Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification

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Contents

Introduction

The Problem Posed by Some of the Original Advisory Committee Notes

Assume that a lawyer is reading one of the Federal Rules of Evidence to determine whether a piece of evidence will be admissible or excluded at trial—for example, whether testimony from another trial can be admitted at a current trial. Assume further, as is not improbable, that the lawyer finds the language of the rule unclear. Thus, in our example, the relevant rule calls for admissibility if a party's "predecessor in interest" had a similar motive and opportunity to develop the testimony of the witness at the previous trial—but what does "predecessor in interest" mean?

Most lawyers faced with statutory ambiguity would seek clarification from some ready source of legislative intent. As it happens, the Federal Rules of Evidence have a ready source: the Advisory Committee Notes. These notes are printed by virtually every publisher of the Federal Rules of Evidence.

The Advisory Committee Notes are indeed *usually* a good source for determining the meaning of an evidence rule. In the 1970s, the Advisory Committee on Evidence Rules prepared a complete draft of proposed Federal Rules of Evidence. This draft was approved by the Judicial Conference of the United States, and then approved by the Supreme Court for referral to Congress. The original Federal Rules of Evidence were the product of the rule-making process established by Congress in the Rules Enabling Act, 28 U.S.C. § 2072.

A problem arises, however, where the rule drafted by the Advisory Committee was either rejected or substantially changed by Congress. Where that is the case, the Advisory Committee Note on the effected rule is a commentary on legislation that never came into being. A lawyer who looks at the Advisory Committee Note for guidance may become confused, or worse, when the Advisory Committee Note conforms by number, but not in substance, to the rule ultimately adopted.

While the most serious problem in reviewing the Advisory Committee Notes is their occasional dissonance with some of the rules actually adopted, there are other discrepancies in the original notes that must also be recognized. Some of the notes have cross-references to rules that were never adopted; some cross-references are simply erroneous. There

are also some "typos" that if read literally change the meaning of particular notes in a way not intended by the drafters.

The recently reconstituted Advisory Committee on Evidence Rules, which this author currently serves as reporter, has from its inception expressed an interest in correcting those original Advisory Committee Notes that might mislead lawyers and courts. The committee explored various means of achieving this goal, including the possibility of providing completely new Advisory Committee Notes to all the Federal Rules of Evidence. The committee ultimately determined, however, that the original Advisory Committee Notes could not be changed by way of rule making—nor would change even be advisable with respect to most of the notes. The Advisory Committee concluded that the original notes are invaluable legislative history, even if they are misleading in spots. Moreover, the committee concluded that the notes could not be amended through the rule-making process—if the notes were to be definitively changed or updated, it would have to happen in conjunction with changes to the rules themselves. And there was, understandably, no interest in a complete recodification of the Federal Rules of Evidence. A massive recodification effort would undoubtedly create more problems—by upsetting settled expectations and by creating inadvertent changes—than would be solved.

The Advisory Committee finally resolved to take a less drastic course—a course that would not require an amendment of any rules and yet would inform judges and lawyers about inaccurate or outmoded Advisory Committee Notes. The committee directed the reporter to prepare a list of Advisory Committee Notes that might be considered outmoded by congressional changes to a rule, or that were simply incorrect when written. The objective was to send this list to publishers of the Federal Rules of Evidence, so that it might be included either as an appendix or as a series of editorial notes to be placed within the respective Advisory Committee Notes that needed to be corrected.

At the Advisory Committee meeting where the reporter submitted the list of editorial comments, Joe Cecil of the Federal Judicial Center suggested that the Center might prepare the reporter's list as a pamphlet for publication. The Advisory Committee agreed wholeheartedly with this proposal, and expresses its gratitude to Joe and the Federal Judicial Center for all the work that has been contributed to this project.

This publication is styled as a set of editorial comments to the particular Advisory Committee Notes that are either inaccurate as written or that became outmoded when the proposed rule was changed by Congress. The proposed editorial notes are placed immediately after the statement in the original Advisory Committee Note that is inaccurate or misleading. In order to save space, the original Advisory Committee Notes are not reprinted *in toto*. Only the portions of the notes that need correcting are reproduced.

The Most Important Congressional Changes to the Advisory Committee's Draft Federal Rules

What follows, by way of introduction, is a short discussion of some of the major changes that Congress made to the Federal Rules of Evidence as proposed by the Advisory Committee. These are the rules that pose the most serious risk of misunderstanding when compared to the original Advisory Committee Notes.

1. Judicial Notice—Rule 201(g)

Federal Rule 201(g) determines the instructions that a court must give when a fact satisfies the standards for judicial notice proscribed in Rule 201(b). (Rule 201(b) provides that a fact is subject to judicial notice when it is not subject to reasonable dispute, either because it is generally known within the jurisdiction or because its accuracy can be readily determined by reference to unimpeachable sources.) The Advisory Committee Note to Rule 201(g) states as follows:

> Proceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases.

In fact, however, the rule *does* distinguish between civil and criminal cases. In civil cases, the jury must accept a judicially noticed fact as conclusive; in criminal cases, the court must instruct the jury "that it may, but is not required to, accept as conclusive any fact judicially noticed." Congress rejected the Advisory Committee proposal on the ground that a mandatory instruction was "contrary to the spirit of the Sixth Amendment right to a jury trial."

2. Presumptions—Rule 301

Federal Rule 301 provides that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." The rule is the culmination of a battle between two conflicting views of the effect a presumption should have. The views are known by the law professors who propounded them. Under the "Morgan" view, a presumption shifts the risk of nonpersuasion to the party against whom the presumption operates. Thus, if there is a presumption that a mailed letter is received, the party claiming non-receipt has the burden shifted to it to prove, by a preponderance of the evidence, that the letter was never received. In contrast, under the "Thayer" view, the opponent must merely offer credible evidence sufficient to support a finding contrary to the presumed fact in order to take the presumption out of the case. (The Thayer view has been termed the "bursting bubble" view of presumptions, because the presumption "bursts" when contrary evidence as to the presumed fact is introduced.) The practical difference between these views is in the quality and quantity of evidence required to overcome the presumption.

The Advisory Committee Note to Rule 301 is essentially a brief for the Morgan view of presumptions. It states that presumptions under the rule are given "the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it." The Advisory Committee reasoned that presumptions are based on a combination of probability and fairness. If that combination of factors is strong enough to warrant a presumption, it should also be strong enough to shift the risk of nonpersuasion to the party against whom the presumption operates. The Advisory Committee Note has this to say about the Thayer view:

> The so-called "bursting bubble" theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too "slight and evanescent" an effect.

The problem with the note is that Congress rejected the Advisory Committee's view of the matter. Rule 301 adopts the "bursting bubble"

view of presumptions—the party against whom the presumption operates need only present evidence sufficient to support a finding contrary to the presumed fact. When that occurs, the presumption vanishes from the case. Thus, a lawyer operating with a presumption in her favor should not rely on the Advisory Committee Note; if she did, she would have a misplaced confidence in the ability of the presumption to withstand contrary evidence.

3. Rule 406—Proof of Habit

Rule 406 provides that evidence of habit is admissible to prove conduct in accordance with the habit. The Advisory Committee Note to Rule 406 refers to a subdivision (b) of the rule governing the permissible methods of proving habit. The note states that habit can be proven only through opinion evidence or by proof of specific instances of conduct.

The problem is that there is no subdivision (b) to Rule 406. Congress believed that the method of proof of habit should be left to the courts on a case-by-case basis. So the Advisory Committee Note should not be relied on as a correct statement of the only possible means of proving habit. For example, habit could potentially be proven through reputation evidence.

