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

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MILTON I. SHADUR
EVIDENCE RULES

TO: **Honorable Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Milton I. Shadur, Chair**
Advisory Committee on Evidence Rules

DATE: **May 1, 2002**

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

I. Introduction

The Advisory Committee on Evidence Rules met on April 19, 2002, in Washington, D.C. At the meeting the Committee approved a proposed amendment to Evidence Rule 608(b), with the unanimous recommendation that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Part II of this Report summarizes the discussion of this proposed amendment. An attachment to this Report includes the text, Committee Note, GAP report, and summary of public comment for the proposed amendment to Rule 608(b).

The Evidence Rules Committee also unanimously agreed to revise a proposed amendment to Evidence Rule 804(b)(3) that was released for public comment. Part II of this Report summarizes the discussion of the proposed amendment as released for public comment and its proposed revision. The Evidence Rules Committee unanimously recommends that the revised proposal to amend Rule 804(b)(3) be released for a new round of public comment.

The Evidence Rules Committee also reviewed some long-term projects that are summarized in Part III of this Report. The draft minutes of the April meeting set forth a more detailed discussion of all the matters considered by the Committee. Those minutes are attached to this Report.

II. Action Items

A. Recommendation To Forward the Proposed Amendment to Evidence Rule 608(b) to the Judicial Conference

At its June 2001 meeting the Standing Committee approved the publication of a proposed amendment to Evidence Rule 608(b). The Committee resolved 12 written comments from the public on this proposed amendment. Public hearings were cancelled because nobody expressed an interest in testifying. A complete discussion of the Committee's consideration of the public comments respecting Rule 608(b) can be found in the draft minutes attached to this Report. The following discussion briefly summarizes the proposed amendment to Rule 608(b).

The proposed amendment to Evidence Rule 608(b) is intended to bring the text of the Rule into line with the original intent of the drafters. The Rule was intended to prohibit the admission of extrinsic evidence when offered to attack or support a witness' character for truthfulness. Unfortunately the text of the Rule is phrased as prohibiting extrinsic evidence when offered to attack or support a witness' "credibility"– a less precise locution. The term "credibility" can be read to prohibit extrinsic evidence when offered for non-character forms of impeachment, such as to prove bias, contradiction or prior inconsistent statement. *United States v. Abel,* 469 U.S. 45 (1984) held that the Rule 608(b) extrinsic evidence prohibition does not apply when it is offered for a purpose other than proving the witness' character for veracity. But even though most case law is faithful to the drafters' original intent, a number of cases continue to misapply the Rule to preclude extrinsic evidence offered to impeach a witness on grounds other than character. *See, e.g., Becker v. ARCO Chem. Co.,* 207 F.3d 176 (3d Cir. 2000) (stating that evidence offered for contradiction is barred by Rule 608(b)); *United States v. Bussey,* 942 F.2d 1241 (8th Cir. 1991) (stating that the "plain language" of the Rule bars the use of extrinsic evidence to impeach a witness by way of contradiction); *United States v. Graham,* 856 F.2d 756 (6th Cir. 1988) (Rule 608(b) bars extrinsic evidence when offered to prove that the witness is biased).

The proposed amendment substitutes the term "character for truthfulness" for the overbroad term "credibility," thereby limiting the extrinsic evidence ban to cases in which the proponent's sole purpose is to impeach the witness' character for veracity. This change is consistent with the Court's construction of the Rule in *Abel.* The Committee Note to the proposed Rule clarifies that the admissibility of extrinsic evidence offered to impeach a witness on grounds other than character is governed by Rules 402 and Rule 403, not by Rule 608(b).

The public comments on the proposed amendment uniformly praised the Advisory Committee's deletion of the overbroad term "credibility" and agreed that the Rule should be limited to its original intent, which was to exclude extrinsic evidence only when it is offered to prove a witness' character for truthfulness, and to leave all other uses of extrinsic evidence to be regulated by Rules 402 and 403.

