EVIDENCE

Minnesota Rules of Evidence

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Minnesota Rules of Evidence

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TEXT OF RULES

ARTICLE 1. GENERAL PROVISIONS

Rule 101. Scope

These rules govern proceedings in the courts of this state, to the extent and with the exceptions stated in Rule 1101.

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Committee Comment - 1977

Rule 102 sets the stage for the application of the evidentiary rules. In the interpretation of the rules, principles of fairness and convenience should be paramount. The rules should not be read narrowly but with a view for accomplishing essential fairness, with a minimum of formality and procedural obstacles in the search for the truth. The rules provide for a great deal of flexibility and discretion. This rule urges that such discretion and flexibility be exercised to accomplish the stated purpose.

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the 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.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. Upon request of any party, the court shall place its ruling on the record. The court may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Error. Nothing in this rule precludes taking notice of errors in fundamental law or of plain errors affecting substantial rights although they were not brought to the attention of the court.

(Amended effective January 1, 1990; amended effective September 1, 2006.)

Committee Comment - 1989

Rule 103(a) codifies the existing practice in Minnesota. Only error affecting substantial rights is actionable. Minn. R. Civ. P. 61 and Minn. R. Crim. P. 31.01. The rule does not define what is meant by substantial rights but leaves this for case by case decision. Although there are many cases applying this standard no clear cut definition of substantial rights has emerged. The normal procedure in these cases appears to be an examination of the effect of the alleged error upon the trial as a whole for determination as to whether or not the error was prejudicial. See J. Hetland and O. Adamson, Minnesota Practice Rule 61 (1970) and cases cited therein. In criminal cases, certain constitutional errors require automatic reversal, see State v. Schmit, 273 Minn. 78, 88, 139 N.W.2d 800, 807 (1966), whereas others must be harmless beyond a reasonable doubt, Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710, 711 (1967), and see State ex rel. Kopetka v. Tahash, 281 Minn. 52, 56, 160 N.W.2d 399, 402 (1968). See also C. Wright, Federal Practice and Procedure, section 856, rule 52 (1969), and cases cited therein. In cases involving nonconstitutional errors, where the error has the effect of depriving the defendant of a fair trial, the court has applied the reasonable doubt standard, State v. White, 295 Minn. 217, 226, 203 N.W.2d 852, 859 (1973); and something akin to the automatic reversal standard, see, e.g., State v. Flowers, 262 Minn. 164, 169, 114 N.W.2d 78, 81 (1962); State v. Reardon, 245 Minn. 509, 513, 514, 73 N.W.2d 192, 195 (1955). However, in cases involving error of a less grievous type, presumably error not affecting the fairness of the trial process, the Court has inquired into whether it is likely that the error played a substantial part in influencing the jury to convict. State v. Caron, 300 Minn. 123, 127, 128, 218 N.W.2d 197, 200 (1974). See State v. Van Alstine, Minn., 232 N.W.2d 899, 905 (1975); State v. Fields, Minn., 237 N.W.2d 634, 635 (1976); State v. Wilebski, Minn., 238 N.W.2d 213, 215 (1976).

The rule continues the existing practice of requiring not only a timely objection, but a specific objection unless the context of the question makes the grounds for objection obvious. See Kenney v. Chicago Great Western Ry., 245 Minn. 284, 289, 71 N.W.2d 669, 672, 673, certiorari denied 350 U.S. 903, 76 S. Ct. 182, 100 L.Ed. 793 (1955); Adelmann v. Elk River Lumber Co., 242 Minn. 388, 393, 394, 65 N.W.2d 661, 666 (1954). Under current practice, a motion in limine to strike or prohibit the introduction of evidence operates as a timely objection and obviates the requirement of any further objection with respect to such evidence. If the Court excludes evidence, an offer of proof must be made to preserve the issue for review unless the substance of the evidence is apparent from its context. See Auger v. Rofshus, 267 Minn. 87, 91, 125 N.W.2d 159, 162 (1963); Wozniak v. Luta, 258 Minn. 234, 241, 103 N.W.2d 870, 875 (1960); Minn. R. Civ. P. 43.03, see also Minn. R. Civ. P. 46, 59.01(6), and Minn. R. Crim. P. 26.03 subd 14(1).

Rule 103(b)

This rule is adapted from Minn. R. Civ. P. 43.03. In order to determine on review whether or not a substantial right of a party was affected by the exclusion of evidence the reviewing court must have some information as to the nature of the excluded testimony. Parties are entitled to have the rulings of the court placed on the record if they so request. The rule gives the court authority to require that the offer of proof be in question and answer form to provide an accurate record for review. It would also be permissible to allow cross-examination of the witness making the offer of proof.

Rule 103(c)

The rule gives the court the discretion in the conduct of the trial to employ procedures that would minimize the possibility of inadmissible evidence being suggested to the jury. It puts to rest the issue that was unresolved in In re McConnell, 370 U.S. 230, 82 S. Ct. 1288, 8 L.Ed.2d 434 (1962) as to whether or not questions on which an offer of proof is based must be asked to a witness in the presence of the jury.

Rule 103(d)

This subdivision (d) makes it clear that the rule is not meant to affect the application of the "plain error" rule or the application of Minn. R. Civ. P. 51 with respect to error in fundamental law contained in instructions to the jury. Plain error is a federal term which has recently been adopted in Minn. R. Crim. P. 31.02. See State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 550, 551, 141 N.W.2d 3, 11 (1965). The Minnesota Supreme Court has not formally recognized the plain error rule in civil cases although in several cases they have addressed issues on appeal that were not properly preserved by a timely specific objection. E.g., Rosenfeld v. Rosenfeld, Minn., 249 N.W.2d 168 (1976); Jones v. Peterson, 279 Minn. 241, 156 N.W.2d 733 (1968); Magistad v. Potter, 227 Minn. 570, 36 N.W.2d 400 (1949).

Committee Comment - 2006

Rule 103(a)

This amendment in Rule 103(a) is taken from the corresponding Fed. R. Evid. 103 and would codify existing practice in Minnesota. See Minn. R. Evid. 103(a) comm. cmt. -- 1989 ("Under current practice, a motion in limine to strike or prohibit the introduction of evidence operates as a timely objection and obviates the requirement of any further objection with respect to such evidence."); Myers v. Winslow R. Chamberlain Co., 443 N.W.2d 211, 216 (Minn. App. 1989) (ruling that objections on the record in chambers need not be repeated at trial to preserve the issue for review). But see State v. Litzau, 650 N.W.2d 177, 183 (Minn. 2002) ("Ordinarily, a party need not renew an objection to the admission of evidence to preserve a claim of error for appeal following a ruling on a motion in limine. If, however, excluded evidence is offered at trial because the court has changed its initial ruling, the objection should be renewed at trial.") (citation omitted).

The federal rule refers to preserving the claim of error "for appeal." In civil cases in Minnesota to preserve the evidentiary ruling for appeal, in addition to a timely and specific objection, the claim also must be included in a motion for new trial. Sauter v. Wasemiller, 389 N.W.2d 200, 201-02 (Minn. 1986).

The amendment does not prevent an attorney from making an offer of proof where appropriate, or from renewing an objection. Repetitive, cumulative objections should be avoided, but occasionally the context at trial is more developed and may be different from what was anticipated at the time of the former ruling, justifying a renewed objection and perhaps a different ruling.

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. 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, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, and so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

(Amended effective January 1, 1990.)

Committee Comment - 1977

Rule 104(a)

Rule 104 sets out the relative function of the judge and jury in the trial process. It is clear that the application of the exclusionary rules of evidence rests in the hands of the court. To the extent that admissibility of evidence is conditioned on the resolution of a second question (unavailability of a witness, Rule 804; qualification of expert witness, Rule 702; existence of privilege, etc.) it is the function of the court to determine whether or not the condition has been fulfilled. Often the resolution of the second question will involve a factual determination, and to that extent the court acts as a trier of fact. In this capacity, the court is not bound by the exclusionary rules of evidence other than the rules dealing with privilege. The exclusionary rules of evidence reflect a concern over the capabilities of a lay jury to make technical legal and factual distinctions. The same considerations are not present when the decision as to such a preliminary question is to be made by the court. Furthermore, in the interest of judicial time and expense practicality dictates that the court be permitted to consider reliable hearsay, affidavit, or offers of proof on the preliminary questions as to the competence of an offer of evidence. See C. McCormick, Evidence section 53 (2d ed. 1972). Many existing rules of procedure permit the court to make important decisions based on affidavit. Minn. R. Civ. P. 43.05, 4.06, 56, 65.01, 65.02 and Minn. R. Crim. P. 28.05 subd 5(2), 32. The policy behind preserving the confidentiality of certain communications would be destroyed by permitting the court to inquire into privilege.

Rule 104(b)

The rule should continue existing practice in Minnesota. See State v. Martin, 293 Minn. 116, 125, 197 N.W.2d 219, 225 (1972) where the court discusses this rule with apparent approval.

Rule 104(a) must be read consistently with 104(b) and (c). Pursuant to rules 401-403 the court must make a determination as to the relevance and admissibility of an offer of evidence. If the relevance of the offer is dependent on the existence of a second fact the court's function is to determine whether there is sufficient evidence admitted for a jury decision as to the existence of the second fact. It is for the jury to determine whether or not the second fact is established and the weight to be given the original offer. Questions of fact are deemed to be appropriate for jury determination. To permit the court to determine preliminary questions of this nature would be to severely limit the fact finding function of the jury.

For specific application of this provision see rules 901 and 1008. The Committee recommends the rule as provided in the Uniform Rules of Evidence since it clearly preserves the court's control over the order of proof.

Rule 104(c)

Preliminary hearings on the admissibility of confessions must be heard outside of the presence of the jury. Jackson v. Denno, 378 U.S. 368, 394, 84 S. Ct. 1774, 1790, 12 L.Ed.2d 908, 925, 926, 1 A.L.R.3d 1205 (1964); State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 554, 141 N.W.2d 3, 13 (1965), and Minn. R. Crim. P. 7.01, 8.03 and 11.02. The second sentence of the rule is applicable to both civil and criminal proceedings.

Hearings on preliminary questions should be heard outside of the presence of the jury when requested by the accused or where the interests of justice so require. This is consistent with Rule 103(c). See Minn. R. Crim. P. 7.01, 8.03 and 11.02 for specific types of preliminary questions that are resolved at the omnibus hearing in a criminal case.

Rule 104(d)

This rule limits the court's discretion as to the scope of cross-examination pursuant to Rule 611(b). The rule does not speak to the issue of the subsequent use of testimony on preliminary matters.

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Committee Comment - 1977

Consistent with Rule 103 the rule places the burden on the opposing party to request a limiting instruction before a court is required to give such an instruction. This is generally consistent with existing practice. State v. DeZeler, 230 Minn. 39, 48, 41 N.W.2d 313, 319, 15 A.L.R.2d 1137 (1950); State v. Soltau, 212 Minn. 20, 25, 2 N.W.2d 155, 158 (1942). The rule should not be read to indicate that a limiting instruction in every case will cure any potential prejudice that might be encountered by the admission of the evidence. E.g., Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968). Such a decision is for the court to make under Rule 403 or applicable statutory or constitutional provisions.

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party 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.

Committee Comment - 1977

The rule extends the present rule with regard to depositions to other writings and recordings. Minn. R. Civ. P. 32.01(4). The rule is not intended to apply to conversations.

ARTICLE 2. JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts in civil cases.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable

of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

(Amended effective January 1, 1990.)

Committee Comment - 1989

Rule 201(a)

The rule governing judicial notice is applicable only to civil cases. The status of the law governing the use of judicial notice in criminal cases is unsettled and not appropriate for codification. While it is understood that a trial judge should not direct a verdict against an accused in a criminal case, it is less clear the extent to which the court can take judicial notice of uncontested and uncontradictable peripheral facts or facts establishing venue. See e.g. State v. White, 300 N.W.2d 176 (Minn. 1980); State v. Trezona, 286 Minn. 531, 176 N.W.2d 95 (1970). Trial courts should rely on applicable case law to determine the appropriate use of judicial notice in criminal cases.

This rule is limited to judicial notice of "adjudicative" facts, and does not govern judicial notice of "legislative" facts. The distinction between adjudicative and legislative facts was developed by Professor Kenneth C. Davis. An Approach to Problems of Evidence in the Administrative Process, 55 Harv.L.Rev. 364, 404-407 (1942); Judicial Notice, 55 Colum.L.Rev. 945 (1955); Administrative Law Text, Ch. 15 (3d ed. 1972).

Adjudicative facts generally are the type of facts decided by juries. Facts about the parties, their activities, properties, motives, and intent, the facts that give rise to the controversy, are adjudicative facts.

Legislative facts involve questions of law and policy and normally are decided by the court. See Beaudette v. Frana, 285 Minn. 366, 372, 173 N.W.2d 416, 419, 420 (1969) where the Court notices the effect which various courses of conduct might have upon the integrity of the marriage relationship. See also McCormack v. Hankscraft Co., 278 Minn. 322, 338, 154 N.W.2d 488, 500 (1967) "(e)nlarging a manufacturer's liability to those injured by its products more adequately meets public policy demands to protect consumers from the inevitable risks of bodily harm created by mass production and complex marketing conditions." The Committee was in agreement with the promulgators of the federal rule of evidence in not limiting judicial notice of legislative facts. See United States Supreme Court Advisory Committee Note.

Rule 201(b)

Minnesota has traditionally limited judicial notice of adjudicative facts to situations incapable of serious dispute. See State ex rel. Remick v. Clousing, 205 Minn. 296, 301, 285 N.W. 711, 714,

123 A.L.R. 465 (1939). This includes matters capable of accurate and ready determination. See Bollenbach v. Bollenbach, 285 Minn. 418, 429, 175 N.W.2d 148, 156 (1970), as well as facts of common knowledge; In re Application of Baldwin, 218 Minn. 11, 16, 17, 15 N.W.2d 184, 187 (1944).

Rule 201(c), (d)

These issues have received little attention in Minnesota. See generally State, Department of Highways v. Halvorson, 288 Minn. 424, 429, 181 N.W.2d 473, 476 (1970). The net effect of the rule should be to encourage the taking of judicial notice in appropriate circumstances. The improper refusal to take judicial notice would not necessarily be reversible. See Rule 103.

Rule 201(e)

The opportunity to be heard is a mainstay of procedural fairness. This right is protected by the rule. If the limits imposed upon the judicial notice by subdivision (b) of this rule are properly observed, there should be relatively little controversy concerning the right to be heard. The shape of the hearing on the issue of judicial notice rests in the discretion of the trial judge. However, in a jury trial such a hearing should always be outside of the presence of the jury. Rule 103(c). See also Rule 104(c).

Rule 201(f)

This subdivision recognizes that the circumstances which make judicial notice of adjudicative facts appropriate are not limited to any particular stage of the judicial process.

Rule 201(g)

The conclusive nature of judicially noticed facts in civil cases is consistent with the restrictions which the rule places upon the kinds of facts which can be judicially noticed.

The rule does not affect judicial notice of foreign law. See Minn. R. Civ. P. 44.04. There are a number of existing statutes that deal with judicial notice of local laws, regulations, etc. See e.g., Minnesota Statutes 1974, chapter 599, and sections 268.12, clause (3), 410.11; Minnesota Statutes 1975 Supplement, section 15.049.

ARTICLE 3. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by statute or by these rules, 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.

Committee Comment - 1977

Only the burden of producing evidence is affected by a presumption. A presumption is a procedural device that satisfies the burden of producing evidence. Once the basic facts that give rise to the presumption are established the opponent must produce evidence to rebut the assumed fact or a verdict will be directed on the issue. If sufficient evidence is introduced that would justify a finding of fact contrary to the assumed fact, the presumption is rebutted and has no further function at the trial.

The disappearance of the presumption does not deprive the offered evidence of whatever probative value and whatever effect to which it would otherwise be entitled. For example, it may

be that the presumption is rebutted but the underlying facts that give rise to the presumption are sufficiently probative to justify an instruction as to a permissive inference. In approving the federal rule the United States Congress contemplated such instruction. 4 U.S. Code Cong. & Ad. News, 93d Cong., 2d Sess., House Conference Report No. 93-1597, Dec. 14, 1974, p. 7099. 4 U.S. Code Cong. & Ad. News, 93d Cong., 2d Sess., Senate Report No. 93-1277, Oct. 11, 1974, p. 7051. The Court's authority to give such an instruction does not flow from the presumption which has disappeared but from the Court's power and duty to sum up and instruct the jury. Under this rule a jury should never be instructed in terms of presumption. Furthermore, a presumption has no effect on the burden of persuasion.

The rule is largely consistent with the stated practice in Minnesota. Ryan v. Metropolitan Life Ins. Co., 206 Minn. 562, 289 N.W. 557 (1939); Te Poel v. Larson, 236 Minn. 482, 53 N.W.2d 468 (1952). However, the application of the rule has been inconsistent. See Jones v. Peterson, 279 Minn. 241, 246, 156 N.W.2d 733, 736 (1968); Krinke v. Faricy, 304 Minn. 450, 231 N.W.2d 491, 492 (1975); Thompson, Presumptions and the New Rules of Evidence in Minnesota, 2 Wm.Mitchell L.Rev.-(1976).

