Case Law Divergence from the Federal Rules of Evidence

DANIEL J. CAPRA

Reed Professor of Law
Fordham University School of Law

FEDERAL JUDICIAL CENTER
2000

This publication was undertaken in furtherance of the Federal Judicial Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the author and not necessarily those of the Federal Judicial Center.

This page is blank in the printed version of the report.

Contents

Introduction, 1
Examples of Case Law In Conflict with the Text of the Rule, the Committee Note, or Both, 3
1. Rule 106, 3
2. Rule 403, 4
3. Rule 404(a), 4
4. Rule 407, 5
5. Rule 601, 6
6. Rule 607, 6
7. Rule 608(b), 7
8. Rule 613(b), 7
9. Rule 704(b), 8
10. Rule 801(c) (Implied Assertions), 9
11. Rule 801 Committee Note on Confrontation, 9
12. Rule 803(4), 10
13. Rule 803(5), 11
14. Rule 803(6), 11
15. Rule 803(8)(B), 12
16. Rule 803(8)(B) and (C), 12
17. Rule 804(b)(1), 13
18. Rule 804(b)(3), 14
19. Rule 805, 14
20. Rule 806, 15
21. Rule 807, 15
Examples of Case Law Development Where the Rule and Committee Note Are Silent, 17
1. Rule 103, 17
2. Rule 104(a), 18
3. Rule 301, 19
4. Rule 404(b), 20
5. Rule 410, 21
6. Article VI, 22
7. Rule 615, 23
8. Rule 801(d)(1)(B), 23
9. Rule 803(3), 24
10. Rule 803(18), 25
11. Rule 1101, 25

This page is blank in the printed version of the report.

Introduction

Assume that a lawyer in federal court is trying to determine whether a piece of evidence will be admissible at trial—for example, the lawyer wants to know whether a videotape can be admitted as a learned treatise. Obviously, the best place to start is with the text of the Federal Rules of Evidence. But if the lawyer thinks that the text of a particular rule plainly answers the question of admissibility, or simply leaves the question open for argument, that lawyer will often be wrong. That is because the case law has diverged from the text of the Federal Rules on many important points. Thus, in our example, the Rule admitting learned treatises does not on its face permit introduction of videotapes, and yet such tapes have been admitted under the case law.

The Advisory Committee on Evidence Rules, which this author currently serves as Reporter, has expressed concern that the divergence between case law and the text of the Rule might create a trap for the unwary. See generally Becker & Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules,* 60 Geo. Wash. L. Rev. 857, 868 (1992) (noting the need to "resolve discrepancies between the plain text of the Federal Rules and the generally shared interpretation of the Rules deriving from preexisting common law traditions"). One way to correct this divergence might be to propose an amendment to the text of any Rule subject to divergent case law. But the Advisory Committee is acutely aware of the costs of amending an evidence rule—amendments can lead to the disruption of settled expectations, and may create further problems of interpretation and divergence.

The Advisory Committee resolved to take a less drastic course—a course that would not require an amendment of any rules and yet would highlight for lawyers and judges the existence of divergent case law. The committee directed the Reporter to prepare this report in an effort to increase the awareness of counsel practicing in federal courts, as well as judges, about the possibility that case law has diverged from the text of some of the Federal Rules of Evidence. This divergence comes in two forms: (1) where the case law (defined as case law in at least one circuit) is flatly inconsistent with the text of the Rule, the Committee Note explaining the text, or both; and (2) where the case law has provided sig-

nificant development on a point that is not addressed by either the text of the Rule or the Committee Note.

This report highlights the major instances in which case law has diverged from an applicable Rule. Before proceeding to these illustrations, it is important to stress several qualifications on the scope of this report. First, there is no intent to imply that any of the case law discussed herein is incorrect or "wrongly decided." The goal of this report is to point out the case law divergence from the Federal Rules of Evidence, without commenting on the merits of that divergence. Indeed, commentators have opined that much of the divergent case law is sensible and well decided. See, e.g., Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence,* 71 Ind. L.J. 551, 571 (1996) ("Sometimes we must look beyond the words of the Rules to understand evidentiary doctrine. We must do so when the Rules are not definitive or ambiguous . . . but sometimes even when the text is clear.").

Second, there is no intent to imply that any of the Rules discussed herein are problematic or need to be amended. The fact that the case law diverges from the Rule might be relevant to the need for an amendment, but it is certainly not dispositive. Whether a particular Rule should be amended is a complex question that is well beyond the scope of this report.

Third, there is no attempt to be comprehensive in the treatment of the case law construing the Evidence Rules discussed herein. Divergent case law is defined here as case law in at least one circuit that has diverged from the text of the particular Rule. This report does not purport to provide a treatise-like discussion of all the pertinent case law, from all the circuits, construing a particular Rule. The goal of this report is to raise "red flags" with lawyers and judges, by providing basic information about areas in which case law can be found that diverges from the text of the Federal Rules of Evidence.

Examples of Case Law In Conflict with the Text of the Rule, the Committee Note, or Both

1. Rule 106

Rule 106 sets forth a rule of completeness, providing that when a party introduces a writing or recorded statement, the adversary may "require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106 by its terms permits the adversary to introduce completing statements only when the proponent introduces a *written or recorded* statement. The language of the Rule does not on its face permit completing evidence when the proponent introduces an oral statement, such as the inculpatory parts of a criminal defendant's oral confession.

Some courts have found, however, that Rule 106, or at least the principle of completeness embodied therein, requires admission of omitted portions of an *oral* statement when necessary to correct a misimpression. See *United States v. Tarantino,* 846 F.2d 1384 (D.C. Cir. 1988) (prior oral statements of a government witness were properly offered on redirect examination, since the defendant had used portions of the statements in cross-examination and the omitted portions placed the statements in context). See also the discussion in *United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (noting the case law permitting criminal defendants to offer omitted parts of statements they make to law enforcement officers that provide exculpatory information). Compare *United States v. Harvey,* 914 F.2d 966 (7th Cir. 1990) (Rule 106 does not apply to oral statements).