4. Rule 501—Privileges

The rules on privilege provide the most notable example of Advisory Committee proposals that were rejected by Congress. As originally approved by the Supreme Court, Article V of the Federal Rules contained thirteen proposed rules. These rules defined nine separate privileges and delineated certain rules for controlling the use of privileges. Congress rejected the proposed Article V in its entirety. In its place, Congress adopted a single rule on privileges, Rule 501, which provides that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," except where state law provides the rule of decision, in which case the state law of privilege applies.

So a lawyer looking to the Advisory Committee Note for Rule 501 in particular, and the notes on Article V in general, would be looking to commentary on rules that were never adopted. This is not to say, however, that the Advisory Committee Notes to Article V are worthless or necessarily misleading in all respects. Most courts have held that the rec-

ommendations of the Advisory Committee and the Supreme Court are a useful guide, though not controlling in determining the existence and scope of a federal privilege. As Judge Edward Becker put it:

> [T]he proposed rules prove a useful reference point and offer guidance in defining the existence and scope of evidentiary privileges in the federal courts. . . . The Standards are the culmination of three drafts prepared by an Advisory Committee consisting of judges, practicing lawyers and academicians. . . . Finally, they were adopted by the Supreme Court. . . . The Advisory Committee in drafting the Standards was for the most part restating the law currently applied in the federal courts.

In re Grand Jury Investigation, 918 F.2d 374, 380 (3d Cir. 1990) (adopting a clergy–penitent privilege and relying on the Advisory Committee's proposed rule). *See also United States v. McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979) (applying the common-interest rule of the attorney–client privilege, citing proposed Rule 503(b)(3): "Although the Congress, in its revision of the Federal Rules of Evidence, deleted the detailed privilege rules . . . the recommendations of the Advisory Committee, approved by the Supreme Court, are a useful guide to the federal courts in their development of a common law of evidence.").

Similarly, in *Jaffee v. Redmond,* 116 S. Ct. 812 (1996), the Court, in adopting a psychotherapist–patient privilege, relied heavily on the fact that it was one of the nine specific privileges originally recommended by the Advisory Committee. The Court also stressed the reverse proposition—that if a privilege was not one of those proposed by the Advisory Committee, this would cut against its recognition under federal common law.

While the Advisory Committee Notes to Article V can provide some guidance, it would not be wise to treat the Advisory Committee proposals, or the notes, as a totally accurate description of federal common law. For example, federal common law protects confidential marital communications, while the proposed federal rule (505) did not. Under Rule 501, the common law governs and the privilege for confidential marital communications continues, something one would not know from looking at the proposed federal rule and its accompanying note. Moreover, the proposed marital privilege rule gave the criminal defendant the right to bar a spouse's testimony, whereas the Supreme Court has now held that the testifying spouse has the sole right to claim the spousal immunity privilege. *Trammel v. United States,* 445 U.S. 40 (1980). Also, proposed Rule

512, in conjunction with proposed Rule 511, would have provided more protection for privileged communications disclosed erroneously or overheard improperly than many common-law decisions. Finally, even in *Jaffee*, the Court, by extending the privilege to cover statements to social workers as well as statements to psychotherapists, went further than the Advisory Committee's proposal.

In sum, the Advisory Committee Notes to Article V provide one source for determining the federal law of privileges; but the source should not be given undue weight. And the specific Advisory Committee Note to Rule 501 has nothing at all to do with the rule ultimately adopted.

5. Rule 601—Competence

Rule 601 is a broad rule providing that every witness is presumed competent. The rule proposed by the Advisory Committee had only one sentence: "Every person is competent to be a witness except as otherwise provided by these Rules." The intent of the Advisory Committee was to wipe out all the ancient rules of incompetency—most particularly the Dead Man's statute. Dead Man's statutes generally provide that a person interested in an action brought against the estate of a dead person is incompetent to testify in his own behalf or interest as to a transaction or communication between himself and the dead person. The Advisory Committee Note to Rule 601 states that 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."

The Advisory Committee thought, correctly, that Dead Man's statutes are misguided. Under the Dead Man's Rule, a person is disqualified from testifying because it is thought that he will be able to lie on the witness stand without the possibility of contradiction from someone now dead. Yet this is really a concern over credibility, that the factfinder is easily able to comprehend, and that can be addressed adequately through argument. For every piece of fraudulent testimony screened out by the Dead Man's statute, there are probably three or more meritorious claims that are dismissed because of the failure of proof. Moreover, the Dead Man's statutes are so complicated that they give rise to much wasteful litigation as to their precise meaning. For example, the New York Dead Man's statute uses over 300 words to establish a rule of incompetency; not surprisingly, there are hundreds of reported cases attempting to di-

vine the meaning of the New York Dead Man's statute. (For a discussion of the New York statute, see Martin, Capra & Rossi, New York Evidence Handbook, ch.6, Aspen Press 1997.)

So the Advisory Committee was undoubtedly correct to condemn Dead Man's statutes and to reject them in proposed Rule 601. The problem, however, is that many states still have a Dead Man's statute. The Advisory Committee proposal left no room for state Dead Man's statutes, even where state law provided the rule of decision in federal court. The Advisory Committee Note to Rule 601 specifically declares that state Dead Man's statutes are not to have effect in diversity cases. Congress, however, was concerned that Dead Man's statutes represent state policy which should not be disregarded in diversity cases. Therefore, Congress added a second sentence to Rule 601, providing that "in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law." Thus, the Advisory Committee's Note is incorrect in its comment on the inapplicability of state Dead Man's statutes in diversity cases.

6. Rule 608—Impeachment with Bad Acts

Rule 608 provides for impeachment of a witness's character for veracity. Rule 608(b) states that a witness's character can be attacked through specific instances of misconduct on the witness's part. Thus, a witness can be asked on cross-examination about his having lied to Congress. The inference is that if he lied to Congress, he has a propensity to lie, and therefore he is more likely to be lying on the witness stand. The Advisory Committee's proposed Rule 608 permitted specific instances of conduct to be brought out on cross-examination of the witness being attacked, within the discretion of the trial judge, if probative on the witness's character for veracity, "and not remote in time." The Advisory Committee Note to Rule 608, provides, correspondingly, as follows:

> 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 specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time.

Congress, however, deleted the language precluding the use of acts remote in time to impeach a witness's character for veracity. Congress was

of the view that the reference to remoteness in time was confusing—would remoteness be determined by the time between the bad act and trial, or the time between the bad act and the incident involved at trial? Congress believed that the reference to judicial discretion in the rule was sufficient to protect against impeachment with truly stale bad acts.

Counsel confronted with bad acts of a witness that have occurred years before the trial should not place much reliance on the Advisory Committee's proposed total exclusion of acts that are remote in time. Congress's reference to judicial discretion is the key to making an argument to admit or exclude bad acts that occurred long ago. Contrary to the Advisory Committee's implication, there are no ironclad rules. Cases can be found admitting acts that might well be considered "remote in time." For example, in *United States v. Jackson*, 882 F.2d 1444 (9th Cir. 1989), the court found no error when the defendant, a disbarred lawyer charged with mail and tax fraud, was impeached with his acts of misappropriating client funds fourteen years earlier. The defendant argued that the acts could not be the subject of impeachment because they were "remote in time." The court found that while remoteness is a relevant factor, there is no time limit in Rule 608(b), and that the court did not abuse its discretion in allowing inquiry into the bad acts. The acts were clearly probative of the defendant's character for veracity. On the other hand, in *United States v. Kennedy*, 714 F.2d 968 (9th Cir. 1983), the court held that a witness's involvement with the Hell's Angels ten years earlier was properly excluded, the court remarking that the bad acts "detracted only minimally" from the witness's credibility.

Thus, remoteness, while not dispositive as it would appear to be under the Advisory Committee's Note, remains an important factor because the older the act, the less it says about the witness's current propensity to lie on the stand. Still, if the act occurred long ago and yet evidences dishonest character, it may be sufficiently probative to justify consideration by the factfinder.