The rule does not define presumption, leaving this to court or statutory resolution. Because the term presumption has been used loosely in the past to refer to inferences, assumptions and matters of substantive law, the court must determine whether it is dealing with a true procedural presumption. For example, the statement that everyone is presumed to know the law is not based on presumption, but is a mere shorthand statement for the proposition that the substantive law does not recognize ignorance of the law as a permissible defense or excuse. J. Thayer, A Preliminary Treatise on Evidence at the Common Law, p. 335 (1898); Electric Short Line Term. Co. v. City of Minneapolis, 242 Minn. 1, 7, 64 N.W.2d 149, 153 (1954). Similarly, the so called presumption of legitimacy that attaches when a child is born during wedlock is not a true presumption but an operation of the substantive law that allocates the burden of persuasion in a litigation.

The rule applies to both common law presumptions and statutory presumptions with the exception of those statutory presumptions in which the legislature has specifically provided that the presumption shall have some other effect. See Minnesota Statutes 1974, section 602.04. The rule applies only in civil actions and proceedings.

ARTICLE 4. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Committee Comment - 1977

The threshold test for the admissibility of evidence is the test of relevancy. Essentially, it is a test of logic, and assessment of probative value. Evidence must have some probative value or it should not be admitted. The rule adopts a liberal as opposed to restrictive approach to the question of relevancy. If the offer has any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence it is relevant. A slight probative tendency is sufficient under Rule 401. Even where probative value is established and the evidence is relevant it still might be excluded under various other provisions in these rules, state and federal constitutions and other court rules. Rule 402.

The evidentiary offer must tend to prove or disprove a fact that is of consequence to the litigation. What is of consequence to the litigation depends upon the scope of the pleadings, the theory of recovery and the substantive law. The rule avoids reference to materiality, an overused term meaning different things in different situations. The fact to be established need not be an ultimate fact or a vital fact. It need only be a fact that is of some consequence to the disposition of the litigation.

The liberal approach to relevancy is consistent with Minnesota practice. In Boland v. Morrill, 270 Minn. 86, 98, 99, 132 N.W.2d 711, 719 (1965) the Court defined relevancy as a function of the effect the offered evidence might have upon the proof of a material fact in issue:

If the offered evidence permits an inference to be drawn that will justify a desired finding of fact, it is relevant. Reduced to simple terms, any evidence is relevant which logically tends to prove or disprove a material fact in issue.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the United States Constitution, the State Constitution, statute, by these rules, or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded 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.

Committee Comment - 1977

This rule along with Rule 102 provides the guidance for the proper application of these rules. Rule 403 sets forth the appropriate considerations that must be addressed in resolving challenges to the admissibility of relevant evidence. The rule creates a balancing test. Probative value is balanced against other considerations of policy, fairness, and convenience. The rule favors the admission of relevant evidence by requiring a determination that its probative value be "substantially" outweighed by the dangers listed in the rule before relevant evidence will be excluded.

Conspicuously missing from the proposed rule is the exclusion of relevant evidence on the basis of surprise. Even with modern discovery methods the question of surprise may still come up in litigation but a continuance rather than the exclusion of the evidence is deemed to be the better method of handling such a case. Minnesota cases list surprise as a basis for excluding otherwise relevant evidence. However, few if any reported cases have excluded relevant evidence on this ground. Cf, State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965), (new trial ordered essentially on a surprise analysis.) Otherwise the rule is consistent with existing Minnesota practice. State v. Gavle, 234 Minn. 186, 208, 48 N.W.2d 44, 56 (1951); State v. Haney, 219 Minn. 518, 520, 18 N.W.2d 315, 316 (1945).

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In a criminal prosecution, such evidence shall not be admitted unless (1) the prosecutor gives notice of its intent to admit the evidence consistent with the Rules of Criminal Procedure; (2) the prosecutor clearly indicates what the evidence will be offered to prove; (3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; (4) the evidence is relevant to the prosecutor's case; and (5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant. Evidence of past sexual conduct of the victim in prosecutions involving criminal sexual conduct, including attempts or any act of criminal sexual predatory conduct is governed by Rule 412.

(Amended effective January 1, 1990; amended effective September 1, 2006.)

Committee Comment -1989

Rules 404 to 411 give specific treatment to several areas where questions of relevancy commonly arise. To the extent that these rules call for the exclusion of certain offers of evidence, the court's discretion has been limited. All issues of admissibility are ultimately subject to the provisions of Rules 401 and 403, which also serve to limit the court in its exercise of discretion.

Rule 404(a)

The use of character evidence to prove conduct is subject to the limitations of Rule 404. The rule is generally consistent with the common law doctrine that character evidence is not admissible to prove that an individual acted in conformity with his character on a specific occasion. Certain exceptions to this general doctrine are contained in the rule.

The rule recognizes the traditional exception which permits the accused in a criminal case to introduce evidence of his good character as proof of the substantive issue of guilt or innocence. State v. Peery, 224 Minn. 346, 353, 28 N.W.2d 851, 855 (1947); State v. Dolliver, 150 Minn. 155, 184 N.W. 848 (1921). If the accused puts his character in issue the prosecutor may offer evidence in rebuttal. State v. Sharich, 297 Minn. 19, 23, 209 N.W.2d 907, 911 (1973).

The former Minnesota practice in civil actions which extended similar rights to a defendant where the cause of action was predicated upon defendant's "(d)epraved conduct or acts involving moral turpitude," State v. Oslund, 199 Minn. 604, 605, 273 N.W. 76 (1937), has been discontinued by this rule.

Rule 404(a)(2) continues the existing practice which permits the admission of a pertinent character trait of the victim to be offered by the accused in a criminal case. See State v. Keaton, 258 Minn. 359, 367, 104 N.W.2d, 650, 656, 86 A.L.R.2d 649 (1960). Evidence of this type is most commonly offered in cases involving issues of self-defense. The rule also permits the prosecution in homicide cases to introduce evidence of the character trait of peacefulness of the victim to rebut any evidence that the victim was the first aggressor. Before an accused can introduce evidence of

the victim's past sexual conduct in cases involving sexual offenses the provisions of Rule 404(c) must be satisfied.

Rule 404(b)

Subdivision (b) suggests certain purposes for which evidence of other acts or crimes may be admitted subject to the provisions of Rule 403. The list of acceptable purposes is not meant to be exclusive. See Minn. R. Crim. P. 7.02 which provides that the prosecuting attorney must give notice of certain additional offenses that might be offered pursuant to this rule of evidence. See also State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967); State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965).

The Committee has revised Rule 404(b) by adding one sentence which codifies Minnesota case law. State v. Billstrom.

Rule 404(c)

The Committee renumbered the rules in Article 4, moving the rule addressing evidence of the victim's past sexual conduct to a new Rule 412 to conform to the numbering in the Federal Rules of Evidence and Uniform Rules of Evidence.

Committee Comment - 2006

Rule 404(b)

Rule 404(b) has been revised to reflect the five part test that trial courts must apply in determining whether to admit other act evidence under the rule. See State v. Ness, 707 N.W.2d 676, 685-86 (Minn. 2006); State v. McLeod, 705 N.W.2d 776, 787 (Minn. 2005); Angus v. State, 695 N.W.2d 109, 119 (Minn. 2005); State v. Asfeld, 662 N.W.2d 534, 542 (Minn. 2003). In applying the test, the court should first determine the precise purpose or fact for which the evidence was offered and the relevance of the proffered evidence to that particular purpose or fact. Only after finding that the proffered evidence is relevant to a pertinent purpose or fact should the trial court apply the fifth prong's balancing test. See Ness, 707 N.W.2d at 686. The Ness opinion further held that the "need" requirement first enunciated in State v. Billstrom, 276 Minn. 174, 178-79, 149 N.W.2d 281, 284 (1967), is not an "independent requirement of admissibility" but is to be addressed in the context of the fifth prong's balancing test. Ness, 707 N.W.2d at 690.

The intent of the revision is, in part, to provide a clear balancing test to be applied in determining the admissibility of other acts evidence. The Minnesota Supreme Court has used conflicting language when describing the trial court's task. See generally James A. Morrow, Peter N. Thompson & Alfred C. Holden, Weighing Spreigl Evidence: In Search of a Standard, 60 BENCH & B. OF MINN. 23 (November 2003). Consistent with the Court's longstanding view that because of the great potential for misuse of this evidence, the trial judge should exclude the evidence in the close case, the Court has instructed the trial judge to exclude the evidence if the probative value is outweighed by the potential for unfair prejudice. In some of the same opinions, however, the Court also referred to the Rule 403 balancing test that requires the trial judge to admit the evidence in the close case. Rule 403 requires admission unless the probative value is "substantially" outweighed by the unfair prejudice. Even in Ness, an opinion designed to reconcile inconsistent decisions, the Court stated that other act evidence "may not be introduced if its probative value is substantially outweighed by its tendency to unfairly prejudice the factfinder." Ness, 707 N.W.2d at 685. However, the Ness Court, following Angus, 695 N.W.2d at 119, Asfeld, 662 N.W.2d at 542, and State v. Kennedy, 585 N.W.2d 385, 389 (Minn. 1998), held that the fifth prong as stated in Rule 404(b)(5) is the appropriate balancing test for other acts evidence. Ness, 707 N.W.2d at 689-93. This test focuses on whether the probative value is outweighed by the potential for unfair prejudice. A slight balance in favor

of unfair prejudice requires exclusion. Since this test is a more stringent test, evidence that satisfies this balancing test will certainly satisfy Rule 403.

Rule 404(b) also changes the description of the cases where Rule 412 is applicable. Consistent with Rule 412, the description is no longer dependent on statute numbers thereby alleviating the need to revise the evidence rule whenever criminal statutes are renumbered, amended, or added.

Similar conduct by the accused against a victim of domestic abuse or against other family or household members is governed by Minnesota Statutes 2004, section 634.20. In State v. McCoy, 682 N.W.2d 153, 159-61 (Minn. 2004), the supreme court held that the clear and convincing evidence standard of Rule 404(b) does not apply when evidence is offered under the statute.

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

(Amended effective January 1, 1990.)

Committee Comment - 1977

While Rule 404 determines when character evidence is admissible, Rule 405 determines the proper methods of introducing character evidence. In the note to the federal rule the Supreme Court Advisory Committee explained the rationale for drawing distinctions as to the various methods of proving character:

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine. Citing C. McCormick, Evidence section 153 (1954).

When character is not in issue the rule permits evidence by way of reputation or opinion. The rule is consistent with Minnesota law. Minnesota has long followed the minority rule and has permitted opinion evidence to establish good character. State v. Humphrey, 173 Minn. 410, 413, 217 N.W. 373, 374 (1928); State v. Lee, 22 Minn. 407, 409, 410 (1876). The foundation for the opinion and the competency of the witness to make the statement should be governed by the principles in Articles 6 and 7.

On cross-examination of a character witness the opposing party may inquire into specific instances in order to test the basis for the testimony on direct. The rule is not meant to provide an opportunity for attorneys to make points by innuendo by asking questions about unsubstantiated instances, and the Court should levy appropriate sanctions where such is the case. See gen. State v. Flowers, 262 Minn. 164, 114 N.W.2d 78 (1962); State v. Silvers, 230 Minn. 12, 40 N.W.2d 630 (1950).

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(Amended effective January 1, 1990.)

Committee Comment - 1989

The change in the title of the rule conforms the title to the text of the rule and to the title of the corresponding Federal Rule and Uniform Rule 406. Habit is not defined in the rule, but the definition as set forth in McCormick is generally accepted and should be used in conjunction with this rule. Whereas character evidence is considered to be a "generalized description of one's disposition, or of one's disposition in respect to a generalized trait," habit describes "one's regular response to a repeated specific situation." C. McCormick, Evidence section 195 (2d ed. 1972). Whether the response is sufficiently regular and whether the specific situation has been repeated enough to constitute habit are questions for the trial court. See Lewan, Rationale of Habit Evidence, 16 Syracuse L. Rev. 39 (1964). The Court should make a searching inquiry to assure that a true habit exists. Once it is established that a habit does exist testimony as to that habit is highly probative. Such testimony has been received in Minnesota Courts. See Department of Employment Security v. Minnesota Drug Products, Inc., 258 Minn. 133, 138, 104 N.W.2d 640, 644 (1960); Evison v. Chicago, St. Paul, Minneapolis & Omaha Ry., 45 Minn. 370, 372, 373, 48 N.W. 6, 7, 11 (1891).

Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

(Added effective September 1, 2006.)

Committee Comment - 1989

The rule reflects the conventional approach to the admissibility of subsequent remedial measures. Based on policy considerations aimed at encouraging people to make needed repairs, along with the real possibility that subsequent repairs are frequently not indicative of past fault, such evidence is not admissible to establish negligence or culpable conduct. The evidence might be admissible to establish other controverted issues in the case or for impeachment purposes. The rule is consistent with existing Minnesota practice. See Faber v. Roelofs, 298 Minn. 16, 20-23, 212 N.W.2d 856, 859-860 (1973).

Under the rule subsequent remedial measures can be admissible to establish feasibility of precautionary measures in any case where such feasibility is in issue. Subsequent remedial measures are not admissible to prove defect in design defect cases. See Kallio v. Ford Motor Co., 407 N.W.2d 92 (Minn. 1987), rejecting Ault v. International Harvester Co., 13 Cal.3d, 113, 117 Cap.Rptr. 812, 528 P.2d 1148 (1975). The Committee is of the view that such measures are also inadmissible in failure to warn cases in view of Bilotta v. Kelly Co. Inc., 346 N.W.2d 616 (Minn. 1984), which held that design defect and failure to warn cases can be submitted to the jury on a single theory of products liability. See DeLuryea v. Winthrop Laboratories, 697 F.2d 222 (8th Cir. 1983).

Committee Comment - 2006

The amendment comes from Fed. R. Evid. 407, which was added in 1997. The amending language makes it clear that to merit protection under the rule the remedial measure must come after the accident or injury. This approach is consistent with current practice in Minnesota. See Myers v. Hearth Techs., Inc., 621 N.W.2d 787, 792 (Minn. App. 2001) (finding changes made before the accident do not qualify as subsequent remedial measures); Beniek v. Textron, Inc., 479 N.W.2d 719, 723 (Minn. App. 1992) (finding that design changes after plaintiff purchased the product, but before the accident, are not excluded by this rule).

In addition, the language insures that the protection under the rule does not depend on the legal theory advanced at trial. The Minnesota Supreme Court has already ruled that subsequent remedial measures are not admissible to prove defect in design defect cases. See Kallio v. Ford Motor Co., 407 N.W.2d 92, 97-98 (Minn. 1987). The 1989 Minnesota Supreme Court Advisory Committee Comment to Rule 407 provided that subsequent remedial measures "are also inadmissible in failure to warn cases in view of Bilotta v. Kelly Co. Inc., 346 N.W.2d 616 (Minn. 1984) which held that design defect and failure to warn cases can be submitted to the jury on a single theory of products liability." The amended language would also make subsequent remedial measures inadmissible to prove that a product was defective in a pure strict liability or a breach of warranty case.

Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Committee Comment - 1977

This rule will substantially alter present practice in Minnesota affording more protection to compromise discussions that presently exist. The increased protection is justified to the extent that it will encourage frank and free discussion to compromise negotiations and avoid the necessity for parties to speak in terms of hypotheticals. Not only are offers of compromise or the acceptance of compromise inadmissible but also all statements made in compromise negotiations. Contra, Esser v. Brophey, 212 Minn. 194, 196-99, 3 N.W.2d 3, 4, 5 (1942). Before the rule of exclusion is applicable there must be a genuine dispute as to either validity or amount. Absent such a dispute there is no real compromise. The rule does not immunize otherwise discoverable material merely because it was revealed within the context of an offer of compromise. Finally the rule only excludes evidence of compromise on the issue of liability, not for other possible purposes as suggested in the rule. See Esser, id. at 199, 200, 3 N.W.2d at 6.

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Committee Comment - 1977

The rule is based on many of the same considerations that give rise to Rule 408. Unlike Rule 408 there is no requirement that there be an actual dispute at the time the medical payments are made or offered. In addition, the rule does not preclude the admissibility of statements that accompany the payments or offers to pay. Consistent with Rule 408 the rule only precludes such an offer of evidence when offered to prove liability for the injury. Subject to the provisions of Rules 401-403 such evidence may be admissible to prove other issues of consequence to the litigation.

Rule 410. Offer to Plead Guilty; Nolo Contendere, Withdrawn Plea of Guilty

Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of 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, criminal, or administrative action, case, or proceeding whether offered for or against the person who made the plea or offer.

Committee Comment - 1977

At present the subsequent effect of a withdrawn plea of guilty or an offer to plead guilty is governed by Minn. R .Crim. P. 15.06 which provides:

> *If the defendant enters a plea of guilty which is not accepted or which is withdrawn, neither the plea discussions, nor the plea agreement, nor the plea shall be received in evidence against or in favor of the defendant in any criminal, civil, or administrative proceeding.*

The rule of evidence makes it clearer that not only the plea but also those statements that accompany the plea are inadmissible. See gen. Minn. R. Crim. P. 15.02.