Moreover, some courts have held that Rule 106 can operate as a de facto hearsay exception when the opponent opens the door and creates a misimpression by offering only part of a statement. In other words, completing evidence has been found admissible under Rule 106 even if it would otherwise be hearsay. See *United States v. Sutton,* 801 F.2d 1346, 1369 (D.C. Cir. 1986) ("Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that that proffered evidence should be considered contemporaneously"). See also C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5078, at 376 (supporting this approach). Such a reading of the Rule is not apparent from the text or Committee Note. See *United States v. Wilkerson,* 84 F.3d 692 (4th Cir. 1996)

(interpreting Rule 106 as purely a timing device, not as a rule permitting the admission of otherwise inadmissible evidence).

2. Rule 403

Rule 403 provides that a trial judge may exclude proffered evidence if its probative value is substantially outweighed "by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Of the negative factors listed that would support exclusion, only one refers to the jury directly—the danger of "misleading the jury." This seems to indicate that other negative factors mentioned in the Rule, specifically the danger of unfair prejudice and confusion of the issues, must be taken into account in a bench trial. Yet courts have held to the contrary, reasoning that unfair prejudice and confusing evidence will not have the same negative impact on the judge as they would have on the jury. See, e.g., *Schultz v. Butcher,* 24 F.3d 626 (4th Cir. 1994) (trial court erred in excluding evidence in a bench trial on the ground of its prejudicial effect); *Gulf States Utils. v. Ecodyne Corp.,* 635 F.2d 517 (5th Cir. 1981) (the portion of Rule 403 referring to prejudicial effect and confusing evidence "has no logical application in bench trials").

3. Rule 404(a)

Rule 404(a) states that no party is permitted in the first instance to introduce character evidence to prove action in accordance with character, except for the "accused"—that is, only the "accused" can open the door to circumstantial use of character evidence. Thus, the Rule seems explicit in prohibiting the circumstantial use of character evidence in civil cases. The Committee Note confirms this exclusionary principle.

Yet some courts have permitted civil defendants to use character evidence circumstantially "when the central issue in a civil case is by its nature criminal." *Palmquist v. Selvik,* 111 F.3d 1332, 1342 (7th Cir. 1997) (assuming that character evidence could be admissible in certain civil cases); *Perrin v. Anderson,* 784 F.2d 1040 (10th Cir. 1986) (police officers charged with excessive force are permitted to prove the decedent's violent character).

4. Rule 407

Rule 407 prohibits the admission of actions taken after an injury or harm which, if taken previously, would have made the injury or harm less likely to occur, if the remedial action is offered to prove negligence, culpable conduct, product defect, design defect, or failure to warn. The Rule by its terms appears to preclude evidence of any action by *anyone* that would have made the injury or harm less likely to occur. Courts have held, however, that subsequent remedial measures are not excluded by Rule 407 if the measure is taken by someone *other than the defendant*, that is, if it is a "third party repair." See, e.g., *TLT-Babcock, Inc. v. Emerson Elec. Co.,* 33 F.3d 397 (4th Cir. 1994) (design change not excluded by Rule 407 where the change was made by an entity that was not a party to the case); *Dixon v. International Harvester Co.,* 754 F.2d 573 (5th Cir. 1985) (repair by tractor owner after an accident not excluded when offered against tractor manufacturer).

Also, the Rule states that "impeachment" is a proper purpose for admitting subsequent remedial measures. Taken literally, this would mean that a plaintiff in a product liability case could offer proof of a subsequent remedial measure to "impeach" a defense witness's assertion that the product used by the plaintiff was safely designed. Yet courts have generally limited the use of subsequent remedial measures when offered for the purposes of impeachment by way of contradiction. The fear is that this exception would swallow the rule of exclusion. See, e.g., *Harrison v. Sears, Roebuck & Co.,* 981 F.2d 25 (1st Cir. 1992) (a desire merely to undercut an expert's credibility cannot be sufficient to trigger the impeachment exception to Rule 407, or else the exception would swallow the rule of exclusion); *Kelly v. Crown Equip. Co.,* 970 F.2d 1273 (3d Cir. 1992) (subsequent remedial measure cannot be offered for simple contradiction of expert's statement that a design was safe).

Thus, the "impeachment" permitted by the Rule has been limited to cases in which defense witnesses have made extravagant claims of safety. See *Wood v. Morbark Indus.,* 70 F.3d 1202 (11th Cir. 1995) (post-accident design change admissible for impeachment where defense witness testified that the original design was the safest possible design); *Muzyka v. Remington Arms Co.,* 774 F.2d 1309 (5th Cir. 1985) (design change should have been admitted for impeachment where defense witnesses testified that the product was the best and safest product of its kind).

5. Rule 601

Rule 601 essentially states that all questions that had been treated previously as matters of competency are now matters of credibility for the fact finder. The Committee Note, elaborating on the Rule, indicates an intent to prohibit a trial judge from excluding a witness on grounds of incompetence. Yet courts have excluded witnesses who have been found incapable of testifying in a competent fashion. See, e.g., *United States v. Gates,* 10 F.3d 765, 766 (11th Cir. 1993) ("Notwithstanding Rule 601, a court has the power to rule that a witness is incapable of testifying, and in an appropriate case it has the duty to hold a hearing to determine that issue."); *United States v. Gutman,* 725 F.2d 417, 420 (7th Cir. 1984) (trial court retains the power, and sometimes the duty, to hold a hearing "to determine whether a witness should not be allowed to testify because insanity has made him incapable of testifying in a competent fashion.").

6. Rule 607

Rule 607 states categorically that a party can impeach any witness it calls. On its face, the Rule permits the following scenario:

1. In a criminal case, a witness would testify at trial that the defendant was not at the scene of the crime, yet the witness stated previously to a police officer that the defendant committed the crime.
2. The prior statement to the police officer could not be admitted as substantive evidence because it is hearsay.
3. The prosecutor calls the witness, knowing that the witness will give testimony favorable to the defendant, and then "impeaches" the witness with the prior statement to the police officer, on the ground that it is inconsistent with the witness's in-court testimony.

Thus, Rule 607 by its terms permits the prosecutor to proffer prior inconsistent statements, not made under oath (and therefore not admissible for their truth under Rule 801(d)(1)(A)), in the guise of impeachment.