7. Rule 609—Impeachment With Prior Convictions

Rule 609 provides that certain prior convictions of a witness can be introduced to impeach the witness's character for veracity. As originally drafted by the Advisory Committee and approved by the Supreme Court, rule 609(a) provided for automatic admission of all felony convictions, unless it had been more than ten years since the conviction or the witness's

confinement thereon, in which case Rule 609(b) provided that the conviction would be absolutely inadmissible. The rule further provided for admissibility of misdemeanor convictions, but only if they involved dishonesty or false statement. The Advisory Committee Note sets forth opposing views on the admissibility of prior convictions. One view, which Congress had previously adopted for the District of Columbia courts, provided for automatic admission of all felonies, and automatic admission of misdemeanors based on dishonesty or false statement. A more moderate view provided that crimes involving dishonesty should be automatically admitted, while other convictions (e.g., murder, bank robbery, etc.) should be excluded. The judgment behind this latter view was that only convictions involving dishonesty or false statement (also called "crimen falsi" convictions) were truly probative of the witness's character for truthfulness. A third view provided, in the words of the Advisory Committee, that "the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965)."

The Advisory Committee expressed no view on the merits of these conflicting proposals. It opted for the automatic admissibility view because Congress, in 1970, had taken this position in providing rules of evidence for the District of Columbia courts. See section 14-305 of the District of Columbia Code. Rule 609(a) was "drafted to accord with the congressional policy manifested in the 1970 legislation."

Apparently Congress had a change of heart on the matter when it reviewed the proposed Federal Rules of Evidence. As to automatic admission of felonies, the House Committee on the Judiciary report expresses concern over "the danger of unfair prejudice . . . and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused" that would result from automatic admission of all felony convictions for impeachment. The House's position was that *only* crimen falsi crimes should be admissible. Eventually, Congress settled on a modified approach in Rule 609(a), whereby all recent crimen falsi crimes would be automatically admitted, while felony convictions not involving dishonesty or false statement would be admissible if they pass a judicial balancing of probative value and prejudicial effect; criminal defendants receive a somewhat more protective balancing test with respect to non-crimen falsi crimes, in deference to their

constitutional right to testify. (The balancing process for non-crimen falsi crimes was clarified by a 1990 amendment to Federal Rule 609(a)(1).)

The end result is a complex rule. Anyone seeking to master it should not rely on the original Advisory Committee Note, however—it is completely out of sync with the rule as passed and later amended, since it describes the rule as automatically admitting all recent felony convictions, which is not the case. The Advisory Committee Comment to the 1990 amendment to Rule 609(a) is a far more accurate guide to the rule.

As to old crimes (i.e., where more than ten years have passed since conviction or confinement), Congress decided, contrary to the Advisory Committee's position, that they could have probative value in assessing the credibility of a witness. The Senate Committee on the Judiciary stated that "[A]lthough convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness." Accordingly, Rule 609(b) as adopted states that if more than ten years have passed since the date of conviction or confinement (whichever is later), the conviction can be admitted to impeach the witness, but only if the probative value of the conviction substantially outweighs the risk of prejudice. Yet the Rule 609(b) test, while exclusionary, does not exclude all old convictions. Thus a lawyer attempting to divine the meaning of Rule 609(b) should not look to the Advisory Committee Note—she would get the mistaken impression that convictions more than ten years old can never be admitted.

8. Rule 611(b)—Scope of Cross-Examination

There are basically two views concerning the proper scope of cross-examination of a witness. The "English Rule" states that the cross-examiner should be free to inquire about any information relevant to the case; in contrast, the traditional "American Rule" is that the cross-examiner may only ask questions that concern the subject matter of the direct examination (with the exception, of course, of questions pertaining to the witness's credibility). An illustration of the difference is instructive. Assume a wrongful death case in which the plaintiff is suing for the death of his wife. The plaintiff calls the next door neighbor who testifies that he saw the decedent walking across the street in front of her house whereupon she was run down by the defendant's bakery truck. On cross-examination, defense counsel wants to inquire into the neighbor's knowl-

edge of any extramarital affairs that the plaintiff had during the course of the plaintiff's marriage. Under the English Rule, this would be perfectly permissible; the information is relevant to the damages that the plaintiff has suffered from the loss of his wife. Under the American Rule, the information is, of course, equally relevant, but it cannot be brought up on cross-examination. The subject matter of direct dealt with the accident, which is a question of liability. The subject matter of the proposed cross-examination goes to damages.

The rationale for the American Rule is that a party generally should be free to follow its own order of proof without distraction from the adversary. The American Rule does not, of course, prevent the adversary from ever inquiring into a subject matter beyond the scope of a witness's direct examination. It operates simply as a timing device. The solution for the adversary is to call the witness to testify again during its own case.

The Advisory Committee opted for the wide-open cross-examination model in its proposed Rule 611(b), with the proviso that the trial judge would have discretion, in the interests of justice, to "limit cross-examination with respect to matters not testified to on direct examination." Quoting McCormick, the note states:``The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the opinion rule) leading in the trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only."

Despite this cogent argument, Congress rejected the Advisory Committee's proposal. In essence, Congress reversed the presumption in the Advisory Committee's proposed rule. As promulgated, Rule 611(b) limits cross-examination to the subject matter of direct and to questions of credibility, but grants the trial judge discretion to expand the scope of cross-examination in a particular case. Congress' position, as expressed by the House Committee on the Judiciary, was that the traditional American Rule "facilitates orderly presentation by each party at trial." The safety valve of judicial discretion was included to limit the hair-splitting arguments as to the proper "scope of direct" at trial and on appeal, that would otherwise surely occur under the American Rule. The result is that a lawyer seeking to determine the proper scope of cross-examination should not refer to the Advisory Committee Note.

9. Rule 611(c)—Leading Questions

Federal Rule 611(c) provides that leading questions are generally impermissible on direct examination, and generally permissible on cross-examination. The proviso is that when a party calls "a hostile witness, an adverse party, or a witness identified with an adverse party," the party may use leading questions on direct. The reason for restricting leading questions is that we prefer testimony of the witness to testimony of the lawyer. If the witness is sympathetic to the lawyer's cause (as is ordinarily the case when the witness is called on direct) the risk is that he will be too easily led to simply affirm the closed-ended statements of the lawyer. On the other hand, if the witness is unsympathetic to the lawyer's cause (as is ordinarily the case on cross-examination), there is a possibility that open-ended, non-leading questions could be evaded or exploited by the witness—therefore leading questions should generally be permitted on cross-examination.

The Advisory Committee's proposal for Rule 611(c) was somewhat more restrictive in permitting leading questions than the rule ultimately adopted by Congress. The Advisory Committee would have permitted leading questions on cross-examination in civil cases only. The Advisory Committee gave no explanation for this limitation. The proviso for leading questions on direct was limited to situations in which the witness was either an adverse party, or a person identified with an adverse party.

Congress believed that the permission for leading questions on cross-examination should be applicable to criminal as well as civil cases, "to reflect the possibility that in criminal cases a defendant may be entitled to call witnesses identified with the government, in which event the . . . defendant should be permitted to inquire with leading questions." (Statement of House Committee on the Judiciary). Moreover, Congress was of the view that leading questions should be permissible with respect to *all* hostile witnesses, not merely those witnesses who were adverse parties or identified with them. Consequently, the Advisory Committee Note to the rule gives an inaccurate impression—it describes the rule as more narrow in permitting leading questions than it actually is.

10. Rule 612—Writing Used to Refresh Memory

Federal Rule 612 addresses the problem of a witness using a writing to refresh memory. The rule provides that in certain circumstances the adversary has the right to have the writing produced, to cross-examine the

witness thereon, and to introduce into evidence the portions of the writing that relate to the testimony. This right is granted whenever the witness uses a document to refresh recollection while testifying. If the writing was used to refresh recollection before trial, inspection and use by the adversary is only granted if the trial court finds it necessary in the interests of justice.