Based on principles of comity as well as fairness to the person making the plea, the rule also precludes evidence of pleas or offers to plea nolo contendere in those jurisdictions that permit such a plea.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

(Amended effective January 1, 1990.)

Committee Comment - 1977

The rule is in agreement with the approach currently followed in Minnesota that evidence as to whether a person is or is not insured against liability is inadmissible upon the issue of negligence or wrongful conduct. See Olson v. Prayfrock, 254 Minn. 42, 44, 94 N.W.2d 540, 542 (1958). Such evidence may be admissible to prove other issues, such as bias of a witness. See Scholte v. Brabec, 177 Minn. 13, 16, 224 N.W. 259, 260 (1929). The rule is obviously not intended to apply to those cases in which liability turns on whether or not a person was insured. See Minnesota Statutes 1974, section 65B.67.

Rule 412. Past Conduct of Victim of Certain Sex Offenses

(1) In a prosecution for acts of criminal sexual conduct, including attempts or any act of criminal sexual predatory conduct, evidence of the victim's previous sexual conduct shall not be

admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order under the procedure provided in Rule 412. Such evidence can be admissible only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature and only in the following circumstances:

(A) When consent of the victim is a defense in the case,

(i) evidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue, relevant and material to the issue of consent;

(ii) evidence of the victim's previous sexual conduct with the accused; or

(B) When the prosecution's case includes evidence of semen, pregnancy or disease at the time of the incident or, in the case of pregnancy, between the time of the incident and trial, evidence of specific instances of the victim's previous sexual conduct, to show the source of the semen, pregnancy or disease.

(2) The accused may not offer evidence described in Rule 412(1) except pursuant to the following procedure:

(A) A motion shall be made by the accused prior to the trial, unless later for good cause shown, setting out with particularity the offer of proof of the evidence that the accused intends to offer, relative to the previous sexual conduct of the victim.

(B) If the court deems the offer of proof sufficient, the court shall order a hearing out of the presence of the jury, if any, and in such hearing shall allow the accused to make a full presentation of the offer of proof.

(C) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the accused regarding the previous sexual conduct of the victim is admissible under the provisions of Rule 412(1) and that its probative value is not substantially outweighed by its inflammatory or prejudicial nature, the court shall make an order stating the extent to which such evidence is admissible. The accused may then offer evidence pursuant to the order of the court.

(D) If new information is discovered after the date of the hearing or during the course of trial, which may make evidence described in Rule 412(1) admissible, the accused may make an offer of proof pursuant to Rule 412(2), and the court shall hold an in camera hearing to determine whether the proposed evidence is admissible by the standards herein.

(Amended effective January 1, 1990; amended effective September 1, 2006.)

Committee Comment - 1989

The original draft of the rules contained a proposed rule which was intended to preserve the holdings of State v. Zaccardi, 280 Minn. 291, 159 N.W.2d 108 (1968) and State v. Warford, 293 Minn. 339, 200 N.W.2d 301 (1972), cert. denied 410 U.S. 935, 93 S. Ct. 1388, 35 L.Ed.2d 598 (1973). While the Committee was drafting the rules, the Legislature passed an extensive revision of the law relating to sex offenses. Criminal Code of 1963, Minnesota Laws 1975, chapter 374, p. 1244, codified at Minnesota Statutes 1975 Supplement, sections 609.341 to 609.35. Included in the legislation was Minnesota Statutes 1975 Supplement, section 609.347, which contained provisions relating to evidence, procedure, substantive law and jury instructions. During the public hearings held on the rules, various persons appeared before the committee and a number of written comments were received, all in support of the provisions of Minnesota Statutes 1975 Supplement, section

609.347. As a result, the Committee decided to revise the original proposed evidentiary rule to incorporate the evidentiary and procedural provisions of the statute.

It is the intent of the Committee that subdivisions 1, 2, and 5 of the statute shall not be affected by the rule. Subdivision 1 relates to the weight of evidence; subdivision 2 relates to the substantive law defining the offenses; and subdivision 5 concerns jury instructions. It was the opinion of the Committee that none of these subjects should be incorporated into evidentiary rules. Accordingly, it is the Committee's intent that these subdivisions shall continue in effect after the rules take effect.

Subdivision 3 of the statute relates to admissibility, and subdivision 4 relates to the procedure for determining admissibility. Both of these subjects are properly within the scope of evidentiary rules, and the Committee incorporated their substance into the revised Rule 412. The revised rule contains the substance of the statute's provision that evidence of the victim's previous sexual conduct can only be admitted in limited circumstances and the provision for mandatory notice and hearing before such evidence can be admitted.

The committee made various changes, some of style and some of substance. Among the changes of style are the substitution of the words "accused" for "defendant" and "victim" for "complainant" so as to be consistent with the balance of Rule 404.

Although the Committee agreed in substance with the thrust of the statute, because of the many questions that were created by the language in the statute, the Committee could not recommend the entire statute as drafted. For example, although it appears that the purpose of the statute was to eliminate the unwarranted attack on the victim's character when such evidence does not relate to the issues at trial, the effect of the statute could be the opposite. Subdivision (3)(a) suggests that the victim's past sexual conduct would be admissible to prove "fabrication."

This could have the effect of expanding the use of past sexual conduct to all contested trials, an unwise result that seems inconsistent with sound policy and the purposes of the legislation. The evidentiary rule does not make past conduct admissible to prove fabrication.

The statute did not make it clear that consent and identity of semen, disease, or pregnancy are the only two issues to which evidence of the victim's prior sexual conduct should be admitted. Furthermore, it is not clear from the statute the extent to which prior sexual conduct with the accused is admissible. The evidentiary rule makes it clear that this evidence is only admissible when consent or identity is in issue. Finally, portions of the statute could be subject to constitutional attack on due process or right of confrontation grounds. As a consequence, the Committee redrafted these sections trying to remain true to the overall legislative intent which the Committee endorses.

The statute recognized three situations in which previous sexual conduct of the victim would be relevant and admissible. The first of these occurs when consent is in issue. Prior sexual conduct is offered in order to give rise to an inference that the victim acted in conformity with that past conduct on a particular occasion. In the case of a victim of a sex offense, this is only relevant to prove that the victim consented to the act. If consent is not a defense, as, for example, the accused denies he was involved in the incident, evidence of the victim's past conduct is not relevant. This type of evidence is treated in Rule 412(1). The rule recognizes the same two categories of such evidence recognized by the statute: evidence tending to show a common scheme or plan (subsection (A)(i)); and evidence of conduct involving both the accused and the victim (subsection (A)(ii)). As in the statute, the rule allows only these two categories of past sexual conduct to be admitted to prove consent.

The second situation in which evidence of the victim's previous sexual conduct can be admitted under both the statute and the rule occurs when the prosecution has offered evidence concerning semen, pregnancy or disease, to show either that the offense occurred or that the accused committed

it. In this case the accused may offer evidence of the victim's specific sexual activity to rebut the inferences raised by the prosecution's evidence. Rule 412(1)(B). In this situation consent is not material, and the rule admits such evidence without requiring consent to be a defense.

The third situation in which the statute admitted evidence of previous sexual conduct occurs when the victim testifies specifically concerning such sexual conduct - or more probably, lack of sexual conduct - on direct examination. The statute allowed evidence of previous sexual conduct to impeach the victim's testimony. Minnesota Statutes 1975 Supplement, section 609.347, subdivision 3, paragraph (d). This provision was not incorporated in the rule because the Committee is of the opinion that the accused might not know whether the victim was going to testify about lack of sexual conduct until the victim had actually completed direct examination. To impose the notice and hearing requirement does not seem to be fair in such a case. Moreover, the prosecution and victim can obviate such impeaching testimony by avoiding general statements about the victim's sexual activity on direct examination. For these reasons subdivision 3, paragraph (d), of the statute is not incorporated in the rule. The Committee has not attempted to codify rules about circumstances under which prosecution evidence of this nature opens the door to rebuttal evidence by the defense.

The Committee deleted the language, "Evidence of such conduct engaged in more than one year prior to the date of alleged offense is inadmissible," from subdivision 3, paragraph (a), of the statute. Obviously, the longer time lapse between the past conduct and the date of the alleged consent, the less probative the evidence becomes. However, there might be situations in which the victim engaged in a common scheme or plan which began more than a year before the offense and which might be relevant. The year limitation is arbitrary and may be unconstitutional. A sufficient safeguard is contained in the requirement that the probative value must not be substantially outweighed by the inflammatory and prejudicial nature of the evidence. This standard of admissibility has been altered slightly from the statutory language to conform with the general standard of admissibility found in Rule 403. The change was necessary so that it would not appear that the accused had to meet a more stringent test of admissibility when proving a defense, than did the prosecutor in proving the accused's guilt.

With the respect to the procedural portions of the rule, the Committee deleted the language "to the fact of consent" from subdivision 4, paragraph (c), of the statute. The required finding is that the evidence be "admissible as prescribed by this rule." Under both the statute and the rule, certain evidence of previous sexual conduct - that concerning the source of semen, pregnancy or disease - is admissible whether or not consent is a defense.

The Committee deleted the language "and prescribing the nature of the questions to be permitted at trial," also from subdivision 4, paragraph (c), of the statute. A court order stating the extent to which the evidence is admissible is a sufficient safeguard, especially when considered with the restrictive language, "nor shall any reference to such conduct be made in the presence of the jury," taken from the statute and incorporated in Rule 412(1). Prescribing the nature of the questions to be asked by counsel is a marked and unnecessary departure from the adversary system and may be unconstitutional.

In rare cases, the due process clause, the right to confront accusers, or the right to present evidence will require admission of evidence not specifically described in Rule 412. See State v. Benedict, 397 N.W.2d 337, 341 (Minn. 1986); State v. Caswell, 320 N.W.2d 417, 419 (Minn. 1982).

Committee Comment - 2006

The amendment is intended to clarify the reach of the rape shield rule. The amendment provides a general description of the types of cases in which this rule is applicable. The rule is drafted broadly enough to incorporate offers of evidence against alleged victims in prosecutions brought

under the new sexual predator laws. See, e.g., Minnesota Statutes 2005 Supplement, section 609.3453, (criminal sexual predatory conduct). The language in the amendment can accommodate future statutory changes without requiring that the rule be amended. Similar language is also included in the amendment to Rule 404. The rape shield rule should be applicable in all cases where the accused is offering evidence of the past sexual conduct of the alleged victim.

ARTICLE 5. PRIVILEGES

Rule 501. General Rule

Nothing in these rules shall be deemed to modify, or supersede existing law relating to the privilege of a witness, person, government, state or political subdivision.

Committee Comment - 1977

In the enabling legislation which created the committee, the legislature specifically attempted to limit the power of the Supreme Court to promulgate rules of evidence which conflicted, modified, or superseded "Statutes which relate to the competency of witnesses to testify, found in Minnesota Statutes, sections 595.02 to 595.025"; and "Statutes which relate to the privacy of communications." Minnesota Statutes 1974, section 480.0591, subdivision 6, paragraphs (a) and (d). Rule 501 reflects the committee's recognition of these limitations. The bulk of the existing law dealing with the traditional privileges is found in Minnesota Statutes 1974, sections 595.02 to 595.025.

ARTICLE 6. WITNESSES

Rule 601. Competency

Except as provided by these rules, the competency of a witness to give testimony shall be determined in accordance with law.

Committee Comment - 1977

As with Rule 501 this rule reflects the committee's adherence to the enabling legislation which attempts to limit the Court's authority to promulgate rules of evidence in this area. See Comment to Rule 501. Although Minnesota Statutes 1974, sections 595.02 to 595.08, are referred to as competency statutes some in fact are statutes creating privilege. The general competency statutes are Minnesota Statutes 1974, sections 595.02, clause (6), and 595.06.

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

(Amended effective January 1, 1990.)

Committee Comment - 1977

The rule states a fundamental principle of evidence law. Expert witnesses provide the only exception to the rule that witnesses must testify from firsthand knowledge. See Rule 703. The rule, although phrased in terms of competency, is essentially a specific application of Rule 104(b). Testimony simply is not relevant unless the witness testifies from firsthand knowledge.

The requirement of firsthand knowledge does not preclude a witness from testifying as to a hearsay statement which qualifies as an exception to the hearsay rule (see Article 8) and was heard

by the witness. Whereas the witness in such circumstances could repeat the hearsay statements the witness could not testify as to the subject matter of the statements without firsthand knowledge. See United States Supreme Court Advisory Committee Note.

The rule requires that witnesses have firsthand knowledge. It does not specifically refer to the declarant of a hearsay statement that is admitted subject to an exception to the hearsay rule. With the exception of party admissions, which are admitted as a function of the adversary system (and are not hearsay under Rule 801(d)(2) the Courts have generally required that the declarant of a hearsay statement have firsthand knowledge, before the hearsay statement is admissible. The rule should be read to continue this practice. See C. McCormick, Evidence sections 18, 264, 285, 300, 310 (2d ed. 1972).

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

(Amended effective January 1, 1990.)

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

(Amended effective January 1, 1990.)

Committee Comment - 1977

This rule is intended to implement Minn. R. Civ. P. 43.07.

Committee Comment - 2006

Interpreters who have not been qualified as experts should not be allowed to provide their opinion about the content of questions and answers involving persons who do not speak English or are handicapped in communication. The specific rules governing the qualifications of interpreters are set forth in Minn. Gen. R. Prac. 8. This rule provides that an interpreter who is listed on the statewide roster as a certified court interpreter is presumed competent to interpret in all court proceedings. Minn. Gen. R. Prac. 8.02(a). Most court interpreters on the statewide roster, however, have not passed the stringent tests and are not certified. Interpreters on the statewide roster but not certified, or those interpreters not on the roster, must be qualified as expert witnesses before providing interpretation. Judges should use the screening standards developed by the State Court Administrator to determine whether the non-certified interpreter is qualified. See Minn. Gen. R. Prac. 8.02(c). The State Court Administrator standards are available at: http://www.courts.state.mn.us/documents/0/Public/Interpreter_Program/voir_dire.doc

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Committee Comment - 1977

The rule as provided states the general rule in Minnesota as well as the approach generally followed in the United States. State v. Sandquist, 146 Minn. 322, 178 N.W. 883 (1920). See also Annot., 157 A.L.R. 315 (1945).

Rule 606. Competency of Juror as Witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called to so testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror, or as to any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict, or as to whether a juror gave false answers on voir dire that concealed prejudice or bias toward one of the parties, or in order to correct an error made in entering the verdict on the verdict form. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

(Amended effective January 1, 1990; amended effective July 1, 2016.)

Committee Comment - 1989

The rule is based on the same rationale that gives rise to Rule 605. However, when a juror is called as a witness an objection is required by the party opposing this testimony. Opportunity should be provided for an objection out of the presence of the jury.

Rule 606(b) is a reasoned compromise between the view that jury verdicts should be totally immunized from review in order to encourage freedom of deliberation, stability, and finality of judgments; and the necessity for having some check on the jury's conduct. Under the rule, the juror's thought processes and mental operations are protected from later scrutiny. Only evidence of the use of extraneous prejudicial information or other outside influence that is improperly brought to bear upon a juror is admissible. In criminal cases such an intrusion on the jury's processes on behalf of the accused might be mandated by the Sixth Amendment. See Parker v. Gladden, 385 U.S. 363, 364, 87 S.Ct. 468, 470, 17 L.Ed.2d 420, 422 (1966).

The application of the rule may be simple in many cases, such as unauthorized views, experiments, investigations, etc., but in other cases the rule merely sets out guidelines for the court to apply in a case-by-case analysis. Compare Olberg v. Minneapolis Gas Co., 291 Minn. 334, 340, 191 N.W.2d 418, 422 (1971) in which the Court stated that evidence of a juror's general "bias, motives, or beliefs should not be considered" with State v. Hayden Miller Co., 263 Minn. 29, 35, 116 N.W.2d 535, 539 (1962) in which the Court holds that bias resulting from specialized or personal knowledge of the dispute and withheld on voir dire is subject to inquiry.

The rule makes the juror's statements by way of affidavit or testimony incompetent. The rule does not purport to set out standards for when a new trial should be granted on the grounds of juror misconduct. Nor does the rule set the proper procedure for procuring admissible information from jurors. In Minnesota it is generally considered improper to question jurors after a trial for the purpose of obtaining evidence for a motion for a new trial. If possible misconduct on behalf of a juror is suspected, it should be reported to the Court, and if necessary the jurors will be interrogated on the record and under oath in court. Schwartz v. Minneapolis Gas Co., 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960); Olberg v. Minneapolis Gas Co., 291 Minn. 334, 343, 191 N.W.2d 418, 424 (1971); Minn. R. Crim. P. 26.03, subd 20(6). See also Rule 3.5 of the Rules of

Professional Conduct in regard to communications with jurors. The amended rule allows jurors to testify about overt threats of violence or violent acts brought to bear on jurors by anyone, including by other jurors. Threats of violence and use of violence is clearly outside of the scope of the acceptable decisionmaking process of a jury. The pressures and dynamics of juror deliberations will frequently be stressful and jurors will, of course, become agitated from time to time. The trial court must distinguish between testimony about "psychological" intimidation, coercion, and persuasion, which would be inadmissible, as opposed to express acts or threats of violence. See State v. Scheerle, 285 N.W.2d 686 (Minn. 1979); State v. Hoskins, 292 Minn. 111, 193 N.W.2d 802 (1972).