Despite the affirmative and permissive language of the Rule, the courts have held that a prosecutor cannot call a witness solely to impeach that witness, because to allow this practice would undermine the hearsay rule. See, e.g., *United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985) ("The prosecution, however, may not call a witness it knows to be hostile for the primary purpose of eliciting otherwise inadmissible impeachment

testimony, for such a scheme merely serves as a subterfuge to avoid the hearsay rule. The danger in this procedure is obvious."); *United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975) (conviction reversed on the ground that the government should not have been permitted to call a witness for no other purpose than to impeach him). See generally Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence,* 68 Tex. L. Rev. 745 (1990) (noting this and other situations in which courts have felt compelled to diverge from the text of an Evidence Rule in order to reach a just result).

7. Rule 608(b)

Rule 608(b) states that specific instances of the conduct of a witness, "for the purpose of attacking or supporting the witness' *credibility* . . . may not be proved by extrinsic evidence." (Emphasis added.) Read literally, "the first sentence of (b) could bar extrinsic evidence for bias, competency and contradiction impeachment, since they too deal with credibility." American Bar Association Section on Litigation, *Emerging Problems Under the Federal Rules of Evidence* 161 (3d ed. 1998).

Yet courts have held that the Rule 608(b) extrinsic evidence ban is not applicable unless the sole reason for the impeachment is to attack the witness's character for veracity. See, e.g., *United States v. Winchenbach,* 197 F.3d 548 (1st Cir. 1999) (impeachment with proof of prior inconsistent statement is governed by the balancing process of Rule 403 rather than the absolute exclusion of Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384, 1409 (D.C. Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Lindemann,* 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403, not Rule 608(b)).

8. Rule 613(b)

Rule 613(b) and the Committee Note both indicate that it is not necessary to give a witness an opportunity to examine a prior inconsistent statement before that statement is admissible to impeach the witness. All that is necessary is that the witness be given an opportunity at some point in the trial to explain or deny the statement. The Rule thus rejects the common-law rule from Queen Caroline's case, under which the propo-

nent was required to lay a foundation for the prior inconsistent statement at the time the witness testified.

Despite the language of the Rule and Note, however, some courts have reverted to the common-law rule. See, e.g., *United States v. Sutton,* 41 F.3d 1257 (8th Cir. 1994) (trial judge properly excluded testimony as to inconsistent statements by a prosecution witness on the ground that the witness had not been given an opportunity to explain or deny the prior statement while cross-examined by defense counsel); *United States v. Marks,* 816 F.2d 1207, 1211 (7th Cir. 1987) (trial judge is entitled, despite the language of Rule 613(b), "to conclude that in particular circumstances the older approach should be used in order to avoid confusing witnesses and juries").

9. Rule 704(b)

Rule 704(b) seems to prohibit all expert witnesses from testifying that a criminal defendant either did or did not have the requisite mental state to commit the crime charged. It states that "[n]o expert witness . . . may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto."

But some courts have held (and others have implied) that the Rule is applicable only to mental health experts, and therefore does not prohibit intent-based testimony from law enforcement personnel, such as narcotics agents. See, e.g., *United States v. Gastiaburo,* 16 F.3d 582 (4th Cir. 1994) (stating that Rule 704(b) does not apply to the testimony of an expert law enforcement agent); *United States v. Lipscomb,* 14 F.3d 1236 (7th Cir. 1994) (expressing sympathy with such a position, but finding it unnecessary to decide the matter).

Other courts, while technically applying the Rule 704(b) limitation to all expert witnesses, have applied it in such a way as to nullify its impact—permitting, for example, an expert to opine as to the mental state of a hypothetical person whose fact situation mirrors the fact situation at issue. See, e.g., *United States v. Williams,* 980 F.2d 1463 (D.C. Cir. 1992) (permitting a law enforcement agent to testify that a hypothetical person carrying Ziploc bags, each containing small amounts of drugs, was intending to distribute them; the hypothetical matched the facts of the case).

10. Rule 801(c) (Implied Assertions)

Rule 801(c) defines hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." The Committee Note states that "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted" is excluded from the definition of hearsay "by the language of subdivision (c)." This would mean that a statement would be hearsay only if it were offered to prove the truth of the express assertion in the statement; offering it to prove the truth of any implied assertion would escape hearsay proscription. So, for example, the statement "It is raining cats and dogs" would be admissible to prove it is raining; the statement would not be offered to prove the express assertion that cats and dogs are falling from the sky.

This highly constricted definition of hearsay has generally been rejected by the courts. The courts generally state that statements are hearsay if (1) they are offered to prove the truth of a matter *implied* in the statement and (2) the speaker *intended* to communicate that implication. See, e.g., *United States v. Reynolds,* 715 F.2d 99 (3d Cir. 1983) (rejecting the government's suggestion that only a statement's express assertion should be considered in deciding whether it constitutes hearsay); *Lyle v. Koehler,* 720 F.2d 426, 433 (6th Cir. 1983) (concluding that letters were hearsay because "the inferences they necessarily invite form an integral part of the letters"; the reference to "matters asserted" in Rule 801(c) covers both express and implied assertions); *United States v. Jackson,* 88 F.3d 845, 848 (10th Cir. 1996) (stating that the important question under Rule 801(c) is whether the assertion, express or implied, "is intended"). See also Milich, *Re-examining Hearsay Under the Federal Rules: Some Method for the Madness,* 39 Kan. L. Rev. 893 (1991) (arguing for an intent-based test in determining whether implied assertions are hearsay).

11. Rule 801 Committee Note on Confrontation

The original Committee Note to Rule 801 includes an extensive discussion of the law of confrontation as it existed at the time the Rules were proposed. This Note is quite outdated, since the Supreme Court has substantially developed and revised its interpretation of the Confrontation Clause since that time. For example, the Committee Note draws a fairly sharp distinction between the hearsay exceptions and the Confrontation Clause, but the recent jurisprudence leads to the conclusion that state-

ments fitting within the Federal Rules of Evidence hearsay exceptions will ordinarily satisfy the Confrontation Clause. Virtually all of the major Federal Rules exceptions, except the residual exception, have been found by federal courts to be "firmly rooted," which means that statements falling within these exceptions automatically satisfy the Confrontation Clause. And as to the residual exception, the reliability requirements of that exception have been found congruent with those imposed by the Confrontation Clause. See generally *Ohio v. Roberts,* 448 U.S. 56 (1980); *Idaho v. Wright,* 497 U.S. 805 (1990); *White v. Illinois,* 502 U.S. 346 (1992). See the discussion of this case law in S. Saltzburg, M. Martin & D. Capra, *Federal Rules of Evidence Manual* 1702–05, 1852–54 (7th ed. 1998).

