of the testimony, the
10 judge shall examine the writing in camera, excise any
11 portions not so related, and order delivery of the re-
12 mainder to the party entitled thereto. Any portion
13 withheld over objection shall be preserved and made
14 available to the appellate court in the event of an
15 appeal. If a writing is not produced or delivered pur-
16 suant to order under this rule, the judge shall make

1 such order as justice requires, except that in criminal
2 cases when the United States elects not to comply, the
3 order shall be one striking the testimony or, if the
4 judge in his discretion determines that the interests of
5 justice so require, declaring a mistrial.

First draft
1st revision

Advisory Committee's Note

Rule 6-12 (Tentative final draft)

The treatment of writings used to refresh recollection while on the stand is in accord with settled doctrine. MCCORMICK § 9, p. 15. The bulk of the case law has, however, denied the existence of any right to access by the opponent when the writing is used prior to taking the stand, though the judge may have discretion in the matter. Goldman v. United States, 316 U.S. 129 (1942); Needelman v. United States, 261 F.2d 802 (5th Cir. 1958), cert. dismissed 362 U.S. 600, rehearing denied 363 U.S. 858; Annot. 82 A.L.R.2d 473, 562 and 7 A.L.R.3d 181, 247. An increasing group of cases has repudiated the distinction. People v. Scott, 29 Ill. 2d 97, 193 N.E.2d 814 (1963); State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957); State v. Hunt, 25 N.J. 514, 138 A.2d 1 (1958); State v. Deslovers, 40 R.I. 89, 100 Atl. 64 (1917). This position is believed to be correct. As Wigmore put it, "the risk of imposition and the need of safeguard is just as great" in both situations. 3 WIGMORE § 762, p. 111. To the same effect is MCCORMICK § 9, p. 17.

The purpose of the rule is the same as that of the

Jencks statute, 18 U.S.C. § 3500: to promote the search of credibility and memory. The same sensitivity to disclosure of government files may be involved; hence the procedure of the statute is incorporated in the rule. Differences of application should be noted. The Jencks statute applies only to statements of witnesses; the rule is not so limited. The statute applies only to criminal cases; the rule applies to all cases. The statute applies only to government witnesses; the rule applies to all witnesses. The statute contains no requirement that the statement be consulted for purposes of refreshment before or while testifying; the rule so requires. Since many writings would qualify under either statute or rule, a substantial overlap exists, but the identity of procedures makes this of no importance.

The consequences of nonproduction by the government in a criminal case are those of the Jencks statute, striking the testimony or in exceptional cases a mistrial. 18 U.S.C. § 3500(d). In other cases these alternatives are unduly limited, and such possibilities as contempt, dismissal, finding issues against the offender, and the like are available. See Rule 16(g) of the Federal Rules of Criminal Procedure and Rule 37(b) of the Federal Rules of Civil Procedure for appropriate sanctions.

Tentative final draft

1 Rule 6-13. Prior statements of witnesses.

2 (a) Examining witness concerning prior statement.

3 In examining a witness concerning a prior statement made
4 by him, whether written or not, the statement need not
5 be shown or its contents disclosed to him, but on request
6 the same shall be shown or disclosed to opposing counsel.

7 (b) Extrinsic evidence of prior statement of

8 witness. Extrinsic evidence of a prior contradictory
9 statement by a witness is inadmissible unless the witness
10 is afforded an opportunity to explain or deny the same
11 and the opposite party is afforded an opportunity to
12 interrogate him thereon. This provision does not apply
13 to admissions of a party-opponent as defined in Rule
14 8-01(c)(3).

First draft

Advisory Committee's Note

Rule 6-13 (Tentative final draft)

Subdivision (a). The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness. Abolished by statute in the country of its origin, the requirement nevertheless gained currency in the United States. The rule abolishes this useless impediment to cross-examination. Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 246-247 (1967); MCCORMICK § 28; 4 WIGMORE §§ 1259-1260. Both oral and written statements are included.

The provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 10-02 relating to production of the original when the contents of a writing are sought to be proved.

Subdivision (b). The rule preserves the essence of the familiar foundation requirements for impeachment by

extrinsic proof of a prior inconsistent statement. Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 247 (1967). Some disposition to entrust the matter to the discretion of the judge is apparent, New Jersey Evidence Rule 22(b), California Evidence Code § 770, based on the grounds that "Any other approach is too technical and unrealistic," Comment to Uniform Rule 22(b), and that the witness may have become unavailable by the time the statement is discovered, Comment to A.L.I. Model Code Rule 106. These reasons are not believed to justify transferring the matter to the realm of discretion. However, the traditional procedural formula of calling the attention of the witness to the statement on cross-examination is relaxed by the rule in favor of simply affording the witness opportunity to explain and the opposite party an opportunity to examine on the statement, with no requirement of any particular time or sequence. Thus several collusive witnesses could be examined before disclosure of a joint prior inconsistent statement. See Comment to California Evidence Code § 770. Also, dangers of oversight are reduced. See McCORMICK § 37, p. 68.

Under principles of expressio unius the rule does not apply to impeachment by evidence of prior inconsistent conduct. The use of inconsistent statements to impeach a hearsay declaration is treated in Rule 8-06.

1 Rule 6-14. Calling and interrogation of witnesses by
2 judge.

3 (a) Calling by judge. The judge may, on his own
4 motion or at the suggestion of a party, call witnesses,
5 and all parties are entitled to cross-examine witnesses
6 thus called.

7 (b) Interrogation by judge. The judge may interro-
8 gate witnesses, whether called by himself or by a party.
9 The parties may object to questions so asked and to evi-
10 dence thus adduced at any time prior to the submission
11 of the cause.

First draft

Advisory Committee's Note

Rule 6-14 (Tentative final draft)

Subdivision (a). While exercised more frequently in criminal than in civil cases, the authority of the judge to call witnesses is well established. MCCORMICK § 8, p. 14; MAGUIRE, WEINSTEIN, et al., CASES ON EVIDENCE 303-304 (5th ed. 1965); 9 WIGMORE § 2484. One reason for the practice, the old rule against impeaching one's own witness, no longer exists by virtue of Rule 6-07, supra. Other reasons remain, however, to justify the continuation of the practice of calling court's witnesses. The right to cross-examine, with all it implies, is assured. The tendency of juries to associate a witness with the party calling him, regardless of technical aspects of vouching, is avoided. And the judge is not imprisoned within the case as made by the parties.

Subdivision (b). The authority of the judge to question witnesses is also well established. MCCORMICK § 8, pp. 12-13; MAGUIRE, WEINSTEIN, et al., CASES ON EVIDENCE 737-739 (5th ed. 1965); 3 WIGMORE § 784. The authority is, of course, abused when the judge abandons his proper role and assumes that of advocate, but the

manner in which interrogation should be conducted and the proper extent of its exercise are not susceptible of formulation in a rule. The omission in no sense precludes courts of review from continuing to reverse for abuse.

The provision relating to objections is designed to relieve counsel of the embarrassment attendant upon objecting to questions by the judge, both in his relations with the judge during the trial and in the eyes of the jury, while at the same time affording the judge opportunity to repair the damage done insofar as feasible. Compare the "automatic" objection feature of Rule 6-05 when the judge is called as a witness.

Tentative final draft

1 Rule 6-15. Exclusion and sequestration of witnesses.

2 At the request of a party the judge shall order witnesses
3 excluded so that they cannot hear the testimony of other
4 witnesses, and he may make the order of his own motion.

5 This rule does not authorize exclusion of (1) a party
6 who is a natural person, or (2) an officer or employee
7 of a party which is not a natural person designated as
8 its representative by its attorney, or (3) a person whose
9 presence is shown by a party to be essential to the pre-
10 sentation of his cause.

First draft
1st revision

Advisory Committee's Note

Rule 6-15 (Tentative final draft)

The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. 6 WIGMORE §§ 1837-1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.

Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 WIGMORE § 1841. (2) As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness. United States v. Infanzon, 235 F.2d 318 (2d Cir. 1956);

Portomene v. United States, 221 F.2d 582 (5th Cir. 1955);
Powell v. United States, 208 F.2d 618 (6th Cir. 1953);
Jones v. United States, 252 F. Supp. 781 (W.D. Okla.
1966). Designation of the representative by the attorney
rather than by the client may at first glance appear to
be an inversion of the attorney-client relationship, but
it may be assumed that the attorney will follow the
wishes of the client, and the solution is simple and
workable. See California Evidence Code § 777. (3) The
category contemplates such persons as an agent who handled
the transaction being litigated or an expert needed to
advise counsel in the management of the litigation. See
6 WIGMORE § 1841, n.4.

Tentative final draft

Article VII. Opinions and Expert Testimony

1 Rule 7-01. Opinion testimony by lay witnesses. If the
2 witness is not testifying as an expert, his testimony in
3 the form of opinions or inferences is limited to those
4 opinions or inferences which are (a) rationally based
5 on the perception of the witness and (b) helpful to a
6 clear understanding of his testimony or the determina-
7 tion of a fact in issue.

First draft

Advisory Committee's Note

Rule 7-01 (Tentative final draft)

The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of firsthand knowledge or observation.

Limitation (b) is designed to remove obstacles to effective communication which have in the past been thrown up in the paths of witnesses, but with due regard to requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. MCCORMICK § 11. Moreover, the practical impossibility of determining by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also.

7 WIGMORE § 1919. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 415-417 (1952). If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

The language of the rule is substantially that of Uniform Rule 56(1). Similar provisions are California Evidence Code § 800; Kansas Code of Civil Procedure § 60-456(a); New Jersey Evidence Rule 56(1).

Tentative final draft

1 Rule 7-02. Testimony by experts. If scientific,
2 technical, or other specialized knowledge will assist
3 the trier of fact to understand the evidence or to
4 determine a fact in issue, a witness qualified as an
5 expert by special knowledge, skill, experience, train-
6 ing, or education, may testify thereto.

First draft

Advisory Committee's Note

Rule 7-02 (Tentative final draft)

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded, and the rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in nonopinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however, and it continues to be permissible for the expert to take the further step of suggesting the inference which should be drawn from

applying the specialized knowledge to the facts. See Rules 7-03 to 7-05.

The rule deals with the qualifications of experts in traditional terms. McCORMICK § 13.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 WIGMORE § 1918.

Tentative final draft

1 Rule 7-03. Opinion testimony by experts. The facts or
2 data in the particular case upon which an expert bases
3 an opinion or inference may be those perceived by or
4 made known to him at or before the hearing. If of a
5 type reasonably relied upon by experts in forming
6 opinions or inferences upon the subject, the facts or
7 data need not be admissible in evidence.

Advisory Committee's Note

Rule 7-03 (Tentative final draft)

Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, The Basis of Medical Testimony, 15 Vand. L. Rev. 473, 489 (1962). Whether he must first relate his observations is treated in Rule 7-05. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 7-05. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions 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. 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, and his validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Rheingold, supra, at 531; McCORMICK § 15. A similar provision is California Evidence Code § 801(b).

If it be feared that this enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since the requirement of reliance is not satisfied. See Comment, CAL. LAW REV. COMM'N, Recommendation Proposing an Evidence Code 148-150 (1965).

Tentative final draft

1 Rule 7-04. Opinion on ultimate issue. Testimony in the
2 form of an opinion or inference otherwise admissible is
3 not objectionable because it embraces an ultimate issue
4 to be decided by the trier of fact.

First draft

Advisory Committee's Note

Rule 7-04 (Tentative final draft)

The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. To render this approach fully effective and to allay any doubt on the subject, the so-called ultimate issue rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 WIGMORE §§ 1920, 1921; MCCORMICK § 12. The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 WIGMORE § 1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of

ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of "might or could," rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. People v. Wilson, 25 Cal. 2d 341, 153 P.2d 720 (1944), whether abortion necessary to save life of patient; Clifford-Jacobs Forging Co. v. Industrial Comm., 19 Ill. 2d 236, 166 N.E.2d 582 (1960), medical causation; Dowling v. L. H. Shattuck, Inc., 91 N.H. 234, 17 A.2d 529 (1941), proper method of shoring ditch; Schweiger v. Solbeck, 191 Or. 454, 230 P.2d 195 (1951), cause of landslide. In each instance the opinion was allowed.

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under

Rules 7-01 and 7-02, opinions must be helpful to the trier of fact, and Rule 4-03 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. McCORMICK § 12.

For similar provisions see Uniform Rule 56(4); California Evidence Code § 805; Kansas Code of Civil Procedure § 60-456(4); New Jersey Evidence Rule 56(3).

Tentative final draft

1 Rule 7-05. Disclosure of facts or data underlying expert
2 opinion.

3 (a) ~~If the opponent is furnished a written statement~~
4 ~~of the facts or data constituting the basis for an expert's~~
5 ~~opinion or has an opportunity to compel disclosure of the~~
6 ~~same through judicial procedure, at or before the time~~
7 ~~the expert testifies.~~ The expert may testify in terms of
8 opinion or inference and give his reasons therefor with-
9 out other prior disclosure of the ^{underlying} facts or data, unless
10 the judge requires otherwise.

11 (b) The expert may in any event be required to dis-
12 close the underlying facts or data on cross-examination.

First draft

Advisory Committee's Note

Rule 7-05 (Tentative final draft)

The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 426-427 (1952). While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand.

The elimination of the requirement of preliminary disclosure of underlying facts or data has a long background of support. In 1937 the Commissioners on Uniform State Laws incorporated a provision to this effect in their Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58. Rule 4515, N.Y.C.P.L.R. (McKinney 1963), provides:

"Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based.

Upon cross-examination, he may be required to specify the data"

See also California Evidence Code § 802; Kansas Code of Civil Procedure §§ 60-456, 60-457; New Jersey Evidence Rules 57, 58.

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 answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. ~~The rule leaves it undisturbed except when a better substitute is given in the form of a written statement or the result of discovery.~~ Rule 26(b)(4)(B), PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS (November 1967), contemplates substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan.

L. Rev. 455 (1962). These safeguards are reinforced by the discretionary power of the judge to require preliminary disclosure in any event.

Tentative final draft

1 Rule 7-06. Court appointed experts.

2 Appointment.

2 (a) The judge may on his own motion or on the motion
3 of any party enter an order to show cause why expert wit-
4 nesses should not be appointed, and may request the
5 parties to submit nominations. The judge may appoint
6 any expert witnesses agreed upon by the parties, and may
7 appoint witnesses of his own selection. An expert wit-
8 ness shall not be appointed by the judge unless he
9 consents to act. A witness so appointed shall be in-
10 formed of his duties by the judge in writing, a copy of
11 which shall be filed with the clerk, or at a conference
12 in which the parties shall have opportunity to participate.
13 A witness so appointed shall advise the parties of his
14 findings, if any; his deposition may be taken by any
15 party; and he may be called to testify by the court or

~~The expert witness so appointed may be
called on to testify by the court or~~

1 any party. He shall be subject to cross-examination by
2 each party, including a party calling him as a witness.

Compensation.

3 (b) Expert witnesses so appointed are entitled to
4 reasonable compensation in such sum only as the judge may
5 allow. The compensation thus fixed is payable from such
6 funds as may be provided by law in criminal cases and by
7 the opposing parties in equal portions to the clerk of
8 the court in civil cases at such time as the court shall
9 direct and thereafter charged in like manner as other costs.

Disclosure of appointment.

10 (c) ~~The fact of the appointment of an expert witness~~
11 ~~by the judge may be revealed to the trier of the facts as~~
12 relevant to his credibility and the weight of his testimony.

In the exercise of his discretion the judge may authorize the disclosure to the jury of the fact that he appointed the

Parties' experts of own selection.

13 (d) Nothing in this rule limits the parties in calling
14 expert witnesses of their own selection and at their own
15 expense.

First draft

Advisory Committee's Note

Rule 7-06 (Tentative final draft)

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. While the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled, Levy, Impartial Medical Testimony--Revisited, 34 Temple L.Q. 416 (1961), the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. Scott v. Spanjer Bros., Inc., 298 F.2d 928 (2d Cir. 1962); Danville Tobacco Assn. v. Bryant-Buckner

Associates, Inc., 333 F.2d 202 (4th Cir. 1964); Sink, The Unused Power of a Federal Judge to Call His Own Expert Witnesses, 29 So. Cal. L. Rev. 195 (1956); 2 WIGMORE § 563, 9 id. § 2484; Annot., 95 A.L.R.2d

383. Hence the problem becomes largely one of detail.

The New York plan is well known and is described in REPORT BY SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK: IMPARTIAL MEDICAL TESTIMONY (1956). On recommendation of the Section on Judicial Administration, local adoption of an impartial medical plan was endorsed by the American Bar Association. 82 A.B.A. Rep. 184-185 (1957). Descriptions and analyses of plans in effect in various parts of the country are found in Van Dusen, A United States District Judge's View of the Impartial Medical Expert System, 32 F.R.D. 498 (1963); Wick and Kightlinger, Impartial Medical Testimony Under the Federal Civil Rules: A Tale of Three Doctors, 34 Ins. Counsel J. 115 (1967); and numerous articles collected in KLEIN, JUDICIAL ADMINISTRATION AND THE LEGAL PROFESSION 393 (1963). Statutes and rules include California Evidence Code §§ 730-733; Illinois Supreme Court Rule 215(d); Burns Indiana Stats. 1956, § 9-1702; Wisconsin Stats. Ann. 1958, § 957-27.

In the federal practice, a comprehensive scheme for court appointed experts was initiated with the adoption of Rule 28 of the Federal Rules of Criminal Procedure in 1946. The Judicial Conference of the United States in 1953 considered court appointed experts in civil cases, but only with respect to whether they should be compensated from public funds, a proposal which was rejected. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 23 (1953). The present rule expands the practice to include civil cases.

Subdivision (a) is based on Rule 28 of the Federal Rules of Criminal Procedure, with a few changes, mainly in the interest of clarity. Language has been added to provide specifically for the appointment either on motion of a party or on the judge's own motion. A provision subjecting the court appointed expert to deposition procedures has been incorporated. The rule has been revised to make definite the right of any party, including the party calling him, to cross-examine.

Subsection (b) combines the present provision for compensation in criminal cases with what seems to be a fair and feasible handling of civil cases, originally found in the Model Act and carried from there into Uniform Rule 60. See also California Evidence Code §§ 730-731.

Subsection (c) seems to be essential if the use of court appointed experts is to be fully effective. Uniform Rule 61 so provides.

Subsection (d) is in essence the last sentence of Rule 28 of the Federal Rules of Criminal Procedure.

First draft

Article VIII. Hearsay

Introductory Note: The Hearsay Problem

The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948), SELECTED WRITINGS ON EVIDENCE AND TRIAL 764, 765 (Fryer ed. 1957); Shientag, Cross-Examination--A Judge's Viewpoint, 3 Record 12 (1948); Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U. Pa. L. Rev. 484, 485 (1937), SELECTED WRITINGS, supra, 756, 757; Weinstein, Probative Force of Hearsay, 46 Iowa L. Rev. 331 (1961). Sometimes a fourth is added, sincerity, but in fact it seems merely to be an aspect of the three already mentioned.