Committee Comment - 2016

Consistent with the federal rule, Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. In addition, in accordance with the common law, the rule has been amended to provide that jurors may testify or provide affidavits "when there was some indication that a juror gave false answers on voir dire which concealed prejudice or bias toward one of the parties and thereby deprived that party of a fair trial." State v. Stofflet, 281 N.W.2d 494, 498 (Minn. 1979) (quoting Note, 4 Wm. Mitchell L. Rev. 417, 432-33).

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

(Amended effective January 1, 1990.)

Committee Comment - 1977

It has been settled for some time in Minnesota that absent surprise, a party cannot impeach his own witness. The Minnesota Court has recognized that attorneys must take their witnesses where they find them and cannot always vouch for their credibility, but has followed the rule in an effort to avoid subjecting the jury to hearsay statements, ostensibly admitted for impeachment purposes. State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939); Selover v. Bryant, 54 Minn. 434, 438, 439, 56 N.W. 58, 59 (1893). The Court has used the surprise doctrine as a means for screening those cases in which a prior inconsistent statement is improperly being offered to prejudice the jury with hearsay from the case where the introduction of the prior statement is essential to a fair presentation of the claims.

Not only has the application of the rule resulted in technical distinctions but occasionally operates to deprive the trier of fact of valuable, relevant evidence. A witness with firsthand knowledge might not be called by either party, or if a witness does testify the rule may preclude impeachment to place the testimony in proper perspective. Such results are inconsistent with the principles of these evidentiary rules as expressed in Rule 102.

Some intrusions on the traditional rule have already been implemented in civil cases by Minn. R. Civ. P. 43.02 and by the operation of the Sixth Amendment Confrontation Clause in criminal cases. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). It was the committee's belief that the "surprise doctrine" no longer was justified. Consequently, it is recommended that the proposed rule be adopted, bringing Minnesota into conformity with the modern trend.

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness, and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of the witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(c) Criminal cases. The prosecutor in a criminal case may not cross-examine the accused or defense witness under subdivision (b) unless (1) the prosecutor has given the defense notice of intent to cross-examine pursuant to the rule; (2) the prosecutor is able to provide the trial court with sufficient evidentiary support justifying the cross-examination; and (3) the prosecutor establishes that the probative value of the cross-examination outweighs its potential for creating unfair prejudice to the accused.

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

(Amended effective January 1, 1990; amended effective September 1, 2006.)

Committee Comment - 1977

The rule permits impeachment by means of reputation or opinion evidence. Traditionally, Minnesota has distinguished between opinion and reputation when dealing with the issue of credibility. Reputation testimony has been permitted but personal opinion has been excluded. See Simon v. Carroll, 241 Minn. 211, 220, 221, 62 N.W.2d 822, 828, 829 (1954); State v. Kahner, 217 Minn. 574, 582, 15 N.W.2d 105, 109 (1944). However, since the Minnesota courts permit the witness to testify as to whether he would believe the testimony which the impeached witness would give under oath, Minnesota courts come very close to permitting opinion testimony as to credibility.

Evidence of truthful character is only admissible for rehabilitation purposes after the character of the witness is attacked. What is meant by "otherwise" in the rule is left for case-by-case analysis. The United States Supreme Court Advisory Committee Note indicates that impeachment of a witness by introducing evidence of bias is not an attack on the character of the witness sufficient to justify rehabilitation. It is further suggested that evidence of misconduct admitted under Rule 608(b) or 609 is such an attack. Impeachment in the form of contradiction may justify rehabilitation, depending on the circumstances. See United States Supreme Court Advisory Committee Note.

This subdivision (b) considers the use of specific conduct to attack or support the credibility of a witness. (See Rule 609 for the admissibility of a criminal conviction.) The rule corresponds to existing practice in Minnesota. It is permissible to impeach a witness on cross-examination by prior misconduct if the prior misconduct is probative of untruthfulness. See State v. Gress, 250 Minn. 337, 343, 84 N.W.2d 616, 621 (1957); Note 36 Minn.L.Rev. 724, 733 (1952). However, because this is deemed an inquiry into a collateral matter the cross-examiner may not disprove an answer

by extrinsic evidence. State v. Nelson, 148 Minn. 285, 296, 181 N.W. 850, 855 (1921). In criminal cases the courts have been somewhat reluctant to permit such evidence if it tends to involve matters that might prejudice the jury. See State v. Haney, 219 Minn. 518, 520, 18 N.W.2d 315, 316 (1945).

The last sentence in Rule 608 preserves the rights of an accused or other witness to assert the Fifth Amendment privilege as to those questions which relate only to credibility. If the question relates to matters other than credibility this rule has no application.

Committee Comment - 2006

Rule 608(b)

The amendment in Rule 608(b) comes from the amendment to Fed. R. Evid. 608(b), which was added in 2003. The language clarifies that the restriction on extrinsic evidence applies only if the witness is being impeached on the issue of character for truthfulness. If the witness is impeached by evidence of bias the denial may be contradicted by extrinsic evidence. For example, if a witness denies the plaintiff is her son, the denial may be challenged by extrinsic evidence. If the witness denies that she lied on a job application, the denial may not be disproved by extrinsic evidence.

The limitation on extrinsic evidence applies only to evidence that requires testimony from another witness. Counsel may contradict the witness with evidence offered through the testimony of the witness being impeached. For example, if the witness denies lying on a job application, counsel may try to refresh the witness' recollection by showing the witness the application. Counsel may offer the job application if the foundation for admitting it can be established through the testimony of the witness being impeached. If the witness denies lying on a job application, and the lie cannot be established through cross-examination of that witness, counsel may not disprove the denial by calling another witness. Because this is an inquiry into a collateral matter counsel may not call a rebuttal witness to lay the foundation for admitting the job application and proving the lie. Compare Carter v. Hewitt, 617 F.2d 961, 969-70 (3d Cir. 1980) (admitting, as non-extrinsic evidence, a letter that defendant admitted authoring) with United States v. Martz, 964 F.2d 787, 788 (8th Cir. 1992) (precluding defendant from introducing witness' plea agreements after witness denied making any agreement stating that documents are not admissible under rule 608(b) "merely to show a witness' general character for truthfulness"). See generally ROGER C. PARK, DAVID P. LEONARD & STEVEN H. GOLDBERG, EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 485 (2d ed. 2004).

Rule 608(c)

Rule 608(c) incorporates the holding in State v. Fallin, 540 N.W.2d 518, 522 (Minn. 1995) (placing burden on the prosecutor before allowing cross-examination of defendant or defense witnesses about acts of misconduct reflecting on truthfulness). The balancing test taken from Fallin is not the Rule 403 test favoring admissibility unless probative value is "substantially outweighed" by unfair prejudice. Under this test the court should not allow the cross-examination if probative value and unfair prejudice are closely balanced. Fallin, 540 N.W.2d at 522. The evidence should not be allowed unless probative value on the issue of credibility outweighs the potential for unfair prejudice.

The rule follows the holding in Fallin. Neither the rule nor the Court's opinion addresses the issue of whether the accused or a party in a civil case must provide notice and satisfy the same evidentiary standard if counsel attempts to impeach a witness under this rule. Ethical requirements in Minn. R. Prof. Cond. 3.4(e) would be applicable in all cases to restrict lawyers from alluding "to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." Nothing in this rule would limit the rights and obligations in discovery. The Committee recognizes that in some circumstances Minn. R. Crim. P. 9 provides for differing

obligations of discovery between the prosecutor and the defense. See also State v. Patterson, 587 N.W.2d 45, 50 (Minn. 1998) ("Discovery rules are 'based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial' and are 'designed to enhance the search for truth'") (citations omitted).

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, vacation or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, vacation or certificate of rehabilitation or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, vacation or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is not admissible under this rule unless permitted by statute or required by the state or federal constitution.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(Amended effective January 1, 1990.)

Committee Comment - 1989

Rule 609

The question of impeachment by past conviction has given rise to much controversy. Originally convicted felons were incompetent to give testimony in courts. It was later determined that they should be permitted to testify but that the prior conviction would be evidence which the jury could consider in assessing the credibility of the witness. However, not all convictions reflect on the individual's character for truthfulness. In cases where a conviction is not probative of truthfulness the admission of such evidence theoretically on the issue of credibility breeds prejudice. The potential for prejudice is greater when the accused in a criminal case is impeached by past crimes that only indirectly speak to character for truthfulness or untruthfulness. The rule represents a workable solution to the problem. Those crimes which involve dishonesty or false statement are admissible for impeachment purposes because they involve acts directly bearing on a person's character for truthfulness. Dishonesty in this rule refers only to those crimes involving untruthful conduct. When

dealing with other serious crimes, which do not directly involve dishonesty or false statement the Court has some discretion to exclude the offer where the probative value is outweighed by prejudice. Convictions for lesser offenses not involving dishonesty or false statement are inadmissible.

The substantive amendment is designed to conform this rule to the accepted practice in Minnesota, which is to allow the accused to introduce evidence of past crimes in the direct examination of the accused.

Contrary to the practice in federal courts, the defendant can preserve the issue at a motion in limine and need not testify to litigate the issue in post trial motions and appeals. Compare State v. Jones, 271 N.W.2d 534 (Minn. 1978) with Luce v. United States, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984). The trial judge should make explicit findings on the record as to the factors considered and the reasons for admitting or excluding the evidence. If the conviction is admitted, the court should give a limiting instruction to the jury whether or not one is requested. State v. Bissell, 368 N.W.2d 281 (Minn. 1985).

Subdivision (b)

The rule places a ten year limit on the admissibility of convictions. This limitation is based on the assumption that after such an extended period of time the conviction has lost its probative value on the issue of credibility. Provision is made for going beyond the ten year limitation in unusual cases where the general assumption does not apply.

The rule will supersede Minnesota Statutes 1974, section 595.07.

Subdivision (c)

The rule is predicated on the assumption that if the conviction has been "set aside" for reasons that suggest rehabilitation, the probative value of the conviction on the issue of credibility is diminished. For example, pardons pursuant to Minnesota Constitution, article 5, section 7 (restructured 1974), or Minnesota Statutes 1974, section 638.02, would operate to make a prior conviction inadmissible as would a vacation of the conviction or subsequent nullification pursuant to Minnesota Statutes 1974, sections 609.166 to 609.168, or Minnesota Statutes 1974, section 242.01 et seq. A restoration of civil rights, which does not reflect findings of rehabilitation would not qualify under the rule. See Minnesota Statutes 1974, section 609.165. If there is a later conviction, as defined in the rule, the assumption of rehabilitation is no longer valid. If otherwise relevant and competent both convictions may be used for impeachment purposes. Obviously, if the first conviction is "set aside" based on a finding of innocence, the conviction would have no more probative value under any circumstances. See Rules 401-403.

Subdivision (d)

The amendment is a change in style not substance. Minnesota Statutes 1988, section 260.211, subdivision 2, does permit the disclosure of juvenile records in limited circumstances. Pursuant to Minnesota Statutes 1988, section 260.211, subdivision 1, a juvenile adjudication is not to be considered a conviction nor is it to impose civil liabilities that accompany the conviction of a crime. Rule 609(d) reflects this policy by precluding impeachment by evidence of a prior juvenile adjudication. It is conceivable that the state policy protecting juveniles as embodied in the statute and the evidentiary rule might conflict with certain constitutional provisions, e.g., the Sixth Amendment confrontation clause. Under these circumstances the evidentiary rule becomes inoperative. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), construed in State v. Schilling, 270 N.W.2d 769 (Minn. 1978).

Committee Comment - 2016

Rule 609(a) does not prohibit impeachment through an unspecified felony conviction if the impeaching party makes a threshold showing that the underlying conviction falls into one of the two categories of admissible convictions under rule 609(a). However, a party need not always impeach a witness with an unspecified felony conviction. Instead, "the decision about what details, if any, to disclose about the conviction at the time of impeachment is a decision that remains within the sound discretion of the district court," considering whether the probative value of admitting the evidence outweighs its prejudicial effect. "If a court finds that the prejudicial effect of disclosing the nature of the felony conviction outweighs its probative value, then it may still allow a party to impeach a witness with an unspecified felony conviction if the use of the unspecified conviction satisfies the balancing test of Rule 609(a)(1)." State v. Hill, 801 N.W.2d 646, 651-53 (Minn. 2011).

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

(Amended effective January 1, 1990.)

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. An accused who testifies in a criminal case may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

(Amended effective January 1, 1990.)

Committee Comment - 1977

Rule 611(a)

The mechanics of the trial process and the method and order of interrogating witnesses is left to the discretion of the trial court. The rule makes it clear that the court must bear the ultimate responsibility for the proper conduct of the trial. The rule presents three general principles which should guide the court in its exercise of "reasonable control." See also Rule 102.

Rule 611(b)

The court is also given some discretion over the scope of cross-examination. Generally, the scope of cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. Consistent with Rule 611(a) and the court's power to control the order of proof, the court may permit a broader scope of cross-examination in the appropriate case. However, inquiries into matters which were not the subject of direct examination

will be treated as if originating from direct examination. The rule makes it clear that the scope of cross-examination of an accused who takes the witness stand in a criminal trial is limited only by principles of relevancy and the Fifth Amendment. See, e.g., Rules 104(d), 608(b).

Rule 611(c)

The use of leading questions is left to the discretion of the trial court. Generally, leading questions should not be permitted when the witness is sympathetic to the examiner. However, for preliminary matters and the occasional situation in which leading questions are necessary to develop testimony because of temporary lapse of memory, mental defect, immaturity of a witness, etc., the court may permit inquiry by leading questions on direct examination. When a party calls the opposing party, a witness identified with the opposing party, or a hostile witness leading questions should also be permitted.

Usually there is a right to ask leading questions on cross-examination. When the witness is clearly sympathetic to the examiner the court has discretion to prohibit the use of leading questions. For example, if a party defendant is called as a witness by the plaintiff for direct examination, leading questions should not be permitted on the cross-examination by the defendant's own attorney. This rule and Rule 607 incorporate and expand Minn. R. Civ. P. 43.02. The committee urges that the procedural rule be repealed.

Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by the Rules of Criminal Procedure, if a witness uses a writing to refresh memory for the purpose of testifying, either:

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and if otherwise admissible to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires.

(Amended effective January 1, 1990.)

Committee Comment - 1977

The rule continues existing practice, requiring disclosure of any statements that are used by a witness for the purpose of refreshing his recollection on the witness stand. Once the witness' recollection is refreshed the witness can testify from present recollection. Documents used for refreshing recollection need not satisfy any requirements of trustworthiness, authenticity, etc. This should be contrasted with the process involved when a witness has no present recollection and attempts to introduce a document into evidence pursuant to Rule 803(5). The rule substantially expands the common law approach by requiring production, within the discretion of the Court, of writings that were reviewed by a witness in preparation for testifying. Most of the writings that would be used for these purposes would be discoverable prior to trial pursuant to Minn. R. Civ. P. 26-37 and Minn. R. Crim. P. 9. The rule is expressly made subject to the Rules of Criminal Procedure. Specifically the operative provisions of the criminal rules would be Rules 9.01 subd. 3

and 9.02 subd. 3 which preclude inquiry into legal theories, opinions, and conclusions as well as certain reports and internal documents. Additionally, Rule 9.01 provides for the timing of the disclosure in certain cases.

Although it was the committee's view that in most cases the materials reviewed by a witness prior to testifying should be turned over upon request, it was thought that the trial court should have some discretion in the matter. Cf. State v. Grunau, 273 Minn. 315, 141 N.W.2d 815 (1966). Some flexibility might be necessary in the large case if the witness reviewed an extraordinary amount of documentary material and in the very small case where the attorney might not have access to all of the materials reviewed by a witness prior to trial.

If the statements are turned over, the opposing party may use the statements for cross-examination purposes. If admissible for impeachment purposes or otherwise the statements can be introduced into evidence. The rule should not be read to disregard applicable privileges that are validly asserted to protect the confidentiality of a communication. See Rule 501. The rule does not speak to the issue that will be raised in civil cases if the document that is used to refresh a witness' recollection falls under the work product doctrine. See Minn. R. Civ. P. 26.02 subd 3. The issue is left for development in the traditional common law fashion. See 3 J. Weinstein and M. Berger, Weinstein's Evidence paragraph 612(04) (1975).

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded a prior opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

(Amended effective January 1, 1990.)

Committee Comment - 1977

Rule 613(a)

Prior statements of a witness may be used for cross-examination purposes without disclosing the statement to the witness. The rule deviates from the longstanding practice in most American jurisdictions which require disclosure to the witness before any such cross-examination. This practice has been soundly criticized as depriving the cross-examiner of a vital tool. See C. McCormick Evidence section 28 (2d ed. 1972); 4 Wigmore, Evidence section 1260 (Chadbourn ed. 1972). The rule is based on the belief that the truth finding function of cross-examination will be better served by permitting such examination without providing the witness with a warning as to where the examiner is going. The rule provides for disclosure to the opposing counsel to insure the integrity of the process.