12. Rule 803(4)

Rule 803(4) provides a hearsay exception for statements made for purposes of treatment or diagnosis when the statements deal with the "cause or external source" of the medical condition. The exception does not, by its terms, provide a hearsay exception for statements attributing fault. The Committee Note states that statements of fault "would not ordinarily qualify" under the exception, and distinguishes the statement "I was hit by a car" (admissible when made to medical personnel) from the statement "I was hit by a car that ran a red light" (inadmissible).

Yet in at least some classes of cases, statements attributing fault, when made to medical personnel, are admitted by the courts under Rule 803(4). The most common example is a statement from a child victim of sexual abuse specifically identifying the abuser. See, e.g., *United States v. Renville,* 779 F.2d 430, 438 (8th Cir. 1985) (child's statement attributing fault is admissible under Rule 803(4) "where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding"); *United States v. Joe,* 8 F.3d 1488, 1494 (10th Cir. 1993) ("[T]he domestic sexual abuser's identity is admissible under Rule 803(4) where the abuser has such an intimate relationship with the victim that the abuser's identity becomes reasonably pertinent to the victim's proper treatment.").

13. Rule 803(5)

Rule 803(5) provides a hearsay exception for past recollection recorded: a record "containing a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately" where the record is "shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly." What happens, however, when a person makes a statement to another person, and that other person is the one who writes it down? The exception by its terms does not seem to permit a "two-party voucher" system of proving past recollection recorded, since it states that the record must be shown to have been "made or adopted by the witness." Thus, the Rule does not envision that a person with personal knowledge of a matter might make a statement that was recorded by another, with the record being made admissible by counsel's calling both the reporter and the recorder. Despite the language of the Rule, however, cases can be found that permit two-party vouching under Rule 803(5). See, e.g., *United States v. Williams,* 951 F.2d 853 (7th Cir. 1993) .

14. Rule 803(6)

Rule 803(6) defines a business record as one "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted activity." This language could be read as abrogating the common-law requirement that the person transmitting the information to the recorder must have a business duty to do so. It states only that the transmitting person must have "knowledge," not that the person must be reporting within the business structure.

Despite the text of the Rules, the courts have held that all those who report information included in a business record must be under a business duty to do so—or else the hearsay problem created by the report coming from an outsider must be satisfied in some other way. See *United States v. Turner,* 189 F.3d 712, 719–20 (8th Cir. 1999) ("[W]hen the source of information and the recorder of that information are not the same person, the business record contains hearsay upon hearsay. If both the source and recorder of the information were acting in the regular course of the organization's business, however, the hearsay upon hearsay problem may be excused by the business records exception to the rule against

hearsay."); *Bemis v. Edwards,* 45 F.3d 1369 (9th Cir. 1995) (a 911 call was not admissible as a business record because the caller was not under any business duty to report, and the report did not independently satisfy any hearsay exception); *Cameron v. Otto Bock Orthopedic Indus. Inc.*, 43 F.3d 14 (1st Cir. 1994) (product failure reports submitted to the manufacturer after the plaintiff's accident were inadmissible; the reports were submitted by parties who had no business duty to report accurately to the manufacturer).

15. Rule 803(8)(B)

Rule 803(8)(B) provides a hearsay exception for public reports, but the Rule specifically excludes from its coverage public reports setting forth "matters observed by police officers and other law enforcement personnel" if such reports are offered "in criminal cases." Read literally, the Rule would not provide a hearsay exception for a forensic report prepared by the police that concluded that the defendant was innocent. Such a report would be offered by the defendant, but the exclusionary language of Rule 803(8)(B) covers all police reports offered in criminal cases.

Yet some lower courts have refused to be bound by the plain meaning of the Rule, reasoning that Congress intended to regulate only police reports that unfairly *inculpate* a criminal defendant, and that the exception should therefore apply to public reports offered by the accused. See, e.g., *United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975) (despite its exclusionary language, Rule 803(8)(B) should be read in light of Congress's intent to exclude police reports only when offered *against* a criminal defendant). But see *United States v. Sharpe,* 193 F.3d 852, 868 (5th Cir. 1999) (the defendant's reliance on Rule 803(8)(B) to admit an exculpatory police report was "misplaced" because the Rule does not grant admissibility for any such reports offered in criminal cases).

16. Rule 803(8)(B) and (C)

Rule 803(8)(B) and (C) both contain language that appears to exclude from the hearsay exception all records prepared by law enforcement personnel when such records are offered against a criminal defendant. Read literally, these provisions would prevent the government from introducing simple tabulations of nonadversarial information. For example, these subdivisions appear not to grant a hearsay exception for a routine print-

out from the Customs Service recording license plates of cars that crossed the border on a certain day, when offered in a criminal case to prove the location of a car.

Courts have refused to apply the plain exclusionary language of these subdivisions literally, however. They reason that the exclusionary language could not have been intended to cover reports that are ministerial in nature and prepared under nonadversarial circumstances; the language was designed to regulate only adversarial, evaluative reports (such as crime scene reports) that carry the risk of fabrication. See, e.g., *United States v. Orozco*, 590 F.2d 789 (9th Cir. 1979) (Customs records of border crossings are admissible under Rule 803(8) because they are ministerial and not prepared under adversarial circumstances); *United States v. Grady*, 544 F.2d 598 (2d Cir. 1976) (reports concerning firearms' serial numbers were admissible because they were records of routine factual matters prepared in nonadversarial circumstances).