One public commentator noted that there are other places in the Evidence Rules where the term "credibility" is probably used to mean "character for truthfulness." He suggested that the Committee use the occasion of the proposed amendment to address other provisions in the Evidence Rules where the term "credibility" is arguably misused. The Committee considered this comment carefully. It unanimously determined that the proposed amendment should be revised slightly to replace the term "credibility" with the term "character for truthfulness" in the last sentence of Rule 608(b). The Committee also revised the proposed Committee Note to refer to this slight change in the text and to explain that the change was made to provide uniform terminology throughout Rule 608(b).

The Evidence Rules Committee further considered whether the term "credibility" should be changed in other Evidence Rules. The Committee determined that the term need not be changed in Rule 608(a), because that Rule already limits impeachment to evidence pertinent to a witness' character for truthfulness. The Committee also determined that the use of the term "credibility" in Rules 609 and 610 has not created the same problems for courts and litigants as has the use of that term in Rule 608(b). The Committee found no reason to delay or withdraw the amendment to Rule 608(b) simply because the term "credibility" is used in other Evidence Rules.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 608(b), as modified following publication, be approved and forwarded to the Judicial Conference.

B. Recommendation To Approve the Revised Proposed Amendment to Evidence Rule 804(b)(3) For Release For Public Comment

At its June 2001 meeting the Standing Committee approved the publication of a proposed amendment to Evidence Rule 804(b)(3). This amendment would require every proponent of a declaration against penal interest to establish corroborating circumstances clearly indicating the trustworthiness of the hearsay statement. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest; but by its terms the Rule imposes no similar requirement on the prosecution. Nor does the Rule require a showing of corroborating circumstances in civil cases. The most important goal of the proposed amendment as released for public comment was to provide equal treatment to the accused and the prosecution in a criminal case.

After reviewing the public comment – particularly the comment filed by the Department of Justice – a majority of the Evidence Rules Committee determined that the proposal released for public comment would create substantial problems of application in criminal cases where declarations against penal interest are offered by the prosecution. This is because most courts have held that "corroborating circumstances" can or must be shown by reference to independent corroborating evidence indicating that the declarant's statement is true. But this definition of corroborating

circumstances – including a component of corroborating evidence – is problematic if applied to government-proffered hearsay statements because of the decision in *Lilly v. Virginia,* 527 U.S. 116 (1999). In *Lilly* the Court declared that the hearsay exception for declarations against penal interest is not "firmly rooted" and therefore the Confrontation Clause is not satisfied simply because a hearsay statement fits within that exception. Therefore, to admit a declaration against penal interest consistently with the Confrontation Clause after *Lilly*, the government is required to show that the statement carries "particularized guarantees of trustworthiness" that indicate it is reliable. And the Court in *Lilly* held that this showing of "particularized guarantees of trustworthiness" cannot be met by a showing of independent corroborating evidence. Rather, the statement must be shown reliable due to the circumstances under which it is made.

Consequently, the proposed amendment's requirement of "symmetry" in applying the corroborating circumstances requirement to statements offered by the prosecution could end up in requiring the government to satisfy an evidentiary standard that is either more stringent than that required by the Constitution or different from that required by the Constitution. The government might have to provide independent corroborating evidence that the declaration against penal interest is true, even though the Confrontation Clause imposes no such requirement. The risk of confusion and undue burden in applying different evidentiary and constitutional standards to the same piece of evidence is profound. For this reason, a majority of the Evidence Rules Committee voted to withdraw the proposed amendment to Rule 804(b)(3) as it was released for public comment.

Despite voting to withdraw the proposed amendment, the Committee determined that the existing Rule presents a number of problems, the most important being that it does not comport with the Constitution in a criminal case. This is because after *Lilly*, Rule 804(b)(3) is not a firmly-rooted hearsay exception, so the mere fact that a statement falls within the exception does not satisfy the Confrontation Clause. *Lilly* holds that a statement offered under a hearsay exception that is not firmly-rooted will satisfy the Confrontation Clause only when it bears "particularized guarantees of trustworthiness." And the *Lilly* Court held that this standard of "particularized guarantees" would not be satisfied simply because the statement was disserving to the declarant's penal interest. To satisfy the Confrontation Clause, the government must show circumstantial guarantees of trustworthiness beyond the fact that the statement is disserving. Yet Rule 804(b)(3) as written requires only that the prosecution show that the statement is disserving to the declarant's penal interest. It does not impose any additional evidentiary requirement. Thus, after *Lilly*, Rule 804(b)(3) as written is not consistent with constitutional standards. To the Committee's knowledge, no other categorical hearsay exception has the potential of being applied in such a way that a statement could fit within the exception and yet would violate the accused's right to confrontation. Other categorical hearsay exceptions, such as those for dying declarations, excited utterances and business records, have been found firmly-rooted.