The Advisory Committee's proposed Rule 612 was significantly broader in dealing with recollection refreshed before trial. The Advisory Committee noted that the bulk of the case law to that point had "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." The Advisory Committee Note criticizes this position, stating that the "risk of imposition and the need of safeguard" is just as great when the witness refreshes recollection pre-trial as it is when recollection is refreshed at trial. The risk in either case is that it is the writing, and not the witness, that is really testifying.

But Congress thought that the Advisory Committee's position would create a risk of abuse on the other side, i.e., by the party demanding disclosure. As the House Committee on the Judiciary put it, "permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial." In light of the concerns expressed by Congress, it appears that most trial judges have exercised discretion to prevent discovery of statements used before trial to refresh recollection, in order to prevent harassment and to ensure that lawyers are not inhibited in carefully preparing witnesses for their trial testimony. *See, e.g.*, *Cosden Oil v. Karl O. Helm A.G.*, 736 F.2d 1064 (5th Cir. 1984) (no abuse of discretion in refusing to require production of document used by witness to refresh his recollection prior to testifying). Yet a lawyer looking at the Advisory Committee Note to the rule would think that there is an absolute right to demand production of a document if it was used to refresh recollection before trial.

11. Rule 704—Opinion on Ultimate Issue

Rule 704 presents a different problem from the ones previously discussed, in that Congress did not reject the Advisory Committee's proposal at the time that the Federal Rules of Evidence were initially adopted. Rather, in 1984, Congress added a subdivision to Rule 704 that renders the original

Advisory Committee Note misleading. As originally proposed by the Advisory Committee and adopted without change by Congress, Rule 704 provided that "[T]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The reasoning behind the rule is sound: assuming that an expert provides a solid foundation and explanation on an issue for which the fact finder needs assistance, the expert should not be precluded from providing a logical and helpful conclusion to his testimony. The fact finder is simply left hanging if the expert is not permitted to cap off the testimony by stating a conclusion on the ultimate issue to which the expert is testifying. Sometimes, a conclusion on an ultimate issue ties the expert's testimony into a coherent whole, and as such it helps the jury to understand the issues in dispute. Illustrative is *United States v. Buchanan*, 787 F.2d 477 (10th Cir. 1986), a case in which the issue was whether an explosive device possessed by the defendant had to be registered as a firearm. This presented a difficult question of application of fact to law, given the variety of possible explosive devices and the complexity of federal firearms regulations. The government called an expert from the Bureau of Alcohol, Tobacco & Firearms, who led the jury through the regulations and described in detail how each of the characteristics of the device was covered by an applicable regulation. The agent concluded that the device was one that had to be registered under federal firearm regulations. While this was an ultimate conclusion that the jury would eventually have to reach, the court held that the conclusion was helpful to the jury, because the "question before the jury involved the consideration of a particular homemade device against an array of statutory definitions." Accordingly, the conclusion was properly admitted under Rule 704.

The Advisory Committee Note to Rule 704 states that the "ultimate issue" rule is abolished. It criticizes any per se limitation on ultimate issue testimony as "unduly restrictive, difficult of application, and generally serv[ing] only to deprive the trier of fact of useful information." The Advisory Committee Note asserts that that the ultimate issue rule can lead to "odd verbal circumlocutions". For example, "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."

The note provides a powerful argument for rejecting the ultimate issue rule. But Congress passed the Insanity Defense Reform Act of 1984,

one provision of which added a subdivision (b) to Rule 704. *See* 18 U.S.C. §§ 4241–4247. This amendment was promulgated outside the rule-making process, and so there is no Advisory Committee Note that can be referred to. Rule 704(b) provides that an expert in a criminal case is not permitted to testify to whether the defendant did or did not have the requisite mental state to commit the charged crime.

It is obvious that there is a conflict between the original Advisory Committee Note to Rule 704 and the subsequent amendment. Rule 704(b) plainly revives the ultimate issue rule in criminal cases. It raises the very anomaly referred to in the Advisory Committee Note—that an expert witness could say something about the mental state of the defendant, but simply cannot say the buzzword "intent" or "incapable of understanding the wrongfulness of his actions." The fact remains, however, that Congress has amended Rule 704, and as a result, the original Advisory Committee Note to the rule is misleading, at least as to ultimate issue testimony in criminal cases.

12. Prior Inconsistent Statements—Rule 801(d)(1)(A)

Under the common law, a statement of a witness that was inconsistent with his in-court testimony could be admitted to impeach the witness's credibility, but there was no special hearsay exception to allow such a statement to be admissible for its truth. The Advisory Committee thought that the common-law rule, distinguishing between impeachment and substantive use of prior inconsistent statements, was nonsensical. It noted that the major concern of the hearsay rule is that an out-of-court statement could not be tested for reliability because the person who made the statement could not be cross-examined about it. But with prior inconsistent statements, "[t]he declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter." Moreover, "[t]he 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." Finally, "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." For all these reasons, the Advisory Committee's proposed Rule 801(d)(1)(A) would have exempted all prior inconsistent statements of testifying witnesses from the hearsay rule. The Advisory Committee's

Note to the proposal makes this clear: "Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence."

Congress, however, cut back on the Advisory Committee proposal. In the form ultimately adopted, Rule 801(d)(1)(A) states that only those prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" are admissible as substantive evidence. The rationales for this limitation, as expressed by the House Committee on the Judiciary, are that: 1) if the statement was given under oath at a formal proceeding, "there can be no dispute as to whether the prior statement was made"; and 2) the requirements of oath and formality of proceeding "provide firm additional assurances of the reliability of the prior statement."

The requirements imposed by Congress in Rule 801(d)(1)(A) have little to do with the concerns that are at the heart of the hearsay rule. First, while the requirement of a formal proceeding tends to alleviate concern over whether the prior inconsistent statement was ever made, that concern has nothing to do with the hearsay rule. The making of the statement (as distinguished from its truth) is a question addressed by in-court testimony—the in-court witness testifies that the statement was or was not made, and this becomes a jury question. Second, the requirements of oath and formality do little to guarantee the reliability of the prior out-of-court statement. The whole basis for reliability of these statements is that the declarant is the same person as the witness who is testifying under oath at the time of trial, and can therefore be cross-examined about the prior statement. That reliability guarantee is not dependent on the circumstances under which the out-of-court statement was made. Thus, the limitations imposed by Congress do not seem to mesh very well with the concerns expressed.

However, while the Advisory Committee's proposal has a stronger basis in the theory of the hearsay rule, the fact remains that it is not the law. Therefore, the Advisory Committee's categorical assertion that prior inconsistent statements "are substantive evidence" is misleading.

13. Rule 803(6)—Business Records

The Advisory Committee's proposed exception for business records was somewhat broader than that ultimately adopted by Congress. As a result, the Advisory Committee Note to the business records exception, Rule

803(6), is somewhat misleading. The Advisory Committee proposal covered any record made "in the course of a regularly conducted activity." It specifically eschewed the term "business" on the ground that other types of regularly prepared records should not have to be shoehorned "into the fact patterns which give rise to traditional business records." This was so even though the definition of "business" in the predecessor statute to Rule 803(6) (28 U.S.C. 1732) covered far more than traditional profit-making activity.

Again, Congress was concerned about the breadth of the Advisory Committee proposal. The House Committee believed that there were insufficient guarantees of reliability in records made in the course of activities "falling outside the scope of business activities as that term is broadly defined in 28 U.S.C. 1732." Therefore, the version of Rule 803(6) adopted by Congress covers records "kept in the course of a regularly conducted business activity." "Business" is defined as including "business, institution, association, profession, occupations, and calling of every kind, whether or not conducted for profit."