17. Rule 804(b)(1)

Rule 804(b)(1) provides a hearsay exception for prior testimony when offered against a party who either (1) had a similar motive and opportunity to develop the testimony at the time it was given, or (2) had a predecessor in interest with such a similar motive and opportunity at the time the testimony was given. Some courts have defined the term "predecessor in interest" as *anyone* who had a similar motive and opportunity to develop the testimony, at the time it was given, as the opponent would have at the instant trial; these courts do not require some legal relationship between the prior party and the party against whom the evidence is now offered. This construction collapses the term "predecessor in interest" with the term "similar motive." See, e.g., *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978) (prior testimony properly admitted against plaintiff where prior party had a similar motive to develop the testimony as the plaintiff in the instant case would have were the declarant to testify at trial; Judge Stern, concurring, states that such an expansive definition of "predecessor in interest" effectively reads that term out of the Rule); *Horne v. Owens-Corning Fiberglass Corp.*, 4 F.3d 276 (4th Cir. 1993) (prior testimony from a different case properly admitted against the plaintiff where a party to the prior action, though not affiliated in any way with the plaintiff, had a similar motive to develop the testimony).

Other courts have admitted such evidence not as prior testimony (for want of a predecessor in interest) but as residual hearsay. See *Dartez v. Fibreboard Corp.,* 765 F.2d 456 (5th Cir. 1985).

18. Rule 804(b)(3)

Rule 804(b)(3) provides that if a declaration against penal interest is offered to exculpate an accused, it is not admissible under this hearsay exception "unless corroborating circumstances clearly indicate the trustworthiness of the statement." On its face, the rule does not require a showing of corroborating circumstances for statements offered by the government that *inculpate* the accused. Yet many courts have required the government to establish corroborating circumstances for inculpatory statements offered under Rule 804(b)(3). See, e.g., *United States v. Barone,* 114 F.3d 1284 (1st Cir. 1997) (imposing a corroborating circumstances requirement for statements offered by the prosecution under Rule 804(b)(3) while acknowledging that the Rule does not explicitly require a showing of corroborating circumstances for such statements); *United States v. Garcia,* 897 F.2d 1413 (7th Cir. 1990) (requiring a showing of corroborating circumstances for inculpatory declarations against penal interest).

Similarly, the corroborating circumstances requirement does not appear to apply when declarations against penal interest are offered in civil cases, since the requirement covers statements offered to exculpate the "accused." At least one court, however, has applied the corroborating circumstances requirement to declarations against penal interest offered in civil cases. See *American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (reasoning that it is important to have a "unitary standard" for declarations against penal interest, no matter in what case and no matter by whom they are offered).

19. Rule 805

Rule 805 states that hearsay within hearsay is not excluded if each part of the combined statement "conforms with an exception to the hearsay rule." However, admissions and certain prior statements of testifying witnesses are classified by Rule 801(d) as "not hearsay." Rule 805 could technically be read to preclude admissibility of multiple hearsay where one level of

hearsay would be admissible under the Rule 801(d) exemptions, as opposed to an "exception" as is mentioned by Rule 805.

But it has been held that the technical distinction between the Rule 801(d) category of "not hearsay" and the Rule 803, 804, and 807 categories of "hearsay subject to exception" cannot control the application of Rule 805's standard for admitting multiple levels of hearsay. See, e.g., *United States v. Dotson,* 821 F.2d 1034, 1035 (5th Cir. 1987) ("For the purposes of the hearsay-within-hearsay principle expressed in Rule 805, non-hearsay statements under Rule 801(d) . . . should be considered in analyzing a multiple-hearsay statement as the equivalent of a level of the combined statement that conforms with an exception to the hearsay rule.").

20. Rule 806

Rule 806 states that a hearsay declarant's credibility may be attacked "by any evidence which would be admissible" if the declarant had testified as a witness. The language raises a problem when the proponent wishes to attack the declarant by proffering specific bad acts to prove the witness's bad character for veracity. Rule 608(b) prohibits extrinsic proof of bad acts when offered to show the witness's character for untruthfulness. Rule 806 could therefore be read literally as prohibiting bad acts impeachment of a hearsay declarant, since the only way to introduce such acts without the witness being there to admit them would be to proffer extrinsic evidence in apparent violation of Rule 608(b).

But courts have stated that extrinsic evidence of a bad act offered to prove a hearsay declarant's character for veracity is admissible (subject to Rule 403). The reasoning is that since the declarant is not available for cross-examination, extrinsic evidence is "the only means of presenting such evidence to the jury." *United States v. Friedman,* 854 F.2d 535, n.8 (2d Cir. 1988). See the extensive discussion of this problem in Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant,* 56 Ohio State L.J. 495 (1995).

21. Rule 807

Rule 807 provides a "residual exception" to the hearsay rule, granting admissibility to trustworthy statements that are "not specifically covered by" other exceptions. There are at least two ways in which the case law

diverges from the text or Committee Note to Rule 807. First, the Rule permits the admission of residual hearsay only if that hearsay is "not specifically covered" by another exception. This might seem to indicate that hearsay that "nearly misses" one of the established exceptions should not be admissible as residual hearsay, because it is specifically covered by, and yet not admissible under, another exception. In fact, however, most courts have construed the term "not specifically covered" by another hearsay exception to mean "not admissible under" another hearsay exception. See, e.g., *United States v. Fernandez,* 892 F.2d 976 (11th Cir. 1989) (grand jury statement is "not specifically covered" by another hearsay exception because it is not admissible under any such exception). Compare *United States v. Dent,* 984 F.2d 1453 (7th Cir. 1993) (Easterbrook, J., concurring) (arguing that grand jury testimony can never be admissible as residual hearsay, since such testimony is specifically covered by, though not admissible under, the hearsay exception for prior testimony).

The second divergence between the case law and the text of the residual exception involves the notice requirement. The Rule states that "a statement may not be admitted" under this exception unless the proponent gives notice "sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it." Most courts have read the notice requirement far more flexibly than its language seems to indicate. For example, most courts have held that the notice requirement can be satisfied by providing notice at trial, so long as the adversary is given sufficient time to prepare. See, e.g., *United States v. Baker,* 985 F.2d 1248 (4th Cir. 1993).

Other courts have read a good cause exception into the notice requirement. See, e.g., *United States v. Lyon,* 567 F.2d 777 (8th Cir. 1977). But see *United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978) (rejecting a good cause exception as not permitted by the text of the Rule).