The Committee found it notable that courts have struggled mightily to read Evidence Rules as if their text were consistent with the Constitution. Courts are understandably uncomfortable with having Evidence Rules that could be unconstitutional as applied. One example is the cases construing Rules 413-415. Courts have gone a long way to read those Rules as incorporating a Rule 403

balancing test, even though that is not evident from the text of those Rules. The rationale for that construction is that otherwise the Rules would violate the due process rights of a defendant charged with a sex crime. Another example of a non-textual construction found necessary due to the constitutional infirmity of the text of the Rule is Rule 804(b)(3) itself. The leading case on the subject, *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978), construed Rule 804(b)(3) as requiring corroborating circumstances for inculpatory statements against penal interest even though the text does not abide that construction. The Court reasoned that unless such a requirement were read into the Rule, the Rule would violate the defendant's right to confrontation. The Committee therefore believes that if courts are going to read language into a Rule to protect its constitutionality, it makes sense to write the Rule in compliance with the Constitution in the first place.

The Committee also determined that codifying constitutional doctrine provides a protection for defendants against an inadvertent waiver of the reliability requirements imposed by the Confrontation Clause. A defense counsel might be under the impression that the hearsay exceptions as written comport with the Constitution. Indeed, this is a justifiable assumption for all the categorical hearsay exceptions in the Federal Rules of Evidence, which have been found "firmly rooted" – except for Rule 804(b)(3). A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking that an additional, more specific objection on constitutional grounds would be unnecessary. If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements would be eliminated. *See, e.g.*, *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (court considers only admissibility under Rule 804(b)(3) because defense counsel never objected to the hearsay on constitutional grounds; yet there is no harm to the defendant because the Circuit requires corroborating circumstances for inculpatory statements against penal interest).

The Evidence Rules Committee also found it notable that a number of the Federal Rules of Evidence are written with constitutional standards in mind. For example, Rule 412, the rape shield law, provides that evidence of the victim's sexual conduct is admissible if its exclusion "would violate the constitutional rights of the defendant." Rule 803(8)(B) and (C), covering law enforcement reports in criminal cases, contain exclusionary language that is designed to protect the accused's right to confrontation. *See United States v. Oates*, 560 F.2d 45 (2d Cir. 1977) (noting the constitutional basis for that exclusionary language). And Rule 201(g) contains a limitation on judicial notice in criminal cases, in specific deference to the defendant's constitutional right to jury trial. So it is hardly unusual, and indeed it is appropriate, for Evidence Rules to be written in light of constitutional standards.

Because of the concerns over the unconstitutionality of the Rule as presently written, the Committee has proposed a revised amendment to Rule 804(b)(3). That proposed amendment would accomplish at least three important objectives:

1. It would retain the corroborating circumstances requirement as applied to statements against penal interest offered by the accused. The Evidence Rules Committee remains convinced that the corroborating circumstances requirement is necessary to guard against the risk that criminal defendants and their cohorts will manufacture unreliable hearsay statements.

2. It would extend the corroborating circumstances requirement to declarations against penal interest offered in civil cases. This part of the proposal is unchanged from the proposal as originally released for public comment. The Committee notes that at least two federal circuits currently require corroborating circumstances for declarations against penal interest offered in civil cases, even though the text of the Rule does not impose such a requirement. *See American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999); *McClung v. Wal-Mart Stores, Inc.*, 270 F.3d 1007, 1013-15 (6th Cir. 2001). This part of the proposal would bring the Rule into line with this sensible case law.