In the end, there is probably not much difference between the Advisory Committee's proposed Rule 803(6) and the rule ultimately adopted. Whether the term "business" is excised from the language of the rule, or whether it is defined so broadly as to cover all regularly conducted activity, is probably of little moment. Nonetheless, it is confusing to read the Advisory Committee Note and then to look at the rule. The note should be read with the understanding that the Advisory Committee's push to liberalize the hearsay exception was tempered, at least somewhat, by Congress.

14. Rule 804(a)(5)—Deposition Preference

Rule 804 sets forth exceptions to the hearsay rule that are premised on the unavailability of the hearsay declarant. The rationale of these exceptions is that while statements falling within them are not as reliable as the in-court testimony of the declarant, they are better than nothing at all. Therefore, if the declarant is unavailable, statements falling within these exceptions are admissible for their truth.

Rule 804(a) defines unavailability for purposes of the Rule 804 exceptions. Rule 804(a)(5) sets forth the ground of "absence," and defines when a declarant can be considered absent so that a qualifying hearsay statement can be admitted. The Advisory Committee's proposed definition

of absence was that the proponent "has been unable to procure [the declarant's] attendance by process or other reasonable means." The Advisory Committee Note states categorically that "[t]he rule contains no requirement that an attempt be made to take the deposition of a declarant." The question of absence was to be determined, in the Advisory Committee's view, by "whether the declarant could be physically produced; if not, any statement qualifying under the Rule 804(b) exceptions would be admissible."

The House Committee on the Judiciary was in favor of requiring the proponent to attempt to depose a witness before a witness could be declared absent. The Senate Committee on the Judiciary disagreed with this position, calling a deposition requirement a "needless, impractical, and highly restrictive complication." Nonetheless, the House version was adopted in Conference and incorporated in Rule 804(a)(5). Now, before a declarant can be found absent for purposes of dying declarations, declarations against interest, and statements of pedigree (i.e., Rules 804(b)(2),(3), and (4)), the proponent must show that an attempt was made to depose the declarant. Such an attempt must be made even if the declarant is abroad, since both the Civil and Criminal Rules of Procedure provide a means for deposing witnesses outside the country. It should be noted, however, that there is no deposition preference for an absent declarant who has given prior testimony that would otherwise be admissible under Rule 804(b)(1). This is because, as the House recognized, prior testimony has already been cross-examined either at trial or deposition, so it makes little sense to require the proponent to try to depose the declarant again to give exactly the same kind of testimony.

Because of Congress's inclusion of a deposition preference in Rule 804(a)(5), the Advisory Committee Note to that rule, which treats absence only in terms of inability to physically produce the declarant at trial, should not be relied upon as a proper statement of the rule.

15. Rule 804(b)(1)—Prior Testimony

Congress and the Advisory Committee were in disagreement about the proper scope of the prior testimony exception to the hearsay rule. The justification for the exception is that the declarant has already been cross-examined under oath about the same subject matter previously, so the statement is reliable enough to be admitted despite the fact that it is hearsay. The dispute between Congress and the Advisory Committee was over

whether a party could be bound by the testimony if someone other than that party conducted the prior cross-examination.

The Advisory Committee proposal provided for admissibility if the party against whom it was offered *or a person with motive and interest similar to that of the party* had an opportunity to examine the declarant when the testimony was given. An example may help to illustrate how this would work. Assume a series of cases arising from an airplane accident. In the first case, a witness gives favorable testimony for the airline, and is cross-examined thoroughly by the first plaintiff's counsel. Under the Advisory Committee's version of Rule 804(b)(1), the transcript of this testimony could be admitted against subsequent plaintiffs, since the first plaintiff had a "similar motive and opportunity" to cross-examine the witness as the subsequent plaintiffs would have were the witness now available.

The House Committee on the Judiciary objected to the Advisory Committee's proposal on the ground that it is "generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party." The sole exception to this principle, according to the House Committee, is when a party's "predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness." The House Committee's view prevailed in Congress even though, in the words of the Senate Committee on the Judiciary, there is "considerable merit" to the Advisory Committee's version. The merit in the Advisory Committee position is that if the prior party conducted basically the same cross-examination that the current party would conduct if the witness were available, there is no unfairness in admitting the testimony against the current party; indeed, it is patently unfair to exclude such testimony when the alternative is no evidence at all, given the declarant's unavailability. The Senate Committee consoled itself, however, with the conclusion that the difference between the House and Advisory Committee versions was "not great."

As enacted, Rule 804(b)(1) provides that prior testimony is admissible "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony." This would seem to mean that in the hypothetical airplane cases posed above, the testimony favorable to the airline would not be admissible against subsequent plaintiffs. The first plaintiff could not be deemed a "predecessor in interest" of sub-

sequent unrelated parties, at least insofar as that term is ordinarily used in a legal context. The common understanding of "predecessor in interest" is, of course, that the first party is in some kind of privity relationship with the subsequent party. Accordingly, the Advisory Committee Note to Rule 804(b)(1) would appear to be misleading when it states that the rule allows "substitution of one with the right and opportunity to develop the testimony with similar motive and interest."

Interestingly, however, on this point the Advisory Committee Note may have more vitality than the words of the rule itself. For example, in *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978), the court construed the "predecessor in interest" language as requiring only a "sufficient community of interest" between the prior litigant and the party against whom the prior testimony is offered. No property, title, or juridical relationship was required for the prior litigant to be considered a "predecessor in interest." In *Lloyd*, an altercation between Lloyd and Alvarez resulted in the Coast Guard proceeding against Lloyd to revoke his license. Lloyd testified at the Coast Guard proceeding, and was cross-examined by counsel for the Coast Guard. The motion to revoke Lloyd's license was ultimately denied. In a subsequent action under the Jones Act, in which Alvarez claimed that the shipper was negligent in allowing Lloyd to work on the ship, the shipper offered Lloyd's testimony at the Coast Guard proceeding against Alvarez, even though Alvarez was not a party to the Coast Guard proceeding and there was no privity relationship between Alvarez and the Coast Guard.

The *Lloyd* court noted that Congress failed to define the term "predecessor in interest" in the rule; the court found telling the language from the Senate Committee that the intended change from the Advisory Committee proposal was "not great." It therefore held that the predecessor in interest requirement is satisfied whenever the prior litigant had a similar motive and opportunity to develop the testimony as the current litigant would have were the declarant available to testify. As Judge Stern cogently pointed out in a concurring opinion, this expansive construction of the term "predecessor in interest" effectively reads that term out of the rule—it defines the term as equivalent to "similarity of motive"— a requirement that is already part of the rule. (Judge Stern was of the view that the more honest approach would be to permit admission of testimony such as that involved in *Lloyd* under the residual exception to the hearsay rule.)

Subsequently, in *Horne v. Owens-Corning Fiberglass Corp.*, 4 F.3d 276 (4th Cir. 1993), an asbestos action, the court held that a deposition from another asbestos case was properly admitted against the plaintiff as prior testimony, even though she had no relationship whatever with the plaintiff in the previous litigation. The court relied *solely* on the Advisory Committee Note to Rule 804(b)(1), and stated that to preclude admissibility under that rule, a new party "must point up distinctions in her case not evidenced in the earlier litigation that would preclude similar motives of witness examination." In this case, the plaintiff was in the same situation with respect to asbestos exposure as was the prior plaintiff.

In sum, while the Advisory Committee Note has technically been superseded by a stricter Rule 804(b)(1), the courts have generally opted in this area for the Advisory Committee approach.