Examples of Case Law Development Where the Rule and Committee Note Are Silent

1. Rule 103

Rule 103 provides conditions for a party wishing to preserve a claim of evidentiary error for appeal. It states that a party must make a timely objection or motion to strike, stating the specific ground of objection if that ground is not apparent from the context. An amendment to Rule 103, scheduled to take effect on December 1, 2000, further provides that if the trial court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. But the Rule does not address the question whether a party can appeal an advance ruling holding evidence admissible if the evidence is not actually admitted at trial. For example, assume that a criminal defendant moves in advance of trial to preclude the prosecution from impeaching him with his prior convictions. Assume further that the trial court rules definitively that the convictions are admissible impeachment evidence. Can the defendant decide not to testify at trial and then argue on appeal that the trial court erred in its advance ruling?

While Rule 103 is silent on whether an appeal can be taken from a ruling holding evidence admissible when the evidence is not eventually admitted at trial, there is significant case law on this question. The Supreme Court, in *Luce v. United States,* 469 U.S. 38 (1984), specifically held that an accused must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the accused's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other comparable situations. See *United States v. DiMatteo,* 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). See also *United States v. Goldman,* 41 F.3d 785, 788 (1st Cir. 1994) ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria,* 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal);

United States v. Ortiz, 857 F.2d 900 (2d Cir. 1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error on appeal); *United States v. Bond*, 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his Fifth Amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

Rule 103 is also silent on whether a party who objects to evidence that the trial court definitively rules admissible, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. Lower courts had been in conflict on this question. See, e.g., *Judd v. Rodman,* 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *Gill v. Thomas,* 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal").

The Supreme Court, in *Ohler v. United States,* 120 S. Ct. 1851 (2000), resolved this question by holding that a party who introduces evidence of a prior conviction on direct examination waives any right to appeal an *in limine* ruling holding that the evidence would be admissible at trial. The Court, in an opinion by Chief Justice Rehnquist, recognized that Rule 103 was silent on this question. It refused to depart from the general common-law rule that "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted."

2. Rule 104(a)

Rule 104(a) states that preliminary questions "concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . ." But the Rule is silent on who bears the burden of proof on admissibility questions, and it is also silent on what standard of proof is to be employed.

The courts have developed a significant body of case law to answer these questions. Most importantly, in *Bourjaily v. United States,* 483 U.S. 171 (1987), the Court held that the party seeking to admit the evidence—the proponent—generally has the burden of proving that the admissi-

bility requirements set forth in the Federal Rules of Evidence are met. Furthermore, the *Bourjaily* Court held that the burden of proving an admissibility requirement under Rule 104(a) is by a preponderance of the evidence. The specific holding in *Bourjaily* was that for a statement to be admissible under the coconspirator exception to the hearsay rule, the trial court must find that the prosecution has established by a preponderance of the evidence that the defendant and the hearsay declarant were members of the same conspiracy.

The reasoning in *Bourjaily* has been extended to most other questions of admissibility under the Federal Rules of Evidence. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 79 (1993) (proponent of expert testimony has the burden of showing that it is more likely than not reliable). So for example, a proponent who proffers a hearsay statement under the excited utterance exception has the burden of showing it more likely than not that the declarant was under the influence of a startling event when he spoke. See *Miller v. Keating,* 754 F.2d 507 (3d Cir. 1985) (proponent must establish admissibility of an excited utterance by a preponderance of the evidence).

One important exception arises with privileges. Because privilege rules operate to exclude relevant and reliable evidence, they are not favored. Therefore, the party seeking to *exclude* proffered evidence on the ground that it is privileged bears the burden of showing, by a preponderance of the evidence, that a privilege applies. See generally *United States v. Zolin*, 491 U.S. 554 (1989).

3. Rule 301

Rule 301 provides some guidance on the effect of a presumption. The Rule does not define the term "presumption"; it simply states that unless otherwise provided, "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." The Rule specifically leaves it to substantive law to determine when proffered evidence establishes a presumption that a fact exists.

Generally speaking, presumptions are based on one or more of the following rationales:

1. One party has superior access to proof;

2. Social or economic policies warrant a presumption;
3. Experience indicates the high probability of a given conclusion from a given set of facts;
4. A presumption will promote efficiency and convenience.

So, for example, it has been held that proof that a letter was mailed establishes a presumption that it was received. *Anderson v. United States,* 966 F.2d 487 (9th Cir. 1982) (in a taxpayer's suit for a refund, the government failed to rebut the common-law presumption of receipt that arose from the taxpayer's proof of mailing her return).

Rule 301 is also silent on whether a party favored by a presumption is entitled to a peremptory instruction if the party against whom the presumption operates fails to offer any rebuttal evidence. For example, if a party proves that he mailed a letter, and the opponent provides no conflicting evidence, is the mailing party entitled to an instruction to the jury that the letter is to be deemed mailed? Courts have held that such an instruction must be given upon request. See, e.g., *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.,* 960 F.2d 1020, 1037 (Fed. Cir. 1992) (where presumption applies, the presumed fact "must be inferred, absent rebuttal evidence."). See also C. Mueller & L. Kirkpatrick, *Evidence* 137 (1st ed. 1995) ("[I]f the basic facts of a presumption are established, the presumption controls decision on the presumed fact unless there is counterproof that the presumed fact is not so. In jury-tried cases, the judge gives an appropriate instruction. In bench-tried cases, the judge must find the presumed fact.").

4. Rule 404(b)

Rule 404(b) provides that a person's uncharged acts of misconduct can be offered to prove something other than a person's character, such as intent or motive. Rule 404(b) imposes a notice requirement on the prosecution in criminal cases, which is intended to protect the accused from unfair surprise; it provides that "upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

What happens if the government gives pretrial notice of its intent to proffer a prior bad act and then subsequently discovers a *different* bad

act that it wants to use as well? Or what if the government responds to a defense request by stating that it does not intend to use Rule 404(b) evidence and *then* uncovers a bad act committed by the defendant that it does intend to use? The notice requirement of Rule 404(b) does not state whether the prosecution has a continuing obligation to notify the defendant if it discovers Rule 404(b) evidence after an initial response to the defendant's request.