3. It would require that statements against penal interest offered against the accused must be "supported by particularized guarantees of trustworthiness." This language is carefully chosen to track the language used by the Supreme Court in its Confrontation Clause jurisprudence. It would guarantee that the Rule would comport with the Constitution in criminal cases, without imposing on the government any evidentiary requirement that it is not already required to bear.

The proposed revised amendment to Rule 804(b)(3) was approved by all members of the Committee, including the Justice Department representative. The proposed revised amendment and accompanying Committee Note are attached to this Report.

The Committee believes that the proposed revision is a substantial change from the proposed amendment that was released for public comment. The proposal released for public comment was intended to provide symmetry and unitary treatment of declarations against penal interest; "corroborating circumstances" would be required for all such statements. Most of the public comment considered the merits of a symmetrical application of the corroborating circumstances requirement in criminal cases. In contrast, the proposed revision would impose different admissibility requirements depending on the party proffering the declaration against penal interest. The prosecution would be required to show "particularized guarantees of trustworthiness" (i.e., the Confrontation Clause reliability standard), while all other parties would be required to show "corroborating circumstances" – however that term is interpreted by the courts. Because the revision is a significant change, the Evidence Rules Committee recommends that the revised proposal be released for a new period of public comment.

Recommendation: The Evidence Rules Committee recommends that the revised proposal to amend Evidence Rule 804(b)(3) be approved for release for public comment.

III. Information Items

A. Privileges

The Evidence Rules Committee continues to work on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. This project will not necessarily result in proposed amendments, however. It is possible that the end result might be an

FJC publication, not an official Committee document, much like two previous publications on Advisory Committee Notes and case law divergence.

The Subcommittee on Privileges prepared two draft rules for consideration by the Committee at the April meeting. Those drafts set forth: 1) a privilege for confidential communications to physicians and mental health providers; and 2) a privilege for confidential communications to clerics. At the April meeting the Committee provided extensive guidance and commentary on the draft of the physician-mental health provider privilege. The Committee also tentatively determined that any privilege for communications to clerics should be left to common law development. .

The Subcommittee on Privilege continues to conduct research on the privileges and will continue to revise and develop draft rules for further consideration and discussion at the October, 2002 meeting and future meetings of the Evidence Rules Committee.

B. Long-Range Planning

At its April meeting the Committee resolved to continue its practice of monitoring the cases and the legal scholarship for suggestions as to necessary amendments to the Evidence Rules. The Committee remains strongly of the view that amendments should not be proffered simply for the sake of change. On the other hand, the Committee recognizes that valid arguments for necessary amendments must be considered.

At the April meeting the Committee considered a number of suggestions for amendments derived from three sources: 1. Legal scholarship suggesting change to one or more Evidence Rules; 2. The Uniform Rules project; and 3. Federal case law indicating either a conflict in the meaning of an Evidence Rule or a divergence between the case law and the text of a Rule.

The Committee voted to **reject** any long-term project to consider amendments to the following Evidence Rules:

Rule 104 (Preliminary Questions of Admissibility)

Rule 401 (Definition of Relevance)

Rule 402 (Admissibility of Relevant Evidence)

Rule 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, etc.)

Rule 404(b) (Admissibility of Other Crimes, Wrongs or Acts)

Rule 405 (Methods of Proving Character)

Rules 413-15 (Admissibility of Uncharged Sexual Misconduct)

Rule 610 (Impeachment for Religious Beliefs)

Rule 611 (Mode and Order of Interrogating Witnesses)

Rule 801(c) (Definition of Hearsay).

The Committee voted to consider tentatively whether the following Rules should be amended:

Rule 106 (To consider whether the rule of completeness should apply to statements that are not in writing, e.g., oral or electronic statements.)

Rule 404(a) (To consider whether character evidence should be admissible in civil cases where the defendant is charged with an act that constitutes a criminal offense.)

Rule 408 (To consider whether compromise evidence should be admissible in related criminal litigation.)

Rule 412 (To consider whether evidence of false and withdrawn claims of rape should be admissible, and to consider a technical amendment to the existing text.)

Rule 606(b) (To consider whether statements by jurors should be admissible when the inquiry is to determine whether the jury made a clerical error in rendering the verdict.)