In order to encourage the witness to do his best with respect to each of these factors, and to expose any inaccuracies which may enter in, the Anglo-American tradition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the

trier of fact, (3) subject to cross-examination.

(1) Standard procedure calls for the swearing of witnesses. While the practice is perhaps less effective than in an earlier time, no disposition to relax the requirement is apparent, other than to allow affirmation by persons with scruples against taking oaths.

(2) The demeanor of the witness traditionally has been believed to furnish trier and opponent with valuable clues. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 495-496 (1951); Sahm, Demeanor Evidence: Elusive and Intangible Imponderables, 47 A.B.A.J. 580 (1961), quoting numerous authorities. The witness himself will probably be impressed with the solemnity of the occasion and the possibility of public disgrace. And willingness to falsify may reasonably become more difficult in the presence of the person against whom directed. Rules 26 and 43(a) of the Federal Rules of Criminal and Civil Procedure, respectively, include the general requirement that testimony be taken orally in open court. The Sixth Amendment right of confrontation is a manifestation of these beliefs and attitudes.

(3) Emphasis on the basis of the hearsay rule today tends to center upon the condition of cross-examination. All may not agree with Wigmore that cross-examination is "beyond doubt the greatest legal engine ever invented for the discovery of truth," but all will agree with his statement that it has become a "vital feature" of the Anglo-American system. 5 WIGMORE § 1367, p. 29. The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental. Morgan, Foreword to MODEL CODE OF EVIDENCE 37 (1942).

The logic of the preceding discussion might suggest that no testimony be received unless in full compliance with the three ideal conditions. No one advocates this position. Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without. The problem thus resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions.

The solution evolved by the common law has been a

general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness. Criticisms of this scheme are that it is bulky and complex, fails to screen good from bad hearsay realistically, and inhibits the growth of the law of evidence.

Since no one advocates excluding all hearsay, three possible solutions may be considered: (1) abolish the rule against hearsay and admit all hearsay; (2) admit hearsay possessing sufficient probative force, but with procedural safeguards; (3) revise the present system of class exceptions.

(1) Abolition of the hearsay rule would be the simplest solution. The effect would not be automatically to abolish the giving of testimony under ideal conditions. If the declarant were available, compliance with the ideal conditions would be optional with either party. Thus the proponent could call the declarant as a witness as a form of presentation more impressive than his hearsay statement. Or the opponent could call the declarant to be cross-examined upon his statement. This is the tenor of Uniform Rule 63(1), admitting the hearsay declaration of a person "who is present at the hearing and available for cross-examination." Compare the treatment of

declarations of available declarants in Rule 8-01(c)(2) of the instant rules. If the declarant were unavailable, a rule of free admissibility would make no distinctions in terms of degrees of noncompliance with the ideal conditions and would exact no quid pro quo in the form of assurances of trustworthiness. Rule 503 of the Model Code did exactly that, providing for the admissibility of any hearsay declaration by an unavailable declarant, finding support in the Massachusetts act of 1898, enacted at the instance of Thayer, Mass. Gen. L. 1932, c. 233 § 65, and in the English act of 1938, St. 1938, c. 28, Evidence. Both are limited to civil cases. The draftsmen of the Uniform Rules chose a less advanced and more conventional position. Comment, Uniform Rule 63. The present Advisory Committee has been unconvinced of the wisdom of abandoning the traditional requirement of some particular assurance of credibility as a condition precedent to admitting the hearsay declaration of an unavailable declarant.

In criminal cases, the Sixth Amendment requirement of confrontation would no doubt move into a large part of the area presently occupied by the hearsay rule in the event of the abolition of the latter. The resultant split between civil and criminal evidence is regarded as

an undesirable development.

(2) Abandonment of the system of class exceptions in favor of individual treatment in the setting of the particular case, accompanied by procedural safeguards, has been impressively advocated. Weinstein, The Probative Force of Hearsay, 46 Iowa L. Rev. 331 (1961). Admissibility would be determined by weighing the probative force of the evidence against the possibility of prejudice, waste of time, and the availability of more satisfactory evidence. The bases of the traditional hearsay exceptions would be helpful in assessing probative force. Ladd, The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof, 18 Minn. L. Rev. 506 (1934). Procedural safeguards would consist of notice of intention to use hearsay, free comment by the judge on the weight of the evidence, and a greater measure of authority in both trial and appellate judges to deal with evidence on the basis of weight. The Advisory Committee has rejected this approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial

procedures, and requiring substantially different rules for civil and criminal cases. The only way in which the probative force of hearsay differs from the probative force of other testimony is in the absence of oath, demeanor, and cross-examination as aids in determining credibility. For a judge to exclude evidence because he does not believe it has been described as "altogether atypical, extraordinary" Chadbourn, Bentham and the Hearsay Rule--A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence, 75 Harv. L. Rev. 932, 947 (1962).

(3) The approach to hearsay in these rules consists of a general rule excluding hearsay, with two broadly phrased exceptions under which evidence is not required to be excluded even though hearsay. The first exception prescribes the conditions under which hearsay is admissible without regard to unavailability of the declarant; the second does the same for declarants who are unavailable. The traditional hearsay exceptions are drawn upon to illustrate the applicability of the two exceptions. This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.

Confrontation and Due Process

Until very recently, decisions invoking the confrontation clause of the Sixth Amendment were surprisingly few, a fact probably explainable by the former inapplicability of the clause to the States and by the hearsay rule's occupancy of much the same ground. The pattern which emerges from the earlier cases invoking the clause is substantially that of the hearsay rule, applied to criminal cases: an accused is entitled to have the witnesses against him testify under oath, in the presence of himself and trier, subject to cross-examination; yet considerations of public policy and necessity require the recognition of such exceptions as dying declarations and former testimony of unavailable witnesses. Mattox v. United States, 156 U.S. 237 (1895); Motes v. United States, 178 U.S. 458 (1900); Delaney v. United States, 263 U.S. 586 (1924). Beginning with Snyder v. Massachusetts, 291 U.S. 97 (1934), the Court began to speak of confrontation as an aspect of procedural due process, thus extending its applicability to state cases and to federal cases other than criminal. The language of Snyder was that of an elastic concept of hearsay. The deportation case of Bridges v. Wixon,

326 U.S. 135 (1945), may be read broadly as imposing a strictly construed right of confrontation in all kinds of cases or narrowly as the product of a failure of the Immigration and Naturalization Service to follow its own rules. In re Oliver, 333 U.S. 257 (1948), ruled that cross-examination was essential to due process in a state contempt proceeding, but, in United States v. Nugent, 346 U.S. 1 (1953), the court held that it was not an essential aspect of a "hearing" for a conscientious objector under the Selective Service Act. Stein v. New York, 346 U.S. 156, 196 (1953), disclaimed any purpose to read the hearsay rule into the Fourteenth Amendment, but in Greene v. McElroy, 360 U.S. 474 (1959), revocation of security clearance without confrontation and cross-examination was held unauthorized, and a similar result was reached in Willner v. Committee on Character, 373 U.S. 96 (1963). Ascertaining the constitutional dimensions of the confrontation-hearsay aggregate against the background of these cases is a matter of some difficulty, yet the general pattern is at least not inconsistent with that of the hearsay rule.

In 1965 the confrontation clause was held applicable to the States. Pointer v. Texas, 380 U.S. 400 (1965). Prosecution use of former testimony given at a preliminary

hearing where petitioner was not represented by counsel was a violation of the clause. The same result would have followed under conventional hearsay doctrine read in the light of a constitutional right to counsel, and nothing in the opinion suggests any difference in essential outline between the hearsay rule and the right of confrontation. In the companion case of Douglas v. Alabama, 380 U.S. 415 (1965), however, the result reached by applying the confrontation clause is one reached less readily via the hearsay rule. A confession implicating petitioner was put before the jury by reading it to the witness in portions and asking if he made that statement. The witness refused to answer on grounds of self-incrimination. The result, said the Court, was to deny cross-examination, and hence confrontation. True, it could broadly be said that the confession was a hearsay statement which for all practical purposes was put in evidence. Yet a more easily accepted explanation of the opinion is that its real thrust was in the direction of curbing undesirable prosecutorial behavior, rather than merely applying rules of exclusion, and that the confrontation clause was the means selected to achieve this end. Comparable facts and a like result appeared in Brookhart v. Janes, 384 U.S. 1 (1966).

The pattern suggested in Douglas was developed further and more distinctly in a pair of cases at the end of the 1966 term. United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), hinged upon practices followed in identifying accused persons before trial. This pretrial identification was said to be so decisive an aspect of the case that accused was entitled to have counsel present; a pretrial identification made in the absence of counsel was not itself receivable in evidence and, in addition, might fatally infect a courtroom identification. The presence of counsel at the earlier identification was described as a necessary prerequisite for "a meaningful confrontation at trial." United States v. Wade, supra, at p. 236. Wade involved no evidence of the fact of a prior identification and hence was not susceptible of being decided on hearsay grounds. In Gilbert, witnesses did testify to an earlier identification, readily classifiable as hearsay under a fairly strict view of what constitutes hearsay. The Court, however, carefully avoided basing the decision on the hearsay ground, choosing confrontation instead. 388 U.S. 263, 272, n.3. See also Parker v. Gladden, 385 U.S. 363 (1966), holding that the right of confrontation was violated when the

bailiff made prejudicial statements to jurors, and Note, 75 Yale L.J. 1434 (1966).

Under the earlier cases, the confrontation clause may have been little more than a constitutional embodiment of the hearsay rule, even including traditional exceptions but with some room for expanding them along similar lines. But under the recent cases the impact of the clause clearly extends beyond the confines of the hearsay rule. These considerations have led the Advisory Committee to conclude that a hearsay rule can function usefully as an adjunct to the confrontation right in constitutional areas and independently in nonconstitutional areas. In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 8-03 and 8-04 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility. See Uniform Rule 63(1) to (31) and California Evidence Code §§ 1200-1340.

Tentative final draft

1 Rule 8-01. Definitions. The following definitions

2 apply under this Article:

3 (a) Statement. A "statement" is (1) an oral or
4 written assertion or (2) nonverbal conduct of a person,
5 if, ~~but only if,~~ it is intended by him as an assertion.

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

8 (c) Hearsay. "Hearsay" is a statement, offered in
9 evidence to prove the truth of the matter asserted, unless

10 (1) Testimony at hearing. The statement is one
11 made by a witness while testifying at the trial or
12 hearing; or

13 (2) Prior statement by witness. The declarant
14 testifies at the trial or hearing and is subject to
15 cross-examination concerning the statement, and the
16 statement is (i) inconsistent with his testimony,

1 or (ii) consistent with his testimony and is
2 offered to rebut an express or implied charge
3 against him of recent fabrication or improper
4 influence or motive, or (iii) one of identifi-
5 cation of a person made soon after perceiving
6 him, or (iv) a transcript of testimony given
7 under oath at a trial or hearing or before a
8 grand jury; or

9 (3) Admission by party-opponent. The state-
10 ment is offered against a party and is (i) his own
11 statement, in either his individual or a repre-
12 sentative capacity, or (ii) a statement of which
13 he has manifested his adoption or belief in its
14 truth, or (iii) a statement by a person authorized
15 by him to make a statement concerning the subject, or
16 (iv) a statement by his agent or servant concerning

1 a matter within the scope of his agency or employ-
2 ment, made before the termination of the relation-
3 ship, or (v) a statement by a co-conspirator of a
4 party during the course and in furtherance of the
5 conspiracy.

6 (d) Unavailability. "Unavailable as a witness"

7 includes situations where the declarant is:

8 (1) Exempted by ruling of the judge on the
9 ground of privilege from testifying concerning the
10 subject matter of his statement; or

11 (2) Persistent in refusing to testify despite
12 an order of the judge to do so; or

13 (3) Unable to be present or to testify at the
14 hearing because of death or then existing physical
15 or mental illness or infirmity; or

16 (4) Absent from the hearing and beyond the

1 ~~jurisdiction~~^{power} of the court to compel appearance

2 ~~by its process; or~~

3 (5) Absent from the hearing and the proponent
4 of his statement has exercised reasonable diligence
5 but has been unable to procure his attendance, ~~by~~

6 ~~by its process.~~
process.

7 A declarant is not unavailable as a witness if his
8 exemption, refusal, inability, or absence is due to
9 the procurement or wrongdoing of the proponent of his
10 statement for the purpose of preventing the witness from
11 attending or testifying.

First draft

Advisory Committee's Note

Rule 8-01 (Tentative final draft)

Subdivision (a). The definition of "statement" assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.

It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of "statement." Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition

sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 214, 217 (1948), and the elaboration in Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 Stan. L. Rev. 682 (1962). Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. Falknor, The "Hear-Say" Rule as a "See-Do" Rule; ^{Evidence of Conduct,} 33 Rocky Mt. L. Rev. 133 (1961). Similar considerations govern nonassertive verbal conduct and verbal conduct which is

assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c).

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact. Maguire, The Hearsay System: Around and Through the Thicket, 14 Vand. L. Rev. 741, 765-767 (1961).

For similar approaches, see Uniform Rule 62(1); California Evidence Code §§ 225, 1200; Kansas Code of Civil Procedure § 60-459(a); New Jersey Evidence Rule 62(1).

Subdivision (c). The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted. McCORMICK § 225; 5 WIGMORE § 1361, 6 id. § 1766. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything

asserted, and the statement is not hearsay. Emich Motors Corp. v. General Motors Corp., 181 F.2d 70 (7th Cir. 1950), rev'd on other grounds 340 U.S. 558, letters of complaint from customers offered as a reason for cancellation of dealer's franchise, to rebut contention that franchise was revoked for refusal to finance sales through affiliated finance company; Coureas v. Allstate Insurance Co., 198 Va. 77, 92 S.E.2d 378 (1956), testimony that owner told driver he could take the car, to prove consent under omnibus clause in liability policy. The effect is to exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

The definition of hearsay must, of course, be read with reference to the definition of statement set forth in subdivision (a).

Several types of statements which would otherwise literally fall within the definition are expressly excluded from it:

(1) Present testimony. Testimony given by a witness in the course of court proceedings is excluded since there is compliance with all the ideal conditions for testifying.

(2) 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 problem. The 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 presence 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 (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. Rptr. 599, 441 P.2d 111 (1968). And with regard 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 four 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.

(i) 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. Rptr. 599, 441 P.2d 111 (1968). 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. (ii) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as 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. (iii) The admission of evidence of recent 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, 354 P.2d 865 (1960); Judy v. State, 218 Md. 168, 146 A.2d 29 (1958); State v. Simmons, 63 Wash. 2d 16, 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 (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 ALR 2d 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 ALR 2d Later Case Service 1225-1228. . . ." 388 U.S. at 272, n.3.

(iv) Testimony given under oath at a trial or hearing and presented in the form of a transcript affords a further instance of particularized protection against hearsay dangers. The testimony was given under oath with the sanction of perjury and circumstances of some solemnity, the transcript affording protection against mistakes. The demands of Bridges v. Wixon, 326 U.S. 135 (1945), read in its broadest sense, are fully met. See United States v. De Sisto, 329 F.2d 929 (2d Cir. 1964), cert. denied 377 U.S. 979.

(3) Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U. Pa. L. Rev. 484, 564 (1937); MORGAN, BASIC PROBLEMS OF EVIDENCE 265 (1962);

4 WIGMORE § 1048. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

The rule specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against him. (i) A party's own statement is the classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required; the statement need only be relevant to representative affairs. To the same effect is California Evidence Code § 1220. Compare Uniform Rule 63(7), requiring a statement to be made in a representative capacity to be admissible against a party in a representative capacity. (ii) Under established principles an admission may be made by adopting or acquiescing in the statement of another. While

knowledge of contents would ordinarily be essential, this is not inevitably so: "X is a reliable person and knows what he is talking about." See MCCORMICK § 246, p. 527, n.15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that "anything you say may be used against you"; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties, and hence the rule contains no special provisions concerning failure to deny in criminal cases. (iii) No authority is required for the general proposition that a statement

authorized by a party to be made should have the status of an admission by the party. However, the question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. The rule is phrased broadly so as to encompass both. While it may be argued that the agent authorized to make statements to his principal does not speak for him, MORGAN, BASIC PROBLEMS OF EVIDENCE 273 (1962), communication to an outsider has not generally been thought to be an essential characteristic of an admission. Thus a party's books or records are usable against him, without regard to any intent to disclose to third persons. 5 WIGMORE § 1557. See also MCCORMICK § 78, pp. 159-161. In accord is New Jersey Evidence Rule 63(8)(a). Cf. Uniform Rule 63(8)(a) and California Evidence Code § 1222 which limit status as an admission in this regard to statements authorized by the party to be made "for" him, which is perhaps an ambiguous limitation to statements to third persons. Falknor, Vicarious Admissions and the Uniform Rules, 14 Vand. L. Rev. 855, 860-861 (1961).

(iv) The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the

agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing, and a substantial trend favors admitting statements related to a matter within the scope of the agency or employment. Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958); KLM v. Tuller, 292 F.2d 775, 784 (D.C. Cir. 1961); Martin v. Savage Truck Lines, Inc., 121 F. Supp. 417 (D.D.C. 1954), and numerous state court decisions collected in 4 WIGMORE, 1964 Supp., pp. 66-73, with comments by the editor that the statements should have been excluded as not within scope of agency. For the traditional view see Northern Oil Co. v. Socony Mobil Oil Co., 347 F.2d 81, 85 (2d Cir. 1965) and cases cited therein. Similar provisions are found in Uniform Rule 63(9)(a), Kansas Code of Civil Procedure § 60-460(i)(1), and New Jersey Evidence Rule 63(9)(a). (v) The limitation upon the admissibility of statements of co-conspirators to those made "during the course and in furtherance of the conspiracy" is in the accepted pattern. While the broadened view of agency taken in item (iv) might suggest wider admissibility of statements of co-conspirators,

the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established. See Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159 (1954); Comment, 25 U. Chi. L. Rev. 530 (1958). The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. Krulewitch v. United States, 336 U.S. 440 (1949); Wong Sun v. United States, 371 U.S. 471, 490 (1963). For similarly limited provisions see California Evidence Code § 1223 and New Jersey Rule 63(9)(b). Cf. Uniform Rule 63(9)(b).

Subdivision (d). The definition of unavailability implements the division of hearsay exceptions into two categories by Rules 8-03 and 8-04. The first category of exceptions, recognized in Rule 8-03, includes those in which the nature of the statement and the circumstances of its making justify the conclusion that no greater accuracy is likely to result from calling the declarant in person as a witness, so that unavailability is not a relevant factor. The second category of exceptions, covered in Rule 8-04, includes statements admittedly inferior to testimony by the declarant but with

such assurances of accuracy as to make their reception in evidence a wiser choice than doing completely without, so that unavailability becomes a determinative factor in the operation of what is essentially a rule of preference.