It has been held, however, that the Rule imposes a continuing obligation of notice. See, e.g., *United States v. Barnes,* 49 F.3d 1144, 1148 (6th Cir. 1995) (declaring that Rule 404(b) requires "a continuing obligation on the government to comply with the notice requirement . . . whenever it discovers information that meets the previous defense request"; noting that a contrary reading "would force the defense to make numerous, periodic requests until the trial has been completed—surely a wasteful procedure.").

The notice requirement of Rule 404(b) is conditioned on a request by the accused. The Rule does not state how specific the request must be to trigger the government's notice obligation. For example, is an omnibus motion for discovery sufficient to trigger the notice requirement?

Courts have held that an omnibus motion is not sufficient to trigger the government's obligation to notify the defendant under the Rule. Rather, a request for notification, "at a minimum, must be sufficiently clear and particular, in an objective sense, fairly to alert the prosecution that the defense is requesting pretrial notification of the general nature of any Rule 404(b) evidence the prosecution intends to introduce." *United States v. Tuesta-Toro,* 29 F.3d 771, 774 (1st Cir. 1994) (notice not required where defense demanded outright pretrial disclosure of statements in any form, referring to the defendant in any way, without regard to their admissibility or the government's intention to introduce them). Compare *United States v. Williams*, 792 F. Supp. 1120, 1133 (S.D. Ind. 1992) (notification required in response to detailed request reciting text of Rule 404(b)); *United States v. Alex*, 791 F. Supp. 723, 728 (N.D. Ill. 1992) (notification required in response to request specifically referencing Rule 404(b)).

5. Rule 410

Rule 410 provides certain protections to criminal defendants during the process of plea bargaining. Rule 410 is silent, however, on whether its

protections can be waived by a criminal defendant. In *United States v. Mezzanatto,* 513 U.S. 196 (1995), during guilty plea negotiations the defendant agreed that he could be impeached with statements made during the negotiations if he ultimately went to trial and testified inconsistently with those statements. The Supreme Court upheld the agreement, finding that the defendant had knowingly and voluntarily waived his right to the protection of Rule 410. The Court refused to hold that the Rule's silence on the matter meant that its protections could not be waived. Instead the Court presumed that any statutory right could be waived in the absence of a specific provision to the contrary, so long as the waiver was knowing and voluntary.

The facts of *Mezzanatto* involved a waiver permitting the impeachment use of statements made during guilty plea negotiations. Neither *Mezzanatto* nor Rule 410 itself says anything explicitly about whether a defendant can waive the protections of the Rule so as to provide that the prosecution can admit his or her statements during plea negotiations as substantive evidence at trial, that is, as party admissions admissible even if the defendant does not testify. At least one court has relied on the rationale of *Mezzanatto* to uphold a waiver of Rule 410 protections that permitted the government to use the defendant's statements as substantive evidence in its case-in-chief. See *United States v. Burch,* 156 F.3d 1315 (D.C. Cir. 1998).

6. Article VI

Article VI governs treatment of testifying witnesses. The Article is silent about many of the common forms of impeachment, such as bias, contradiction, and mental capacity. There is, of course, a significant amount of case law dealing with impeachment matters on which Article VI is silent. Case law generally regulates the forms of impeachment not specifically covered by Article VI by using principles derived from Evidence Rules 402 and 403—such impeachment is permitted unless the probative value of the impeachment evidence is substantially outweighed by the risks of prejudice, confusion, and delay. See *United States v. Abel,* 469 U.S. 45 (1984) (impeachment for bias governed by Rule 403 principles). See generally S. Saltzburg, M. Martin & D. Capra, *Federal Rules of Evidence Manual* 939–70, 1139–48; 3 C. Mueller & L. Kirkpatrick, *Federal Evidence* 109–207, 327–470 (2d ed. 1994). See also Imwinkelreid, *The Silence Speaks Volumes: A Brief Reflection on the Question of Whether It Is*

Necessary To Fill the Seeming Gaps in Article VI of the Federal Rules of Evidence, Governing the Admissibility of Evidence Logically Relevant to the Witness's Credibility, 1998 Univ. Ill. L. Rev. 1013, 1036 (noting that Article VI is silent about most matters of impeachment, but concluding that "as a general proposition, there is little to be gained and much to be lost by initiating the process of revising Article VI").

7. Rule 615

Rule 615 provides that at the request of a party, and with some exceptions, "the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may also make the order of its own motion." The Rule specifically provides only for exclusion of witnesses from the courtroom. It is silent about whether a trial judge can order witnesses not to talk to each other outside the courtroom; it says nothing about a judge's power to order a potential witness to refrain from obtaining access to certain information, such as newspaper articles, that might taint the witness's testimony.

The courts have held, however, that the trial court retains its common-law power to fashion a more far-reaching sequestration order appropriate to the circumstances of the case. See the extensive discussion in *United States v. Sepulveda,* 15 F.3d 1161, 1175 (1st Cir. 1993) (Rule 615 "demarcates a compact procedural heartland, but leaves appreciable room for judicial innovation beyond the perimeters of that which the rule explicitly requires"). This common-law power includes the discretion to sequester witnesses before, during, and after their testimony (see *Geders v. United States*, 425 U.S. 80 (1976)), and to compel the parties to present witnesses in a prescribed sequence (see *United States v. Machor*, 879 F.2d 945, 954 (1st Cir. 1989)). As the court in *Sepulveda* stated, "Rule 615 neither dictates when and how this case-management power ought to be used nor mandates any specific extra-courtroom prophylaxis, instead leaving the regulation of witness conduct outside the courtroom to the district judge's discretion."

8. Rule 801(d)(1)(B)

Rule 801(d)(1)(B) provides that a statement is not excluded as hearsay if the witness is subject to cross-examination and the statement is "consistent with the declarant's testimony and is offered to rebut an express or

implied charge of recent fabrication." The hearsay exemption for prior consistent statements does not specifically provide that the prior consistent statement must *precede* the existence of the alleged motive to falsify in order to be admissible. However, the Supreme Court in *Tome v. United States*, 513 U.S. 150 (1995), held that a statement is not admissible under Rule 801(d)(1)(B) unless it was made before the witness's alleged motive to falsify arose.