Rule 613(b)

If a prior inconsistent statement is offered for impeachment purposes by means of extrinsic evidence this subdivision is applicable. The committee altered the federal rule in order to continue the existing practice of requiring prior disclosure to the witness and an opportunity to explain before offering a prior inconsistent statement into evidence. This procedure would obviate the

necessity for proof by extrinsic evidence if the witness admits making the inconsistent statement. In the appropriate case the court has the discretion to waive this foundational requirement. See generally Carroll v. Pratt, 247 Minn. 198, 203, 204, 76 N.W.2d 693, 697, 698 (1956).

The rule does not apply to party admissions that are admissible as substantive evidence. See Rule 801(d)(2). See also Minn. R. Civ. P. 32.01 subd 2.

Rule 614. Calling and Interrogating Witnesses

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

(d) Juror interrogation in criminal trials. Jurors may not suggest questions or interrogate witnesses in criminal trials.

(Amended effective September 1, 2006.)

Committee Comment - 1977

Trial courts have traditionally been vested with the power to call and interrogate witnesses. This right is consistent with the responsibility of the Court in insuring a speedy and just determination of the issues. See Rules 102 and 611(a). The rule does not immunize the trial court's action from review. The right to call and question witnesses can be abused by the trial court which assumes an advocate's position, particularly in a jury trial. The precise manner and extent of questioning by the Court cannot be reduced to a simple rule of evidence and must be developed on a case-by-case basis. United States Supreme Court Advisory Committee Note. See also State v. Rasmussen, 268 Minn. 42, 44-46, 128 N.W.2d 289, 290, 291, certiorari denied 379 U.S. 916, 85 S.Ct. 267, 13 L.Ed.2d 187 (1964).

A specific objection is required to preserve the issue for appeal. See Rule 103. However, the objection need not be made contemporaneously with the objectionable act if the jury is present. The objection can be made at the next available opportunity when the jury is absent.

Committee Comment - 2006

The amendment precluding juror questioning in criminal cases codifies the holding in State v. Costello, 646 N.W.2d 204, 214-15 (Minn. 2002). Consistent with the opinion in Costello, the rule does not address the issue of whether jurors may ask questions in civil cases.

Rule 615. Exclusion of Witnesses

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.

Committee Comment - 1989

The rule conforms to existing law in Minnesota and is consistent with Minn. R. Crim. P. 26.03 subd 7. The rule, unlike the federal rule, leaves the issue subject to the discretion of the trial court. A request for sequestration in criminal cases rarely should be denied. State v. Jones, 347 N.W.2d 796 (Minn. 1984); State v. Garden, 267 Minn. 97, 125 N.W.2d 591 (1963). The committee agrees,

however, with the Advisory Committee Note to Fed. R. Evid. 615 that investigating officers, agents who were involved in the transaction being litigated, or experts essential to advise counsel in the litigation can be essential to the trial process and should not be excluded.

Rule 616. Bias of Witness

For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.

(Adopted effective January 1, 1990.)

Committee Comment - 1989

Rule 616 is adopted from the Uniform Rules of Evidence. Rule 616 codifies United States v. Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) which in turn reaffirmed existing practice. Thus, the rule does not constitute a change in practice. The committee viewed the rule as useful, however, to reiterate that bias, prejudice, or interest of a witness is a fact of consequence under Rule 401. Further, the rule should make it clear that bias, prejudice, or interest is not a collateral matter, and can be established by extrinsic evidence. See State v. Underwood, 281 N.W.2d 337 (Minn. 1979); State v. Waddell, 308 N.W.2d 303 (Minn. 1981); State v. Garceau, 370 N.W.2d 34 (Minn. App. 1985). Included in bias, prejudice, or interest is evidence that the witness is being paid by a party.

Rule 617. Conversation with Deceased or Insane Person

A witness is not precluded from giving evidence of or concerning any conversations with, or admissions of a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof.

(Former Rule 616 redesignated as Rule 617 effective January 1, 1990.)

Committee Comment - 1989

This rule, former Minn. R. Evid. 616, was renumbered to permit the inclusion of Rule 616, Bias of Witness, in a manner consistent with the organization of the Uniform Rules of Evidence. This rule supersedes Minnesota Statutes 1974, section 595.04, which is known to the bench and bar of Minnesota as the "Dead Man's Statute." The purpose of this statute was to reduce the possibility of perjury in cases of this type. However, the statute was subject to all the problems and potential for injustice which are inherent in a rule which excludes otherwise admissible evidence.

The evidentiary rule represents a considered opinion that the protection which the statute had offered to decedents' estates was not sufficient to justify the problems it created for honest litigants with legitimate claims. Much of the rationale for abolishing the "Dead Man's Statute" is set out in detail in In re Estate of Lea, 301 Minn. 253, 222 N.W.2d 92 (1974).

ARTICLE 7. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witness

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness' testimony or the determination

of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

(Amended effective January 1, 1990; amended effective July 1, 2016.)

Committee Comment - 1977

The rule is consistent with existing practice in Minnesota. The rule permits testimony by means of opinion and inference when it is based on firsthand knowledge and will be helpful to an effective presentation of the issues. Because the distinction between fact and opinion is frequently impossible to delineate, the rule is stated in the nature of a general principle, leaving specific application to the discretion of the trial court.

Committee Comment - 2016

Rule 701(c) comes from the 2000 amendment to the Federal Rules of Evidence. Parties should not avoid the foundational requirements of Rule 702 and the pre-trial disclosure requirements of Minn. R. Civ. P. 26.01(b) and Minn. R. Crim. P. 9.01, 9.02 by introducing testimony based on scientific, technical, or specialized knowledge under this rule. The rule addresses the nature of the testimony, and is not an attempt to characterize a particular witness. As stated in the Federal Advisory Committee Note:

> *The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. See, e.g., United States v. Figueroa-Lopez, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices).*

Non-expert inference or opinion testimony tends to fit into two separate categories. First, as a matter of necessity, witnesses may testify in the form of a generalized opinion about common matters they observed such as speed, size, distance, how they felt or how others appeared, intoxication, mental ability and numerous other subjects, if helpful.

The second category involves testimony from a skilled layman. The Federal Advisory Committee Note describes this as testimony, not based on specialized knowledge, but based on "particularized knowledge" developed in day-to-day affairs, including testimony from an owner about the value of a business, house, or chattel. See, e.g., Vreeman v. Davis, 348 N.W.2d 756, 757-58 (Minn. 1984) (allowing owner to testify about the value of a mobile home); Ptacek v. Earthsoils, Inc., 844 N.W.2d 535, 539-40 (Minn. Ct. App. 2014) (allowing experienced farmers to testify about the cause of their crop failure).

The amendment is not a change from past practice but is designed to assist lawyers and judges in the line-drawing process distinguishing between lay and expert testimony. In deciding whether the testimony fits under Rule 701 or 702, the trial judge should initially consider the complexity of the subject area, although some subject areas, such as handwriting or intoxication, are susceptible to both lay and expert testimony. The inquiry should center on the extent to which the testimony involves "inferences or thought processes not common to everyday life." See State v. Brown, 836 S.W.2d 530, 549 (Tenn. 1992) ("The distinction between an expert and a non-expert witness is that a non-expert witness's testimony results from a process of reasoning familiar in everyday life, and an expert's testimony results from a process of reasoning which can be mastered only by specialists in the field.").

Finally, to qualify under Rule 701 both the witness' understanding about the historical facts as well as the underlying foundation for making the inference or opinion must derive from the witness' personal experience and personal knowledge. See Pierson v. Edstrom, 160 N.W.2d 563, 566 (Minn. 1968) (precluding police officer, who was not an eyewitness to the accident, from testifying about the speed of the vehicle); Marsh v. Henriksen, 7 N.W.2d 387, 389 (Minn. 1942) (excluding passenger's testimony about the speed of a car when the witness lacked personal knowledge and experience to judge speed at the time of the accident).

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.

(Amended effective September 1, 2006.)

Committee Comment - 1977

The admissibility of expert opinion has traditionally rested in the discretion of the trial court. This discretion is primarily exercised in two areas:

1. determining if an opinion can assist the trier of fact in formulating a correct resolution of the questions raised; and

2. deciding if the witness is sufficiently qualified as an expert in a given subject area to justify testimony in the form of an opinion. There will be no change in existing practice in this regard.

The rule is not limited to scientific or technical areas, but is phrased broadly to include all areas of specialized knowledge. If an opinion could assist the trier of fact it should be admitted subject to proper qualification of the witness. The qualifications of the expert need not stem from formal training and may include any knowledge, skill, or experience that would provide the background necessary for a meaningful opinion on the subject. The rule also contemplates expert testimony in the form of lecture or explanation. The expert may educate the jury so the jurors can draw their own inference or conclusion from the evidence presented.

Committee Comment - 2006

The amendment codifies existing Minnesota case law on the admissibility of expert testimony. The trial judge should require that all expert testimony under Rule 702 be based on a reliable foundation. The proposed amendment does not purport to describe what that foundation must look like for all types of expert testimony. The required foundation will vary depending on the context of the opinion, but must lead to an opinion that will assist the trier of fact. If the opinion or evidence involves a scientific test, the case law requires that the judge assure that the proponent establish that "'the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.'"Goeb v. Tharaldson, 615 N.W.2d 800, 814 (Minn. 2000) (quoting State v. Moore, 458 N.W.2d 90, 98 (Minn. 1990)).

In addition, if the opinion involves novel scientific theory, the Minnesota Supreme Court requires that the proponent also establish that the evidence is generally accepted in the relevant scientific community. The rule does not define what is novel, leaving this for resolution by the courts. See, e.g., State v. Klawitter, 518 N.W.2d 577, 578-86 (Minn. 1994) (addressing whether 12-step drug

recognition protocol involves novel scientific theory); State v. Hodgson, 512 N.W.2d 95, 98 (Minn. 1994) (ruling that bite-mark analysis does not involve novel scientific theory).

The Minnesota Supreme Court provided the standard for admissibility of novel scientific testimony in Goeb. The court stated:

> *Therefore, when novel scientific evidence is offered, the district court must determine whether it is generally accepted in the relevant scientific community. See Moore, 458 N.W.2d at 97-98; Schwartz, 447 N.W.2d at 424-26. In addition, the particular scientific evidence in each case must be shown to have foundational reliability. See Moore, 458 N.W.2d at 98; Schwartz, 447 N.W.2d at 426-28. Foundational reliability "requires the 'proponent of a * * * test [to] establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.'" Moore, 458 N.W.2d at 98 (alteration in original) (quoting State v. Dille, 258 N.W.2d 565, 567 (Minn. 1977)). Finally, as with all testimony by experts, the evidence must satisfy the requirements of Minn. R. Evid. 402 and 702 -- be relevant, be given by a witness qualified as an expert, and be helpful to the trier of fact. See State v. Nystrom, 596 N.W.2d 256, 259 (Minn. 1999).*

Goeb, 615 N.W.2d at 814.

In State v. Roman Nose, 649 N.W.2d 815, 819 (Minn. 2002), the court described the standard in a different way:

> *Put another way, the Frye-Mack standard asks first whether experts in the field widely share the view that the results of scientific testing are scientifically reliable, and second whether the laboratory conducting the tests in the individual case complied with appropriate standards and controls.*

Finally, in State v. MacLennan, 702 N.W.2d 219, 230 (Minn. 2005) the court explained the standard:

> *Under the Frye-Mack standard, a novel scientific theory may be admitted if two requirements are satisfied. The district court must first determine whether the novel scientific evidence offered is generally accepted in the relevant scientific community. Second, the court must determine whether the novel scientific evidence offered is shown to have foundational reliability. As with all expert testimony, the evidence must comply with Minn. R. Evid. 402 and 702; that is, it must be relevant, helpful to the trier of fact, and given by a witness qualified as an expert. The proponent of the novel scientific evidence bears the burden of establishing the proper foundation for the admissibility of the evidence.*

(Citations omitted.)

Rule 703. Bases of Opinion Testimony by Experts

(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.

(Amended effective January 1, 1990.)

Committee Comment - 1989

The rule represents a fresh approach to the question of expert testimony--one which more closely conforms to modern realities. Consistent with existing practice the expert can base an opinion on firsthand knowledge of the facts, facts revealed at trial by testimony of other witnesses, or by way of hypothetical questions. The rule also permits the opinion to be based on data or facts presented to the witness prior to trial. The sufficiency of facts or data in establishing an adequate foundation for receiving the opinion is subject to a two-part test:

1. are these facts and data of a type relied upon by experts in this field when forming inferences or opinions on the subject;

2. is this reliance reasonable?

In explanation the United States Supreme Court Advisory Committee stated:

> *. . . (A) physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X-rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life and death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. (citations omitted)*

Supreme Court Advisory Committee Note.

The requirement that the facts or data be of a type reasonably relied upon by experts in the field provides a check on the trustworthiness of the opinion and its foundation. In determining whether the reliance is reasonable, the judge must be satisfied that the facts and data relied on by the experts in the field are sufficiently trustworthy to ensure the validity of the opinion. The sufficiency of the foundation for the opinion testimony could be treated as a preliminary question under Rule 104.

The rule is aimed at permitting experts to base opinions on reliable hearsay and other facts that might not be admissible under these rules of evidence. Obviously, a prosecution witness could not base an opinion on evidence that had been seized from a defendant in violation of the Fourth or Fifth Amendments. The application of the "fruit of the poisonous tree doctrine" would mandate such a result. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Similarly, where state policy considerations require that certain matters not be admitted at trial, the state policy should not be thwarted by allowing the same evidence to come in the "back door" in the form of an expert's opinion. See, e.g., Minnesota Statutes 1974, sections 595.02 and 169.121.

This rule deals with the adequacy of the foundation for the opinion. Rule 705 determines the timing and necessity for establishing the foundation at trial. Great emphasis is placed on the use of cross-examination to provide the trier of fact with sufficient information to properly assess the weight to be given any opinion.

Although an expert may rely on inadmissible facts or data in forming an opinion, the inadmissible foundation should not be admitted into evidence simply because it forms the basis for an expert opinion.

In civil cases, upon a showing of good cause, the inadmissible foundation, if trustworthy, can be admitted on direct examination for the limited purpose of establishing the basis for the opinion. See generally Carlson, Policing the Bases of Modern Expert Testimony, 39 Vand.L.Rev. 577 (1986);

Federal Rules of Evidence: A Fresh Review and Evaluation, ABA Criminal Justice Section, Rule 703 and accompanying comment, 120 F.R.D. 299, at 369 (1987).

In criminal cases, the inadmissible foundation should not be admitted. Admitting such evidence might violate the accused's right to confrontation. See State v. Towne, 142 Vt. 241, 453 A.2d 1133 (1982).

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Committee Comment - 1977

Expert and lay witnesses will not be precluded from giving an opinion merely because the opinion embraces an ultimate fact issue to be determined by the jury. If the witness is qualified and the opinion would be helpful to or assist the jury as provided in Rules 701-703, the opinion testimony should be permitted. In determining whether or not an opinion would be helpful or of assistance under these rules a distinction should be made between opinions as to factual matters, and opinions involving a legal analysis or mixed questions of law and fact. Opinions of the latter nature are not deemed to be of any use to the trier of fact. The rule is consistent with existing practice in Minnesota as stated in In re Estate of Olson, 176 Minn. 360, 370, 223 N.W. 677, 681 (1929):

> *...Standing alone, the objection that the opinion of a qualified witness is asked upon the very issue and the ultimate one for decision is not sufficient. So long as the matter remains in the realm where opinion evidence is customarily resorted to, there is ordinarily no valid objection to permitting a person who has qualified himself to express an opinion upon the ultimate issue. That is a matter well left to the discretion of the trial judge. While in a will contest the opinion of a witness, lay or scientific, should not be asked as to the testator's capacity to make a valid will, there is certainly no objection to questions concerning his ability to comprehend his property and dispose of it understandingly.*

See also In re Estate of Jenks, 291 Minn. 138, 144, 189 N.W.2d 695, 698 (1971).

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Committee Comment - 1989

Rule 705 streamlines the presentation of expert testimony leaving it to cross-examination to develop weaknesses in the expert's opinion. Obviously, if there is to be effective cross-examination the adverse party must have advance knowledge of the nature of the opinion and the basis for it. The procedural rules provide for much of this information by way of discovery. See Minn. R. Civ. P. 26 and Minn. R. Crim. P. 9.01 subd 1(4). In the case where the adverse party has not been provided with the necessary information to conduct an effective cross-examination, the Court should, if requested by the adverse party, exercise its discretion under the rule and require that a full foundation be established on direct examination.

Rule 706. Court Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to

submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(Amended effective January 1, 1990.)

Committee Comment - 1977

This rule implements Rule 614 setting up the appropriate procedure to be used in calling an expert as a court witness. By recommending this rule the committee did not intend to encourage the use of court appointed expert witnesses. In the appropriate case, a trial judge might find that the use of a court expert would be necessary to a fair, expeditious, and inexpensive proceeding. See e.g., Minnesota Statutes 1974, section 176.391, clause (2), which provides for the appointment of impartial experts in Workmen's Compensation proceedings.