At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. For example, see the separate explications of unavailability in relation to former testimony, declarations against interest, and statements of pedigree, separately developed in MCCORMICK §§ 234, 257, and 297. However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions, and the treatment in the rule is therefore uniform for all cases, although differences in the range of process for witnesses between civil and criminal cases will lead to a less exacting requirement under item (4). See Rule 45(e) of the Federal Rules of Civil Procedure and Rule 17(e) of the Federal Rules of Criminal Procedure.

Five instances of unavailability are specified.

(1) Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony). Wyatt v. State, 35 Ala. App. 147,

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46 So.2d 837 (1950); State v. Stewart, 85 Kan. 404, 116 P. 489 (1911); Annot., 45 A.L.R.2d 1354; Uniform Rule 62(7)(a); California Evidence Code § 240(1); Kansas Code of Civil Procedure § 60-459(g)(1). A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made. (2) A witness is rendered unavailable if he simply refuses to testify despite judicial pressures to do so, a position supported by similar considerations of practicality. Johnson v. People, 152 Colo. 586, 384 P.2d 454 (1963); People v. Pickett, 339 Mich. 294, 63 N.W.2d 681, 45 A.L.R.2d 1341 (1954). Contra, Pleau v. State, 255 Wis. 362, 38 N.W.2d 496 (1949). (3) Death and infirmity find general recognition as grounds. MCCORMICK §§ 234, 257, 297; Uniform Rule 62(7)(c); California Evidence Code § 240(3); Kansas Code of Civil Procedure § 60-459(g)(3); New Jersey Evidence Rule 62(6)(c). See also the provisions on use of depositions in Rule 26(d)(3) of the Federal Rules of Civil Procedure and Rule 15(e) of the Federal Rules of Criminal Procedure. (4) and (5) Absence from the hearing coupled with inability to compel attendance also satisfies the requirement. MCCORMICK § 234; Uniform Rule 62(7)(d) and (e); California Evidence Code § 240(4) and (5); Kansas Code of Civil Procedure § 60-459(g)(4) and (5); New Jersey Rule 62(6)(b) and (d).

If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of his statement, the requirement is not satisfied.

Tentative final draft

1 Rule 8-02. Hearsay rule. Hearsay is inadmissible ~~in~~
2 ~~evidence~~ except as ~~otherwise~~ provided by these rules
3 or by the Rules of Civil and Criminal Procedure or by
4 Act of Congress.

First draft

Advisory Committee's Note

Rule 8-02 (Tentative final draft)

The provision excepting from the operation of the rule hearsay which is made admissible by the Rules of Civil or Criminal Procedure or by Act of Congress continues the admissibility thereunder of hearsay which would not qualify under these Evidence Rules. The following examples illustrate the working of the exception:

Federal Rules of Civil Procedure

Rule 4(g): proof of service by affidavit.

Rule 26(d): admissibility of depositions (transferred to Rule 32 under Proposed Amendments of November 1967).

Rule 43(e): affidavits when motion based on facts not appearing of record.

Rule 56: affidavits in summary judgment proceedings.

Rule 65(b): showing by affidavit for temporary restraining order.

Federal Rules of Criminal Procedure

Rule 4(a): affidavits to show grounds for issuing warrants.

Rule 12(b)(4): affidavits to determine issues of fact in connection with motions.

Acts of Congress

10 U.S.C. § 7730: affidavits of unavailable witnesses in actions for damages caused by vessel in naval service, or towage or salvage of same, when taking of testimony or bringing of action delayed or stayed on security grounds.

29 U.S.C. § 161(4): affidavit as proof of service in NLRB proceedings.

38 U.S.C. § 5206: affidavit as proof of posting notice of sale of unclaimed property by Veterans Administration.

Tentative final draft

1 Rule 8-03. Hearsay exceptions: availability of de-
2 clarant immaterial.

3 (a) General provisions. A statement is not excluded
4 by the hearsay rule if the nature of the statement and
5 the special circumstances under which it was made offer
6 assurances of accuracy not likely to be enhanced by
7 calling the declarant as a witness, even though he is
8 available.

9 (b) Illustrations. By way of illustration and not
10 by way of limitation, the following are examples of
11 statements conforming with the requirements of this rule:

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

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

5 (3) Then existing mental, emotional, or physi-
6 cal condition. A statement of the declarant's then
7 existing state of mind, emotion, sensation, or physi-
8 cal condition (such as intent, plan, motive, design,
9 mental feeling, pain, and bodily health), but not
10 including memory or belief to prove the fact remem-
11 bered or believed unless it relates to the execution,
12 revocation, identification, or terms of declarant's
13 will.

14 (4) Statements for purposes of medical diagnosis
15 or treatment. Statements made for purposes of medical
16 diagnosis or treatment and describing medical history,

1 or past or present symptoms, pain, or sensations,
2 or the inception or general character of the cause
3 or external source thereof insofar as reasonably
4 pertinent to diagnosis or treatment.

5 (5) Recorded recollection. A memorandum or
6 record concerning a matter about which a witness
7 once had knowledge but now has not sufficient recol-
8 lection to enable him to testify fully and accurately,
9 shown to have been made when the matter was fresh in
10 his memory and to reflect that knowledge correctly.
11 The memorandum or record may be read into evidence
12 but may not itself be received unless offered by an
13 adverse party.

14 (6) Records of regularly conducted activity. A
15 memorandum, report, record, or data compilation in
16 any form of acts, events, conditions, opinions, or

1 diagnoses, made at or near the time by, or from
2 information transmitted by, a person with knowledge,
3 all in the course of a regularly conducted activity,
4 as shown by the testimony of the custodian or other
5 qualified witness, unless the source of information
6 or the method or circumstances of preparation indi-
7 cate lack of trustworthiness.

8 (7) Absence of entry in records of regularly
9 conducted activity. Evidence that a matter is not
10 included in the memoranda, reports, records, or data
11 compilations, in any form, of a regularly conducted
12 activity, to prove the nonoccurrence or nonexistence
13 of the matter, if the matter was of a kind of which
14 a memorandum, report, record, or data compilation
15 was regularly made and preserved.

16 (8) Public records and reports. Records, reports,

1 statements, or data compilations, in any form, of
2 public officials or agencies setting forth (a) the
3 activities of the official or agency, or (b) matters
4 observed pursuant to duty imposed by law, or (c) in
5 civil cases and against the government in criminal
6 cases, factual findings resulting from an investi-
7 gation made pursuant to authority granted by law,
8 unless the sources of information or the method or
9 circumstances of the investigation indicate lack of
10 trustworthiness.

11 (9) Required reports. Records or data compila-
12 tions, in any form, of births, fetal deaths, deaths,
13 or marriages, if the report thereof was made to a
14 public office pursuant to requirements of law.

15 (10) Absence of public record or entry. To prove
16 the absence of a record, report, statement, or data

1 compilation, in any form, or the nonoccurrence or
2 nonexistence of a matter of which a record, report,
3 statement, or data compilation, in any form, was
4 regularly made and preserved by a public officer,
5 agency, or official, evidence in the form of a
6 certificate of the custodian, *or other person authorized to make the* or testimony, that *certification,*
7 diligent search failed to disclose the record,
8 report, statement, or data compilation, or entry.

9 (11) Records of religious organizations.

10 Statements of births, marriages, divorces, deaths,
11 legitimacy, ancestry, relationship by blood or
12 marriage, or other similar facts of personal or
13 family history, contained in a regularly kept
14 record of a religious organization.

15 (12) Marriage, baptismal, and similar certifi-

16 cates. Statements of fact contained in a certificate

1 that the maker performed a marriage or other
2 ceremony or administered a sacrament, made by a
3 clergyman, public official, or other person
4 authorized by the rules or practices of a reli-
5 gious organization or by law to perform the act
6 certified, and purporting to have been issued at
7 the time of the act or within a reasonable time
8 thereafter.

9 (13) Family records. Statements of fact con-
10 tained in family Bibles, genealogies, charts,
11 engravings on rings, inscriptions on family
12 portraits, engravings on urns, crypts, or tomb-
13 stones, or the like.

14 (14) Records of documents affecting an interest
15 in property. The record of a document purporting
16 to establish or affect an interest in property, as

1 proof of the content of the original recorded
2 document and its execution and delivery by each
3 person by whom it purports to have been executed,
4 if the record is a record of a public office and
5 an applicable statute authorized the recording of
6 documents of that kind in that office.

7 (15) Statements in documents affecting an
8 interest in property. A statement contained in a
9 document purporting to establish or affect an
10 interest in property if the matter stated was rele-
11 vant to the purpose of the document, unless dealings
12 with the property since the document was made have
13 been inconsistent with the truth of the statement
14 or the purport of the document.

15 (16) Statements in ancient documents. State-
16 ments in a document more than 20 years old whose

1 authenticity is established.

2 (17) Market reports, commercial publications.

3 Market quotations, tabulations, lists, directories,
4 or other published compilations, generally used
5 and relied upon by the public or by persons in
6 particular occupations.

7 (18) Learned treatises. To the extent called

8 to the attention of an expert witness upon cross-
9 examination or relied upon by him in direct exami-
10 nation, statements contained in published treatises,
11 periodicals, or pamphlets on a subject of history,
12 medicine, or other science or art, established as
13 a reliable authority by the testimony or admission
14 of the witness or by other expert testimony or by
15 judicial notice.

16 (19) Reputation concerning personal or family

1 history. Reputation among members of his family
2 by blood or marriage, or among his associates, or
3 in the community, concerning a person's birth,
4 marriage, divorce, death, legitimacy, relation-
5 ship by blood or marriage, ancestry, or other
6 similar fact of his personal or family history.

7 (20) Reputation concerning boundaries or
8 general history. Reputation in a community,
9 arising before the controversy, as to boundaries
10 of or customs affecting lands in the community,
11 and reputation as to events of general history
12 important to the community or state or nation in
13 which located.

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

1 (22) Judgment of previous conviction. Evidence
2 of a final judgment, entered after a trial or upon
3 a plea of guilty (but not upon a plea of nolo con-
4 tendere), adjudging a person guilty of a crime punish-
5 able by death or imprisonment in excess of one year,
6 to prove any fact essential to sustain the judgment,
7 but not including, when offered by the Government
8 in a criminal prosecution for purposes other than
9 impeachment, judgments against persons other than
10 the accused. The pendency of an appeal may be shown
11 but does not affect admissibility.

12 (23) Judgment as to personal, family, or gen-
13 eral history, or boundaries. Judgments as proof
14 of matters of personal, family or general history,
15 or boundaries, essential to the judgment, if the
16 same would be provable by evidence of reputation.

First draft

Advisory Committee's Note

Rule 8-03 (Tentative final draft)

Subdivision (a). The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement is inherently superior to, or at least as good as, testimony given by the declarant in person at the trial, thus justifying his nonproduction even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them.

The design of this rule and of the rule which follows is calculated to take full advantage of the accumulated wisdom and experience of the past. The common law exceptions are resorted to, however, not as a basis for formulating an extensive series of minute

categories into some one of which a proffered hearsay statement must be fitted under penalty of exclusion, but rather as furnishing examples of appropriate application of one or the other of the two rules. Thus counsel may prepare for trial with ample predictability of result, while at the same time room is left for growth and development of the law of evidence in the hearsay area consistently with the broad purposes expressed in Rule 1-02. See Dallas County v. Commercial Union Ins. Co., 286 F.2d 388 (5th Cir. 1961).

Subdivision (b).

Examples (1) and (2). In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement. The underlying theory of Example (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement; if the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. MORGAN, BASIC PROBLEMS OF EVIDENCE 340-341 (1962). The theory of Example (2) is simply that circumstances

may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 WIGMORE § 1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling.

While the theory of Example (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication, Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 Colum. L. Rev. 432 (1928), it finds support in cases without number. See cases in 6 WIGMORE § 1750; Annot., 53 A.L.R.2d 1245 (statements as to cause of or responsibility for motor vehicle accident); Annot., 4 A.L.R.3d 149 (accusatory statements by homicide victims). Since unexciting events are less likely to evoke comment, decisions involving Example (1) are far less numerous. Illustrative are Tampa Elec. Co. v. Getrost, 151 Fla. 558, 10 So.2d 83 (1942); Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942); and cases cited in MCCORMICK § 273, p. 585, n.4.

With respect to the time element, Example (1) recognizes that in many, if not most, instances precise

contemporaneity is not possible, and hence a slight lapse is allowable. Under Example (2) the standard of measurement is the duration of the state of excitement. "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, Spontaneous Statements and State of Mind, 46 Iowa L. Rev. 224, 243 (1961); McCORMICK § 272, p. 580.

Participation by the declarant is not required: a nonparticipant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Slough, supra; McCORMICK, supra; 6 WIGMORE § 1755; Annot., 78 A.L.R.2d 300.

Whether proof of the startling event may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. For cases in which this evidence consists of the condition of the declarant (injuries, state of shock), see Insurance Co. v. Mosley, 75 U.S. (8 Wall.) 397 (1869); Wheeler v. United States, 211 F.2d 19 (D.C. Cir. 1954); Weatherbee v. Safety Casualty Co., 219 F.2d 574 (5th Cir. 1955); Lampe v. United States, 229 F.2d 43 (D.C. Cir. 1956). Nevertheless, on occasion the

only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as "increasing," Slough, supra at 255, and as the "prevailing practice," McCORMICK § 272, p. 579. Illustrative are Armour & Co. v. Industrial Commission, 78 Colo. 569, 243 Pac. 546 (1926); Young v. Stewart, 191 N.C. 297, 131 S.E. 735 (1926). Moreover, under Rule 1-04(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. People v. Poland, 22 Ill. 2d 175, 174 N.E.2d 804 (1961). However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, Garrett v. Howden, 73 N.M. 307, 387 P.2d 874 (1963); Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939), a result which would under appropriate circumstances be consistent with the rule.

Permissible subject matter of the statement is limited under Example (1) to description or explanation of the event or condition, since it may be assumed that a narrative of events leading up to or connected with the event in question or a statement dealing with

unrelated matters will lack the quality of spontaneity. No such limitation is found in connection with Example (2), where a narrative of past events or a statement on other matters may tend to indicate reflection rather than spontaneity but by no means requires that conclusion. 6 WIGMORE §§ 1750, 1754. See Sanitary Grocery Co. v. Snead, 90 F.2d 374 (D.C. Cir. 1937), slip-and-fall case sustaining admissibility of clerk's statement, "That has been on the floor a couple of hours," and Murphy Auto Parts Co., Inc. v. Ball, 249 F.2d 508 (D.C. Cir. 1957), upholding admission, on issue of driver's agency, his statement that he had to call on a customer and was in a hurry to get home. Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 Wayne L. Rev. 204, 206-209 (1960).

Similar provisions are found in Uniform Rule 63(4) (a) and (b); California Evidence Code § 1240 (as to Example (2) only); Kansas Code of Civil Procedure § 60-460(d) (1) and (2); New Jersey Evidence Rule 63(4).

Example (3) is essentially a specialized application of Example (1), presented separately to enhance its usefulness and accessibility. See McCORMICK §§ 265, 268.

The exclusion of "memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual

destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind. Shepard v. United States, 290 U.S. 96 (1933); Maguire, The Hillmon Case--Thirty-three Years After, 38 Harv. L. Rev. 709, 718-731 (1925); Hinton, States of Mind and the Hearsay Rule, 1 U. Chi. L. Rev. 394, 417 (1934). The rule of Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892), allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed.

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an ad hoc judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. MCCORMICK § 271, pp. 577-578; Annot., 34 A.L.R.2d 588, 62 A.L.R.2d 855. A similar recognition of the need for and practical value of this kind of evidence is found in California Evidence Code § 1260.

Example (4). Even those few jurisdictions which have shied away from generally admitting statements of

present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. McCORMICK § 266, p. 563. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, Shell Oil Co. v. Industrial Commission, 2 Ill. 2d 590, 119 N.E.2d 224 (1954); McCORMICK § 266, p. 564; New Jersey Evidence Rule 63(12)(c). Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the example the statement need not have been made to a physician; statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including

statements of this kind. The distinction thus called for was one most unlikely to be made by juries, and the example accordingly rejects the limitation. This position is consistent with the provision of Rule 7-03 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

Example (5). A hearsay exception for recorded recollection is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question." United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965), citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., 82 A.L.R.2d 478, 520. The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them. Owens v. State, 67 Md. 307, 316, 10 Atl. 210, 212 (1887).

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness

should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. McCORMICK § 277, p. 593; 3 WIGMORE § 738, p. 76; Jordan v. People, 151 Colo. 133, 376 P.2d 699 (1962), cert. denied 373 U.S. 944; Hall v. State, 223 Md. 158, 162 A.2d 751 (1960); State v. Bindhammer, 44 N.J. 372, 209 A.2d 124 (1965). Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. Hence the example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately." To the same effect are California Evidence Code § 1237 and New Jersey Rule 63(1)(b), and this has been the position of the federal courts. Vicksburg & Meridian R.R. v. O'Brien, 119 U.S. 99 (1886); Ahern v. Webb, 268 F.2d 47 (10th Cir. 1959); and see N.L.R.B. v. Hudson Pulp & Paper Co., 273 F.2d 665 (5th Cir. 1960); N.L.R.B. v. Federal Dairy Co., 297 F.2d 487 (1st Cir. 1962). But cf. United States v. Adams, 385 F.2d 550 (2d Cir. 1967).

No attempt is made in the example to spell out the

method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in Rathbun v. Brancatella, 93 N.J.L. 222, 107 Atl. 279 (1919), is entirely consistent with the example.

Example (6) represents an area which has received much attention from those seeking to improve the law of evidence. The Commonwealth Fund Act was the result of a study completed in 1927 by a distinguished committee under the chairmanship of Professor Morgan. MORGAN et al., THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM 63 (1927). With changes too minor to mention, it was adopted by Congress in 1936 as the rule for federal courts. 28 U.S.C. § 1732. A number of states took similar action. The Commissioners on Uniform State Laws in 1936 promulgated the Uniform Business Records as Evidence Act, 9A U.L.A. 506, which has acquired a substantial following in the states. Model Code Rule 514 and Uniform Rule 63(13) also deal with the subject. Differences of varying degrees of importance exist among these various treatments.

These reform efforts were largely within the context

of business and commercial records, as the kind usually encountered, and concentrated considerable attention upon relaxing the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type. In their areas of primary emphasis on witnesses to be called and the general admissibility of ordinary business and commercial records, the Commonwealth Fund Act and the Uniform Act appear to have worked well, and the example seeks to preserve their advantages.

On the subject of what witnesses must be called, the Commonwealth Fund Act eliminated the common law requirement of calling or accounting for all participants by failing to mention it. United States v. Mortimer, 118 F.2d 266 (2d Cir. 1941); La Porte v. United States, 300 F.2d 878 (9th Cir. 1962); McCORMICK § 290, p. 608. Model Code Rule 514 and Uniform Rule 63(13) did likewise. The Uniform Act, however, abolished the common law requirement in express terms providing that the requisite foundation testimony might be furnished by "the custodian or other qualified witness." Uniform Business Records as Evidence Act, § 2; 9A U.L.A. 506. The example follows

the Uniform Act in this respect.