Rule 607 (To consider whether the Rule should be amended to prohibit a party from calling a witness solely to impeach that witness with otherwise inadmissible information.)

Rule 609 (To consider whether to adopt the Uniform Rules definition of a conviction involving dishonesty or false statement.)

Rule 613(b) (To consider whether to require a party to confront a witness with a prior inconsistent statement before it can be admitted for impeachment.)

Rule 704(b) (To consider whether the Rule should be amended to exclude only opinions of mental health experts).

Rule 706 (To consider certain stylistic suggestions and to determine whether to incorporate civil trial practice standards developed by the ABA.)

Rule 801(d)(1)(B) (To consider whether the Rule should be amended to provide that a prior consistent statement is admissible for its truth whenever it is admissible to rehabilitate the witness.)

Rule 803(3) (To consider whether the Rule should be amended to cover statements of the declarant's state of mind when offered to prove the conduct of someone other than the declarant.)

Rule 803(4) (To consider whether statements made to medical personnel for purposes of litigation should continue to be admissible under the exception.)

Rule 803(5) (To consider whether the hearsay exception should cover records prepared by someone other than the party with personal knowledge of the event.)

Rule 803(6) (To consider whether the business records exception should be amended to require that statements recorded by a person without knowledge of the event must be shown to be reliable, either due to business duty or some other guaranty of trustworthiness.)

Rule 803(8) (To consider whether the language excluding law enforcement reports in criminal cases should be replaced by general language requiring that public reports are to be excluded if they are untrustworthy under the circumstances).

Rule 803(18) (To consider whether the "learned treatise" exception should be amended to provide for admissibility of "treatises" in electronic form.)

A more detailed discussion of the above proposals, and the tentative Committee determinations, can be found in the Minutes, attached to this Report.

IV. Minutes of the April, 2002 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April, 2002 meeting are attached to this Report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Proposed Amendment to Evidence Rule 608(b) and Committee Note (recommended for approval and forwarding to the Judicial Conference).

Proposed Revised Amendment to Evidence Rule 804(b)(3) and Committee Note (recommended for approval for release for public comment).

Draft Minutes of the April 2002 meeting of the Evidence Rules Committee

Attachment 1

Proposed Amendment to Rule 608(b)

Committee Recommendation: That the Standing Committee Approve the Proposed Amendment and Forward the Proposed Amendment to the Judicial Conference.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 608. Evidence of Character and Conduct of Witness

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

(b) Specific instances of conduct. — Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' ~~credibility~~ character for truthfulness, other than conviction of

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

crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters ~~which~~ that relate only to ~~credibility~~ character for truthfulness.

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COMMITTEE NOTE

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel,* 469 U.S. 45 (1984); *United States v. Fusco,* 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . .").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g., United States v. Winchenbach,* 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino,* 846 F.2d 1384 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is

governed by Rules 402 and 403); *United States v. Lindemann,* 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403). Rules 402 and 403 displace the common-law rules prohibiting impeachment on "collateral" matters. *See* 4 Weinstein's Evidence § 607.06[3][b][ii] (2d ed. 2000) (advocating that courts substitute "the discretion approach of Rule 403 for the collateral test advocated by case law").

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis,* 183 F.3d 231, 257 n.12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").

For purposes of consistency the term "credibility" has been replaced by the term "character for truthfulness" in the last sentence of subdivision (b). The term "credibility" is also used in subdivision (a). But the Committee found it unnecessary to substitute "character for truthfulness" for "credibility" in Rule 608(a), because subdivision

(a)(1) already serves to limit impeachment to proof of such character.

Rules 609(a) and 610 also use the term "credibility" when the intent of those Rules is to regulate impeachment of a witness' character for truthfulness. No inference should be derived from the fact that the Committee proposed an amendment to Rule 608(b) but not to Rules 609 and 610.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The last sentence of Rule 608(b) was changed to substitute the term "character for truthfulness" for the existing term "credibility." This change was made in accordance with public comment suggesting that it would be helpful to provide uniform terminology throughout Rule 608(b). A stylistic change was also made to the last sentence of Rule 608(b).