However, court experts pose a potential danger. Particularly in a jury trial such an expert might unfairly tip the balance in the adversary process. The rule provides for ample opportunity for the parties to provide the court with the necessary information with which to make the decision whether to call an expert as a court witness.

ARTICLE 8. HEARSAY

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the

declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness, or (C) one of identification of a person made after perceiving the person, if the court is satisfied that the circumstances of the prior identification demonstrate the reliability of the prior identification, or (D) a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) Statement by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of the party. In order to have a coconspirator's declaration admitted, there must be a showing, by a preponderance of the evidence, (i) that there was a conspiracy involving both the declarant and the party against whom the statement is offered, and (ii) that the statement was made in the course of and in furtherance of the conspiracy. In determining whether the required showing has been made, the Court may consider the declarant's statement; provided, however, the declarant's statement alone shall not be sufficient to establish the existence of a conspiracy for purposes of this rule. The statement may be admitted, in the discretion of the Court, before the required showing has been made. In the event the statement is admitted and the required showing is not made, however, the Court shall grant a mistrial, or give curative instructions, or grant the party such relief as is just in the circumstances.

(Amended effective January 1, 1990; amended effective September 1, 2006.)

Committee Comment - 1989

Rule 801(a), (b), and (c)

Rule 801(a), (b), and (c) provide the general definition of hearsay. The definition is largely consistent with the common law. Hearsay is an out of court statement that is used in court to prove the truth of the matter asserted in the statement. If the out of court statement is being offered for some other purpose, such as to prove knowledge, notice, or for impeachment purposes it is not hearsay. "Statement" is defined to include oral and written assertions as well as nonverbal conduct that is intended as an assertion, e.g., nodding of the head up and down to signify assent to a proposition. Nonverbal conduct that is not intended as an assertion is not a statement and is not affected by the hearsay rule. Hence, the rule puts to rest whatever lingering authority Wright v. Tatham, 7 Ad. & Ell. 313 (Ex.Ch.1837), aff'd 5 Cl. & Fin. 670, 7 Eng.Rep. 559 (H.L. 1838) has in Minnesota. Wright involved a will contest in which it was claimed that the testator was not competent at the time he executed his will. To prove competence certain letters were introduced on the theory that the authors of the letters considered the testator to be fully alert or letters of this nature would not have been written. As "implied assertions of the authors" the letters were excluded as hearsay. Under the rule the conduct of writing a letter would not be hearsay and the admissibility of such conduct would be determined under a relevancy analysis. See Article 4.

Rule 801(d)(1)

Adoption of this rule will change Minnesota law as stated in State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939). The Court in Saporen held that prior inconsistent statements of witnesses are admissible only for impeachment purposes. But see Gave v. Pyrofax Gas Corp., 274 Minn. 210, 214, 215, 143 N.W.2d 242, 246 (1966). However, the Court on two occasions has indicated its willingness to reconsider the Saporen rule in the appropriate circumstances. See State v. Slapnicher,

276 Minn. 237, 241, 149 N.W.2d 390, 393 (1967), State v. Marchand, 302 Minn. 510, 225 N.W.2d 537, 538 (1975).

Four reasons were cited to support the decision in Saporen:

1. Lack of oath;

2. Lack of cross-examination;

3. A different ruling might encourage the manufacture of evidence by third degree or entrapment methods;

4. If inconsistent statements were admitted, consistent statements should be admitted.

It was the Committee's belief that the rule eliminates all but the second concern of the Court in Saporen. The requirement that the statement must be given under oath subject to the penalty of perjury is retained. Secondly, the witness must be presently available for cross-examination or explanation of the prior statement.

As amended, Rule 801(d)(1)(B) permits prior consistent statements of a witness to be received as substantive evidence if they are helpful to the trier of fact in evaluating the credibility of the witness. Originally, Rule 801(d)(1)(B) applied only to statements that were offered to rebut a charge of recent fabrication or undue influence or motive. The language of the original rule, if read literally, was too restrictive. For example, evidence of a prior consistent statement should be received as substantive evidence to rebut an inference of unintentional inaccuracy, even in the absence of any charge of fabrication or impropriety. Also, evidence of prompt complaint in sexual assault cases should be received as substantive evidence in the prosecution's case in chief, without the need for any showing that the evidence is being used to rebut a charge of "recent fabrication or improper influence or motive."

The amended rule is consistent with the result in State v. Arndt, 285 N.W.2d 478 (Minn. 1979). Because of the restrictive language of former Rule 801(d)(1)(B), however, the Arndt Court did not rely upon that rule. Instead, it relied upon the theory that the prior statement was not offered for the truth of the matter asserted, and hence was not hearsay under the definition set forth in Rule 801(c). As amended, Rule 801(d)(1)(B) eliminates the need for reliance upon this theory, and thereby eliminates the need for a limiting instruction informing the jury that the evidence cannot be used to prove the truth of the matter asserted.

Amended Rule 801(d)(1)(B) only applies to prior statements that are consistent with the declarant's trial testimony and that are helpful in evaluating the credibility of the declarant as a witness. Thus, when a witness' prior statement contains assertions about events that have not been described by the witness in trial testimony, those assertions are not helpful in supporting the credibility of the witness and are not admissible under this rule.

Even when a prior consistent statement deals with events described in the witness' trial testimony, amended Rule 801(d)(1)(B) does not make the prior statement automatically admissible. The trial judge has discretion under Rules 611 and 403 to control the mode and order of presenting evidence and to exclude cumulative evidence. Thus, the trial judge may prevent the witness from reading a prepared statement before giving oral testimony, or prevent the proponent from using direct examination of the witness merely as a vehicle for having the witness vouch for the accuracy of a written report prepared by the witness. The trial judge may also exclude prior consistent statements that are a waste of time because they do not substantially support the credibility of the witness. Mere proof that the witness repeated the same story in and out of court does not necessarily bolster credibility.

The rule continues the existing practice of permitting testimony about the witness' prior out of court identification. See e.g., State v. Jones, 277 Minn. 174, 179, 152 N.W.2d 67, 72 (1967). The rationale for the rule stems from the belief that if the original identification procedures were conducted fairly, the prior identification would tend to be more probative than an identification at trial. Obviously, if the prior identification did not occur under circumstances insuring its trustworthiness, the identification should not be admissible. The Court must be satisfied as to the trustworthiness of the out of court identification before allowing it to be introduced as substantive evidence. See gen. Minn. R . Crim. P. 7.01 which requires that criminal defendants be given notice of certain identification procedures involved in their case.

Subdivision (d)(1)(D) represents a limited exception to the definition of hearsay. The subject matter of the statement must describe an event or condition at or near the time the declarant perceives the event or condition. The federal rules treat such a statement as hearsay but would include it as an exception to the hearsay rule without regard to the availability of the declarant at trial. Federal Rule 803(1). The committee was concerned with the trustworthiness of such statements when the declarant was not available to testify at trial. When the declarant does testify at trial the distinction between what he did or what he said contemporaneous with an event is frequently an artificial one. As a consequence the committee recommends treating such spontaneous statements as nonhearsay. Furthermore, the traditional concerns that gave rise to the hearsay rule of exclusion are satisfied by the requirement that the declarant be a witness and be subject to cross-examination.

Rule 801(d)(2)

The rule excludes party admissions from its definition of hearsay. The requirements of trustworthiness, firsthand knowledge, or rules against opinion which may be applicable in determining whether or not a hearsay statement should be admissible do not apply when dealing with party admissions. Because the rationale for their admissibility is based more on the nature of the adversary system than in principles of trustworthiness or necessity, it makes sense to treat party admissions as nonhearsay. In addition to a party's own statements and fully authorized statements made by agents of a party, the rule provides for the admissibility of adoptive admissions. For a discussion of the use of adoptive admissions in criminal cases see gen. Village of New Hope v. Duplessie, 304 Minn. 417, 231 N.W.2d 548, 551 (1975). These provisions should not change existing practice.

The admissibility of statements made by agents of a party has given rise to much litigation. The rule rejects the strict agency theory in determining whether or not the statement is admissible. Rather than focusing on the agent's authority to speak for the principle, the rule requires only that the statement be made concerning a matter within the scope of the agency. For example, the statement of a truck driver concerning an accident in which he was involved while driving the truck for his employer can be received as an admission of the employer. Statements made after the employment relationship terminates will not be admissions of the employer.

In Bourjaily v. United States, 483 U.S. 171, 107 S.Ct.2775, 97 L.Ed.2d 144 (1987), the United States Supreme Court construed Fed. R. Evid. 801(d)(2)(E) so that the federal coconspirator rule differed from the Minnesota rule in two important particulars. First, Minnesota law required a prima facie showing of a conspiracy, and second, the showing had to be made without considering the coconspirator's statements. State v. Thompson, 273 Minn. 1, 139 N.W.2d 490 (1966). In Bourjaily the Court continued the prior federal rule that the showing had to be made by a preponderance of the evidence, which is a higher standard than the Minnesota standard of a prima facie showing. However, the Court held that the trial judge could consider the statements in determining whether a conspiracy had been shown, overruling a line of federal cases which held that the statements could not be considered. The amended rule adopts the Bourjaily holdings in the following respects:

The quantum of proof required is a preponderance of the evidence, and under most circumstances the rule allows the judge to consider the statements in determining whether the showing has been made. The proviso in the amended rule precludes the declarant's statement by itself from establishing the conspiracy and is included to prevent the hearsay statement from becoming admissible solely on the basis of the content of the statement.

The amended rule continues prior Minnesota law that the order of proof rests in the discretion of the trial judge, who may admit the declaration before the required showing is made. Although there is a danger that the declarations will be admitted and the showing will not later be made, the Committee took the view that the danger is offset by the trial judge's authority to require the showing to be made outside the presence of the jury under Rule 104(c). Moreover, the amended rule expressly authorizes the judge to grant a mistrial or give such other relief as is just, in the event the statements are admitted and the foundation is not later shown.

The amended rule continues the prior limitation that the statement must be made in the course of and in furtherance of the conspiracy.

Committee Comment - 2006

Right to Confrontation.

In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court adopted a new approach to Sixth Amendment confrontation analysis. The Court ruled that admitting against the accused "testimonial" hearsay from an unavailable declarant, violates the Sixth Amendment right to confrontation, absent a prior opportunity for cross-examination. The Crawford court stated,

> *Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in the development of hearsay law - as does [Ohio v.] Roberts, and as would an approach that exempted such statement from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.*

Crawford, 541 U.S. at 68.

The Crawford court did not define what constitutes "testimonial" hearsay. See id. Some types of evidence appear to be testimonial no matter how the term is defined. For example, courtroom testimony, including testimony at a preliminary hearing, or affidavits are testimonial, as are guilty pleas, allocutions, and grand jury testimony. The Crawford court also stated, "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." Id. at 52.

The full implications of this new approach to Sixth Amendment interpretation is presently being worked out in the courts. See, e.g., State v. Hannon, 703 N.W.2d 498, 507 (Minn. 2005) (ruling that testimony from a witness at the defendant's prior trial did not violate the defendant's right of confrontation where the witness was unavailable, the defendant had an opportunity to cross-examine at the first trial, and the state's theory of the case had not substantially changed); State v. Martin, 695 N.W.2d 578, 584-86 (Minn. 2005) (holding that a dying declaration does not violate a defendant's Sixth Amendment right to confrontation because the Sixth Amendment did not repudiate dying declarations, which were readily admissible at early common law).

Rule 801(d)(2)

The change in the title to Rule 801(d)(2) conforms the title of the rule to the text. The amended title clarifies that the statement by a party opponent need not be an "admission" of guilt or liability in order to be excluded from the definition of hearsay.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by the Legislature.

Committee Comment - 1977

The general rule excluding hearsay is consistent with common law and existing Minnesota practice. Rules 803(24) and 804(5) control the common law development of additional hearsay exceptions. The authority of the legislature to create various exceptions to the hearsay rule is well established. See gen. Minnesota Statutes 1974, chapter 600, which contains several examples of legislative exceptions to the hearsay rule.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) (Not used).

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purpose of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately, 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. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, 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 business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. A memorandum, report, record, or data compilation prepared for litigation is not admissible under this exception.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or

data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases and petty misdemeanors matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings except petty misdemeanors and against the State in criminal cases and petty misdemeanors, factual findings resulting from an investigation made pursuant to authority granted by law.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations unless the sources of information or other circumstances indicate lack of trustworthiness.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(Amended effective January 1, 1990; amended effective September 1, 2006.)

Committee Comment - 1989

The exceptions to the hearsay rule of exclusion (Rule 802) are separated into two categories:

1. those exceptions which are not affected by the availability or unavailability of the declarant (Rule 803), and

2. those exceptions which require that the declarant be unavailable before the hearsay statement might be admissible (Rule 804).

The basis for the distinction is largely historical, and represents a judgment as to which hearsay statements are so trustworthy as to be admissible without requiring the production of the declarant when available.

Rules 803 and 804 provide certain exceptions to the general rule of exclusion for hearsay statements. A statement qualifying as an exception to the hearsay rule must satisfy other provisions in these rules before it is admissible. For example, a statement that qualifies as an exception to the hearsay rule must be relevant and admissible under Article 4 and be based on personal knowledge (Rule 602) before it can be admitted into evidence.

Rule 803(1)

The committee did not recommend adoption of Fed. R. Evid. 803(1) "Present sense impressions." However, if the declarant testifies at trial and is subject to cross-examination, the declarant's present sense impressions are treated as nonhearsay under these rules. Rule 801(d)(1)(D).

Rule 803(2)

The excited utterance exception is one which traditionally has been treated in terms of "res gestae" in Minnesota. The rules avoid use of the term "res gestae" which is considered to be a general catchall phrase sanctioning the admission of several types of hearsay statements. See gen. Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229 (1922). C. McCormick, Evidence section 288 (2d ed. 1972). The rules provide specific exceptions more clearly identifying the rationale and requirements of each. The major effect this rule will have on existing practice is a change in terminology which hopefully will result in better analysis and understanding.

In order to qualify as an excited utterance, the following three requirements must be met:

1. there must be a startling event or condition;

2. the statement must relate to the startling event or condition; and

3. the declarant must be under a sufficient aura of excitement caused by the event or condition to insure the trustworthiness of the statement.

The rationale stems from the belief that the excitement caused by the event eliminates the possibility of conscious fabrication and insures the trustworthiness of the statement. As the time lapse between the startling event and subsequent statement increases, so does the possibility for reflection and conscious fabrication. There can be no fixed guidelines. It is largely a matter for the trial judge to determine whether the statement was given at such a time when the aura of excitement was sufficient to insure a trustworthy statement. Rule 104(a). In reaching this decision, the judge must consider all relevant factors including the length of time elapsed, the nature of the event, the physical condition of the declarant, any possible motive to falsify, etc.

Rule 803(3)

The rule combines two traditional exceptions to the hearsay rule; the state of mind exception and the statement of present bodily condition. Both are based on the belief that spontaneous statements of this nature are sufficiently trustworthy to justify their admission into evidence. State of mind or bodily condition are difficult matters to prove. When they are in issue or otherwise relevant, hearsay statements of this type may be the best proof available.

The rule makes it clear that hearsay statements probative of the declarant's state of mind or emotion are not made inadmissible by the hearsay rule. The more difficult evidentiary problems arise in the determination as to whether state of mind is relevant to the issues in the lawsuit. Clearly, when state of mind is in issue there is no problem. State of mind may also be admitted to prove that the declarant subsequently acted in conformity with his state of mind. See Scott v. Prudential Ins. Co., 203 Minn. 547, 552, 282 N.W. 467, 470 (1938); Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 296, 12 S.Ct. 909, 913, 36 L.Ed. 706, 710, 711 (1892). The rule does not permit evidence of a declarant's present state of mind to be admitted to establish the declarant's previous actions, unless dealing with the execution, revocation, identification, or terms of declarant's will. Cf. Troseth v. Troseth, 224 Minn. 35, 28 N.W.2d 65 (1947). (Present state of mind used to prove previous intent in effectuating gift.)

In considering the admissibility of statements of present sensation or bodily condition, the Court should examine the circumstances surrounding the statements to determine if they were spontaneous statements or statements designed with a view to making evidence. Statements of the latter type should be excluded under Rule 403. See C. McCormick, Evidence section 292 (2d ed. 1972).

Rule 803(4)

Statements to treating physicians traditionally have been admissible as an exception to the hearsay rule if reasonably pertinent to diagnosis and treatment. This includes statements as to present matters as well as past conditions. See Peterson v. Richfield Plaza, Inc., 252 Minn. 215, 228, 89 N.W.2d 712, 722 (1958). In Minnesota, they have been admissible if the physician bases an opinion on the statement.

The rule extends this exception to cover statements made to a nontreating physician if made for the purpose of diagnosis. This rule is the logical outgrowth of Rule 703 which permits a nontreating physician to base an opinion on such a statement if it is the type of statement upon which experts in the field reasonably rely.

Rule 803(5)

The introduction of hearsay documents under this exception must be distinguished from the use of documents to refresh the recollection of a witness. See Rule 612. Only when a witness has insufficient present recollection of the event and attempts to read a hearsay document into the record are the requirements of this rule applicable.