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. MCCORMICK §§ 281, 286, 603; Laughlin, Business Entries and the Like, 46 Iowa L. Rev. 276 (1961). The model statutes and rules have sought to capture these factors and to extend their impact by employing the phrase "regular course of business," in conjunction with a definition of "business" far broader than its ordinarily accepted meaning. The result is a tendency unduly to emphasize a requirement of routine-ness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The example therefore adopts the phrase "the course of a regularly conducted activity" as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a "business."

Amplification of the kinds of activities producing admissible records has given rise to problems which

conventional business records by their nature avoid. They are problems of the source of the recorded information, of entries in opinion form, of motivation, and of involvement as participant in the matters recorded.

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the course but the informant does not. The leading case, Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. Gencarella v. Fyfe, 171 F.2d 419 (1st Cir. 1948); Gordon v. Robinson, 210 F.2d 192 (3d Cir. 1954); Standard Oil Co. of California v. Moore, 251 F.2d 188, 214 (9th Cir. 1957), cert. denied

356 U.S. 975; Yates v. Bair Transport, Inc., 249 F. Supp. 681 (S.D.N.Y. 1965); Annot., 69 A.L.R.2d 1148. Cf.

Hawkins v. Gorea Motor Express, Inc., 360 F.2d 933 (2d Cir. 1966). Contra, 5 WIGMORE § 1530a, n.1, p. 392.

The point is not dealt with specifically in the Commonwealth Fund Act, the Uniform Act, or Uniform Rule 63(13). However, Model Code Rule 514 contains the requirement "that it was the regular course of that business for one with personal knowledge . . . to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record" The example follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity.

Entries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas. The Commonwealth Fund Act provided only for records of an "act, transaction, occurrence, or event," while the Uniform Act, Model Code Rule 514, and Uniform Rule 63(13) merely added the ambiguous term "condition." The limited phrasing of Commonwealth Fund Act, 28 U.S.C.

§ 1732, may account for the reluctance of some federal decisions to admit diagnostic entries. New York Life Ins. Co. v. Taylor, 147 F.2d 297 (D.C. Cir. 1945); Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1958), cert. denied 356 U.S. 960; England v. United States, 174 F.2d 466 (5th Cir. 1949); Skogen v. Dow Chemical Co., 375 F.2d 692 (8th Cir. 1967). Other federal decisions, however, experienced no difficulty in freely admitting diagnostic entries. Reed v. Order of United Commercial Travelers, 123 F.2d 252 (2d Cir. 1941); Buckminster's Estate v. Commissioner of Internal Revenue, 147 F.2d 331 (2d Cir. 1944); Medina v. Erickson, 226 F.2d 475 (2d Cir. 1955); Thomas v. Hogan, 308 F.2d 355 (4th Cir. 1962); Glawe v. Rulon, 284 F.2d 495 (8th Cir. 1960). In the state courts, the trend favors admissibility. Boruski v. MacKenzie Bros. Co., 125 Conn. 92, 3 A.2d 224 (1938); Allen v. St. Louis Public Service Co., 365 Mo. 677, 285 S.W.2d 663, 55 A.L.R.2d 1022 (1956); People v. Kohlmeyer, 284 N.Y. 366, 31 N.E.2d 490 (1940); Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947). To make clear its adherence to the latter position, the example specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been

a source of difficulty and disagreement. In Palmer v. Hoffman, 318 U.S. 109 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not rail-roading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routine-ness raises lack of motivation to be accurate. The opinion of the Circuit Court of Appeals had gone beyond mere lack of motive to be accurate: the engineer's statement was "dripping with motivations to misrepresent." Hoffman v. Palmer, 129 F.2d 976, 991 (2d Cir. 1942). The direct introduction of motivation is a disturbing factor, since absence of motive to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion. Laughlin, Business Records and the Like, 46 Iowa L. Rev. 276, 285 (1961). As Judge Clark said in his dissent, "I submit that there is hardly a grocer's account book

which could not be excluded on that basis." 129 F.2d at 1002. A physician's evaluation report of a personal injury litigant would appear to be in the routine of his business. If the report is offered by the party at whose instance it was made, however, it has been held inadmissible, Yates v. Bair Transport, Inc., 249 F. Supp. 681 (S.D.N.Y. 1965), otherwise if offered by the opposite party, Korte v. New York, N.H. & H.R. Co., 191 F.2d 86 (2d Cir. 1951), cert. denied 342 U.S. 868. The decisions hinge on motivation and which party is entitled to be concerned about it. Professor McCormick believed that the doctor's report or the accident report were sufficiently routine to justify admissibility. MCCORMICK § 287, p. 604. Yet hesitation must be experienced in admitting everything which is observed and recorded in the course of a regularly conducted activity. Efforts to set a limit are illustrated by Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954), error to admit worksheets made by since deceased deputy collector in preparation for the instant income tax evasion prosecution, and United States v. Ware, 247 F.2d 698 (7th Cir. 1957), error to admit narcotics agents' records of purchases. See also Example (8), infra, as to the public record aspects of records of this nature. Some decisions have been satisfied as to motivation of

an accident report if made pursuant to statutory duty, United States v. New York Foreign Trade Zone Operators, 304 F.2d 792 (2d Cir. 1961); Taylor v. Baltimore & O.R. Co., 344 F.2d 281 (2d Cir. 1965), since the report was oriented in a direction other than the litigation which ensued. Cf. Matthews v. United States, 217 F.2d 409 (5th Cir. 1954). The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the example proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

Occasional decisions have reached for enhanced accuracy by requiring involvement as a participant in matters reported. Clainos v. United States, 163 F.2d 593 (D.C. Cir. 1947), error to admit police records of convictions; Standard Oil Co. of California v. Moore, 251 F.2d 188 (9th Cir. 1957), cert. denied 356 U.S. 975, error to admit employees' reports of observed business practices of others. The example includes no requirement of this nature. Wholly acceptable records may involve matters merely observed, e.g. the weather.

The form which the "record" may assume under the example is described broadly as a "memorandum, report, record, or data compilation, in any form." The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. The term is borrowed from Rule 34(a) of PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, (November 1967).

Example (7). Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in Rule 8-01, supra, decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. MCCORMICK § 289, p. 609; MORGAN, BASIC PROBLEMS OF EVIDENCE 314 (1962); 5 WIGMORE § 1531; Uniform Rule 63(14); California Evidence Code § 1272; Kansas Code of Civil Procedure § 60-460(n); New Jersey Evidence Rule 63(14).

Example (8). Public records are a recognized hearsay

exception at common law and have been the subject of statutes without number. MCCORMICK § 291. See, for example, 28 U.S.C. § 1733, the relative narrowness of which is illustrated by its nonapplicability to nonfederal public agencies, thus necessitating resort to the less appropriate business record exception to the hearsay rule. Kay v. United States, 255 F.2d 476 (4th Cir. 1958). The example makes no distinction between federal and non-federal officers and agencies.

Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. Wong Wing Foo v. McGrath, 196 F.2d 120 (9th Cir. 1952), and see Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123 (1919). As to items (a) and (b), further support is found in the reliability factors underlying records of regularly conducted activities generally. See Example (5), supra.

(a) Cases illustrating the admissibility of records of the officer's or agency's own activities are numerous. Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123 (1919), Treasury records of miscellaneous receipts and disbursements; Howard v. Perrin, 200 U.S. 71 (1906), General Land Office records; Ballew v. United States, 160

U.S. 187 (1895), Pension Office records.

(b) Cases sustaining admissibility of records of matters observed are also numerous. United States v. Van Hook, 284 F.2d 489 (7th Cir. 1961), remanded for resentencing 365 U.S. 609, letter from induction officer to District Attorney, pursuant to army regulations, stating fact and circumstances of refusal to be inducted; T'Kach v. United States, 242 F.2d 937 (5th Cir. 1957), affidavit of White House personnel officer that search of records showed no employment of accused, charged with fraudulently representing himself as an envoy of the President; Minnehaha County v. Kelley, 150 F.2d 356 (10th Cir. 1945), Weather Bureau records of rainfall; United States v. Meyer, 113 F.2d 387 (7th Cir. 1940), cert. denied 311 U.S. 706, map prepared by government engineer from information furnished by men working under his supervision.

(c) The more controversial area of public records is that of the so-called "evaluative" report. The disagreement among the decisions has been due in part, no doubt, to the variety of situations encountered, as well as to differences in principle. Sustaining admissibility are such cases as United States v. Dumas, 149 U.S. 278 (1893), statement of account certified by Postmaster General in action against postmaster; McCarty v. United States, 185

F.2d 520 (5th Cir. 1950), reh. denied 187 F.2d 234, Certificate of Settlement of General Accounting Office showing indebtedness and letter from Army official stating Government had performed, in action on contract to purchase and remove waste food from Army camp; Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950), report of Bureau of Mines as to cause of gas tank explosion; Petition of W--, 164 F. Supp. 659 (E.D. Pa. 1958), report by Immigration and Naturalization Service investigator that petitioner was known in community as wife of man to whom she was not married. To the opposite effect and denying admissibility are Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944), State Fire Marshal's report of cause of gas explosion; Lomax Transp. Co. v. United States, 183 F.2d 331 (9th Cir. 1950), Certificate of Settlement from General Accounting Office in action for naval supplies lost in warehouse fire; Yung Tin Teung v. Dulles, 229 F.2d 244 (2d Cir. 1956), "Status Reports" offered to justify delay in processing passport applications. Police reports have generally been excluded except to the extent to which they incorporate firsthand observations of the officer. Annot., 69 A.L.R.2d 1148. Various kinds of evaluative reports are admissible under federal statutes: 7 U.S.C.

§ 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 7 U.S.C. § 210(f), findings of Secretary of Agriculture prima facie evidence in action for damages against stockyard owner; 7 U.S.C. § 292, order by Secretary of Agriculture prima facie evidence in judicial enforcement proceedings against producers association monopoly; 7 U.S.C. § 1622(h), Department of Agriculture inspection certificates of products shipped in interstate commerce prima facie evidence; 8 U.S.C. § 1440(c), separation of alien from military service on conditions other than honorable provable by certificate from department in proceedings to revoke citizenship; 18 U.S.C. § 4245, certificate of Director of Prisons that convicted person has been examined and found probably incompetent at time of trial prima facie evidence in court hearing on competency; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations; 46 U.S.C. § 679, certificate of consul presumptive evidence of refusal of master to transport destitute seamen to United States. While these statutory exceptions to the hearsay rule are left undisturbed, Rule 8-02, the willingness of Congress to recognize a substantial measure of admissibility

for evaluative reports is a helpful guide.

Factors which may be of assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L. Rev. 363 (1957); (2) the special skill or experience of the official, id.; (3) whether a hearing was held and the level at which conducted, Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944); possible motivation problems suggested by Palmer v. Hoffman, 318 U.S. 109 (1943). Others no doubt could be added.

The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the example, as in Example (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the example with respect to evaluative reports under item (c) is very specific: they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.

Example (9). Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence. Uniform Vital Statistics Act, 9C U.L.A. 350 (1957). The example is in principle narrower than Uniform Rule 63(16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment, Uniform Rule 63(16). The example is in the pattern of California Evidence Code § 1281.

Example (10). The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Example (7) with respect to regularly conducted activities, is here extended to public records of the kind mentioned in Examples (8) and (9). 5 WIGMORE § 1633(6), p. 519. Some harmless duplication no doubt exists with Example (7). For instances of federal statutes recognizing this method of proof, see 8 U.S.C. § 1284(b), proof of absence of alien crewman's name from outgoing manifest prima facie evidence of failure to detain or deport, and 42 U.S.C. § 405(c)(3), (4)(B), (4)(C), absence of HEW record prima facie evidence of no wages or self-employment income.

The example includes situations in which absence of a record may itself be the ultimate focal point of inquiry,

e.g. People v. Love, 310 Ill. 558, 142 N.E. 204 (1924), certificate of Secretary of State admitted to show failure to file documents required by Securities Law, as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

The refusal of the common law to allow proof by certificate of the lack of a record or entry has no apparent justification, 5 WIGMORE § 1678(7), p. 752, and the example takes the opposite position, as do Uniform Rule 63(17); California Evidence Code § 1284; Kansas Code of Civil Procedure § 60-460(o); New Jersey Evidence Rule 63(17). Congress has recognized certification as evidence of the lack of a record. 8 U.S.C. § 1360(d), certificate of Attorney General or other designated officer that no record of Immigration and Naturalization Service of specified nature or entry therein is found, admissible in alien cases.

Example (11). Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 WIGMORE § 1523, p. 371, and Example (6) would be applicable. However, both business record doctrine and Example (6) require that the person furnishing the information be one in the business or activity,

and the result is such decisions as Daily v. Grand Lodge, 311 Ill. 184, 142 N.E. 478 (1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be furnished on occasions of this kind, the example contains no requirement that the informant be in the course of the activity. See California Evidence Code § 1315 and Comment.

Example (12). The principle of proof by certification is recognized as to public officials in Examples (8) and (10), and with respect to authentication in Rule 9-02. The present example is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the example is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. See 5 WIGMORE § 1645, as to marriage certificates. When the person executing

the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see Rule 9-02, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, see Uniform Rule 63(18); California Evidence Code § 1316; Kansas Code of Civil Procedure § 60-460(p); New Jersey Evidence Rule 63(18).

Example (13). Records of family history kept in family Bibles have by long tradition been received in evidence. 5 WIGMORE §§ 1495, 1496, citing numerous statutes and decisions. See also Regulations, Social Security Administration, 20 C.F.R. § 404.703(c), recognizing family Bible entries as proof of age in the absence of public or church records. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings. WIGMORE, supra. The example is substantially identical in coverage

with California Evidence Code § 1312.

Example (14). The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the record would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of firsthand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgment or a form of probate, to have been executed and delivered. 5 WIGMORE §§ 1647a-1651. Thus what may appear in the example, at first glance, as endowing the record with an effect independently of local law and inviting difficulties of an Erie nature under Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939), is not present, since the local law in fact governs under the example.

Example (15). Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the

grantors are all the heirs of the last record owner. Under the example, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the example if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one. See Uniform Rule 63(29), Comment.

Similar provisions are contained in Uniform Rule 63(29); California Evidence Code § 1330; Kansas Code of Civil Procedure § 60-460(aa); New Jersey Evidence Rule 63(29).

Example (16). Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 9-01, leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 WIGMORE § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records,

contracts, maps, and certificates, in addition to title documents, citing numerous decisions. Id. § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 id. § 1573, p. 429, referring to recitals in ancient deeds as "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCORMICK § 298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. See Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961), upholding admissibility of 58 year-old newspaper story. Cf. MORGAN, BASIC PROBLEMS OF EVIDENCE 364 (1962), but see id. 254.

For a similar provision, but with the added requirement that "the statement has since generally been acted upon as true by persons having an interest in the matter," see California Evidence Code § 1331.

Example (17). Ample authority at common law supported the admission in evidence of items falling in the category of the example. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 WIGMORE § 1702, authorities are cited which

include such other kinds of publications as newspaper market reports, telephone directories, and city directories. Id. §§ 1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, see Uniform Rule 63(30); California Evidence Code § 1340; Kansas Code of Civil Procedure § 60-460(bb); New Jersey Evidence Rule 63(30). Uniform Commercial Code § 2-724 provides for admissibility in evidence of "reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market."

Example (18). The writers have generally favored the admissibility of learned treatises, McCORMICK § 296, p. 621; MORGAN, BASIC PROBLEMS OF EVIDENCE 366 (1962); 6 WIGMORE § 1692, with the support of occasional decisions and rules, City of Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1939); Lewandowski v. Preferred Risk Mut. Ins. Co., 33 Wis. 2d 69, 146 N.W.2d 505 (1966), 66 Mich. L. Rev. 183 (1967); Uniform Rule 63(31); Kansas Code of Civil Procedure § 60-460(cc), but the great weight of authority has been that learned treatises are not admissible as

substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. 6 WIGMORE § 1692. Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. Ross v. Gardner, 365 F.2d 554 (6th Cir. 1966); Sayers v. Gardner, 380 F.2d 940 (6th Cir. 1967); Colwell v. Gardner, 386 F.2d 56 (6th Cir. 1967); Glendenning v. Ribicoff, 213 F. Supp. 301 (W.D. Mo. 1962); Cook v. Celebrezze, 217 F. Supp. 366 (W.D. Mo. 1963); Sosna v. Celebrezze, 234 F. Supp. 289 (E.D. Pa. 1964); and see McDaniel v. Celebrezze, 331 F.2d 426 (4th Cir. 1964). The example 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.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., 60 A.L.R.2d 77. The example is hinged upon this last position, which is that of the Supreme Court, Reilly v. Pinkus, 338 U.S. 269 (1949), and of recent well considered state court decisions, City of St. Petersburg v. Ferguson, 193 So.2d 648 (Fla. App. 1967), cert. denied 201 So.2d 556; Darling v. Charleston Community Hospital, 33 Ill. 2d 326, 211 N.E.2d 253 (1965); Dabroe v. Rhodes Co., 64 Wn. 2d 431, 392 P.2d 317 (1964).

In Reilly v. Pinkus, supra, the Court pointed out that testing of professional knowledge was incomplete

without exploration of the witness' knowledge of and attitude toward established treatises in the field. The process works equally well in reverse and furnishes the basis of the example.

The example does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness. Dabroe v. Rhodes Co., supra. Moreover, the example avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise. The parallel to the treatment of prior inconsistent statements will be apparent. See Rules 6-13(b) and 8-01(c)(2).

Examples (19), (20), and (21). Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 WIGMORE § 1581, p. 445, and see also § 1583. On this common foundation, reputation as to land boundaries, customs,

general history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad example, but tradition has in fact been much narrower and more particularized, and this is the pattern of these examples.

Example (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 WIGMORE § 1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. Id. § 1605. All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. People v. Reeves, 360 Ill. 55, 195 N.E. 443 (1935); State v. Axilrod, 248 Minn. 204, 79 N.W.2d 677 (1956); Mass. Stat. 1947, c. 410, Mass. G.L.A. c. 233 § 21A; 5 WIGMORE § 1616. And the family has often served as the point of beginning for

allowing community reputation. 5 WIGMORE § 1488. For comparable provisions see Uniform Rule 63(26), (27)(c); California Evidence Code §§ 1313, 1314; Kansas Code of Civil Procedure § 60-460(x), (y)(2); New Jersey Evidence Rule 63(26), (27)(c).

The first portion of Example (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. MCCORMICK § 299, p. 625. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, *id.*, and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered. For similar provisions see Uniform Rule 63(27)(a), (b); California Evidence Code §§ 1320-1322; Kansas Code of Civil Procedure § 60-460(y)(1), (2); New Jersey Evidence Rule 63(27)(a), (b).

Example (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. MCCORMICK §§ 44, 158. The example deals only with the hearsay aspect of this kind of evidence.

Limitations upon admissibility based on other grounds will be found in Rules 4-04, relevancy of character evidence generally, and 6-08, character of witness. The example is in effect a reiteration, in the context of hearsay, of Rule 4-05(a). Similar provisions are contained in Uniform Rule 63(28); California Evidence Code § 1324; Kansas Code of Civil Procedure § 60-460(z); New Jersey Evidence Rule 63(28).

