

Proposed Amendments To The Federal Rules Of Evidence (April 2009)

Recent action has taken place on three matters concerning the FRE. The first involves a proposed amendment to FRE 804(b)(3) (Declarations Against Penal Interest). Second, judicial committees continue to make progress in preparing drafts to “restyle” the FRE.

FRE 804(b)(3) (Declarations Against Penal Interest)

On April 23-24, 2009, the Advisory Committee on Evidence Rules, of the U.S. Judicial Conference, recommended a proposed amendment to Evidence Rule 804(b)(3). The proposed amendment would clarify that the corroborating circumstances requirement applies to statements against penal interest introduced by the government. This requirement currently applies to statements admitted by the defendant. The recommendation has been provided to the Committee on Rules of Practice and Procedure, which will consider the proposal in June 2009.

Under the established rule-making process, if the committee approves the recommendation, in September 2009, the U.S. Judicial Conference will consider whether for consideration at its September 2009 session. If approved by the Judicial Conference, then the Supreme Court will consider the proposal. If transmitted to the Congress by the Court, and if Congress does not take action, the proposed amendment would become effective on December 1, 2010. For more information about this amendment as it progresses, visit: www.FederalEvidence.com/Amendments

Restyled FRE

On April 23-24, 2009, the Advisory Committee on Evidence Rules completed its project to “restyle” the FRE, with the conclusion of FRE 801-1104. Previously, restyled FRE 101-706 was completed. The restyled rules are intended to include non-substantive changes to the rules of evidence. On May 12, 2008, draft restyled rules had been prepared for FRE 101-415. At its meeting in



October 2008, the committee reviewed drafts for restyled FRE 501-706. The effort to restyle the evidence rules is part of a larger project to restyle all of the federal rules. The Standing Committee will be asked to issue the restyled rules for public comment later during the summer 2009.

Federal Reporter Shield Legislation

On March 31, 2009, H.R. 985, the Free Flow of Information Act, passed the House of Representatives. The measure will be considered by the Senate. In sum, under the House-passed measure a new procedure is established to consider the disclosure of confidential information from a journalist upon a proper showing. Disclosure shall not occur

“unless a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person—

(1) that the party seeking to compel production of such testimony or document has exhausted all reasonable alternative sources (other than the covered person) of the testimony or document;

(2) that —

(A) in a criminal investigation or prosecution, based on information obtained from a person other than the covered person —

(i) there are reasonable grounds to believe that a crime has occurred; and

(ii) the testimony or document sought is critical to the investigation or prosecution or to the defense against the prosecution; or

(B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought is critical to the successful completion of the matter;

(3) in the case that the testimony or document sought could reveal the identity of a source of information or include any information that could reasonably be expected to lead to the discovery of the identity of such a source, that—

(A) disclosure of the identity of such a source is necessary to prevent, or to identify any perpetrator of, an act of terrorism against the United States or its allies or other significant and specified harm to national security with the objective to prevent such harm;

(B) disclosure of the identity of such a source is necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm, respectively;

(C) disclosure of the identity of such a source is necessary to identify a person who has disclosed—

(i) a trade secret, actionable under section 1831 or 1832 of title 18, United States Code;

(ii) individually identifiable health information, as such term is defined in section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)), actionable under Federal law; or

(iii) nonpublic personal information, as such term is defined in section 509(4) of the Gramm-Leach-Bliley Act (15 U.S.C. 6809(4)), of any consumer actionable under Federal law; or

(D)

(i) disclosure of the identity of such a source is essential to identify in a criminal investigation or prosecution a person who without authorization disclosed properly classified information and who at the time of such disclosure had authorized access to such information; and
(ii) such unauthorized disclosure has caused or will cause significant and articulable harm to the national security; and

(4) that the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information may be compelled.

Free Flow of Information Act, H.R. 985, 111th Cong., 1st Sess. (2009).

For more information about this amendment as it progresses, visit: www.FederalEvidence.com/Amendments