The rule does not require a total lack of memory. If the present recollection of the witness is impaired to such an extent that he is unable to testify fully and accurately, he may resort to a memorandum or record if it satisfies the other provisions of the rule. In these situations, the previously recorded statement will often be the best available evidence. See Walker v. Larson, 284 Minn. 99, 105, 169 N.W.2d 737, 741, 742 (1969). The provision that the hearsay document will not be received as an exhibit is intended to prevent the jury from placing undue emphasis on the statement.

Rule 803(6)

This provision will replace the existing statutory scheme dealing with the introduction of business records and shop records. See Minnesota Statutes 1974, sections 600.01 to 600.06. Minnesota had previously adopted the Uniform Business Records as Evidence Act to bring state law in this area into conformity with other states adopting the Uniform Act. In recommending the federal rule, it was the committee's view that in the years to come it is of greater importance that the state rule corresponds to the rule in force in the federal courts.

The rule should be read broadly to accomplish the purposes set out in Rule 102 as well as to ensure that only trustworthy evidence is admitted. The application of the rule should not cause a substantive change in existing practice. Past decisions of the Minnesota Supreme Court should serve as guidelines for the proper interpretation of this rule. See gen. Brown v. St. Paul Ry., 241 Minn. 15, 62 N.W.2d 688, 44 A.L.R.2d 535 (1954); City of Fairmont v. Sjostrom, 280 Minn. 87, 157 N.W.2d 849 (1968).

Documents prepared solely for litigation purposes do not qualify under this exception. If the document is prepared in part for business purposes but with an eye toward litigation the court must decide if the interest in litigation sufficiently detracted from the trustworthiness of the report to preclude its admission. See Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, 144

A.L.R. 719 (1943), cited with approval in Brown v. St. Paul Ry. Co., 241 Minn. 15, 36, 62 N.W.2d 688, 702 (dictum).

Rule 803(7)

Absence of an entry in a business record is not made inadmissible by the hearsay rule. The admissibility of such evidence is governed by rules of relevancy. See Article 4.

Rule 803(8)

The rationale for this exception rests in:

1. a belief in the trustworthiness of the work product of government agents operating pursuant to official duty;

2. the necessity for introducing the full reports as opposed to testimony of government agents whose memory may be faulty; and

3. a concern for the disruption that would result in government agencies if its employees were continually required to testify in trials. See United States Supreme Court Advisory Committee Note. See also C. McCormick, Evidence section 315 (2d ed. 1972). Subdivisions (A) and (B) are consistent with existing practice.

The rule was amended to clarify that records and reports qualifying under each subdivision (A), (B), and (C) should be excluded if the report is not trustworthy. Among other matters, the court should consider the qualifications, bias, and motivation of the authors, the timeliness and methods of investigation or hearing procedures, and the reliability of the foundation upon which any factual finding, opinion, or conclusion is based.

Subdivision (C) permits introduction of factual findings resulting from investigations made pursuant to authority granted by law except when offered against the accused in criminal cases. Prior to the Minnesota Rules of Evidence, Minnesota courts did not admit reports which included discretionary conclusions and opinions. Barnes v. Northwest Airlines, Inc. 233 Minn. 410, 433, 47 N.W.2d 180, 193 (1951); Clancy v. Daily News Corp., 202 Minn. 1, 7, 277 N.W. 264, 268 (1938). The rule makes no distinction among findings of historical fact, factual conclusions, or opinions. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988) (investigator's report on cause of airplane crash was not excludable because it included investigator's opinion or conclusion). See also Pipestone v. Halbersma, 294 N.W.2d 271 (Minn. 1980). The primary concern of the rule is a determination of whether the factual finding, conclusion, or opinion is trustworthy and helpful to the resolution of the issues. Considerations of whether the document contains historical facts as opposed to conclusions or discretionary factual findings is subordinate to this primary consideration.

At present, public records are admitted pursuant to specific statutes. See e.g., Minnesota Statutes 1974, section 600.13. This rule is not intended to supersede the many statutes that specifically provide for the admission or exclusion of certain public documents. E.g., Minnesota Statutes 1974, section 169.09, subdivision 13.

Rule 803(9)

Minnesota has adopted the Uniform Vital Statistics Act, Minnesota Statutes 1974, sections 144.151 to 144.204, and 144.49, which requires certain individuals to make reports to the State Board of Health concerning births, deaths, etc. Similarly Minnesota Statutes 1974, section 517.10, requires the filing of marriage certificates. Minnesota Statutes 1974, sections 144.167 and 600.20. However, not all statements included in such certificates are admissible. See Backstrom v. New

York Life Ins. Co., 183 Minn. 384, 236 N.W. 708 (1931). This rule should not change existing Minnesota practice.

Rule 803(10)

The absence of a public record or entry, like the absence of a business record, is not made inadmissible by the hearsay rule. The admissibility would depend on principles of relevancy. See Article 4. The rule provides for proof by way of certification that a diligent search failed to disclose the record or entry. See Minn. R. Civ. P. 44.02.

Rule 803(11)

The rule is an extension of the business records exception. See Rule 803(6). This exception is somewhat broader since there is no explicit directive that the court inquire into the trustworthiness of the statement. Unlike the business record exception, the person furnishing the statement is not required to have a business or religious duty to report the information. Contra. Houlton v. Manteuffel, 51 Minn. 185, 187, 53 N.W. 541, 542 (1892).

Rule 803(12)

This provision excepts certain certificates from the hearsay rule. In cases where the certificate is filed or maintained in a church record, this provision provides an alternative method of proof. See Rule 803(8) and (10). See also Minnesota Statutes 1974, section 600.20.

Rule 803(13)

The exception for family records is consistent with common law tradition, although at common law they were admissible only when the declarant was unavailable. See C. McCormick, Evidence section 322 (2d ed. 1972). See also Geisler v. Geisler, 160 Minn. 463, 467, 200 N.W. 742, 744 (1924). Cf. Rule 804(b)(4).

Rule 803(14)

In many cases, the proper recording of an interest in property requires or permits statements on the face of the record which assert proper execution and delivery of the document. See e.g., Uniform Conveyancing Blanks prepared under authority granted by Minnesota Statutes 1975 Supplement, section 507.09. The rule is intended to allow this record to be used as proof of proper execution and delivery of the document, as well as proving the contents of the record. This procedure is consistent with Minnesota practice. See Minnesota Statutes 1974, section 600.13.

Rule 803(15)

The circumstances under which most dispositive documents are made will normally assure the reliability of statements relevant to the purpose of the document. Absent a showing that subsequent dealings with the property have been inconsistent with these statements, there is sufficient indicia of trustworthiness to warrant an exception to the general rule against hearsay.

Rule 803(16)

The admissibility of ancient documents will normally raise problems of authentication and hearsay. The requirements of proper authentication are set forth in Rule 901(b)(8). If properly authenticated, these hearsay documents are deemed to be sufficiently trustworthy to warrant admission as evidence because:

1. they were compiled at a time prior to the litigation when there was no motive to falsify;

2. the documentary form of the evidence reduces the possibility of error in transmission;

3. it is unlikely that present testimony concerning these prior matters will be significantly more probative. Furthermore, in most instances witnesses with firsthand knowledge will not be available.

If the Court has reason to suspect the trustworthiness of the ancient document, it may exercise its discretion under Rule 403 to exclude the evidence.

Rule 803(17)

Many commercial publications and market quotations are highly trustworthy and are relied upon by the general public as well as specialized groups.

The committee was concerned that this exception might permit certain credit reports, etc., reflecting unreliable hearsay to be received as substantive evidence. The distinction between the Minnesota rule and its federal counterpart is intended to emphasize that this exception will not be a universal sanction for the admission of market reports or commercial publications.

The rule makes it clear that the Court retains the power to exclude evidence offered pursuant to this exception if the evidence is not trustworthy. See gen. J. Weinstein & M. Berger, 4 Weinstein's Evidence section 803(17(01)) (1975). This provision is consistent with the authority given the Court under Rule 403.

Rule 803(18)

The circumstances under which learned treatises will be admitted as substantive evidence are set forth by the rule. These limitations should serve to avoid dangers of misunderstanding or misapplication of this evidence.

The rule will expand the use of learned treatises in Minnesota courts. See gen. Briggs v. Chicago Great Western Ry., 238 Minn. 472, 57 N.W.2d 572 (1953); but see Ruud v. Hendrickson, 176 Minn. 138, 222 N.W. 904 (1929); see also Comment, 39 Minn.L.Rev. 905 (1955).

Rule 803(19)

The rationale for the hearsay exception for reputation evidence is explained in the United States Supreme Court Advisory Committee Note:

> *Trustworthiness in reputation evidence is found when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community conclusion, if any has been formed, is likely to be a trustworthy one. (citations omitted)*

When dealing with reputation concerning personal or family history, the community includes the family, associates, or general community. This may be somewhat broader than the traditional pedigree exception in Minnesota. See Houlton v. Manteuffel, 51 Minn. 185, 53 N.W. 541 (1892). See Minnesota Statutes 1974, section 602.02, which permits reputation evidence to prove the fact of marriage.

Rule 803(20)

Subdivision 20 codifies a common law exception to the hearsay rule. C. McCormick, Evidence section 324 (2d ed. 1972).

Rule 803(21)

Subdivision 21 provides that reputation as to character is not excluded by the hearsay rule. The admissibility of this type of evidence is governed by Rules 404, 405, and 608.

Rule 803(22)

Prior to this rule, convictions have not been admissible as substantive evidence. Guilty pleas could be received in a subsequent civil action as party admissions. Otherwise a conviction would be admissible in a subsequent civil case only for impeachment purposes. In addition, it is possible that a criminal conviction might serve as an estoppel in the civil action. See Travelers Ins. Co. v. Thompson, 281 Minn. 547, 163 N.W.2d 289 (1968). The rule gives evidentiary effect to criminal felony convictions, altering existing practice.

The rule is consistent with the modern trend in this area and has much to commend it. See Annot., 18 A.L.R.2d 1287 (1951). It represents a belief in the trustworthiness of verdicts based on the reasonable doubt standard. The rule is limited to convictions for serious crimes to insure that there was sufficient motivation to defend the criminal prosecution. To the extent that the defendant believes the criminal conviction was not accurate for any reason, e.g., new evidence, lack of discovery at the criminal trial, restrictive evidentiary rulings, etc., these matters can be explained at the civil trial. The burden is placed on the party offering the prior conviction to establish what facts were essential to sustain the criminal conviction.

Rule 803(23)

This provision deals with the evidentiary effect to be given a judgment in a civil case concerning matters of personal, family, or general history and boundaries. At one time jury verdicts were essentially the equivalent of reputation. Although the historical rationale for this exception is no longer valid, judgments of this nature have continued to be admitted as an exception to the hearsay rule since such judgments are at least as trustworthy as reputation evidence. Rules 803(19) and (20). See United States Supreme Court Advisory Committee Note.

Rule 803(24)

This exception allows for the continued development of exceptions to the hearsay rule. It provides for sufficient flexibility to carry out the goals set out in Rule 102. The rule defines the common law power of the judge to fashion new exceptions to the hearsay doctrine. For hearsay to qualify under this provision, it must be established that there is some need for the evidence and that the evidence has guarantees of trustworthiness equivalent to the specific exceptions set out in Rule 803.

Furthermore, there is a notice requirement to avoid the possibility of surprise and to lend more predictability to the litigation process. The Committee considered and rejected the federal cases that applied a less restrictive notice requirement. United States v. Bailey, 581 F.2d 341 (3d Cir. 1978); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976) cert. denied 431 U.S. 914, 97 S. Ct. 2174, 53 L.Ed.2d 224; United States v. Leslie, 542 F.2d 285 (5th Cir. 1976).

Committee Comment - 2006

Rule 803(24)

The substance of this rule is combined with Rule 804(b)(5) in new Rule 807.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.

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

(1) Former testimony. In a civil proceeding testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered or a party with substantially the same interest or motive with respect to the outcome of the litigation, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In a criminal proceeding involving a retrial of the same defendant for the same or an included offense, testimony given as a witness at the prior trial or in a deposition taken in the course thereof.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Intentionally left blank]

(6) Forfeiture by wrongdoing. A statement offered against a party who wrongfully caused or acquiesced in wrongfully causing the declarant's unavailability as a witness and did so intending that result.

(Amended effective January 1, 1990; amended effective September 1, 2006; amended effective July 1, 2016.)

Committee Comment - 1989

Rule 804 includes those exceptions to the hearsay rule that are conditioned upon a showing that the declarant is unavailable. As with the exceptions in Rule 803 the requirements of relevancy (Article 4) and firsthand knowledge (Rule 602) must be satisfied. Of necessity the decision as to whether or not a hearsay declaration is based on firsthand knowledge must be made on circumstantial evidence, and this requirement should be sufficiently flexible to accomplish the purposes set out in Rule 102.

Rule 804(a)

Traditionally the definition of unavailability varied among the several hearsay exceptions. The rule takes the general approach that the concept of unavailability should be applied consistently among each of the exceptions. Contra, Rule 804(a)(5). The definition of unavailability indicates that the primary concern is the unavailability of the testimony and not necessarily the unavailability of the declarant. If the declarant is present at trial but will not or cannot testify as to an issue for any reason, whether justified or not, the declarant is deemed to be unavailable on that issue for the purposes of the rule. With the exception of Rule 804(b)(1), a witness will not be deemed unavailable if his testimony can be procured by reasonable means, e.g., by taking his deposition. This is a judgment that evidence by means of deposition would be preferable to the hearsay statement. In determining whether testimony could be procured by reasonable means the judge has some discretion. Appropriate considerations would include such things as the stakes involved, the nature of the testimony, and the expense that would be incurred by out of state depositions. See Rule 102.

The application of the Sixth Amendment confrontation clause will dictate when the declarant must be produced in many criminal cases. See gen. Barber v. Page, 88 S.Ct. 1318, 390 U.S. 719, 20 L.Ed.2d 255 (1968); Mancusi v. Stubbs, 92 S.Ct. 2308, 408 U.S. 204, 33 L.Ed.2d 293 (1972); State v. Shotley, Minn., 233 N.W.2d 755, 757-758 (1975).

Rule 804(b)(1)

This exception deals with the introduction of former testimony when the declarant is unavailable. Former testimony of a witness who testifies at trial might be admissible under Rule 801(d)(1)(A) if inconsistent with the witness' present testimony. The rule distinguishes between civil and criminal cases.

In a civil case the former testimony in the same or different litigation is excepted from the hearsay rule if:

1. the declarant is unavailable; and

2. the party against whom the testimony is being offered or another party with substantially the same interest, had an opportunity and motive to develop the testimony. Briggs v. Chicago Great Western Ry., 248 Minn. 418, 426, 80 N.W.2d 625, 633 (1957).

In a criminal proceeding the rule is only applicable when there is a retrial of the same defendant for the same or an included offense. Even this limited application might raise issues under the confrontation clause. The rule is not intended to codify the scope of the Sixth Amendment.

To the extent that the admissibility of depositions is governed by rules of procedure, the procedural rules shall still be in effect pursuant to Rule 802. See Minn. R. Civ. P. 32.01(3) and Minn. R. Crim. P. 21.06.

Rule 804(b)(2)

This provision represents the traditional "dying declaration exception" to the hearsay rule. At common law the exception was limited to homicide prosecutions. The rule extends this to include civil actions. Otherwise the rule is consistent with the Minnesota approach as stated in State v. Eubanks, 277 Minn. 257, 262, 152 N.W.2d 453, 456, 457 (1967).

In prosecutions for homicide the dying declarations of the deceased as to the cause of his injury or as to the circumstances which resulted in the injury are admissible if it be shown, to the satisfaction of the trial court, that they were made when the deceased was in actual danger of death and had given up all hope of recovery. State v. Elias, 205 Minn. 156, 158, 285 N.W. 475, 476 (1939).

Rule 804(b)(3)

Declarations against interest have traditionally been excepted from the hearsay rule when the declarant is unavailable. Unlike the admission of a party (Rule 801(d)(2)), the basis for this exception centers in notions of trustworthiness and necessity.

The statement must not only be contrary to the declarant's interest at the time made, but so far contrary to his interest that a reasonable person would not have made the statement unless he believed it to be true. Implicit in the rule is the requirement that the declarant have first-hand knowledge (Rule 602), and that he understand or should understand that the statement is likely to be contrary to his interest at the time the statement is made.

The common law exception was originally limited to declarations against proprietary or pecuniary interests. Many jurisdictions, including Minnesota, have expanded this to include statements that might give rise to civil liability, Johnson v. Sleizer, 268 Minn. 421, 426, 129 N.W.2d 761, 764 (1964), and statements against penal interest, State v. Higginbotham, 298 Minn. 1, 212 N.W.2d 881 (1973). This rule was not intended to affect the application of Minnesota Statutes 1974, section 169.94. See Warren v. Marsh, 215 Minn. 615, 11 N.W.2d 528 (1943).

The corroboration requirement in criminal cases for statements that exculpate the accused has been expressly approved by the Supreme Court. State v. Higginbotham, 298 Minn. 1, 212 N.W.2d 881 (1973).