Example (22). When the status of a former judgment is under consideration in subsequent litigation, three possibilities must be noted: (1) the former judgment is conclusive under the doctrine of res judicata or collateral estoppel; or (2) it is admissible in evidence for what it is worth; or (3) it may be of no effect at all. The first situation does not involve any problem of evidence except in the way that principles of substantive law generally bear upon the relevancy and materiality of evidence. When, however, res judicata and collateral estoppel do not apply, then a choice is presented between the second and third alternatives. The example adopts the second for judgments of criminal conviction of felony grade. This is the direction of the decisions, Annot., 18 A.L.R.2d 1287, 1299, which manifest an increasing reluctance to reject in toto the

validity of the law's factfinding processes outside the confines of res judicata and collateral estoppel. While this may leave a jury with the evidence of conviction but without means to evaluate it, as suggested by Judge Hinton, Note, 27 Ill. L. Rev. 195 (1932), it seems safe to assume that the jury will give it substantial effect unless defendant offers a satisfactory explanation, a possibility not foreclosed by the example. But see North River Ins. Co. v. Militello, 104 Colo. 28, 88 P.2d 567 (1939), in which the jury found for plaintiff on a fire policy despite the introduction of his conviction for arson. For supporting federal decisions see Clark, J., in New York & Cuba Mail S.S. Co. v. Continental Cas. Co., 117 F.2d 404, 411 (2d Cir. 1941); Connecticut Fire Ins. Co. v. Farrara, 277 F.2d 388 (8th Cir. 1960).

Practical considerations require exclusion of convictions of minor offenses, not because the administration of justice in its lower echelons must be inferior, but because motivation to defend at this level is often minimal or nonexistent. Cope v. Goble, 39 Cal. App. 2d 448, 103 P.2d 598 (1940); Jones v. Talbot, 394 P.2d 316 (Idaho 1964); Warren v. Marsh, 215 Minn. 615, 11 N.W.2d 528 (1943); Annot., 18 A.L.R.2d 1287, 1295-1297; 16 Brooklyn L. Rev. 286 (1950); 50 Colum. L. Rev. 529 (1950); 35 Cornell L.Q.

872 (1950). Hence the example includes only convictions of felony grade, measured by federal standards.

Judgments of conviction based upon pleas of nolo contendere are not included. This position is consistent with the construction of Section 5 of the Clayton Act, 15 U.S.C. § 16, and recognizes the inconclusive and compromise nature of these judgments. General Electric Co. v. City of San Antonio, 334 F.2d 480 (5th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963), cert. denied 376 U.S. 939; Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967); City of Burbank v. General Electric Co., 329 F.2d 825 (9th Cir. 1964). See also state court decisions in accord, Annot., 18 A.L.R.2d 1287, 1314.

While these rules do not in general purport to resolve constitutional issues, they have in general been drafted with a view to avoiding collision with constitutional principles. Consequently the example does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any effect to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation. Kirby v. United States, 174 U.S. 47 (1899), error to convict of possessing stolen

postage stamps with only evidence of theft the record of conviction of the thieves. The situation is to be distinguished from cases in which conviction of another person is an element of the crime, e.g. 15 U.S.C. § 902(d), interstate shipment of firearms to a known convicted felon.

For comparable provisions see Uniform Rule 63(20); California Evidence Code § 1300; Kansas Code of Civil Procedure § 60-460(r); New Jersey Evidence Rule 63(20).

Example (23). A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity, and it was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. See City of London v. Clerke, Carth. 181, 90 Eng. Rep. 710 (K.B. 1691); Neill v. Duke of Devonshire, 8 App. Cas. 135 (1882). The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity

to reputation is strong, and the example goes no further, not even including character.

The leading case in the United States, Patterson v. Gaines, 47 U.S. (6 How.) 550, 599 (1847), follows in the pattern of the English decisions, mentioning as illustrative matters thus provable: manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigree. More recent recognition of the principle is found in Grant Bros. Construction Co. v. United States, 232 U.S. 647 (1914), in action for penalties under Alien Contract Labor Law, decision of board of inquiry of Immigration Service admissible to prove alienage of laborers, as a matter of pedigree; United States v. Mid-Continent Petroleum Corp., 67 F.2d 37 (10th Cir. 1933), records of commission enrolling Indians admissible on pedigree; Jung Yen Loy v. Cahill, 81 F.2d 809 (9th Cir. 1936), board decisions as to citizenship of plaintiff's father admissible in proceeding for declaration of citizenship. Contra, In re Estate of Cunha, 414 P.2d 925 (Haw. 1966).

1 Rule 8-04. Hearsay exceptions: declarant unavailable.

2 (a) General provisions. A statement is not ex-
3 cluded by the hearsay rule if the nature of the state-
4 ment and the special circumstances under which it was
5 made offer strong assurances of accuracy and the
6 declarant is unavailable as a witness.

7 (b) Illustrations. By way of illustration and not
8 by way of limitation, the following are examples of
9 statements conforming with the requirements of this rule:

10 (1) Former testimony. Testimony given as a
11 witness at another hearing of the same or a dif-
12 ferent proceeding, or in a deposition taken in
13 compliance with law in the course of another
14 proceeding, at the instance of or against a
15 party with an opportunity to develop the testi-
16 mony by direct, cross, or redirect examination,

1 with motive and interest similar to those of the
2 party against whom now offered.

3 (2) Statement of recent perception. A state-
4 ment, not in response to the instigation of a
5 person engaged in investigating, litigating, or
6 settling a claim, which narrates, describes, or
7 explains an event or condition recently perceived
8 by the declarant, made in good faith, not in con-
9 templation of pending or anticipated litigation
10 in which he was interested, and while his recol-
11 lection was clear.

12 (3) Statement under belief of impending death.
13 A statement made by a declarant while believing
14 that his death was imminent.

15 (4) Statement against interest. A statement
16 which was at the time of its making so far contrary

1 to the declarant's pecuniary or proprietary interest,
2 or so far tended to subject him to civil or criminal
3 liability or to render invalid a claim by him against
4 another or to make him an object of hatred, ridicule,
5 or social disapproval, that a reasonable man in his
6 position would not have made the statement unless
7 he believed it to be true. This example does not
8 include a statement or confession offered against
9 the accused in a criminal case, made by a codefendant
10 or other person *implicating both himself and* ~~charged with the crime, implicating~~
11 the accused.

12 (5) Statement of personal or family history.

13 (i) A statement concerning the declarant's own birth,
14 marriage, divorce, legitimacy, relationship by blood
15 or marriage, ancestry, or other similar fact of
16 personal or family history, even though declarant

1 had no means of acquiring personal knowledge of the
2 matter stated; or (ii) a statement concerning the
3 foregoing matters, and death also, of another
4 person, if the declarant was related to the other
5 by blood or marriage or was so intimately associated
6 with the other's family as to be likely to have
7 accurate information concerning the matter declared.

First draft

Advisory Committee's Note

Rule 8-04 (Tentative final draft)

Subdivision (a). Rule 8-03, supra, provides for the admission of hearsay when its quality is considered to be at least as good as would be forthcoming if the declarant took the stand and testified. Under those circumstances, whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant rule proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. The specified standard, offering "strong assurances of accuracy," is consistent with the pattern of hearsay exceptions evolved at common law with respect to declarations of unavailable declarants.

Subdivision (b). The examples find their sources largely in the established common law exceptions to the

hearsay rule. They are designed to illustrate the application of subdivision (a), not to fix its outer limits. Growth and development in practical application are encouraged.

Example (1). Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of trier and opponent ("demeanor evidence"), and this is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should fall under Rule 8-03, supra. However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Thus in cases under Rule 8-03 demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available, and the example indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

Under the example, the testimony may be offered (1) against the party against whom it was previously offered or (2) against the party by whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. (1) If the party against whom now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party against whom now offered is the one by whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, i.e. by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party, of litigants' ability to pick and choose witnesses, and of vouching for one's own witnesses. Cf. McCORMICK § 246, pp. 526-527; 4 WIGMORE § 1075. A more direct and acceptable approach is simply to recognize direct and redirect

examination of one's own witness as the equivalent of cross-examining an opponent's witness. Falknor, Former Testimony and the Uniform Rules: A Comment, 38 N.Y.U.L. Rev. 650, n.1 (1963); MCCORMICK § 231, p. 483. See also 5 WIGMORE § 1389. Allowable techniques for dealing with hostile, double-crossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. MCCORMICK § 233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. Id.

As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the

common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity.

Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. Falknor, supra, at 652; MCCORMICK § 232, pp. 487-488. The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered. The example departs to the extent of allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest. This position is supported by modern decisions. MCCORMICK § 232, pp. 489-490; 5 WIGMORE § 1388.

Rules of the same tenor will be found in Uniform Rule 63(3)(b); California Evidence Code §§ 1290-1292; Kansas Code of Civil Procedure § 60-460(c)(2); New Jersey Evidence Rule 63(3). The principal difference from the present example is in the inclusion of provisions that the rule shall not apply if it denies an accused the right of confrontation or in a simple refusal in criminal cases to allow a substitute for the

accused in the former hearing. The genesis of these limitations is a caveat in Uniform Rule 63(3) Comment that use of former testimony against an accused may violate his right of confrontation. Mattox v. United States, 156 U.S. 237 (1895), held that the right was not violated by the Government's use, on a retrial of the same case, of testimony given at the first trial by two witnesses since deceased. The decision leaves open the questions (1) whether direct and redirect are equivalent to cross-examination for purposes of confrontation, (2) whether testimony given in a different proceeding is acceptable, and (3) whether the accused must himself have been a party to the earlier proceeding or whether a similarly situated person will serve the purpose. Professor Falknor concluded that, if a dying declaration untested by cross-examination is constitutionally admissible, former testimony tested by the cross-examination of one similarly situated does not offend against confrontation. Falknor, supra, at 659. The constitutional acceptability of dying declarations has often been conceded. Mattox v. United States, 156 U.S. 237, 243 (1895); Kirby v. United States, 174 U.S. 47, 55 (1899); Pointer v. Texas, 380 U.S. 400, 407 (1965).

Example (2). The example finds support in several

directions. The well known Massachusetts Act of 1898 allows in evidence the declaration of any deceased person made in good faith before the commencement of the action and upon personal knowledge. Mass. G.L., c. 233, § 65. To the same effect is R.I.G.L., § 9-19-11. Under other statutes, a decedent's statement is admissible on behalf of his estate in actions against it, to offset the presumed inequality resulting from allowing a surviving opponent to testify. California Evidence Code § 1261; Conn. G.S., § 52-172; and statutes collected in 5 WIGMORE § 1576. See also Va. Code § 8-286, allowing statements made when capable by a party now incapable of testifying. In 1938 the Committee on Improvements in the Law of Evidence of the American Bar Association recommended adoption of a statute similar to that of Massachusetts but with the concept of unavailability expanded to include, in addition to death, cases of insanity or inability to produce a witness or take his deposition. 63 A.B.A. REPORTS 570, 584, 600 (1938). The same year saw enactment of the English Evidence Act of 1938, allowing written statements made on personal knowledge, if declarant is deceased or otherwise unavailable or if the court is satisfied that undue delay or expense would otherwise be caused, unless declarant was an interested

person in pending or anticipated relevant proceedings. 1938, 1 & 2 Geo. 6; CROSS ON EVIDENCE 482 (3rd ed. 1967). Model Code Rule 503(a) provided broadly for admission of any hearsay declaration of an unavailable declarant. No circumstantial guarantees of trustworthiness were required. Debate upon the floor of the American Law Institute did not seriously question the propriety of the rule but centered upon what should constitute unavailability. 18 A.L.I. Proceedings 90-134 (1941). The Uniform Rules draftsmen took a less advanced position, more in the pattern of the Massachusetts statute, and invoked several assurances of accuracy: recency of perception, clarity of recollection, good faith, and antecedence to the commencement of the action. Uniform Rule 63(4)(c).

Opposition developed to the Uniform Rule because of its countenancing of the use of statements carefully prepared under the tutelage of lawyers, claim adjusters, or investigators with a view to pending or prospective litigation. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VIII. Hearsay Evidence), CAL. LAW REV. COMM'N, 318 (1962); Quick Excitement, Necessity and the Uniform Rules: A Re-appraisal of Rule 63(4), 6 Wayne L. Rev. 204, 219-224

(1960). To meet this objection, the example excludes statements made at the instigation of a person engaged in investigating, litigating, or settling a claim. It also incorporates as safeguards the good faith and clarity of recollection required by the Uniform Rule and the exclusion of a statement by a person interested in the litigation provided by the English act. With these guarantees, compliance with the standard set in subdivision (a) of the present rule is believed to be achieved.

With respect to the question whether the introduction of a statement under this example against the accused in a criminal case would violate his right of confrontation, reference is made to the last paragraph of the Advisory Committee's Note under Example (1), supra.

Example (3). The example is the familiar dying declaration of the common law, expanded beyond its traditionally narrow limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. See 5 WIGMORE § 1443 and the classic statement of Chief Baron Eyre in Rex v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789).

The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecutions for other crimes, e.g. a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions, as in Colo. R.S. § 52-1-20, or has expanded the area of offenses to include abortions, 5 WIGMORE § 1432, p. 224, n.4. Kansas by decision extended the exception to civil cases. Thurston v. Fritz, 91 Kan. 468, 138 Pac. 625 (1914). While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases and in prosecutions for crimes other than homicide. The same considerations dictate abandonment of the sometimes encountered limitation to circumstances attending the event in question and allows a concept of unavailability broader than death. See the definition of unavailability in Rule 8-01(d). Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 7-01, and continuation of a requirement of firsthand knowledge is assured by Rule 6-02.

Comparable provisions, some of more restricted scope,

are found in Uniform Rule 63(5); California Evidence Code § 1242; Kansas Code of Civil Procedure § 60-460(e); New Jersey Evidence Rule 63(5).

Example (4). The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. Hileman v. Northwest Engineering Co., 346 F.2d 668 (6th Cir. 1965). If the statement is that of a party, offered by his opponent, it comes in as an admission, Rule 8-03(c)(3), and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.

The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against-interest aspect. Higham v. Ridgway, 10 East 109, 103 Eng. Rep. 717 (K.B. 1808); Reg. v. Overseers of Birmingham, 1 B. & S. 763, 121 Eng. Rep. 897 (Q.B. 1861); MCCORMICK § 256, p. 551, nn. 2 and 3.

The example discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant

or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCORMICK § 254, pp. 548-549. Another is to allow statements tending to expose declarant to hatred, ridicule, or social disapproval, the motivation here being considered to be as strong as when financial interests are at stake. McCORMICK § 255, p. 551. And finally, exposure to criminal liability satisfies the against-interest requirement. The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in Donnelly v. United States, 228 U.S. 243 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. People v. Spriggs, 36 Cal. Rptr. 841, 389 P.2d 377 (1964); Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945); Band's Refuse Removal, Inc. v. Fairlawn Borough, 62 N.J. Super. 522, 163 A.2d 463 (1960); Newberry v. Commonwealth, 191 Va. 445, 61 S.E.2d 318 (1950); Annot., 162 A.L.R. 446.

Questions of possible fabrication are better trusted to the competence of juries than made the subject of attempted treatment by rule. One aspect of third-party confessions, however, receives special treatment in the concluding sentence of the example. Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements. Douglas v. Alabama, 380 U.S. 415 (1965), and Bruton v. United States, 389 U.S. 818 (1968), both involved confessions by codefendants which implicated the accused. While the confession was not actually offered in evidence in Douglas, the procedure followed effectively put it before the jury, which the Court ruled to be error. Whether the confession might have been admissible as a declaration against penal interest was not considered or discussed. Bruton assumed the inadmissibility, as against the accused, of the implicating confession of his codefendant, and centered upon the question of the effectiveness of a limiting instruction. The unacceptability of a confession of this kind as a declaration against interest is emphasized in the dissenting opinion of Mr. Justice White: statements of

codefendants have traditionally been regarded with suspicion because of the readily supposed advantages of implicating another. This view is reflected in the concluding sentence of the example.

For comparable provisions, see Uniform Rule 63(10); California Evidence Code § 1230; Kansas Code of Civil Procedure § 60-460(j); New Jersey Evidence Rule 63(10).

Example (5). The general common law requirement that a declaration in this area have been made ante litem motam has been dropped, as bearing more appropriately on weight than admissibility. See 5 WIGMORE § 1483. Item (i) specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. In some instances it is self-evident (marriage) and in others impossible and traditionally not required (date of birth). Item (ii) deals with declarations concerning the history of another person. As at common law, declarant is qualified if related by blood or marriage. 5 WIGMORE § 1489. In addition, and contrary to the common law, declarant qualifies by virtue of intimate association with the family. Id., § 1487. The requirement sometimes encountered that when the subject of the statement is the relationship between two other persons the declarant must qualify as to both is omitted. Relationship is

reciprocal. Id., § 1491.

For comparable provisions, see Uniform Rule 63(23), (24), (25); California Evidence Code §§ 1310, 1311; Kansas Code of Civil Procedure § 60-460(u), (v), (w); New Jersey Evidence Rule 63(23), (24), (25).

Tentative final draft

1 Rule 8-05. Hearsay within hearsay. Hearsay included
2 within hearsay is not excluded under the hearsay rule
3 if each part of the combined statements conforms with
4 ^{an} ~~either~~ exception to the hearsay rule ~~is~~ provided in
5 these rules.

First draft

Advisory Committee's Note

Rule 8-05 (Tentative final draft)

On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurances. Or, to further illustrate, a dying declaration may incorporate a declaration against interest by another declarant. See McCORMICK § 290, p. 611.

For similar provisions see Uniform Rule 66; California Evidence Code § 1201; Kansas Code of Civil Procedure § 60-463; New Jersey Evidence Rule 66.

1 Rule 8-06. Attacking and supporting credibility of
2 declarant. When a hearsay statement has been admitted
3 in evidence, the credibility of the declarant may be
4 attacked or supported by any evidence which would be
5 admissible for those purposes if declarant had testi-
6 fied as a witness. Evidence of a statement or conduct
7 by the declarant at any time, inconsistent with his
8 hearsay statement, is not subject to any requirement
9 that he have been afforded an opportunity to deny or
10 explain.

First draft

Advisory Committee's Note

Rule 8-06 (Tentative final draft)

The declarant of a hearsay statement which is admitted in evidence is in effect a witness, and his credibility should in fairness be subject to impeachment and support as though he had in fact testified. There are, however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless it has first been called to his attention on the stand, so as to afford him an opportunity to deny or explain. See Rule 6-13(b).