16. Residual Exception

A final aspect of dissonance between the Advisory Committee Notes on hearsay and the resulting Federal Rules involves the residual exceptions to the hearsay rule. The residual exceptions were proposed by the Advisory Committee, and adopted by Congress, to permit the admission of reliable hearsay that was "not specifically covered" by any of the foregoing categorical exceptions. The intent of the Advisory Committee and Congress was to provide some flexibility to admit clearly reliable statements that could not have been anticipated by the drafters.

The Advisory Committee proposed, and Congress adopted, two residual exceptions. One was placed in Rule 803 (subdivision 24), and one was placed in Rule 804 (subdivision (b)(5)). The former provision technically applied when the declarant was available to testify, while the latter provision technically applied when the declarant was unavailable. The exceptions were identically worded, and it soon became clear that it made little difference which of the two exceptions was invoked; regardless of enumeration, the question for residual hearsay was whether the statement was reliable, and whether it was, as both rules required, "more probative" than other evidence reasonably available to prove the point.

In 1994, the reconstituted Advisory Committee proposed a consolidation of the two residual exceptions into a single exception, Rule 807. The intent was to clarify any confusion resulting from two identically worded hearsay exceptions, and also to provide a means of adding new exceptions to Rules 803 and 804 without having to worry about the ref-

erence in Rules 803(24) and 804(b)(5) to "the foregoing exceptions." The proposal to consolidate the two residual exceptions into one became effective on December 1, 1997.

While the consolidation of two residual exceptions into one is not intended to have a substantive effect, it does render the original Advisory Committee Notes on the residual exceptions somewhat confusing. Obviously, the original Advisory Committee Notes refer to two residual exceptions, located in Rules 803 and 804, respectively. While the substance of the original Advisory Committee Note is still very useful in determining the scope of a residual hearsay exception, the note as a whole must be considered in light of the procedural shift to a new Rule 807.

Problem Notes and Suggested Corrections

1. Advisory Committee Note to Rule 104(b)

PROBLEM: Incorrect word that might change the meaning.

Advisory Committee's Note

. . . .

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 [*sic*] established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration

2. Advisory Committee Note to Rule 201(g)

PROBLEM: The rule as enacted distinguishes between civil and criminal cases.

Advisory Committee's Note

. . . .

Authority upon the propriety of taking judicial notice against an accused in a criminal case with respect to matters other than venue is relatively meager. Proceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases. *People v. Mayes,* 113 Cal. 618, 45 P. 860 (1896); *Ross v. United States,* 374 F.2d 97 (8th Cir. 1967). *Cf. State v. Main,* 94 R.I. 338, 180 A.2d 814 (1962); *State v. Lawrence,*

120 Utah 323, 234 P.2d 600 (1951). [Note: This treatment was rejected by Congress, which provided that judicial notice is not conclusive in criminal cases.]

3. Advisory Committee Note to Rule 301

PROBLEM: Internal reference to Rule 303, which was never adopted.

Advisory Committee's Note

. . . .

This rule governs presumptions generally. See Rule 302 for presumptions controlled by state law and Rule 303 for those against an accused in a criminal case. [Note: The latter rule was deleted by Congress.]

PROBLEM: The rule as enacted adopts the "bursting bubble" view of presumptions rather than the burden-shifting approach.

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909, 913 (1937); Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof,* 47 Harv. L. Rev. 59, 82 (1933); Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity,* 12 Stan. L. Rev. 5 (1959). [Note: This approach was rejected by Congress.]

The so-called "bursting bubble'' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too "slight and evanescent'" an effect. Morgan and Maguire, *supra,* at p. 913. [Note: This approach was adopted by Congress.]

4. Advisory Committee Note to Rule 402

PROBLEM: Internal reference to privilege rules that were not enacted.

Advisory Committee's Note

. . . .

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 [Note: The Advisory Committee proposals on Article V were subsequently rejected by Congress]; 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.

5. Advisory Committee Note to Rule 403

PROBLEM: Internal reference to a rule that was renumbered.

Advisory Committee's Note

. . . .

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 106 [Note: This is now Rule 105] and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor. . . .

6. Advisory Committee Note to Rule 404(a)

PROBLEM: Incorrect reference to another rule.

Advisory Committee's Note

. . . .

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 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 [Note: The correct reference is to Rules 608 and 609] for methods of proof. . . .

7. Advisory Committee Note to Rule 406

PROBLEM: Proposed Rule 406(b), dealing with the permissible forms of proof of habit, was deleted by Congress.

Advisory Committee's Note

. . . .

Subdivision (a). [Note: As proposed by the Advisory Committee, Rule 406 contained two subdivisions; subdivision (b) was deleted by Congress.] An oft-quoted paragraph, McCormick § 162, p. 340, describes habit in terms effectively contrasting it with character. . . .

Subdivision (b). [Note: This subdivision was deleted by Congress.] 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. . . .

8. Advisory Committee Note to Rule 410

PROBLEM: The initial Advisory Committee proposal was rejected, because Congress was concerned with its broad exceptions. Then there was an amendment in 1980. Therefore, the Advisory Committee Note to the 1980 amendment is the most appropriate indicator of legislative intent.

Advisory Committee's Note

[Note: The following material is the note accompanying the Advisory Committee's draft of the latest versions of the rule, promulgated in 1980, which sets forth the relevant legislative history. The rule was changed slightly after the note was written.]

The major objective of the amendment to rule [Fed. R. Crim. P.] 11(e)(6) [virtually identical to Rule 410] is to describe more precisely, consistent with the original purpose of the provision, what evidence relating to pleas or plea discussions is inadmissible. The present language is susceptible to interpretation which would make it applicable to a wide variety of statements made under various circumstances other than within the context of those plea discussions authorized by rule 11(e) and intended to be protected by subdivision (e)(6) of the rule. See United States v. Herman, 544 F.2d 791 (5th Cir. 1977), discussed herein.

Fed. R. Ev. 410, as originally adopted by Pub. L. 93-595, provided in part that "evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere* or an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer." (This rule was adopted with the proviso that it "shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule.") As the Advisory Committee Note explained: "Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise." The amendment of Fed. R. Crim. P. 11, transmitted to Congress by the Supreme Court in April 1974, contained a subdivision (e)(6) essentially identical to the rule 410 language quoted above, as a part of a substantial

revision of rule 11. The most significant feature of this revision was the express recognition given to the fact that the "attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching" a plea agreement. Subdivision (e)(6) was intended to encourage such discussions. As noted in H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 7 (1975), the purpose of subdivision (e)(6) is to not "discourage defendants from being completely candid and open during plea negotiations." Similarly, H.R. Rep. No. 94-414, 94th Cong., 1st Sess. 10 (1975), states that "Rule 11(e)(6) deals with the use of statements made in connection with plea agreements." (Rule 11(e)(6) was thereafter enacted, with the addition of the proviso allowing use of statements for purposes of impeachment and in a prosecution for perjury, and with the qualification that the inadmissible statements must also be "relevant to' the inadmissible pleas or offers. Pub. L. 94-64; Fed. R. Ev. 410 was then amended to conform. Pub. L. 94-149.)

. . . .

[Note: What follows next is the Advisory Committee's Note on the original version of Rule 410, which was rejected by Congress.]

Withdrawn pleas of guilty were held inadmissible in federal prosecutions in Kercheval v. United States, 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 1009 (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, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961), reexamined 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.

Pleas of *nolo contendere* are recognized by Rule 11 of the Rules of Criminal Procedure, although the law of numerous States is to the contrary. The present rule gives effect to the principal traditional characteristic of

the *nolo* plea, i.e., avoiding the admission of guilt which is inherent in pleas of guilty. This position is consistent with the construction of Section 5 of the Clayton Act, 15 U.S.C. § 16(a), recognizing the inconclusive and compromise nature of judgments based on *nolo* pleas. 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, 84 S. Ct. 794, 11 L. Ed. 2d 659; 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 Annot., 18 A.L.R.2d 1287, 1314.