Rule 804(b)(4)

Statements of personal or family history have traditionally been admissible as an exception to the hearsay rule. See gen. 5 Wigmore, Evidence section 1480 et seq. (Chadbourn ed. 1974). The rule does not require that the statement be made prior to the controversy, as was the case at common law. It is thought that the timing of the statement goes more to its evidentiary weight than admissibility. The relaxation of the requirement of first-hand knowledge will allow admission of the statement of an unavailable declarant relating to the date of his birth. See United States Supreme Court Advisory Committee Note.

Rule 804(b)(5)

Other than the requirement of unavailability, this exception is identical to Rule 803(24). Since the unavailability of the declarant will increase the necessity for resorting to hearsay statements, it is likely that this provision will be used more frequently than Rule 803(24) in fashioning new exceptions to the hearsay rule.

Committee Comment - 2006

Rule 804(b)(5)

The substance of this rule is combined with Rule 803(24) in new Rule 807.

Advisory Committee Comment - 2016 Amendments

Consistent with the 2010 amendment to the federal rule, Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. As the federal advisory committee explained: "A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception."

Rule 804(b)(6) has been added to codify the forfeiture by wrongdoing exception. Rule 804(b)(6) is consistent with the Minnesota Supreme Court's decisions addressing waiver of the sixth amendment right to confrontation. See State v. Cox, 779 N.W.2d 844, 851 (Minn. 2010) (stating that forfeiture by wrongdoing requires the state to prove that the declarant-witness is unavailable, that the defendant engaged in wrongful conduct, that the wrongful conduct procured the unavailability of the witness, and that the defendant intended to procure the unavailability of the witness); State v. Her, 781 N.W.2d 869 (Minn. 2010).

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Committee Comment - 1977

Where double hearsay is involved the statement is admissible if each step in the transmission of the statement qualifies under an exception to the hearsay rule. Usually this question arises with respect to documentary evidence that includes a hearsay statement. For example, a hospital record that includes a spontaneous statement of a patient indicating present pain would not be excluded by the hearsay rule. See Rule 803(3), (4), and (6).

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

(Amended effective January 1, 1990.)

Committee Comment - 1977

The evidentiary value of a hearsay statement is dependent upon the credibility of the declarant. The proper assessment of hearsay evidence requires an opportunity to impeach and if necessary rehabilitate the credibility of the declarant. The same rules governing impeachment and rehabilitation of witnesses at trial are applicable to a hearsay declarant. However, when impeaching a hearsay declarant with an inconsistent statement, the requirement set forth in Rule 613(b) that

a person be given an opportunity to explain the inconsistent statement is dispensed with. Contra Lerum v. Geving, 97 Minn. 269, 273, 105 N.W. 967, 969 (1906).

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing, to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name, address and present whereabouts of the declarant.

(Adopted effective September 1, 2006.)

Committee Comment - 2006

The new Rule 807 is taken from Fed. R. Evid. 807 and combines Rules 803(24) and 804(b)(5). The rule requires the proponent to disclose, if known, the name, address and present whereabouts of the declarant. In criminal cases, offering hearsay statements against the accused from declarants who do not testify and are not subject to cross-examination, may implicate the constitutional right to confrontation.

ARTICLE 9. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of Authentication or Identification

(a) General provisions. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard first-hand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering

to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Legislative Act or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Committee Comment - 1977

Rule 901(a)

Authentication is simply a more specialized application of the principles of relevancy. Before probative value can be attached to an offer of evidence it must be established that the evidence, be it a chattel, a writing, or a conversation is precisely what the proponent claims it to be. The concept is frequently easy in application but most difficult to define. As a consequence the rule consists of a general statement followed by a number of illustrations setting forth possible applications of the general rule. The illustrations are not intended to limit the general rule in other areas, but are to serve only as examples of how the rule might be applied.

The general rule treats authentication in terms of a condition precedent to admissibility. To satisfy the condition precedent the proponent must present evidence "sufficient to support a finding" by the trier of fact that the offered evidence is what it is claimed to be. Authentication is governed by Rule 104(b) which leaves the order of proof subject to the discretion of the court. Rule 901 does not distinguish between the authentication of writings and chattels, and applies equally to both.

Rule 901(b)

The illustrations are set out as guidelines to the application of the general rule. Rule 901(a) requires that the evidence be sufficient to support a finding that the matter in question is what it is purported to be. It is possible that a factual situation might fit within the letter of a particular illustration and yet, because of peculiar circumstances, lack the probative value required to satisfy the standard in subdivision (a). Certainly there will be occasions when the authentication requirement is met by methods not suggested in subdivision (b).

Rule 901(b)(1)

Perhaps the most common method of authentication is the use of testimony by a witness with knowledge that the offer of evidence is what it is represented to be. See Rule 602.

Rule 901(b)(2)

This illustration makes it clear that a lay witness who is familiar with a person's handwriting should be able to give an opinion for authentication purposes. See Rule 701. See also Johnson v.

Burmeister, 182 Minn. 385, 386-387, 234 N.W. 590-591 (1931). However, the familiarity with the handwriting must not have been acquired for the purposes of the litigation.

Rule 901(b)(3)

In addition to the methods suggested in Rule 901(b)(1) and (2), a letter could be authenticated by opinion testimony of a handwriting expert, or through comparison by the trier of fact with authenticated exemplars. The practice of allowing jurors to determine the authenticity of a writing has been approved in Minnesota. State v. Houston, 278 Minn. 41, 44, 153 N.W.2d 267, 269 (1967). The rule should not be read as a statement that jurors can authenticate other matters by comparison techniques without the benefit of expert testimony, e.g., ballistics or fingerprints. These questions must be resolved on a case-by-case basis.

Rule 901(b)(4)

This illustration indicates that an offer of evidence can be authenticated by circumstantial evidence. Typically, letters and telephone conversations are authenticated by the well known "reply doctrine."

Rule 901(b)(5)

This provision is consistent with Minnesota law. A properly qualified witness may give his opinion as to the identity of a voice whether comparing voices heard first-hand or through a mechanical or electronic transmission or recording. State ex rel. Trimble v. Hedman, 291 Minn. 442, 450, 192 N.W.2d 432, 437 (1971). In addition, the Court in Trimble makes it clear that voiceprints are admissible at trial at least for the purposes of corroborating or impeaching other voice identifications. Id. at 457, 192 N.W.2d at 441. Although the illustration does not directly speak to voiceprints, their admission for identification purposes would not be inconsistent with the underlying rationale. See also Rule 901(b)(9).

Rule 901(b)(6)

Telephone conversations can be authenticated by a number of methods, e.g. the reply doctrine, Rule 901(b)(4); or voice recognition, Rule 901(b)(5). If the number was assigned to a person the conversation may be authenticated by introducing evidence that the call was made to the properly assigned number and the person answering the phone identified himself or his identity can be established by other circumstances. If the number was assigned to a business the conversation may be authenticated by introducing evidence that the call was made to the properly assigned number and the conversation related to the type of business reasonably transacted over the telephone.

Rule 901(b)(7)

To authenticate a public or official record, it need only be established that the document is from the custody of the appropriate office. See Rules 902 and 1005 for the introduction of copies of public records. The hearsay aspects of certain public records are addressed in Rule 803 (8), (9), (10), (14), and (15). See generally, Minn. R. Civ. P. 44 and Minnesota Statutes 1974, section 600.13.

Rule 901(b)(8)

The hearsay problems that are associated with the admissibility of ancient documents are covered in Rule 803(16). The authenticity of a document or data compilation can be established by showing that it is at least 20 years old, found in a place where such documents or compilations are normally kept, and in such condition so as not to create suspicion as to its authenticity. The rule is drafted to reflect contemporary methods of data processing, retention, and storage.

Rule 901(b)(9)

The authentication of many different types of scientific testimony is addressed by this illustration. The admissibility of evidence based on X-rays, computer printouts, voiceprints, public opinion polls, etc., all depend upon a showing that the process or system used does produce an accurate result. The degree of accuracy required might vary with the purposes for which the evidence is being offered, the state of the art, and the type of method or process involved.

Rule 901(b)(10)

This illustration is intended to make it clear that Rule 901 does not limit or supersede other forms of authentication. Existing statutes and court rules providing for authentication of certain evidence remain in effect. See e.g., Minn. R. Civ. P. 44, 80 and 30.06. Minnesota Statutes 1974, sections 175.11 and 600.13.

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Legislative Act or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Legislative Acts. Any signature, document, or other matter declared by Legislative Act to be presumptively or prima facie genuine or authentic.

(Amended effective January 1, 1990.)

Committee Comment - 1989

The rules retain the existing practice of dispensing with the authentication requirement for certain documentary evidence. Because of the difficulty and inconvenience that would result if formal authentication was required and the slight risk of fraud or forgery, certain documents are deemed to be self-authenticating. The fulfillment of the authentication requirement does not preclude the opposing party from attacking the genuineness of the evidence to detract from the weight to be given it by the trier of fact.

Rule 902(1)

Consistent with principles of common law, public documents under seal are self-authenticating. See gen. Minnesota Statutes 1974, sections 175.11 and 600.13. See also Minn. R. Civ. P. 44.01.

Rule 902(2)

The naked signature of a public employee or officer is not sufficient to authenticate the document. However, if accompanied by a certification under seal by a second public officer under the circumstances set out in the rule, the document becomes self-authenticating.

Rule 902(3)

Rule 902(3) was adapted from Fed. R. Civ .P. 44, (Minn. R. Civ. P. 44.01(2)).

Rule 902(4)

Consistent with the common law, certified copies of public records need no additional authentication. See Minnesota Statutes 1974, section 600.13, and Minn. R. Civ. P. 44.01. The rule requires that the copy be of a public or official record, that the custodian or other authorized person certify the copy, and that the certificate comply with Rule 902(1), (2), and (3), a specific statute, or other court rule. The contents of the certificate should generally indicate the status of the signer in relation to the custody of the document, and the accuracy of the copy.

Rule 902(5)

This provision is generally consistent with existing practice. See. e.g., Minn. R. Civ. P. 44, Minnesota Statutes 1974, sections 599.02 and 648.33.

Rule 902(6)

The provision alters the common law, by placing the burden to contest the genuineness of newspapers and other periodicals on the party opposing the offer. Cf. Minnesota Statutes 1974, sections 600.10 to 600.12. It is based on the theory that the likelihood of forgery in these matters is slight and the inconvenience and expense involved by requiring authentication is not justified. The rule speaks only to authentication. The admissibility of such evidence can be challenged pursuant to other rules of evidence.

Rule 902(7)

The rule is based on the unlikelihood of forgery of a trade inscription. In addition, the business community accepts and relies upon the trustworthiness of trade inscriptions. Although this rule is not unquestioned at common law, it represents a reasoned view that is supported in the case law. See United States Supreme Court Advisory Committee Note and cases cited therein.

Rule 902(8) and (9)

These provisions are consistent with existing practice. Minnesota Statutes 1974, section 600.14. See Minnesota Statutes 1974, section 358.15, for the parties authorized to take acknowledgments and Minnesota Statutes 1974, sections 358.34 to 358.37, for the manner of taking acknowledgments. The evidentiary rule is not intended to affect the legal requirements for establishing a valid, executed will set forth by the Uniform Probate Code, Minnesota Statutes 1974, section 524.1-101, et seq. See in particular, Minnesota Statutes 1975 Supplement, section 524.2-501, et seq. The authentication of commercial paper is governed by statutory law. See e.g., Minnesota Statutes 1974, sections 336.1-202, 336.3-307, 336.3-510 and 336.8-105.

Rule 902(10)

In addition to the provisions in these rules, evidence can be authenticated pursuant to specific statutes.

Rule 902(11)

Uniform Rule 902(11) adds business records to those writings that are self-authenticating. The Committee considered Rule 902(11) and recommends against adopting it.

Under present Minnesota law, the authentication requirement for business records is found in Rule 803(6) (..."all as shown by the testimony of the custodian or other qualified witness,..."). The extensive discovery available in both civil and criminal procedures provides a vehicle for resolving authentication issues before trial. The authentication requirement is generally waived. With respect to the minority of cases in which the parties cannot resolve the issue prior to trial, the committee took the view that a party should have the right to insist upon the proof required by Rule 803(6). For these reasons the committee decided not to recommend that business records be added to the list of self-authenticating documents, and recommends that Uniform Rule 902(11) not be adopted.

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Committee Comment - 1977

To authenticate a writing there is no need to present subscribing witnesses unless otherwise required by the laws of the jurisdiction governing the validity of the writing. E.g., Minnesota Statutes

1975 Supplement, section 524.3 to 524.406, which in certain circumstances requires the production of an attesting witness.

ARTICLE 10. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

Committee Comment - 1977

Article 10 deals with the so called "best evidence rule." Rule 1001 is the definitional portion of the article. The rule is drafted sufficiently broad to encompass future scientific advances in the storage and retrieval of data and other information.

Consistent with existing practice, not only the writing itself is classified as an original, but also any counterpart intended to have the same effect by a person executing or issuing it. Thus executed carbon copies are treated as originals. The rule resolves two issues that have been raised in other jurisdictions.

(1) Both the negative and the print of a photograph are treated as an original.

(2) Data printouts, readable by sight, are treated as originals. Practically and common usage justify this result. See United States Supreme Court Advisory Committee Note.

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Legislative Act.

Committee Comment - 1977

This provision is a straightforward statement of the general rule. Only when a party is attempting to prove the contents of a writing, recording, or photograph, must the original be produced. If a party is attempting to prove a different consequential fact there is no general requirement that he do so with the best available evidence. See generally C. McCormick, Evidence section 233 (2d ed. 1972). The rule does not address the question that arises when a party attempts to prove the contents of a writing inscribed on a chattel, e.g., a ring, a license plate, a billboard, etc. The question of

whether the chattel must be produced in these cases is left to the discretion of the trial court. See, e.g., Mattson v. Minnesota & North Wisconsin R. R., 98 Minn. 296, 298, 108 N.W. 517, 518 (1906).

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Committee Comment - 1977

With the development of accurate and convenient reproducing systems much of the concern about the admission of duplicates is eliminated. There remains the fear of possible fraud. However, in most instances where the accuracy of a duplicate is not contested it makes little sense to prohibit the introduction of a duplicate. It makes less sense in civil cases where the litigants by way of discovery usually can examine the original documents. The courts should not place a heavy burden on the party contesting the admission of the duplicates.

The rule will mark a change in Minnesota practice, but not a major change. At present copies made and kept in the ordinary course of business are treated as originals. Minnesota Statutes 1974, section 600.135.

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

(Amended effective January 1, 1990.)

Committee Comment - 1977

This rule is a codification of the common law. In application the rule requiring the production of the original writing is a rule of preference. If the original is available it must be produced if the contents are at issue. However, where the original is not available courts have traditionally permitted the admission of secondary evidence in the circumstances set out in the rule.

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot

be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Committee Comment - 1977

An official record or authorized document which has been filed or recorded may be proved by a certified copy. This is consistent with existing practice under Minnesota Statutes 1974, section 600.13. If a certified copy is not obtainable, the record can be established by other types of evidence including oral testimony.

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

(Amended effective January 1, 1990.)

Committee Comment - 1977

In cases involving voluminous records, the only practical way to introduce the evidence in a meaningful fashion is by resorting to charts, summaries, or calculations. The rule does not require that the original documents be introduced into evidence. However, they must be made available for inspection or copying. The court has the power to require production of the original documents in court.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

Committee Comment - 1977

The original need not be produced if the contents of the writing can be established by the testimony, deposition or written admission of an opposing party. See Swing v. Cloquet Lumber Co., 121 Minn. 221, 225, 141 N.W. 117, 118 (1913). In each of these situations the policy rationale for requiring the original writing is satisfied, with the possible exception that the party opponent's admission might not be accurate. The nature of the adversary system justifies this result. In order to avoid the dangers of erroneous transmission, an oral out of court admission by an adversary is not sufficient to prove the contents of a writing.

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Committee Comment - 1977

The rule is merely a specialized application of Rule 104. Rule 104 sets out the respective functions of the judge and jury. The judge is to make all determinations as to the competency or admissibility of the evidence and the jury is to determine the relevance or probative worth of the evidence. The "best evidence rule" is essentially a rule of competency. Secondary evidence is not competent to prove the contents of an original writing unless the original is destroyed, not available, etc. It is a matter for the judge to decide pursuant to Rules 1008 and 104(a) whether the condition precedent for admissibility has been established. Beyond the questions of admissibility certain factual disputes may arise. Three possible issues are listed in the rule:

(1) whether the original ever existed;

(2) which of two evidentiary items is the original; and

(3) whether the secondary evidence correctly reflects the contents of the original.

As to these questions the judge's function is to determine whether there is sufficient evidence in the record to support a finding on the issue. If sufficient evidence is in the record the issues must be submitted to the trier of fact for resolution.

ARTICLE 11. MISCELLANEOUS RULES

Rule 1101. Rules Applicable

(a) Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the courts of this state.

(b) Rules inapplicable. The rules other than those with respect to privileges do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; probable cause hearings; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Contempt proceedings in which the court may act summarily.

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These rules of evidence are not applicable to certain procedures. However, these proceedings may be governed by evidentiary rules set forth in statutes, federal and state constitutions, and other court rules. See e. g., Minn. R. Crim. P. 18.06.