The principal difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a prior statement,

which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a subsequent one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observance of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. MCCORMICK § 37, p. 69; 3 WIGMORE § 1033. The cases, however, are divided. Cases allowing the impeachment include People v. Collup, 27 Cal. 2d 829, 167 P.2d 714 (1946); People v. Rosoto, 58 Cal. 2d 304, 373 P.2d 867 (1962); Carver v. United States, 164 U.S. 694 (1897). Contra, Mattox v. United States, 156 U.S. 237 (1895); People v. Hines, 284 N.Y. 93, 29 N.E.2d 483 (1940). The force of Mattox, where the hearsay was the former testimony of a deceased witness and the denial of use of a subsequent inconsistent statement was upheld, is much diminished by Carver, where the hearsay was a dying declaration and denial of use of a subsequent inconsistent statement resulted in reversal. The difference in the particular brand of hearsay seems unimportant when the inconsistent statement is a subsequent

one. True, the opponent is not totally deprived of cross-examination when the hearsay is former testimony or a deposition but he is deprived of cross-examining on the statement or along lines suggested by it. Mr. Justice Shiras, with two justices joining him, dissented vigorously in Mattox.

When the impeaching statement was made prior to the hearsay statement, differences in the kinds of hearsay appear which arguably may justify differences in treatment. If the hearsay consisted of a simple statement by the witness, e.g. a dying declaration or a declaration against interest, the feasibility of affording him an opportunity to deny or explain encounters the same practical impossibility as where the statement is a subsequent one, just discussed, although here the impossibility arises from the total absence of anything resembling a hearing at which the matter could be put to him. The courts by a large majority have ruled in favor of allowing the statement to be used under these circumstances. McCORMICK § 37, p. 69; 3 WIGMORE § 1033. If, however, the hearsay consists of former testimony or a deposition, the possibility of calling the prior statement to the attention of the witness or deponent is not ruled out, since the opportunity to

cross-examine was available. It might thus be concluded that with former testimony or depositions the conventional foundation should be insisted upon. Most of the cases involve depositions, and Wigmore describes them as divided. 3 WIGMORE § 1031. Deposition procedures at best are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. Under the federal practice, there is no way of knowing with certainty at the time of taking a deposition whether it is merely for discovery or will ultimately end up in evidence. With respect to both former testimony and depositions the possibility exists that knowledge of the statement might not be acquired until after the time of the cross-examination. Moreover, the expanded admissibility of former testimony and depositions under Rule 8-04(b)(1) calls for a correspondingly expanded approach to impeachment. The rule dispenses with the requirement in all hearsay situations, which is readily administered and best calculated to lead to fair results.

Notice should be taken that Rule 26(f) of the Federal Rules of Civil Procedure, as originally submitted by the Advisory Committee, ended with the following:

". . . and, without having first called them to the deponent's attention, may show statements contradictory thereto made at any time by the deponent."

This language did not appear in the rule as promulgated in December, 1937. See MOORE'S FEDERAL PRACTICE ¶¶ 26.01[9], 26.35 (2nd ed. 1967). In 1951, Nebraska adopted a provision strongly resembling the one stricken from the federal rule:

"Any party may impeach any adverse deponent by self-contradiction without having laid foundation for such impeachment at the time such deposition was taken." R.S. Neb. § 25-1267.07.

For similar provisions, see Uniform Rule 65; California Evidence Code § 1202; Kansas Code of Civil Procedure § 60-462; New Jersey Evidence Rule 65.

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EVIDENCE RULES

November 27, 1968

Members of the Advisory Committee
on Rules of Evidence

Gentlemen:

The text of the tentative final draft of Rules 9-01 to 11-03, with first draft Advisory Committee Notes, is sent to you herewith. The following comments are offered.

Article IX. Authentication

Rules 9-01 and 9-02 have been combined into one rule in the pattern of the hearsay exception rules (Rules 8-03 and 8-04).

Rule 9-01(b). The Reporter has added the references to data compilations in the interest of completeness and consistency.

Rule 9-02(d). The Reporter has added data compilations, has substituted "official" for "public" records in the interest of consistency and to repel any implication that only records open to the public are included, and has added the provision that the certificate be by the custodian.

Rule 9-02(i) has been redrafted as perhaps the only feasible way of dealing with the UCC problem.

Rule 9-03 (9-05 in first draft), omitted by inadvertence from second draft, has been restored.

Article X. Contents of Writings,
Recordings, and Photographs

The view is again urged upon the Committee that harm and confusion from including photographs in this article will far outweigh any slight benefit obtained.

Rule 10-01(a). The Reporter has substituted "other form of data compilation" for "other means."

Rule 10-01(c). The Reporter has added "by a party executing or issuing it" in order to clarify whose intent is meant. He has also added the final sentence.

Rule 10-02. The Reporter has added the reference to Act of Congress for reasons given in the Note.

Rule 10-04. Subheads have been added.

Rule 10-05. The Reporter has added the reference to data compilations.

Rule 10-07. The Reporter has added the phrase dispensing with production of the original or accounting for its nonproduction. Otherwise there is an implication that oral admissions of contents are not admissible even though the original has been lost or destroyed or is otherwise unobtainable.

Rule 10-08 has been revised in the light of the discussion at the meeting of February, 1966.


Article XI. Miscellaneous Rules

Rule 11-01(a). "Magistrates" has been substituted for "commissioners." The Reporter has added "in the proceedings and to the extent hereinafter set forth" to avoid any suggestion that the rules apply in every situation arising before the courts specified and magistrates.

Members of the Advisory Committee
on Rules of Evidence
November 27, 1968

Page Three

Rule 11-01(d)(3). The Reporter has eliminated preliminary examinations for reasons stated in the Note. The reference to probable cause for arrest and search has been limited to proceedings for the issuance of warrants, leaving questions of admissibility to be determined under (1) as a preliminary question for the judge.


Edward W. Cleary
Reporter

Enclosure

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Tentative final draft

1 Article IX. Authentication and Identification

2 Rule 9-01. Requirement of authentication or identification.

3 (a) General provision. The requirement of authenti-

4 cation or identification as a condition precedent to

5 admissibility is satisfied by evidence or other showing

6 sufficient to support a finding that the matter in question

7 is what its proponent claims.

8 (b) Illustrations. By way of illustration and not

9 by way of limitation, the following are examples of authenti-

10 cation or identification conforming with the requirements

11 of this rule:

12 (1) Testimony of witness with knowledge. Testimony

13 ~~of a person with knowledge,~~ that a matter is what it

14 is claimed to be.

15 (2) ~~Lay opinion on handwriting.~~ ^{Non expert opinion} ^{non expert as to} Opinion testimony

1 of witnesses not testifying as experts, as to the
2 genuineness of handwriting, based upon familiarity
3 not acquired for purposes of the litigation.

4 (3) Comparison by trier or expert witness.

5 Comparison by the trier of fact or by expert wit-
6 nesses with specimens which have been authenticated.

7 (4) Distinctive characteristics and the like.

8 Appearance, contents, substance, internal patterns,
9 or other distinctive characteristics, taken in con-
10 junction with circumstances.

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

16 (6) Telephone calls. Telephone conversations,

1 by evidence that a call was made to the number
2 supplied by the telephone company for the person
3 in question, (i) if the call was to a place of
4 business and the conversation related to business
5 reasonably transacted over the telephone, or
6 (ii) if circumstances, including self-identification,
7 show the person answering to be the one called.

8 (7) Public records or reports. Evidence that
9 a writing authorized by law to be recorded or filed
10 and in fact recorded or filed in a public office,
11 or a purported public record, report, statement,
12 or data compilation, in any form, is from the public
13 office where items of this nature are kept.

14 (8) Ancient documents or data compilations.
15 Evidence that a document or data compilation, in
16 any form, (i) is in such condition as to create no

1 suspicion concerning its authenticity, (ii) was in
2 a place where it, if authentic, would likely be,
3 and (iii) is at least 20 years old at the time it
4 is offered.

5 (9) Methods provided by statute or rule. Any
6 method of authentication or identification pro-
7 vided by Act of Congress or by the Rules of Civil
8 or Criminal Procedure.

*Review of
the process of system used to show a*

2 Testimony of a person with knowledge describing a process or system used to produce a result together with the opinion of an ~~an~~ expert witness that the result produced fairly represents or reproduces the facts which the process or system purports to represent or reproduce.

First draft

Advisory Committee's Note

Rule 9-01 (Tentative final draft)

Subdivision (a). Authentication and identification represent a special aspect of relevancy. Michael and Adler, Real Proof, 5 Vand. L. Rev. 344, 362 (1952); MCCORMICK §§ 179, 185; MORGAN, BASIC PROBLEMS OF EVIDENCE 378 (1962). Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as "an inherent logical necessity." 7 WIGMORE § 2129, p. 564.

This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 1-04(b).

The common law approach to authentication of documents has been criticized as an "attitude of agnosticism," MCCORMICK, CASES ON EVIDENCE 388, n.4 (3rd ed. 1956), as one which "departs sharply from men's customs in ordinary affairs," and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and

expense devoted to proving genuine writings which correctly show their origin on their face, McCORMICK § 185, pp. 395, 396. Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification. Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least prima facie genuine items of the kind treated in Rule 9-02, infra. However, the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and cases of genuine controversy will still occur.

Subdivision (b). Following the pattern employed in the treatment of hearsay exceptions in Rules 8-03 and 8-04, the treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision (a). The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.

The examples relate for the most part to documents,

with some attention given to voice communications and computer printouts. As Wigmore noted, no special rules have been developed for authenticating chattels. WIGMORE, CODE OF EVIDENCE § 2086 (3rd ed. 1942).

It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, such as hearsay, may remain.

Example (1) contemplates a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis. See California Evidence Code § 1413, eyewitness to signing.

The example is sufficiently broad to encompass the authentication aspects of the products of computers. Transport Indemnity Co. v. Seib, 178 Neb. 253, 132 N.W.2d 871 (1965); State v. Veres, 7 Ariz. App. 117, 436 P.2d 629 (1968); Merrick v. United States Rubber Co., 7 Ariz. App. 433, 440 P.2d 314 (1968); Freed, Computer Evidence, 16 AM. JUR. PROOF OF FACTS 273; Symposium, Law and Computers in the Mid-Sixties, ALI-ABA (1966); 37 Albany L. Rev. 61 (1967). Since computer problems seem likely

to center in the hearsay area, it was felt that inclusion of a computer example in the present context of authentication might be misleadingly simple. Hence the only specific references to computers under this rule are found in Example (7), public records, and Example (8), ancient documents.

Example (2) states conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the handwriting of another person may be acquired by seeing him write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions. MCCORMICK § 189. See also California Evidence Code § 1416. Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert under the example which follows.

Example (3). The history of common law restrictions upon the technique of proving or disproving the genuineness of a disputed specimen of handwriting through comparison with a genuine specimen, by either the testimony of expert witnesses or direct viewing by the triers themselves, is detailed in 7 WIGMORE §§ 1991-1994. In breaking away, the English Common Law Procedure Act of 1854, 17 & 18 Vict., c. 125, § 27, cautiously allowed expert or trier to use exemplars "proved to the satisfaction of

the judge to be genuine" for purposes of comparison. The language found its way into numerous statutes in this country, e.g. California Evidence Code §§ 1417, 1418. While explainable as a measure of prudence in the process of breaking with precedent in the handwriting situation, the reservation to the judge of the question of the genuineness of exemplars and the imposition of an unusually high standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. Rule 1-04(b). No similar attitude is found in other comparison situations, e.g. ballistics comparison by jury, as in Evans v. Commonwealth, 230 Ky. 411, 19 S.W.2d 1091 (1929), or by experts, Annot., 26 A.L.R.2d 892, and no reason appears for its continued existence in handwriting cases. Consequently the example sets no higher standard for handwriting specimens and treats all comparison situations alike, to be governed by Rule 1-04(b). This approach is consistent with 28 U.S.C. § 1731: "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

Precedent supports the acceptance of visual comparison

as sufficiently satisfying preliminary authentication requirements for admission in evidence. Brandon v. Collins, 267 F.2d 731 (2d Cir. 1959); Wausau Sulphate Fibre Co. v. Commissioner of Internal Revenue, 61 F.2d 879 (7th Cir. 1932); Desimone v. United States, 227 F.2d 864 (9th Cir. 1955).

Example (4). The characteristics of the offered item itself, considered in the light of circumstances, offer authentication techniques in great variety. Thus a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him; Globe Automatic Sprinkler Co. v. Braniff, 89 Okla. 105, 214 Pac. 127 (1923); California Evidence Code § 1421; similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one. McCORMICK § 192; California Evidence Code § 192. And language patterns may indicate authenticity or its opposite. Magnuson v. State, 187 Wis. 122, 203 N.W. 749 (1925); Arens and Meadow, Psycholinguistics and the Confession Dilemma, 56 Colum. L. Rev. 19 (1956).

Example (5). Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular

speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting. Cf. Example (2), supra. People v. Nichols, 378 Ill. 487, 38 N.E.2d 766 (1942); McGuire v. State, 200 Md. 601, 92 A.2d 582 (1952); State v. McGee, 336 Mo. 1082, 83 S.W.2d 98 (1935).

Example (6). The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements or the reply technique, under Example (4), supra, or voice identification, under Example (5), may furnish the necessary foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity. The calling of a number furnished by the telephone company reasonably supports the assumption that the listing is correct and that the number is the one reached. If the number is that of a place of business, the mass of authority allows an ensuing conversation, if it relates to business reasonably transacted over the telephone, on the theory that the maintenance of the telephone connection is an invitation

to do business without further identification. Mattan v. Hoover, 350 Mo. 506, 166 S.W.2d 557 (1942); City of Pawhuska v. Crutchfield, 147 Okla. 4, 293 Pac. 1095 (1930); Zurich General Acc. & Liability Ins. Co. v. Baum, 159 Va. 404, 165 S.E. 518 (1932). Otherwise, some additional circumstance of identification of the speaker is required. The authorities divide on the question whether the self-identifying statement of the person answering suffices. The example answers in the affirmative on the assumption that usual conduct respecting telephone calls furnish adequate assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact. In general, see MCCORMICK § 193; 7 WIGMORE § 2155; Annot., 71 A.L.R. 5, 105 id. 322.

Example (7). Public records are regularly authenticated by proof of custody, without more. MCCORMICK § 191; 7 WIGMORE §§ 2158, 2159. The example extends the principle to include data stored in computers and similar methods, of which increasing use in the public records area may be expected. See California Evidence Code §§ 1532, 1600.

Example (8). The familiar ancient document rule of the common law is extended to include data stored

electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

Any time period selected is bound to be arbitrary. The common law period of 30 years is here reduced to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikeliness of a still viable fraud after the lapse of time. The shorter period is specified in the English Evidence Act of 1938, St. 1938, c. 28, and in Oregon R.S. 1963, § 41.360(34). See also the numerous statutes prescribing periods of less than 30 years in the case of recorded documents. 7 WIGMORE § 2143.

The application of the example is not subject to any limitation to title documents or to any requirement that possession, in the case of a title document, have been consistent with the document. See McCORMICK § 190.

Example (9). The example makes clear that methods of authentication provided by Act of Congress and by the Rules of Civil and Criminal Procedure are not intended to be superseded. Illustrative are the provisions for

authentication of records of proceedings by court reporters,
28 U.S.C. § 753(b) and F.R. Civ. P. 80(c), and for authen-
tication of depositions, F.R. Civ. P. 30(f).

Tentative final draft

1 Rule 9-02. Presumptions of authenticity. The following
2 are presumed to be authentic:

3 (a) Domestic public documents under seal. A document
4 bearing a seal purporting to be that of the United States,
5 or of any state, district, commonwealth, territory, or
6 insular possession thereof, or the Panama Canal Zone, the
7 Trust Territory of the Pacific Islands, or the Ryukyu
8 Islands, or of a political subdivision, department, officer,
9 or agency thereof, and a signature purporting to be an
10 attestation or execution.

11 (b) Domestic public documents not under seal. A
12 document purporting to bear the signature in his official
13 capacity of an officer or employee of any entity included
14 in paragraph (a) hereof, having no seal, if ~~certified as~~
15 ~~authentic under seal by~~ a public officer having a seal

1 and having official duties in the district or political
2 subdivision of the officer or employee. *certifies under seal*

that the signer has the official capacity and that
the signature is genuine.

3 (c) Foreign public documents. A document purporting

4 to be executed or attested in his official capacity by a

5 person authorized by the laws of a foreign country to

6 make the execution or attestation, and accompanied by a

7 final certification as to the genuineness of the signa-

8 ture and official position (1) of the executing or

9 attesting person, or (2) of any foreign official whose

10 certificate of genuineness of signature and official

11 position relates to the execution or attestation or is

12 in a chain of certificates of genuineness of signature

13 and official position relating to the execution or

14 attestation. A final certification may be made by a

15 secretary of embassy or legation, consul general, consul,

16 vice consul, or consular agent of the United States, or

1 a diplomatic or consular official of the foreign country
2 assigned or accredited to the United States. If reason-
3 able opportunity has been given to all parties to
4 investigate the authenticity and accuracy of official
5 documents, the courts may, for good cause shown, order
6 that they be treated as presumptively authentic without
7 final certification or permit them to be evidenced by
8 an attested summary with or without final certification.

9 (d) Certified copies of public records. A copy
10 of an official record or report or entry therein, or of
11 a document authorized by law to be recorded or filed
12 and actually recorded or filed in a public office, ~~and~~
13 including data compilations, in any form, certified as
14 correct by the custodian, *or other person authorized to make the certification* by certificate complying with
15 subdivision (a), (b), or (c) of this Rule.

16 (e) Official publications. Books, pamphlets, or

1 other publications purporting to be issued by public
2 authority.

3 (f) Newspapers and periodicals. Printed materials
4 purporting to be newspapers or periodicals.

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

9 (h) Acknowledged documents. Documents accompanied
10 by a certificate of acknowledgment under the hand and
11 seal of a notary public or other officer authorized by
12 law to take acknowledgments.

13 (i) Commercial paper and related documents. Commer-
14 cial paper, signatures thereon, and documents relating
15 thereto to the extent provided by general commercial law.

16 (j) 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.

First draft

Advisory Committee's Note

Rule 9-02 (Tentative final draft)

Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is presumed, sometimes for reasons of policy but perhaps more often because practical considerations, reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the presumption conclusive; the opposite party is not foreclosed from disputing authenticity.

Subdivision (a). The presumption of genuineness of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records, is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 WIGMORE § 2161; California Evidence Code § 1452. More than 50 provisions for judicial notice of official seals are contained in the United States Code.

Subdivision (b). While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 WIGMORE § 2167; California Evidence Code § 1453, the greater ease of effecting a forgery under these circumstances is apparent. Hence this subdivision of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in subdivision (j), infra.

Subdivision (c) provides a method for extending the presumption of authenticity to foreign official documents by a procedure of certification. It is derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records.

Subdivision (d). The common law and innumerable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, presumably authentic when in conformity with subdivision (a), (b), or (c). Rule 44(a) of the Rules of Civil Procedure and Rule 27 of the Rules of Criminal Procedure have provided authentication procedures of this nature for both domestic and foreign public records. It will be observed that the certification

procedure here provided extends only to public records, reports, and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under (a), (b), or (c) may not be provable by certified copy under (d).