Exclusion of offers to plead guilty or *nolo* has as its purpose the 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 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.

Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use for or against other persons will not impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster. See A.B.A. Standards Relating to Pleas of Guilty § 2.2 (1968). See also the narrower provisions of New Jersey Evidence Rule 52(2) and the unlimited exclusion provided in California Evidence Code § 1153.

9. Advisory Committee Note to Rule 412

Problem: Congress adopted the Advisory Committee's version rather than the Supreme Court's version; the Supreme Court had rejected the Advisory Committee's version.

[Note: There is no legislative history to the original Rule 412, nor is there legislative history to the amended Rule 412, which was passed as part of the Violent Crime Control and Law Enforcement Act of

1994. Congress did in that Act, however, adopt verbatim the version of Rule 412 recommended by the Advisory Committee. The Advisory Committee proposal had been rejected by the Supreme Court in favor of a slightly different version, but Congress chose the Advisory Committee's version over that adopted by the Supreme Court. Accordingly, the Advisory Committee's Note on amended Rule 412 is included here because it provides some indication of the legislative intent behind amended Rule 412.]

Advisory Committee's Note

Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

. . . .

10. Advisory Committee Note to Rule 501

PROBLEM: All of the proposed rules on privilege were rejected by Congress, in favor of the common-law approach.

Advisory Committee's Note

Deleted. Note: Congress rejected the Advisory Committee's proposals on privileges. The reasons given in support of the congressional action are stated in the report of the House Committee on the Judiciary, the Report of the Senate Committee on the Judiciary, and the Report of the House/Senate Conference Committee.

11. Advisory Committee Note to Rule 601

PROBLEMS: Congress added language concerning deference to state law, and the note makes reference to a rule that was not adopted by Congress.

Advisory Committee's Note

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. For the reasoning underlying the decision not to give effect to state statutes in diversity cases, see the Advisory Committee's Note to Rule 501. [Note: This proposal by the Advisory Committee, providing that federal rules of competency applied even where state law provided the rule of decision, was rejected by Congress.]

. . . .

Admissibility of religious belief as a ground of impeachment is treated in Rule 610. Conviction of crime as a ground of impeachment is the subject of Rule 609. Marital relationship is the basis for privilege under Rule 505 [Note: Rule 505 was deleted by Congress.]. 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.

12. Advisory Committee Note to Rule 607

PROBLEM: The note refers to the Advisory Committee's proposed Rule 801(d)(1), while the version of that rule enacted is narrower.

Advisory Committee's Note

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 801(d)(1). [Note: This categorical statement is not correct. Congress changed the Advisory Committee's version of Rule 801(d)(1). As enacted, Rule 801(d)(1)(A) exempts prior inconsistent statements from the hearsay rule only if the statements are made under oath at a formal proceeding.]

. . . .

13. Advisory Committee Note to Rule 608

PROBLEM: Congress deleted the Advisory Committee's "remote in time" limitation on admissibility.

Advisory Committee's Note

. . . .

(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 specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. [Note: The Advisory Committee's proposal precluded reference to bad acts that were remote in time. This provision was deleted by Congress in favor of a

case-by-case balancing of probative value and prejudicial effect.]. Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

. . . .

14. Advisory Committee Note to Rule 609

PROBLEM: Congress amended Rule 609(a)(1) to provide for balancing of probative value and prejudicial effect.

Advisory Committee's Note

As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick § 43; 2 Wright, Federal Practice and Procedure: Criminal § 416 (1969). The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of crimen falsi, without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of § 14-305 of the District of Columbia Code, P.L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving "dishonesty or false statement." Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. Whatever may be the merits of those views, this rule is drafted to accord with the congressional policy manifested in the 1970 legislation. [Note: The rule ultimately adopted by Congress, and as amended in 1990, provides for trial court balancing of probative value and prejudicial effect as to convictions not involving dishonesty or false statement.]

. . . .

PROBLEM: Rule 609(b) was amended to provide for admissibility in exceptional cases, rather than total preclusion of old crimes.

Subdivision (b). Few statutes recognize a 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. [Note: The rule ultimately adopted by Congress provides for admissibility of convictions more than ten years old when the probative value substantially outweighs the prejudicial effect.]

15. Advisory Committee Note to Rule 611

PROBLEM: Incorrect internal reference.

Advisory Committee's Note

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. The rule sets forth the objectives which he should seek to attain.

. . . .

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 403(b). [Note: The correct reference is to Rule 403; there is no subdivision (b).]

. . . .

PROBLEM: The Advisory Committee recommended the English view as to the permissible scope of cross-examination. Congress opted for the American view.

Subdivision (b). [Note: The Advisory Committee version of Rule 611(b) called for wide-open cross-examination on any relevant issue. Congress rejected this proposal and adopted a rule limiting the scope of cross-examination to the subject matter of the direct, with the trial court having discretion to broaden the scope. The Advisory Committee Note makes the case for the Committee's proposal and criticizes the view that was ultimately adopted by Congress.] 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 F. 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 607 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 A. 31 (1929). While this latter reason has merit, the matter is essentially one of the order of presentation and 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 (3d Cir. 1942); Butler v. New York Cent. R. R., 253 F.2d 281 (7th Cir. 1958); United States v. Johnson, 285 F.2d 35 (9th Cir. 1960); Union Automobile Indem. Ass'n v. Capitol Indem. Ins. Co., 310 F.2d 318 (7th Cir. 1962). In evaluating these considerations, McCormick says:

> The foregoing considerations favoring the wide-open or restrictive rules may well be thought to be fairly evenly balanced. There is another factor, however, which seems to swing the balance overwhelmingly in favor of the wide-open rule. This is the consideration of economy of time and energy. Obviously, the wide-open rule presents little or no opportunity for dispute in its application. The restrictive practice in all its forms, on

> the other hand, is productive in many courtrooms, of continual bickering over the choice of the numerous variations of the "scope of the direct" criterion, and of their application to particular cross-questions. These controversies are often reventilated on appeal, and reversals for error in their determination are frequent. Observance of these vague and ambiguous restrictions is a matter of constant and hampering concern to the cross-examiner. If these efforts, delays and misprisons were the necessary incidents to the guarding of substantive rights or the fundamentals of fair trial, they might be worth the cost. As the price of the choice of an obviously debatable regulation of the order of evidence, the sacrifice seems misguided. The American Bar Association's Committee for the Improvement of the Law of Evidence for the year 1937-38 said this:
>
> "The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the Opinion rule) leading in the trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only. Some of the instances in which Supreme Courts have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding.
>
> "We recommend that the rule allowing questions upon any part of the issue known to the witness . . . be adopted. . . ."

McCormick, § 27, p. 51. See also 5 Moore's Federal Practice ¶43.10 (2nd ed. 1964).

The provision of the second sentence, that the judge may in the interests of justice limit inquiry into new matters on cross-examination, is designed for those situations in which the result otherwise would be confusion, complication, or protraction of the case, not as a matter of rule but as demonstrable in the actual development of the particular case.

PROBLEM: Congress changed the Advisory Committee's proposed Rule 611(c), expanding the definition of hostile witnesses, and applying the rule to criminal as well as civil cases.

Subdivision (c).

. . . .

The final sentence deals with categories of witnesses automatically regarded and treated as hostile. Rule 43(b) of the Federal Rules of Civil Procedure has 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 Cas. Co. v. Kador, 225 F.2d 120 (5th Cir. 1955), and Degelos v. Fidelity & Cas. 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. [Note: Congress revised the last sentence of Rule 611(c) by expanding it to apply to criminal cases (allowing the defendant, for example, to use leading questions on the direct examination of a witness associated with the government), and by permitting the use of leading questions in the direct examination of any hostile witness.]

16. Advisory Committee Note to Rule 612

PROBLEM: Congress provided for less extensive disclosure of documents relied on by witnesses before trial.