SUMMARY OF PUBLIC COMMENTS

Thomas J. Nolan, Esq. (01-EV-001) states that the proposed amendment to Rule 608(b) is "extremely important, should be adopted, and can and will significantly increase the administration of justice in the United States Courts."

Mikel L. Stout, Esq. (01-EV-002) approves of the proposed amendment.

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (01-EV-003) endorses the proposed change to Rule 608(b).

The Federal Magistrate Judges Association (01-EV-004) supports the proposed amendment and notes that it "is consistent with the drafters' original intent and Supreme Court authority."

Professor Lynn McLain (01-EV-005) supports the proposed amendment on the ground that it "clarifies the rule and removes an arguable, though unintended, conflict with cases permitting extrinsic proof of bias and of contradiction . . . ."

Professor John C. O'Brien (01-EV-006) supports the proposed change to Rule 608(b). He states that some Evidence Rules use the term "credibility" to refer to "character for truthfulness" and that this usage "has created considerable confusion, particularly with respect to whether extrinsic evidence is precluded by Rule 608(b)." He contends that the problem of misuse of the term "credibility" is not limited to Rule 608(b) and that the Advisory Committee consider proposing similar amendments to replace the term "credibility" with the term "character for truthfulness in Rules 608(a), 609, and 610.

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (01-EV-009) recommends the

adoption of the proposed amendment to Rule 608(b), noting that it is "a modest and benign narrowing clarification of the existing rule." The Committee states that "the Advisory Committee is correct in suggesting that the proposed amendment brings the rule's language in line with its original intent and corrects a less precise locution that has led to unfortunate results in some cases."

The Federal Bar Association, Western Michigan Chapter (01-EV-012) supports the proposed amendment to Rule 608(b).

The State Bar of California's Committee on Federal Courts (01-EV-013) supports the proposed modification of Rule 608(b).

Professor James J. Duane (01-EV-014) recommends that the proposed change to Rule 608(b) should be made, "but only if the word 'credibility' is also replaced with 'character for truthfulness' throughout all of Rules 608, 609 and 610." He argues that the change proposed by the Advisory Committee "would result in a situation whether the word 'credibility' would mean one thing in Rule 608(b), and something quite different in two other parts of the same Rule, as well as the two rules that follow it."

The Committee on the United States Courts of the State Bar of Michigan (01-EV-016) supports the proposed amendment to Rule 608(b).

The National Association of Criminal Defense Lawyers (01-EV-017) "fully supports the proposed amendment to Evidence

Rule 608(b)." The Association notes that the proposed amendment "only makes more clear what the Rule already intends – that the prohibition against proving a specific instance of conduct by a witness with extrinsic evidence only applies where the specific instance of conduct is offered to attack or support the witness's character for truthfulness."

Attachment 2

Proposed Amendment to Rule 804(b)(3)

Committee Recommendation: That the Standing Committee Approve the Proposed Amendment for Release for Public Comment.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * * * *

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

* * * * *

(3) Statement against interest. – A statement ~~which~~ that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the

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

statement unless believing it to be true. But a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ under this subdivision in the following circumstances only: (A) if offered in a civil case or to exculpate an accused in a criminal case, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness, or ~~of the statement~~ (B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

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COMMITTEE NOTE

The Rule has been amended in two respects:

1) To require a showing of corroborating circumstances when a declaration against penal interest is offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (requiring a showing of corroborating

circumstances for a declaration against penal interest offered in a civil case).

2) To confirm the requirement that the prosecution provide a showing of "particularized guarantees of trustworthiness" when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia,* 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not "firmly-rooted"and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear "particularized guarantees of trustworthiness" to be admissible under the Confrontation Clause).

The "particularized guarantees" requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant's penal interest. *See Williamson v. United States,* 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Particularized guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia,* 527 U.S. at 138 (fact that statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest").

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory

statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall,* 165 F.3d 1095 (7th Cir. 1999)):

> (1) the timing and circumstances under which the statement was made;
>
> (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;
>
> (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
>
> (4) the party or parties to whom the statement was made;
>
> (5) the relationship between the declarant and the opponent of the evidence; and
>
> (6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.