Subdivision (e). The presumption of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 WIGMORE § 1684. The subdivision, it will be noted, does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be established presumptively. Rule 44(a) of the Rules of Civil Procedure has been to the same effect.

Subdivision (f). The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility for items therein contained. See 7 WIGMORE § 2150. Cf. 39 U.S.C. § 4005(b), public advertisement prima facie evidence of agency of person named, in postal fraud order proceeding; Canadian Uniform Evidence Act, Draft of 1936,

printed copy of newspaper prima facie evidence that notices or advertisements were authorized.

Subdivision (g). Several factors justify a presumption of genuineness of commercial and mercantile labels and the like. The risk of forgery is minimal. Trade-mark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them. Hence the fairness of the presumption finds recognition in the cases. Curtiss Candy Co. v. Johnson, 163 Miss. 426, 141 So. 762 (1962), Baby Ruth candy bar; Doyle v. Continental Baking Co., 262 Mass. 516, 160 N.E. 325 (1928), loaf of bread; Weiner v. Mager & Throne, Inc., 167 Misc. 338, 3 N.Y.S.2d 918 (1938), same. And see W. Va. Code 1966, § 47-3-5, trade-mark on bottle prima facie evidence of ownership. Contra, Keegan v. Green Giant Co., 150 Me. 283, 110 A.2d 599 (1954); Murphy v. Campbell Soup Co., 62 F.2d 564 (1st Cir. 1933). Cattle brands have received similar treatment in the western states. Rev. Code Mont. 1947, § 46-606; State v. Wolfley, 75 Kan. 406, 89 Pac. 1046 (1907); Annot., 11 L.R.A. (N.S.) 87. And inscriptions on trains and vehicles are held to be prima facie evidence of ownership or control. Pittsburgh, Ft. W. & C. Ry. v. Callaghan, 157 Ill. 406, 41 N.E. 909 (1895); 9 WIGMORE

§ 2510a. See also the provision of 19 U.S.C. § 1615 that marks, labels, brands, or stamps indicating foreign origin are prima facie evidence of foreign origin of merchandise.

Subdivision (h). In virtually every state, acknowledged title documents are receivable in evidence without further proof. Statutes are collected in 5 WIGMORE § 1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved. Instances of broadly inclusive statutes are California Evidence Code § 1451 and N.Y.C.P.L.R. 4538, McKinney's Consol. Laws 1963.

Subdivision (i). Issues of the authenticity of commercial paper in federal courts will usually arise in diversity cases, will involve an element of a cause of action or defense, and with respect to presumptions and burden of proof will be controlled by Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Rule 3-02, supra. There may, however, be questions of authenticity involving lesser segments of a case or the case may be one governed by federal common law. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). Cf. United States v. Yazell, 382 U.S. 341 (1966). In these

situations, resort to the useful authentication provisions of the Uniform Commercial Code is provided for. While the phrasing is in terms of "general commercial law," in order to avoid the potential complications inherent in borrowing local statutes, today one would have difficulty in determining the general commercial law without referring to the Code. See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). Pertinent Code provisions are sections 1-202, 3-307, and 3-510, dealing with third party documents, signatures on negotiable instruments, protests, and statements of dishonor.

Subdivision (j). The subdivision continues in effect presumptions of genuineness provided in various Acts of Congress. See, for example, 10 U.S.C. § 936, signature without seal, together with title, prima facie evidence of authenticity of acts of certain military personnel who are given notarial powers; 15 U.S.C. § 77f(a), signature on SEC registration presumed genuine; 26 U.S.C. § 6064, signature to tax return prima facie genuine.

Tentative final draft

1 Rule 9-03. Subscribing witness' testimony unnecessary.

2 The testimony of a subscribing witness is not necessary

3 to authenticate a writing unless required by the laws

4 of the jurisdiction whose laws govern the validity of

5 the writing.

First draft

Advisory Committee's Note

Rule 9-03 (Tentative final draft)

The common law required that attesting witnesses be produced or accounted for. Today the requirement has generally been abolished except with respect to documents which must be attested to be valid, i.e. wills. MCCORMICK § 188. Uniform Rule 71; California Evidence Code § 1411; Kansas Code of Civil Procedure § 60-468; New Jersey Evidence Rule 71; New York C.P.L.R. Rule 4537.

Tentative final draft

Article X. Contents of Writings,
Recordings, and Photographs

1 Rule 10-01. Definitions. For purposes of this article
2 the following definitions are applicable.

3 (a) Writings and recordings. "Writings" and
4 "recordings" consist of letters, words, or numbers, or
5 their equivalent, set down by handwriting, typewriting,
6 photostating, photographing, magnetic impulse, mechanical
7 or electronic sound recording, or other form of data
8 compilation.

9 (b) Photographs. "Photographs" include still photo-
10 graphs, X rays, and motion pictures.

11 (c) Original. An "original" of a writing or record-
12 ing is the writing or recording itself or any counterpart
13 intended to have the same effect by a person executing or
14 issuing it. An "original" of a photograph includes the

1 negative or any print therefrom. If data are stored in
2 a computer or similar device, any printout or other out-
3 put readable by sight, shown accurately to reflect the
4 data, is an "original."

5 (d) Duplicate. A "duplicate" is a counterpart
6 produced by the same impression as the original, or
7 from the same matrix, or by means of photography, in-
8 cluding enlargements and miniatures, or by mechanical
9 or electronic re-recording, ^{or by chemical reproduction} or by other equivalent
10 technique designed to insure an accurate reproduction
11 of the original.

First draft

Advisory Committee's Note

Rule 10-01 (Tentative final draft)

In an earlier day, when discovery and other related procedures were strictly limited, the misleadingly named "best evidence rule" afforded substantial guarantees against inaccuracies and fraud by its insistence upon production of original documents. The great enlargement of the scope of discovery and related procedures in recent times has measurably reduced the need for the rule. Nevertheless important areas of usefulness persist: discovery of documents outside the jurisdiction may require substantial outlay of time and money; the unanticipated document may not practically be discoverable; criminal cases have built-in limitations on discovery. Cleary and Strong, The Best Evidence Rule: An Evaluation in Context, 51 Iowa L. Rev. 825 (1966).

Subdivision (a). Traditionally the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques

have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments.

Subdivision (c). In most instances, what is an original or the original will be self-evident and further refinement will be unnecessary. However, in some instances particularized definition is required. A carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer. While strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage require that any print from the negative be regarded as an original. Similarly, practicality and usage confer the status of original upon any computer printout. Transport Indemnity Co. v. Seib, 178 Neb. 253, 132 N.W.2d 871 (1965).

Subdivision (d). The definition describes "copies" produced by methods of such accuracy as virtually to eliminate the possibility of error. Copies thus produced are given the status of originals in large measure by Rule 10-03, infra. Copies subsequently produced manually,

whether handwritten or typed, are not within the definition. It should be noted that what is on original for some purposes may be a duplicate for others. Thus a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents are in controversy is a duplicate. This result is substantially consistent with 28 U.S.C. § 1732(b). Compare 26 U.S.C. § 7513, giving full status as originals to photographic reproductions of tax returns and other documents, made by authority of the Secretary of the Treasury, and 44 U.S.C. § 399(a), giving original status to photographic copies in National Archives.

Tentative final draft

1 Rule 10-02. Requirement of original. To prove the
2 content of a writing, recording, or photograph, the
3 original writing, recording, or photograph is required,
4 except as otherwise provided in these rules or by Act
5 of Congress.

First draft

Advisory Committee's Note

Rule 10-02 (Tentative final draft)

The rule is the familiar one requiring production of the original of a document to prove its contents, expanded to include writings, recordings, and photographs, as defined in Rule 10-01(a) and (b), supra.

Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given, and earnings may be proved without producing books of account in which they are entered. McCORMICK § 198; 4 WIGMORE § 1245. Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary,

the rule will seldom apply to ordinary photographs. In most instances a party wishes to introduce the item and the question raised is the propriety of receiving it in evidence. Cases in which an offer is made of the testimony of a witness as to what he saw in a photograph or motion picture, without producing the same, are most unusual. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable. Paradis, The Celluloid Witness, 37 U. Colo. L. Rev. 235, 249-251 (1965). On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture fall in this category. Similarly as to situations in which the picture is offered as having independent probative value, e.g. automatic photograph of bank robber. See People v. Doggett, 83 Cal. App. 2d 405, 188 P.2d 792 (1948), photograph of defendants engaged in indecent

act; Mouser and Philbin, Photographic Evidence--Is There a Recognized Basis for Admissibility? 8 Hastings L.J. 310 (1957). The most commonly encountered of this latter group is, of course, the X ray, with substantial authority calling for production of the original. Daniels v. Iowa City, 191 Ia. 811, 183 N.W. 415 (1921); Cellamare v. Third Ave. Transit Co., 273 App. Div. 260, 77 N.Y.S.2d 91 (1948); Patrick & Tilman v. Matkin, 154 Okl. 232, 7 P.2d 414 (1932); Mendoza v. Rivera, 78 P.R.R. 569 (1955). It should be noted, however, that Rule 7-03, supra, allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application.

The reference to Acts of Congress is made in view of such statutory provisions as 26 U.S.C. § 7513, photographic reproductions of tax returns and documents, made by authority of the Secretary of the Treasury, treated as originals, and 44 U.S.C. § 399(a), photographic copies in National Archives treated as originals.

Tentative final draft

1 Rule 10-03. Admissibility of duplicates. A duplicate
2 is admissible to the same extent as an original unless
3 (1) a genuine question is raised as to the authenticity
4 of the original or (2) in the circumstances it would be
5 unfair to admit the duplicate in lieu of the original.

First draft

Advisory Committee's Note

Rule 10-03 (Tentative final draft)

When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy. By definition in Rule 10-01(d), supra, a "duplicate" possesses this character.

Therefore, if no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under the rule. This position finds support in the decisions. Myrick v. United States, 332 F.2d 279 (5th Cir. 1964), no error in admitting photostatic copies of checks instead of original microfilm in absence of suggestion to trial judge that photostats were incorrect; Johns v. United States, 323 F.2d 421 (5th Cir. 1963), not error to admit concededly accurate tape recording made from original wire recording; Sauget v. Johnson, 315 F.2d 816 (9th Cir. 1963), not error to admit copy of agreement when opponent had original and did not on appeal claim any discrepancy. Other reasons for requiring the original may be present when only a part of the

original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party. United States v. Alexander, 326 F.2d 736 (4th Cir. 1964). And see Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd., 265 F.2d 418, 76 A.L.R.2d 1344 (2d Cir. 1959).

A duplicate, though not entitled to the status of an original under this rule, may of course be admissible as secondary evidence when the original is not required. See Rules 10-04 and 10-05, infra.

Tentative final draft

1 Rule 10-04. Admissibility of other evidence of contents.

2 The original is not required, and other evidence of the
3 contents of a writing, recording, or photograph is
4 admissible if

5 (a) Originals lost or destroyed. All originals are
6 lost or have been destroyed, unless the loss or destruc-
7 tion resulted from the fraudulent act of the proponent; or

8 (b) Original not obtainable. No original can be
9 obtained by any available judicial process or procedure; or

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

- 1 (d) Collateral matters. The writing, recording, or
- 2 photograph is not closely related to a controlling issue.

First draft

Advisory Committee's Note

Rule 10-04 (Tentative final draft)

Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

The rule recognizes no "degrees" of secondary evidence. While strict logic might call for extending the principle of preference beyond simply preferring the original, the formulation of a hierarchy of preferences and a procedure for making it effective is believed to involve unwarranted complexities. Most, if not all, that would be accomplished by an extended scheme of preferences will, in any event, be achieved through the normal motivation of a party to present the most convincing evidence possible and the arguments and procedures available to his opponent if he does not. Compare McCORMICK § 207.

Subdivision (a). Loss or destruction of the original, unless due to fraud of the proponent, is a satisfactory explanation of nonproduction. McCORMICK § 201.

Subdivision (b). When the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is a sufficient explanation of nonproduction. Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction. No further showing is required. See MCCORMICK § 202.

Subdivision (c). A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to be confused with orders to produce or other discovery procedures, as the purpose of the procedure under the present rule is to afford the opposite party an opportunity to produce the original, not to compel him to do so. MCCORMICK § 203.

Subdivision (d). While difficult to define with precision, situations arise in which no good purpose is served by production of the original. Examples are the newspaper in an action for the price of publishing defendant's advertisement, Foster-Holcomb Investment Co. v. Little Rock Publishing Co., 151 Ark. 449, 236 S.W. 597

(1922), and the streetcar transfer of plaintiff claiming status as a passenger, Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 68 N.E. 1087 (1903). Numerous cases are collected in McCORMICK § 200, p. 412, n.1.

Tentative final draft

1 Rule 10-05. Public records. The contents of an offi-
2 cial record, or of a document authorized to be recorded
3 or filed and actually recorded or filed, including
4 data compilations in any form, if otherwise admissible,
5 may be proved by copy, certified as correct in accordance
6 with these rules or testified to be correct by a witness
7 who has compared it with the original. If a copy which
8 complies with the foregoing cannot be obtained by the
9 exercise of reasonable diligence, then other evidence
10 of the contents may be given.

First draft

Advisory Committee's Note

Rule 10-05 (Tentative final draft)

Public records call for somewhat different treatment. Removing them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian himself, and as a consequence judicial decisions and statutes commonly hold that no explanation need be given for failure to produce the original of a public record. MCCORMICK § 204; 4 WIGMORE §§ 1215-1228. This blanket dispensation from producing or accounting for the original would open the door to the introduction of every kind of secondary evidence of contents of public records were it not for the preference given certified or compared copies. Recognition of degrees of secondary evidence in this situation is an appropriate quid pro quo for not applying the requirement of producing the original.

The provisions of 28 U.S.C. § 1733(b) apply only to departments or agencies of the United States. The rule, however, applies to public records generally and is comparable in scope in this respect to Rule 44(a) of the Rules of Civil Procedure.

The certification procedures to which reference is made are set forth in Rule 9-02(d), supra.

Tentative final draft

1 Rule 10-06. Summaries. The contents of voluminous
2 writings, recordings, or photographs which cannot con-
3 veniently be examined in court may be presented in the
4 form of a chart, summary, or calculation. The originals
5 shall be made available for examination or copying, or
6 both, by other parties at a reasonable time and place.
7 The judge may order that they be produced in court.

First draft

Advisory Committee's Note

Rule 10-06 (Tentative final draft)

The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury. The rule recognizes this practice, with appropriate safeguards. 4 WIGMORE § 1230.

Tentative final draft

1 Rule 10-07. Testimony or written admission of party.
2 Contents may be proved by the testimony or deposition
3 of the party against whom offered or by his written
4 admission, without accounting for the nonproduction of
5 the original.

First draft

Advisory Committee's Note

Rule 10-07 (Tentative final draft)

While the parent case, Slatterie v. Pooley, 6 M. & W. 664, 151 Eng. Rep. 579 (Exch. 1840), allows proof of contents by evidence of an oral admission by the party against whom offered, without accounting for nonproduction of the original, the risk of inaccuracy is substantial and the decision is at odds with the purpose of the rule giving preference to the original. See 4 WIGMORE § 1255. The instant rule follows Professor McCormick's suggestion of limiting this use of admissions to those made in the course of giving testimony or in writing. MCCORMICK § 208, p. 424. The limitation, of course, does not call for excluding evidence of an oral admission when non-production of the original has been accounted for and secondary evidence generally has become admissible. Rule 10-04, supra.

A similar provision is contained in New Jersey Evidence Rule 70(1)(h).

Tentative final draft

1 Rule 10-08. Functions of judge and jury. When the
2 admissibility of other evidence of contents under these
3 rules depends upon the fulfillment of a condition of
4 fact, the question whether the condition has been
5 fulfilled is ordinarily for the judge to determine.
6 However, when an issue is raised ^{whether} ~~whether~~ (a) the as-
7 serted writing ever existed, or (b) whether another
8 writing, recording, or photograph produced at the trial
9 is the original, or (c) whether other evidence of con-
10 tents correctly reflects the contents, the issue is
11 for the trier of fact to determine as in the case of
12 other issues of fact.

First draft

Advisory Committee's Note

Rule 10-08 (Tentative final draft)

Most preliminary questions of fact in connection with applying the rule preferring the original as evidence of contents are for the judge, under the general principles announced in Rule 1-04, supra. Thus, the question whether the loss of the originals has been established, or the fulfillment of other conditions specified in Rule 10-04, supra, is for the judge. However, questions may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was not executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue. Levin, Authentication and Content of Writings, 10 Rutgers L. Rev. 632, 644 (1956). The latter portion of the instant rule is designed to insure treatment of these situations as raising jury questions. The decision is not one for

uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations. See Rule 1-04(b), supra.

For similar provisions, see Uniform Rule 70(2); Kansas Code of Civil Procedure § 60-467(b); New Jersey Evidence Rule 70(2), (3).

Tentative final draft

Article XI. Miscellaneous Rules

1 Rule 11-01. Applicability of rules.

2 (a) Courts and magistrates. These rules apply to the

3 ~~The United States Courts of Appeals~~
United States District Courts, the District Court of Guam,

4 the District Court of the Virgin Islands, the District

5 Court for the District of the Canal Zone, and to United

6 States magistrates, in the proceedings and to the extent

7 hereinafter set forth.

8 (b) Proceedings generally. These rules apply generally

9 to civil ~~actions~~ ^{proceedings}, including admiralty and maritime cases, to

10 criminal cases ~~and proceedings~~ ^{to contempt except those in which the judge} to punish for criminal con-

11 ~~tempt of court~~ ^{may act summarily,} and to proceedings under the Bankruptcy Act.

12 (c) Rules of privilege. The rules with respect to

13 privileges apply at all stages of all proceedings.

14 (d) Rules inapplicable. The rules (other than those

1 with respect to privileges) do not apply in the following
2 situations:

3 (1) Preliminary questions of fact. The determi-
4 nation of questions of fact preliminary to admissi-
5 bility of evidence when the issue is to be determined
6 by the judge under Rule 1-04(a).

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

8 (3) Miscellaneous proceedings. Proceedings for
9 extradition or rendition; sentencing, or granting or
10 revoking probation; issuance of warrants for arrest,
11 criminal summonses, and search warrants; criminal
12 contempts punishable summarily by the judge; and pro-
13 ceedings with respect to release on bail or otherwise.