Advisory Committee's Note

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, 62 S. Ct. 993, 86 L. Ed. 1322 (1942); Needelman v. United States, 261 F.2d 802 (5th Cir. 1958), *cert. dismissed*, 362 U.S. 600, 80 S. Ct. 960, 4 L. Ed. 2d 980, *reh. denied*, 363 U.S. 858, 80 S. Ct. 1606, 4 L. Ed. 2d 1739, 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 A. 64 (1917), and 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. [Note: The Advisory Committee proposal to require disclosure of documents relied on by witnesses before trial was rejected, in favor of a provision allowing disclosure only if the court, in its discretion, finds that it is necessary in the interests of justice.]

. . . .

17. Advisory Committee Note to Rule 704

PROBLEM: The application of Rule 704 was limited by Congress's later addition of Rule 704(b).

Advisory Committee's Note

The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order 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'n, 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. [Note: The inference in this note, that Rule 704 imposes no limitations on ultimate issue testimony, must be qualified in light of the later addition of Rule 704(b) by Congress. Rule 704(b) prevents an expert from testifying that a criminal defendant had or did not have the requisite mental state to commit the crime charged.]

18. Advisory Committee Note to Rule 801

PROBLEM: The reference to the residual exceptions is no longer accurate, because these exceptions have been combined into a new Rule 807.

Advisory Committee's Note

. . . .

(3) The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified exceptions "but having comparable circumstantial guarantees of trustworthiness." Rules 803(24) and 804(b)(6). [Note: The latter exception was enacted as (b)(5), and both exceptions have been transferred to a single Rule 807 by a 1997 amendment.] 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.

PROBLEM: Congress modified Rule 801(d)(1)(A) to include an under oath requirement.

(A) Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. [Note: The Advisory Committee proposal was modified by Congress to provide for substantive admissibility only if the prior statement was made under oath at a formal proceeding.] As has been said by the California Law Revision Commission with respect to a similar provision:

> Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

Comment, California Evidence Code § 1235. See also McCormick § 39. The Advisory Committee finds these views more convincing than those expressed in People v. Johnson, 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968). The constitutionality of the Advisory Committee's view was upheld in California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.

19. Advisory Committee Note to Rule 803

PROBLEM: The note on Rule 803(6) refers to a somewhat broader standard of covered activity than the "business" activity ultimately set forth in the rule by Congress.

Advisory Committee's Note

. . . .

Exception (6) . . . 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, 287; 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 routineness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The rule 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." [Note: This terminology was rejected by Congress.]

PROBLEM—Congress changed Rule 803(6) in a way that could arguably affect the business duty requirement that was traditionally part of the rule.

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 regular 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, 78 S. Ct. 1139, 2 L. Ed. 2d 1148; 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, pp. 391-92. 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 rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity. [Note: Congress's amendment to the rule makes it unclear whether the informant must be acting in the course of business activity; but Congress does not appear to have intended to reject the business duty requirement].

PROBLEM: Rule 803(24) has been transferred to Rule 807

Exception (24). [Note: Rule 803(24) has been transferred to Rule 807. The Advisory Committee Note on Rule 803(24) has accordingly been transferred to that Rule as well.]

20. Advisory Committee Note to Rule 804

PROBLEM: Congress added a deposition preference to Rule 804(a)(5).

Advisory Committee's Note

. . . .

Subdivision (a). . . . If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant. [Note: A deposition preference was included by Congress when unavailability is asserted on grounds of absence. See the text of Rule 804(a)(5).]. . . .

PROBLEM: Congress added a predecessor in interest requirement to Rule 804(b)(1).

Exception (1). . . . 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. 487–88. The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered. The rule departs to the extent of allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest. The position is supported by modern decisions. McCormick § 232, pp. 489–90; 5 Wigmore § 1388. [Note: This approach was rejected by Congress, which provided that prior testimony cannot be used against a party unless that party or a predecessor in interest had a similar motive and opportunity to develop the testimony.]

PROBLEM: The dying declaration exception was renumbered (because the exception for statements of recent perception was deleted), and the Rule was limited to civil cases and homicide cases.

[Note: The exception for dying declarations, described in the Note as Exception (3), became Rule 804(b)(2) as enacted. The change in numbering was due to the deletion by Congress of the Advisory Committee's proposal for an exception for statements of recent perception. Also, the dying declaration exception was amended by Congress so as to be available only in civil cases and prosecutions for homicide].

Exception (3). The exception is the familiar dying declaration of the common law, expanded somewhat 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. 223, n. 4. Kansas by decision extended the exception to civil cases. Thurston v. Fritz, 91 Kan. 468, 138 P. 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 suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. Unavailability is not limited to death. See subdivision (a) of this rule. Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of firsthand knowledge is assured by Rule 602.

. . . .

PROBLEM: The exception for declarations against penal interest was renumbered, and statements against social interest were rejected as a basis for admissibility. Also, there is an incorrect internal reference.

[Note: The exception for statements against interest, described below as Exception (4), became Rule 804(b)(3) as enacted. The change in numbering was due to the deletion by Congress of the Advisory Committee's proposal for an exception for statements of recent perception. Also, the statement against interest exception was amended by Congress so as not to cover statements against the declarant's "social" interest.]

Exception (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 803(d)(2) [Note: Now Rule 801(d)(2)], 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. Highman 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 exception 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. 548-49. Another is to allow statements tending to expose declarant to hatred, ridicule, or disgrace, the motivation here being considered to be as strong as when financial interests are at stake. McCormick § 255, p. 551. . . .

PROBLEM: The exception for statements of pedigree was renumbered.

[Note: The exception for statements of pedigree, described below as Exception (5), became Rule 804(b)(4) as enacted. The change in numbering was due to the deletion by Congress of the Advisory Committee's proposal for an exception for statements of recent perception.]

Exception (5). The general common law requirement that a declaration in this area must 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.

PROBLEM: Rule 804(b)(5) has been transferred to Rule 807.

Exception (6). [Note: The residual exception, numbered by the Advisory Committee as Exception (6), was enacted as Rule 804(b)(5). Rule 804(b)(5) has been transferred to Rule 807. The Advisory Committee Note on Rule 804(b)(5) simply referred to the commentary under the identical Rule 803(24), which in 1997 was combined with Rule 804(b)(5) into a single Rule 807.]

21. Advisory Committee Note to Rule 807

PROBLEMS: This rule is a combination of two old rules, so the Advisory Committee Notes to the old rules should be transferred. Also, the Advisory Committee's original proposal on residual exceptions was changed by Congress: Congress added a notice requirement, and also the requirement that the hearsay be probative of a material fact and more probative than any other evidence reasonably available. Also, there are incorrect internal references.

Note: Below is the Advisory Committee's original note to what was then Rule 803(24). In 1997, Rule 803(24) was combined with Rule 804(b)(5) and transferred to a new Rule 807.

Advisory Committee Note to Rule 803(24)

The preceding 23 exceptions of Rule 803 and the first five [Note: Only four were actually enacted] exceptions of Rule 804(b) *infra*, are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exception (24) and its companion provision in Rule 804(b)(6) [Note: The Rule 804 residual exception was originally enacted as 804(b)(5)] are accordingly included. They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102. See Dallas County v. Commercial Union Assur. Co., Ltd., 286 F.2d 388 (5th Cir. 1961). [Note: Congress added several limitations to the residual exception proposed by the Advisory Committee: 1) the hearsay must be more probative than other evidence reasonably available; 2) the statement must be offered as evidence of a "material fact"; and 3) the proponent must give pretrial notice.]

[The original Advisory Committee Note to Rule 804(b)(5) stated as follows: "In language and in purpose, this exception is identical with Rule 803(24). See the Advisory Committee's Note to that provision."]