Rule 801(d)(1)(B) is also silent on whether prior consistent statements can be admitted independently of the Rule, not for their truth but rather to rehabilitate the credibility of the witness. The courts have held that a consistent statement can be probative and admissible for rehabilitation purposes even if it is not admissible under the hearsay exemption. See, e.g., *United States v. Brennan,* 798 F.2d 581, 587 (2d Cir. 1986) (prior consistent statement was not admissible to rebut a charge of improper motive, but it was admissible to clarify an apparent inconsistency that had been brought out by defense counsel on cross-examination: "prior consistent statements may be admissible for rehabilitation even if not admissible under Rule 801(d)(1)(B)."). Accord *United States v. Parodi,* 703 F.2d 768 (4th Cir. 1983).

9. Rule 803(3)

Rule 803(3) provides a hearsay exception for statements of a declarant's state of mind. The Rule is silent, however, on whether a declarant's statement of intent can be used to prove the subsequent conduct of someone other than the declarant. When the victim says, "I am going to meet Frank tonight," is the statement admissible to prove that Frank and the victim actually met? Or is the statement admissible only to prove the future conduct of the declarant? The Committee Note refers to the Rule as allowing "evidence of intention as tending to prove the act intended."

The case law is in conflict. Some courts have refused to admit a statement that the declarant intended to meet with a third party as proof that they actually did meet. See, e.g., *Gual Morales v. Hernandez Vega*, 579 F.2d 677 (1st Cir. 1978); *United States v. Jenkins,* 579 F.2d 840 (4th Cir. 1978) (statements of intent can prove only the declarant's subsequent conduct). Other courts hold such statements admissible if the proponent provides corroborating evidence that the meeting took place. See, e.g., *United States v. Delvecchio,* 816 F.2d 59 (2d Cir. 1987). See C. Mueller & L. Kirkpatrick, *Evidence* 938 (1st ed. 1995) ("Some modern cases take

the clearly correct position that the exception in its present form cannot justify use of statements of intent by themselves as proof of what others did. And yet a growing number of cases approve use of a statement to prove what the speaker and another did together if other evidence confirms what the statement suggests the other did.").

10. Rule 803(18)

Rule 803(18) provides a hearsay exception for "statements contained in published treatises, periodicals, or pamphlets" if they are "established as a reliable authority" by the testimony or admission of an expert witness or by judicial notice. The Rule does not mention whether the learned treatise exception covers evidence presented in demonstrative form, such as a chart or film.

But the Second Circuit has upheld the admission of an authoritative videotape under the learned treatise exception. See *Costantino v. Herzog,* 203 F.3d 164, 171 (2d Cir. 2000) (reasoning that it is "overly artificial to say that information that is sufficiently trustworthy to overcome the hearsay bar when presented in a printed learned treatise loses the badge of trustworthiness when presented in a videotape").

11. Rule 1101

Rule 1101 states that the Federal Rules of Evidence are generally applicable to all federal proceedings. Rule 1101(d) lists certain proceedings to which the Rules are inapplicable, including grand jury and bail proceedings. Courts have found that the Federal Rules of Evidence are inapplicable to a number of proceedings that are not specifically mentioned as exempt in Rule 1101(d). Examples include suppression hearings, proceedings to obtain a temporary restraining order, and proceedings seeking release from psychiatric commitment. See, e.g., *United States v. Frazier,* 26 F.3d 110 (11th Cir. 1994) (Evidence Rules inapplicable in supervised release revocation proceedings); *United States v. Schaefer,* 87 F.3d 562 (1st Cir. 1996) (Evidence Rules inapplicable at suppression hearings); *United States v. Palesky,* 855 F.2d 34 (1st Cir. 1988) (Evidence Rules are not applicable in hearings held to determine whether a person will be committed to or released from a psychiatric facility).

The courts establish these exemptions because they are within the spirit of Rule 1101(d)—exempting from the Rules those proceedings that are

less formal than a trial and in which the judge is the finder of fact. See, e.g., *Government of Virgin Islands in Interest of A.M.*, 34 F.3d 153, 161 (3d Cir. 1994) (Evidence Rules do not apply in juvenile transfer proceedings, even though such proceedings are not specifically exempted in Rule 1101(d)(1); a juvenile transfer proceeding "is of a preliminary nature and is consequently not comparable to a civil or criminal trial.").

This page is blank in the printed version of the report.

The Federal Judicial Center

Board
The Chief Justice of the United States, *Chair*
Judge Stanley Marcus, U.S. Court of Appeals for the Eleventh Circuit
Judge Pauline Newman, U.S. Court of Appeals for the Federal Circuit
Chief Judge Jean C. Hamilton, U.S. District Court for the Eastern District of Missouri
Senior Judge Robert J. Bryan, U.S. District Court for the Western District of Washington
Judge William H. Yohn, Jr., U.S. District Court for the Eastern District of Pennsylvania
Judge A. Thomas Small, U.S. Bankruptcy Court for the Eastern District of North Carolina
Magistrate Judge Virginia M. Morgan, U.S. District Court for the Eastern District of Michigan
Leonidas Ralph Mecham, Director of the Administrative Office of the U.S. Courts

Director
Judge Fern M. Smith

Deputy Director
Russell R. Wheeler

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The Director's Office is responsible for the Center's overall management and its relations with other organizations. Its Systems Innovation & Development Office provides technical support for Center education and research. Communications Policy & Design edits, produces, and distributes all Center print and electronic publications, operates the Federal Judicial Television Network, and through the Information Services Office maintains a specialized library collection of materials on judicial administration.

The Judicial Education Division develops and administers education programs and services for judges, career court attorneys, and federal defender office personnel. These include orientation seminars, continuing education programs, and special-focus workshops. The Interjudicial Affairs Office provides information about judicial improvement to judges and others of foreign countries, and identifies international legal developments of importance to personnel of the federal courts.

The Court Education Division develops and administers education and training programs and services for nonjudicial court personnel, such as those in clerks' offices and probation and pretrial services offices, and management training programs for court teams of judges and managers.

The Research Division undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, often at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal system. The Federal Judicial History Office develops programs relating to the history of the judicial branch and assists courts with their own judicial history programs.