14 (e) Rules applicable in part. In the following pro-
15 ceedings these rules apply ~~only~~ to the extent that matters
16 of evidence are not provided for in the statutes which

1 govern procedure therein: review of agency actions when
2 the facts are subject to trial de novo under 5 U.S.C.
3 § 706(2)(f); review of orders of Secretary of Agriculture
4 under 7 U.S.C. § 292 and §§ 499f and 499g; naturalization
5 and revocation of naturalization under 8 U.S.C. §§ 1421-1429;
6 prize proceedings in admiralty under 10 U.S.C. §§ 7651-7681;
7 review of orders of Secretary of the Interior under 15 U.S.C.
8 § 522; review of orders of petroleum control boards under
9 15 U.S.C. § 715d; actions for fines, penalties, or forfeitures
10 under the Tariff Act of 1930, 19 U.S.C., c. 4, Part V,
11 or under the Anti-Smuggling Act, 19 U.S.C., c. 5; criminal
12 libel for condemnation, exclusion of imports, or other
13 proceedings under the Federal Food, Drug, and Cosmetics
14 Act, 21 U.S.C., c. 9; disputes between seamen under 22 U.S.C.
15 §§ 256-258; habeas corpus under 28 U.S.C. §§ 2241-2254;
16 motions to vacate, set aside, or correct sentence under

1 28 U.S.C. § 2255; actions for penalties for refusal to
2 transport destitute seamen under 46 U.S.C. § 679; actions
3 against the United States for damages caused by or for
4 towage or salvage services rendered to public vessels
5 under 46 U.S.C., c. 22, as implemented by 10 U.S.C. § 7730.

First draft

Advisory Committee's Note

Rule 11^d1 (Tentative final draft)

Subdivision (a). The various enabling acts contain differences in phraseology in their descriptions of the courts over which the Supreme Court's power to make rules of practice and procedure extends. The act concerning civil actions, as amended in 1966, refers to "the district courts . . . of the United States in civil actions, including admiralty and maritime cases. . . ." 28 U.S.C. § 2072, Pub. L. 89-773, § 1, 80 Stat. 1323. The bankruptcy authorization is for rules of practice and procedure "under the Bankruptcy Act." 28 U.S.C. § 2075, Pub. L. 88-623, § 1, 78 Stat. 1001. The Bankruptcy Act in turn creates bankruptcy courts of "the United States district courts and the district courts of the Territories and possessions to which this title is or may hereafter be applicable." 11 U.S.C. §§ 1(10), 11(a). And the provision as to criminal rules up to and including verdicts applies to "criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the district of the Canal Zone and Virgin Islands, in the Supreme Court of Puerto Rico,

and in proceedings before United States commissioners."
28 U.S.C. § 3771.

These various provisions do not in terms describe the same courts. In congressional usage the phrase "district courts of the United States," without further qualification, traditionally has included the district courts established by Congress in the states under Article III of the Constitution, which are "constitutional" courts, and has not included the territorial courts created under Article IV, Section 3, Clause 2, which are "legislative" courts. Hornbuckle v. Toombs, 85 U.S. 648 (1873). However, any doubt as to the inclusion of the District Court ~~of~~ ^{for} the District of Columbia in the phrase is laid at rest by the provisions of the Judicial Code constituting the judicial districts, 28 U.S.C. §§ 81 et seq., creating district courts therein, id. § 132, and specifically providing that the term "district court of the United States" means the courts so constituted. Id. § 451. The District of Columbia is included. Id. § 88. Moreover, when these provisions were enacted, reference to the District of Columbia was deleted from the original civil rules enabling act. 28 U.S.C. § 2072. Likewise Puerto Rico is made a district, with a district court, and included in the term. Id. § 119.

~~The fact that the District Court of Puerto Rico is a legislative rather than a constitutional court is of no significance, since no question is raised as to the power of Congress to enable the Supreme Court to prescribe rules for courts in both categories.~~ The question is simply one of the extent of the authority conferred by Congress. With respect to civil rules it seems clearly to include the district courts in the states, the District Court ^{for} of the District of Columbia, and the District Court for the District of Puerto Rico.

The bankruptcy coverage is broader. The bankruptcy courts include "the United States district courts," which includes those just enumerated above. Bankruptcy courts also include "the district courts of the Territories and possessions to which this title is or may hereafter be applicable." 11 U.S.C. §§ 1(10), 11(a). These latter courts include the district courts of Guam and the Virgin Islands. 48 U.S.C. §§ 1424(b), 1615. Professor Moore points out that whether the District Court for the District of the Canal Zone is a court of bankruptcy "is not free from doubt in view of the fact that no other statute expressly or inferentially provides for the applicability of the Bankruptcy Act in the Zone." He further observes that while there seems to be little

doubt that the Zone is a territory or possession within the meaning of the Bankruptcy Act, 11 U.S.C. § 1(10), it must be noted that the appendix to the Canal Zone Code of 1934 did not list the Act among the laws of the United States applicable to the Zone. 1 MOORE'S COLLIER ON BANKRUPTCY ¶ 1.10, p. 67 (14th ed. 1967). The Code of 1962 confers on the district court jurisdiction of:

"(4) actions and proceedings involving laws of the United States applicable to the Canal Zone; and

(5) other matters and proceedings wherein jurisdiction is conferred by this Code or any other law." Canal Zone Code, 1962, § 141.

Admiralty jurisdiction is expressly conferred. Id. § 142. General powers are conferred on the district court, "if the course of proceeding is not specifically prescribed by this Code, by the statute, or by applicable rule of the Supreme Court of the United States. . . ." Id. § 279. Neither these provisions nor § 1(10) of the Bankruptcy Act ("district courts of the Territories and possessions to which this title is or may hereafter be applicable") furnishes a satisfactory answer as to the status of the District Court of the District of the Canal Zone as a court of bankruptcy. However, the fact is that this court exercises no bankruptcy jurisdiction in practice.

The criminal rules enabling act specifies United States district courts, district courts for the districts

of the Canal Zone and the Virgin Islands, the Supreme Court of Puerto Rico, and proceedings before United States commissioners. Aside from the addition of commissioners, now magistrates, this scheme differs from the bankruptcy pattern in that it makes no mention of the District Court of the District of Guam but by specific mention removes the Canal Zone from the doubtful list. The further difference in including the Supreme Court of Puerto Rico seems not to be significant for present purposes, since the Supreme Court of Puerto Rico is an appellate court. The Rules of Criminal Procedure have not been made applicable to it, as being unneeded and inappropriate, Rule 54(a) of the Federal Rules of Criminal Procedure, and the same approach is indicated with respect to rules of evidence.

If one were to stop at this point and frame a rule governing the applicability of the proposed rules of evidence in terms of the authority conferred by the three enabling acts, an irregular pattern would emerge as follows:

Civil actions, including admiralty and maritime cases--district courts in the states, District of Columbia, and Puerto Rico.

Bankruptcy--same as civil actions, plus Guam and Virgin Islands.

Criminal cases--same as civil actions, plus

Canal Zone and Virgin Islands (but not Guam).

This irregular pattern need not, however, be accepted.

Originally the Advisory Committee on the Rules of Civil Procedure took the position that, although the phrase "district courts of the United States" did not include territorial courts, provisions in the organic laws of Puerto Rico and Hawaii would make the rules applicable to the district courts thereof, though this would not be so as to Alaska, the Virgin Islands, or the Canal Zone, whose organic acts contained no corresponding provisions. At the suggestion of the Court, however, the Advisory Committee struck from its notes a statement to the above effect. MOORE'S FEDERAL PRACTICE ¶ 1.07 (2nd ed. 1967); BARRON and HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 121 (Wright ed. 1960). Congress thereafter by various enactments provided that the rules and future amendments thereto should apply to the district courts of Hawaii, 53 Stat. 841 (1939), Puerto Rico, 54 Stat. 22 (1940), Alaska, 63 Stat. 445 (1949), Guam, 64 Stat. 389 (1950), and the Virgin Islands, 68 Stat. 507 (1954). The original enabling act for rules of criminal procedure specifically mentioned the district courts of the Canal Zone and the Virgin Islands. Puerto Rico was

blanketed in by creating its court a "district court of the United States" as previously described. Although Guam is not mentioned in either the enabling act or in the expanded definition of "district court of the United States," the Supreme Court in 1956 amended Rule 54(a) to state that the Rules of Criminal Procedure are applicable in Guam. The Court took this step following the enactment of legislation by Congress in 1950 that rules theretofore or thereafter promulgated by the Court in civil cases, admiralty, criminal cases, and bankruptcy should apply to the District Court of Guam, 48 U.S.C. § 1424(b), and two Ninth Circuit decisions upholding the applicability of the Rules of Criminal Procedure to Guam. Pugh v. United States, 212 F.2d 761 (9th Cir. 1954); Hatchett v. Guam, 212 F.2d 767 (9th Cir. 1954); Orfield, The Scope of the Federal Rules of Criminal Procedure, 38 U. of Detroit L.J. 173, 187 (1960).

From this history, the reasonable conclusion is that Congressional enactment of a provision that rules and future amendments shall apply in the courts of a territory or possession is the equivalent of mention in an enabling act and that a rule on scope and applicability may properly be drafted accordingly. Therefore the pattern set by Rule 54 of the Federal Rules of Criminal Procedure is here followed.

The substitution of magistrates in lieu of commissioners is made in pursuance of the Federal Magistrates Act, P.L. 90-578, approved October 17, 1968.

Subdivision (b) is a combination of the language of the enabling acts, supra, with respect to the kinds of proceedings in which the making of rules is authorized. It is subject to the qualifications expressed in the subdivisions which follow.

Subdivision (c), singling out the rules of privilege for special treatment, is made necessary by the limited applicability of the remaining rules.

Subdivision (d) (1) provides that the rules, other than those of privilege, do not apply when the judge is determining a preliminary question of fact under Rule 1-04(a), supra. Relatively little judicial authority upon the proposition exists. Purely as an incident to a discussion of the right of cross-examination, Wigmore asserts that the rule is so, but without convincing citation of authority and without discussion of the point itself.

5 WIGMORE § 1385. Morgan refers to the Wigmore statement and comments:

"He has the support of some early text writers and of some early English opinions. Maguire and Epstein show that the majority of modern American cases are opposed to this

view. [Rules of Evidence in Preliminary Controversies as to Admissibility] 36 Yale L.J. 1101 (1927)." MORGAN, BASIC PROBLEMS OF EVIDENCE 51 (1962).

The English writer Cross states the matter cautiously:

"It is probably true to say that the judge is not bound by all the exclusionary rules in determining what material to receive as proof of facts constituting a condition precedent to the admissibility of certain items of evidence. . . . An affidavit has been accepted in support of the contention that a witness was too ill to attend court, with the result that a deposition previously made by him could be read in evidence; but it is impossible to speak with any certainty concerning the exact limits of this doctrine, because there is no modern English authority." CROSS, EVIDENCE 53 (3rd ed. 1967).

McCormick says:

"Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay. . . . American authorities are scattered and inconclusive that the judges [,] trial and appellate [,] give primacy here to habit rather than to practical adaptation to the situation, and tend to require the observance of jury-trial rules of evidence. These are principally cases holding affidavits inadmissible on such hearings." MCCORMICK 123, n.8.

The conclusion thus seems to be justified that precedent has little to offer, and the Committee was free to approach the question as one of policy relatively unencumbered by precedent.

While the American tradition, such as it is, may be modestly in favor of applying the conventional exclusionary rules to preliminary fact determinations, cognizance should be taken of at least two situations in which conventional practice, out of necessity, admits exceptions. One of these exceptions is that an item of evidence, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. While this practice prevails with respect to all proffered evidence, perhaps the hearsay exceptions furnish the best examples. How can it be determined that a declaration is against interest, or excited, without considering the declaration itself? The other exception is that the judge, in ascertaining the mental competency of a witness, may consider the testimony of the witness himself. The books are replete with cases of voir dire examinations of child witnesses. See McCORMICK op. cit.

If the principal concern is over the use of affidavits, it seems difficult to justify. Probably the most closely analogous situation in the field of practice and procedure is the determination of questions of fact arising in connection with motions. Standard procedure recognizes the use of affidavits. Rule 47

of the Federal Rules of Criminal Procedure provides:

"An application to the court for an order shall be by motion. . . . It may be supported by affidavit."

The Rules of Civil Procedure are more detailed. Rule 43(e), dealing with motions generally, provides:

"When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

Rule 4(g) provides for proof of service by affidavit. Rule 56 provides in detail for the entry of summary judgment based on affidavits. Affidavits may supply the foundation for temporary restraining orders under Rule 65(b). These are important determinations, all made on the basis of affidavits, and certainly comparable to rulings on evidence.

The study made for the California Law Revision Commission recommended an amendment to Uniform Rule 2 as follows:

"In the determination of the issue aforesaid [preliminary determination], exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege."
Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay), CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 470 (1962).

The proposal was not adopted in the California Evidence

Code. The Uniform Rules are likewise silent on the subject. However, New Jersey Evidence Rule 8, dealing with preliminary inquiry by the judge, provides:

"In his determination the rules of evidence shall not apply except for Rule 4 [exclusion on grounds of confusion, etc.] or a valid claim of privilege."

(2) While some states have statutory requirements that indictments be based on "legal evidence," and there is some case law to the effect that the rules of evidence apply to grand jury proceedings, 1 WIGMORE § 4(5), the view is insupportable in principle and presents obvious and great difficulties of practical application. The Supreme Court has not ~~adhered to it~~ ^{accepted this view}. In Costello v. United States, 350 U.S. 359 (1956), the Court refused to allow an indictment to be attacked, for either constitutional or policy reasons, on the ground that only hearsay evidence was presented.

18 5 F.2d 132
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"It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change." Id. at 364.

The rule as drafted does not deal with the ~~weight~~ ^{kind} and of evidence, requires

(3) Extradition and rendition proceedings are governed in detail by statute. 18 U.S.C. §§ 3181-3195. They are essentially administrative in character, and traditionally the rules of evidence have not applied. 1 WIGMORE § 4(6).

to suffice within dictum

Extradition proceedings are excepted from the operation of the Rules of Criminal Procedure. Rule 54(b)(5) of Federal Rules of Criminal Procedure.

The rules of evidence have not been regarded as applicable to sentencing or probation proceedings, where great reliance is placed upon the presentence investigation and report. Rule 32(c) of the Federal Rules of Criminal Procedure requires a presentence investigation and report in every case unless the court otherwise directs. In Williams v. New York, 337 U.S. 241 (1949), in which the judge overruled a jury recommendation of life imprisonment and imposed a death sentence, the Court said that due process does not require confrontation or cross-examination in sentencing or passing on probation, and that the judge has broad discretion as to the sources and types of information relied upon. Compare the recommendation that the substance of all derogatory information be disclosed to the defendant, in A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, Sentencing Alternatives and Procedures § 4.4, Tentative Draft (1967, Sobeloff, Chm.). Williams was adhered to in Specht v. Patterson, 386 U.S. 605 (1967), but not extended to a proceeding under the Colorado Sex Offenders Act, which was said to be a new charge leading in effect

to punishment, more like the recidivist statutes where opportunity must be given to be heard on the habitual criminal issue.

Warrants for arrest, criminal summonses, and search warrants are issued upon complaint or affidavit showing probable cause. Rules 4(a) and 41(c) of the Federal Rules of Criminal Procedure. The nature of the proceedings make application of the formal rules of evidence inappropriate and impracticable.

Criminal contempts are punishable summarily if the judge certifies that he saw or heard the contempt and that it was committed in the presence of the court. Rule 42(a) of the Federal Rules of Criminal Procedure. The circumstances which preclude application of the rules of evidence in this situation are not present, however, in other cases of criminal contempt.

Proceedings with respect to release on bail or otherwise do not call for application of the rules of evidence. The governing statute specifically provides:

"Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law." 18 U.S.C. § 3146(f).

This provision is consistent with the type of inquiry contemplated in A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, Standards Relating to Pretrial Release, § 4.5(b), (c),

p. 16 (1968). The references to the weight of the evidence against the accused, in Rule 46(a)(1), (c) of the Federal Rules of Criminal Procedure and in 18 U.S.C. § 3146(b), as a factor to be considered, clearly do not have in view evidence introduced at a hearing under the rules of evidence.

The rule does not exempt habeas corpus proceedings. The Supreme Court held in Walker v. Johnson, 312 U.S. 275 (1941) that the practice of disposing of matters of fact on affidavit, which prevailed in some circuits, did not "satisfy the command of the statute that the judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments.'" This view accords with the emphasis in Townsend v. Sain, 372 U.S. 293 (1963), upon trial-type proceedings, id. 311, with demeanor evidence as a significant factor, id. 322, in applications by state prisoners aggrieved by unconstitutional detentions. Hence subdivision (e) applies the rules to habeas corpus proceedings to the extent not inconsistent with the statute.

Nor does the rule exempt preliminary examinations in criminal cases. Authority as to the applicability of the rules of evidence to preliminary examinations has been meager and conflicting, Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J.

1149, 1168, n.53; Comment, Preliminary Hearings on Indictable Offenses in Philadelphia, 106 U. Pa. L. Rev. 589, 592-593 (1958). Lack of legal training on the part of presiding officers has no doubt tended to make application of the rules a practical impossibility. However, the enhanced standing of magistrates under the Federal Magistrates Act, P.L. 90-578, removes this obstacle and is calculated to increase the dignity of preliminary examinations. Moreover, compliance with the rules of evidence is calculated to render effective the right of the accused to cross-examine witnesses and to introduce evidence in his own behalf, under Rule 5(c) of the Federal Rules of Criminal Procedure. The fundamental difference from grand jury proceedings is apparent.

Subdivision (e). In a substantial number of special proceedings Congressional ad hoc evaluation has resulted in the enactment of particularized evidentiary provisions. Well adapted to the particular proceedings, though not apt candidates for inclusion in a set of general rules, they are left undisturbed.

Tentative final draft

- 1 Rule 11-02. Title. These rules may be known and cited
- 2 as the Federal ^{Rules of} Evidence ~~Rules~~

First draft

Advisory Committee's Note

Rule 11-02 (Tentative final draft)

The official title of the criminal rules is "Federal Rules of Criminal Procedure," Fed. R. Crim. P. 60, and that of the civil rules is "Federal Rules of Civil Procedure," Fed. R. Civ. P. 85. The accepted abbreviated forms of citation are as indicated in the preceding sentence, Harvard Law Review Assn., A UNIFORM SYSTEM OF CITATION 36 (11th ed. 1967), and are brief, convenient, and adequately suggestive. The customary form of text reference to the rules has, however, proved to be redundant, awkward, and uneconomical. E.g., "Rule 35(a) of the Federal Rules of Civil Procedure." Schlagenhauf v. Holder, 379 U.S. 104, 106 (1964). The subject of the present rules readily lends itself to avoidance of this circumlocution. Hence the title is "Federal Evidence Rules," instead of "Federal Rules of Evidence," thus encouraging text reference to be made to "Federal Evidence Rule 10," rather than to "Rule 10 of the Federal Rules of Evidence."

Tentative final draft

1 Rule 11-03. Effective date. These rules take effect on
2 the day (etc., as in Rule 59 of Federal Rules of Criminal
3 Procedure and in conformity with the enabling acts).
4 They govern all proceedings thereafter commenced and so
5 far as just and practicable all proceedings then pending.

First draft

Advisory Committee's Note

Rule 11-03 (Tentative final draft)

The rule is in the language of Rule 59 of the Federal Rules of Criminal Procedure. Rule 86(a) of the Rules of Civil Procedure is to the same effect, though longer.

Compare California Evidence Code § 12, which in substance provides for application to pending proceedings except trials already commenced. Claims of privilege after the effective date were, however, in all cases to be governed by the new code.