

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

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

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

**DATE:** May 12, 2008

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

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## I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on May 1-2, in Boston.

The Committee seeks approval of two proposals, both for release for public comment:

1. Restyled Evidence Rules 101-415 — with the proviso that these rules, if approved, will be held until all the rules are restyled, so that the restyled rules will be released for public comment in a single package [publication deferred until proposed changes to entire set of rules are approved].
2. A proposed amendment to Evidence Rule 804(b)(3), the hearsay exception for declarations against penal interest, that would extend the corroborating circumstances requirement — currently applicable only to statements offered by criminal defendants — to statements against penal interest offered by the prosecution.

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## II. Action Items

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### B. Proposed Amendment to Evidence Rule 804(b)(3)

At its Fall 2007 meeting the Evidence Rules Committee voted to consider the possibility of an amendment to Evidence Rule 804(b)(3), the exception to the hearsay rule for declarations against interest. 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 for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The Committee reviewed a proposed amendment that would extend the corroborating circumstances requirement to declarations against penal interest offered by the prosecution. The possible need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused.

At the Fall 2007 meeting, the Committee deferred to a request from the Department of Justice representative to wait before proposing an amendment until the Department had time to review the proposal and prepare a position. At the Spring 2008 meeting, the DOJ representative stated that the Department supported publication of an amendment to Rule 804(b)(3) that would extend the corroborating circumstances requirement to declarations against penal interest offered by the government in criminal cases. Committee members accordingly expressed strong interest in proceeding with the amendment to Rule 804(b)(3). Members stated that the rule would provide an important guarantee of reliability in criminal prosecutions, and could rectify confusion and dispute among the courts — because some courts currently apply a corroborating circumstances requirement to statements offered by the government and some do not.

The Committee then discussed whether three issues that had been raised in the case law should be addressed in the text or note to a proposed amendment to Rule 804(b)(3). Those questions are as follows:

1. *Should the corroborating circumstances requirement be extended to civil cases?*  
Committee members noted that only one reported decision had extended the corroborating circumstances requirement to civil cases, and that there were no other significant reported cases on the subject. Given the dearth of authority, and the different policy questions that might be raised with respect to declarations against penal interest offered in civil cases, the Committee decided unanimously not to address the applicability of the corroborating circumstances requirement to civil cases.

2. *Should the amendment consider the applicability of the Supreme Court’s decision in Crawford v. Washington?* Under *Crawford v. Washington*, a declaration against penal interest cannot be admitted against an accused if it is testimonial. Committee members considered whether to provide a textual limitation in Rule 804(b)(3), i.e., that “testimonial” declarations against penal interest are not admissible against the accused. The Committee determined that this language was unnecessary, because federal courts after *Crawford* have uniformly held that if a statement is testimonial, it by definition cannot satisfy the admissibility requirements of Rule 804(b)(3). A statement is “testimonial” when it is made to law enforcement officers with the primary motivation that it will be used in a criminal prosecution — but such a statement cannot be a declaration against penal interest because the Supreme Court held in *Williamson v. United States* that statements made to law enforcement officers cannot qualify under the exception as a matter of evidence law. Because of the fit between the hearsay exception and the right to confrontation, Committee members saw no need to refer to the *Crawford* standard in the text of the rule — especially since to do so could create a negative inference with respect to the hearsay exceptions that are not amended. The Committee agreed, however, to add language to the Committee Note to explain why the text of the Rule does not address *Crawford*.

3. *Should the amendment resolve some disputes in the courts about the meaning of “corroborating circumstances”?* Committee members noted that there are a few decisions that define “corroborating circumstances” as prohibiting any consideration of independent evidence that corroborates the assertions of the hearsay declarant. These courts appear to be relying on pre-*Crawford* Confrontation Clause jurisprudence that is no longer applicable. Members noted, however, that the disagreement in the courts about the meaning of “corroborating circumstances” did not run very deep, and that the few courts that are relying on outmoded constitutional law are likely to change their approach when the issue is directly addressed. Eight members of the Committee voted not to include any definition of corroborating circumstances in the text or Committee Note to the proposed amendment. One member dissented.

After discussion, the Committee voted unanimously to refer the proposed amendment to Rule 804(b)(3), and the Committee Note, to the Standing Committee, with the recommendation that the amendment be released for public comment. Committee members noted that the Rule would have to be restyled as part of the restyling project, but resolved unanimously that the proposed substantive change should proceed on a separate track and timeline. Thus, Rule 804(b)(3), together with its substantive change if approved, will be restyled together with all the other hearsay exceptions in the third part of the restyling project.

The proposed amendment to Evidence Rule 804(b)(3), together with the proposed Committee Note, is attached as Appendix C to this Report.

**Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Rule 804(b)(3) be approved for release for public comment.**

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**PROPOSED AMENDMENT TO THE  
FEDERAL RULES OF EVIDENCE\***

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

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**(b) Hearsay exceptions.** — The following are not excluded

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by the hearsay rule if the declarant is unavailable as a

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witness:

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**(3) Statement against interest.** — A statement which

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was at the time of its making so far contrary to the

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declarant's pecuniary or proprietary interest, or so

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far tended to subject the declarant to civil or

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criminal liability, or to render invalid a claim by

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the declarant against another, that a reasonable

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person in the declarant's position would not have

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made the statement unless believing it to be true.

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A statement tending to expose the declarant to

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

15 criminal liability and offered ~~to exculpate the~~  
16 ~~accused~~ in a criminal case is not admissible  
17 unless corroborating circumstances clearly indicate  
18 the trustworthiness of the statement.

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**Committee Note**

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

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause. The Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), held that the Confrontation Clause bars “admission of testimonial

statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” Courts after *Crawford* have held that for a statement to be admissible under Rule 804(b)(3), it must be made in informal circumstances and not knowingly to a law enforcement officer — and those very requirements of admissibility assure that the statement is not testimonial under *Crawford*. See, e.g., *United States v. Johnson*, 495 F.3d 951 (8<sup>th</sup> Cir. 2007) (accomplice’s statements implicating himself and the defendant in a crime were not testimonial as they were made under informal circumstances to another prisoner, with no involvement of law enforcement; for the same reasons, the statements were admissible under Rule 804(b)(3)); *United States v. Franklin*, 415 F.3d 537 (6<sup>th</sup> Cir. 2005) (admissions of crime made informally to a friend were not testimonial, and for the same reason they were admissible under Rule 804(b)(3)).

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